

1. CHAN v. THE VAIL CORP., ET AL., SC20200070**Motion for Leave to File Amended Answer**

Pending is a motion for leave to file an amended answer filed by defendants The Vail Corporation, dba Vail Resorts Management Company; Vail Resorts, Inc.; and Heavenly Valley, LP. The motion is opposed.

Background

This action was commenced on May 29, 2020, by plaintiff Curtis Chan. The action arises from personal injuries sustained by plaintiff while snowboarding at Heavenly Ski Resort. In short, plaintiff alleges that his injuries were significantly aggravated due to the negligence of Heavenly's ski patrollers.

The original complaint asserted causes for (1) negligence, (2) negligent hiring, supervision, and/or training, (3) intentional infliction of emotional distress, and (4) negligent infliction of emotional distress. (Mot., Decl. of Patrick R. Ball, Ex. A.) On July 6, 2020, prior to defendants answering the complaint, a First Amended Complaint ("FAC") asserting the same four causes of action was filed. (*Id.*, Ex. B.) Defendants answered the FAC on August 4, 2020.¹ (*Id.*, Ex. C; Evid. Code, § 452(d)(1).) Relevant here, defendants' answer asserts the affirmative defense of express assumption of risk based upon a written agreement. (Mot., Ball Decl., Ex. C, p. 6.)

On July 13, 2020, plaintiff passed away. (*Id.*, Ex. A to Ex. D.) Due to his death, the case was delayed while his estate was being probated and for a personal representative to substitute in on behalf of plaintiff.

On November 23, 2021, Jean-Paul West LaCount filed a motion for substitution of personal representative for deceased plaintiff. (*Ibid.*) The motion was granted on December 17, 2021. (*Ibid.*) The Second Amended Complaint ("SAC"), filed December 21, 2021, alleges causes of action for (1) negligence and (2) negligent hiring, supervision,

¹ Defendants' answer is titled as an amended answer to the FAC. However, there is no original answer to the FAC in the court's file.

and/or training.² (Mot., Ball Decl., Ex. D.) On February 24, 2022, defendants filed their answer to the SAC. (*Id.*, Ex. E; Evid. Code, § 452(d)(1).) The answer asserts 10 affirmative defenses, including primary assumption of risk, but does not allege express assumption of risk based upon a written agreement.

Legal Standard

Leave of court is required to amend any pleading except as provided by Code of Civil Procedure § 472. “The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading” (Code Civ. Proc., § 473(a)(1).) A trial court may allow the amendment of a pleading at any time up to and including trial. (*Id.* § 576.)

“It is well established that ‘California courts “have a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others.” [Citation.] Indeed, “it is a rare case in which ‘a court will be justified in refusing a party leave to amend [their] pleading so that [they] may properly present [their] case.’ ” [Citation.]’ [Citation.] Thus, absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. [Citation.]” (*Bd. of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.)

“[T]he trial court has wide discretion in determining whether to allow the amendment, but the appropriate exercise of that discretion requires the trial court to consider a number of factors: ‘including the conduct of the moving party and the belated presentation of the amendment. [Citation.] ... The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court’s denial of the amendment. [Citation.]’ [Citation.] ‘The law is also

² Plaintiff’s 3rd C/A for intentional infliction of emotional distress, 4th C/A for negligent infliction of emotional distress, and request for punitive damages were voluntarily dismissed without prejudice on February 14, 2022.

clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.’ [Citation.]” (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613 [italics omitted].)

Discussion

Defendants move for leave to file an amended answer to add an affirmative defense that plaintiff’s claims are barred by the doctrine of express assumption of risk.

Plaintiff is opposed on the grounds that the motion does not comply with California Rules of Court, rule 3.1324; the motion is untimely and defendants have not explained the reasons for the belated presentation; the amendment would severely prejudice plaintiff; and the amendment is futile.

For the following reasons, the court finds that the factors weigh in favor of defendants.

First, plaintiff’s objection pursuant to CRC, rule 3.1324 is not persuasive. The court finds that defendants substantially complied with the provisions of CRC, rule 3.1324.

Second, while there was a considerable delay between the filing of defendants’ answer to the SAC and the filing of the instant motion, the court does not agree that the delay is fatal under the totality of the circumstances. Express assumption of risk was included as an affirmative defense in defendants’ answer to the FAC. Thus, plaintiff was on notice since at least August 4, 2020, when defendants’ answer to the FAC was filed and served, that defendants would be asserting the defense.

Subsequently, the case was stalled for about a year following plaintiff’s death. LaCount did not substitute in on behalf of plaintiff until December 2021, and the SAC was not filed until December 21, 2021. Defense counsel explains that express assumption of risk was inadvertently left out of defendants’ answer to the SAC, filed on February 24, 2022, which omission he only recently discovered. The instant motion was filed on October 18, 2022, almost eight months after defendants’ answer was filed. Although that is a considerable delay, the delay is reasonable given that defendants had already

asserted the defense in their prior answer and the omission came as a surprise to defense counsel.

Third, the court is not persuaded by plaintiff's argument that he will be unfairly prejudiced by the amendment because it would reopen a field of inquiry. Plaintiff was on notice for about 18 months that defendants were asserting the defense. It was not until February 24, 2022, that plaintiff might have noticed in defendants' operative answer that the defense was omitted. Further, trial does not commence until May 8, 2023, which means that the parties have about four months to conduct discovery regarding the written agreement at issue. Because the agreement appears to be a standard release of liability, the court does not anticipate that the parties will require more than four months to complete this discovery.

Lastly, with regard to plaintiff's argument that amendment is futile, that argument is more appropriately tested by demurrer as opposed to denying defendants the opportunity to simply plead an affirmative defense.

For the foregoing reasons, defendants' motion is granted.

TENTATIVE RULING # 1: DEFENDANTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER TO THE SECOND AMENDED COMPLAINT IS GRANTED. THE AMENDED ANSWER MUST BE FILED AND SERVED NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT

THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

2. E.D.C. GROWERS ADVOC. ALLIANCE, ET AL. v. EL DORADO COUNTY, 21CV0161
Case Management Conference

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 2, 2022, IN DEPARTMENT FOUR.

3. EL DORADO HILLS SERV. DIST. v. EL DORADO COUNTY, 22CV1536

Status Conference Re: Service, Response, Admin. Record, Briefing Schedule

**TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
DECEMBER 2, 2022, IN DEPARTMENT FOUR.**

4. MEDINA v. EL DORADO SENIOR CARE, PC20190064

Review Hearing Re: Compliance of Production of Documents and Deposition

This review hearing was scheduled at the conclusion of the long cause hearing on October 28, 2022.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 2, 2022, IN DEPARTMENT FOUR.

5. FAGEN v. DELACOUR, ET AL., 22CV1129

Oral Argument Re: 10/28 Tentative Ruling

**TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
DECEMBER 2, 2022, IN DEPARTMENT FOUR.**