1. PAUL, ET AL. v. THE RIVA PARTNERS, SC20200155

Unopposed Motion for Order Provisionally Certifying Settlement Class & Preliminarily Approving Class Settlement

This is a wage and hour class action. Plaintiffs Aaron Paul and Rebecca Joiner, individually on behalf of themselves and on behalf of all similarly situated individuals ("Class Members") who worked for defendant The Riva Partners, moves for an order provisionally certifying the settlement class and preliminarily approving the Joint Stipulation of Class Action Settlement and Release of Claims ("Settlement Agreement"). The motion is unopposed.

A. SUMMARY OF CLAIMS

The First Amended Complaint ("FAC") includes nine causes of action. Broadly, the claims of the FAC seek relief under multiple factual theories as follows: failure to pay on-call and split shift premium wages; failing to pay all gratuities due; failure to provide meal and rest breaks or compensation in lieu; unreimbursed business-related expenses; failure to provide accurate itemized wage statements; failure to timely pay wages at separation; unlawful or unfair business practices; and violation of PAGA.

B. LEGAL STANDARD

To protect the interests of absent class members, class action settlements must be reviewed and approved by the court. " 'The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.' [Citations.] 'The courts are supposed to be the guardians of the class.' [Citation.]" (*Kullar v. Foot Locker Retail*, *Inc*. (2008) 168 Cal.App.4th 116, 129.)

California follows a two-step procedure for court approval: (1) the court reviews the terms of the settlement and form of settlement notice to the class and provides or denies preliminary approval; and later, (2) the court considers objections by class members and grants or denies final approval. (Cal. Rules of Ct., rule 3.769.)

When no class has been certified, as is the case here, the court must determine whether the case meets requirements for certification. (See *Amchem Prods*., *Inc. v. Windsor* (1997) 521 U.S. 591, 625–627.) The concerns of manageability and due process for absent class members, which counsel against certification in a trial context, are eliminated or mitigated in the context of a settlement. (*Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1807, fn. 19.)

Class certification in California courts is governed by Code of Civil Procedure section 382. The court has discretion to certify a class if it meets three criteria: "[1] [T]he existence of an ascertainable and sufficiently numerous class, [2] a well-defined community of interest, and [3] substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' [Citations.]" (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)

Because this matter also proposes to settle claims under California's PAGA, the court also must consider the criteria that apply under that statute. (See Lab. Code, § 2699(*l*)(2).) There is a lack of guidance in the statute and case law concerning the basis upon which a settlement may be approved. Although not binding authority, in *O'Connor v. Uber Technologies*, *Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, the court denied approval of class action settlements that included PAGA claims in part because the plaintiffs' claims added up to as much as $1 billion in PAGA penalties but the parties settled those claims for $1 million, or 0.1% of their alleged maximum value. As the court stated, "where plaintiffs bring a PAGA representative claim, they take on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment. [Citation.] Such a plaintiff also owes responsibility to the public at large; they act, as the statute's name suggests, as a private attorney general, and 75% of the penalties go to the LWDA 'for enforcement

of labor laws … and for education of employers and employees about their rights and responsibilities under this code.' " (*Id*. at p. 1134.)

In *O'Connor*, the LWDA itself filed a brief stating that "[i]t is thus important that when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public and, in the context of a class action, the court evaluate whether the settlement meets the standards of being 'fundamentally fair, reasonable, and adequate' with reference to the public policies underlying the PAGA." (*Id*. at p. 1133.)

C. SETTLEMENT TERMS

As an initial matter, the Settlement Agreement was mediated with the assistance of Judge David I. Brown (Ret., Sacramento County Super. Ct.). (Mot., Declaration of Daniel F. Gaines, ¶ 12.) The court gives "considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in [concluding] that [the] settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct." (*Kullar*, *supra*, 168 Cal.App.4th at p. 129; see also *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 504.)

1. Proposed Class; Class Representatives and Counsel

The court finds that the proposed class of approximately 583 members is sufficiently numerous and its members are readily ascertainable from defendant's records. The court finds that the class has sufficient common questions of law and fact to support a community interest, given their allegations of common employment policies and practices and the lessened manageability concerns in a settlement context. The plaintiffs' claims are sufficiently typical of those of the class, given the lessened manageability concerns in a settlement context, because plaintiffs and absent class members have suffered similar injuries. (Mot., Gaines Decl., ¶¶ 24–26.) The court finds that plaintiffs and their counsel will be adequate representatives of the class. (*Id*., ¶¶ 1–5, 27–28 & Ex. A.) The court further finds that class treatment for settlement purposes will provide substantial benefits

that render it a superior alternative to individual actions. The parties stipulate that the Settlement Class may be certified for settlement purposes only. If settlement is not approved, the provisional certification will have no force or effect and will be immediately revoked. (Mot., Gaines Decl., ¶ 14.)

Accordingly, the court provisionally certifies the following Settlement Class, as defined by the parties: "All individuals who worked for Defendant as a non-exempt employee in California at any time between November 5, 2016 and July 15, 2022 (the 'Class Period')." (*Id.*, Ex. B, § A(5).) Defendant represents that the Class contains no more than 583 members. (*Ibid.*)

2. Settlement Fund

The Settlement Agreement would create a common fund of $350,000 ("Gross Settlement Amount") to settle claims against defendant, subject to any increase based on an escalator provision in the agreement. (*Id.*, Ex. B, §§ C(19)(a), H(56).) The Gross Settlement Amount covers settlement payments to the Class Members, service awards to the Class Representatives, attorney fees and costs, the Settlement Administrator's fees and costs, and all amounts to be paid to the LWDA. (*Id.*, Ex. B, § C(19)(a).)

The Gross Settlement Amount does not include defendant's share of employer payroll taxes, which will be separately paid by defendant. (*Ibid*.)

Individual Payment Amounts to the Class Members will be calculated by multiplying the Net Settlement Proceeds by a fraction, with the numerator equal to the total wages paid, including gratuities, to each individual participating Class Member during employment with defendant in California in a non-exempt position during the Class Period, and the denominator equal to the total wages paid, including gratuities, to all participating Class Members in California in a non-exempt position during the Class Period. (*Id.*, Ex. B, § C(19)(c).) Each participating Class Member who does not opt out will receive an Individual Payment Amount. (*Ibid.*)

3. Settlement Procedure

Class Members do not need to submit a claim form to receive their Individual Payment Amount. If a Notice sent to a Class Member has not been returned within 30 days from the date of mailing, it will be conclusively presumed that the Class Member received the Notice. In the event of returned or non-deliverable Notices, the Settlement Administrator will make reasonable efforts to locate those members and re-send the Notices, including, inter alia, use of a change of address database and skip tracing. (Mot., Gaines Decl., Ex. B., § E(25).)

Attached to the Class Notice sent to the Class Members will be a Request for Exclusion Form. (*Id.*, Ex. B, § E(24) & Exs. 1, 2.) To opt out, a Class Member must submit a Request for Exclusion Form no later than 45 calendar days after the initial mailing of the Class Notice, unless the court requires a longer period. That deadline shall be extended once by 30 days for those Class Members whose Notice is returned as undeliverable. (*Id.*, Ex. B, § E(29)–(30).) Class Members who timely opt out will not receive a payment and will not be bound by the Settlement Agreement's releases. (*Id.*, Ex. B, § E(28).)

Class Members who object to the Settlement Agreement must submit their objection no later than 45 calendar days after the initial mailing of the Class Notice. (*Id.*, Ex. B, § E(33).)

All Class Members who do not timely opt-out will be bound by the "Released Claims," which include all claims and allegations made in the action, and which could have been raised in the action based on the allegations therein, and any and all claims, obligations, demands, actions, rights, causes of action, and liabilities against the Released Parties, of whatever kind and nature, character, description, whether in law or equity, whether sounding in tort or contract, or federal, state, and/or local law, statute, ordinance, regulation, common law, or other source of law, whether known or unknown, and whether anticipated or unanticipated, for any type of relief, including, without limitation, claims for

wages, damages, unpaid costs, penalties, liquidated damages, punitive damages, interest attorney fees, litigation costs, restitution, or equitable relief. (*Id*., Ex. B, § D(20)–(22).)

Class Members must cash each of their Individual Payment Amount checks within 180 calendar days after they are mailed by the Settlement Administrator. (*Id*., Ex. B, § E(36).) For tax purposes, 25 percent of each Individual Payment Amount will be treated as wages, subject to normal tax withholdings and will be reported on an IRS Form W-2. (*Id*., Ex. B, § C(19)(c)(i).) The remaining 75 percent will be treated as penalties and interest and will be made without withholding. It will be reported to the IRS and payee, to the extent required by law, on IRS Form 1099. (*Ibid*.)

4. Unclaimed Funds

The value of any checks uncashed more than 180 days after mailing will be canceled and the gross amount of the checks paid to the Office of the California State Controller—Unclaimed Property Fund, to be held in the name of the respective Class Member. (*Id.*, Ex. B, § E(36).) No unclaimed funds will revert to defendant.

5. PAGA and LWDA Allocations

The Settlement allocates $10,000 to the PAGA claims, which represents about 2.9 percent of the Gross Fund. (*Id*., Ex. B, § C(19)(d).) Of that amount, 75 percent, or $7,500, will be paid to the LWDA. (*Ibid*.) The remaining 25 percent, or $2,500, will be included in the Net Settlement Proceeds for payment to Class Members. (*Ibid.*) A copy of the Settlement Agreement was electronically filed with the LWDA on November 8, 2022. (See Lab. Code, § 2699(i).)

The court does not accord deference to the allocation of a portion of the settlement funds to the claims asserted under PAGA on account of the parties' arm's-length negotiations or the presence of a neutral mediator. Under PAGA, plaintiffs seek civil penalties that would otherwise be recoverable by the LWDA. (*Iskanian v. CLS Transp. Los Angeles*, *LLC* (2014) 59 Cal.4th 348, 382.) Since the LWDA does not have a statutory right to intervene or object to the settlement, the court's review of a settlement which

includes PAGA claims must ensure that the interests of the LWDA in civil enforcement are defended and that the settlement is fair, adequate, and reasonable under all the circumstances. (*O'Connor*, *supra*, 201 F.Supp.3d at p. 1133; *Iskanian*, *supra*, 59 Cal.4th at p. 62.)

Thus, the court will not approve the final apportionment of funds to PAGA and the LWDA until the final approval hearing. However, the court does preliminarily approve of the proposed payment allocation, which includes the PAGA penalties.

6. Attorney Fees and Costs; Class Representative Service Awards

Plaintiffs' counsel will apply for no more than 35 percent the Gross Settlement Amount (no more than $122,500) for attorney fees. (Mot., Gaines Decl., Ex. B, § C(19)(f).) Additionally, they will also seek reimbursement from the Gross Settlement Amount in an amount to be set by the court for reasonable and actual litigation costs and expenses, not to exceed $30,000. (*Id.*, Ex. B, § C(19)(g).)

Further, the amount awarded to the Class Representatives as a Service Payment will be set by the court in its discretion, not to exceed $15,000 each ($30,000 total). The amount will be deducted from the Gross Settlement Amount. (*Id.*, Ex. B, § C(19)(e).)

As counsel likely anticipate, the court will not approve the amount of requested attorney fees and costs or service awards until the final approval hearing. (See *Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 450–451; *Clark v. American Residential Servs.*, *LLC* (2009) 175 Cal.App.4th 785, 804–807.)

The court reviewed and considered the moving papers, counsel's declaration, the exhibits, and most particularly the Settlement Agreement. The court considered (1) the relative strength of plaintiffs' case; (2) the high risk, expense, complexity, and likely duration of further litigation of this dispute; (3) the high risk of maintaining class status through trial; (4) the amount offered in settlement; (5) the extent of investigation, discovery produced and completed, and the stage of the proceedings; (6) the experience and views

of counsel that settlement is reasonable; and (7) the reaction to the proposed settlement. (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.)

The moving papers and counsel's declaration provide sufficient information to enable the court to assess the application of the *Dunk* factors to this action. Based on counsel's representations, which the court finds to be reasonable and credible, the court preliminarily finds the Settlement Agreement to be fair, reasonable, and adequate. The court has several concerns, however, which are underlined below and must be addressed prior to preliminarily approving the settlement.

The court finds that the proposed Class Notice form and procedures are adequate. However, the court is concerned that the Class Notice will be given in English only. The court requires an explanation as to why this is sufficient.

The court recommends a 60-day period for the submission of exclusions, objections, or disputes. Further, the court requires the addition of language stating "absent good cause found by the court for an untimely submission."

Plaintiffs shall explain why unclaimed funds will be paid to the Office of the California State Controller—Unclaimed Property Fund, to be held in the name of the respective Class Member, rather than to a *cy pres* recipient. (Code Civ. Proc., § 384.)

The court finds that the scope of the release for the class is appropriate.

The employment of ILYM Group, Inc., as Settlement Administrator and the estimated cost of $12,000 is preliminarily approved.

The court intends to order that 10 percent of any fee award is to be kept in the Settlement Fund until the completion of the distribution process and court approval of a final accounting.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 9, 2022, IN DEPARTMENT FOUR.

2. DELGADILLO v. PICKETT, SC20180081

Motion for Attorney Fees and Costs

On the court's own motion, matter is continued to December 16, 2022. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 2: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, DECEMBER 16, 2022, IN DEPARTMENT FOUR.

3. BANK OF THE WEST v. L. SANCHEZ ENTERPRISE, ET AL., 22CV1373

(1) Application for Right to Attach Order for Issuance of Writ of Attachment

(2) Application for Right to Attach Order for Issuance of Writ of Attachment

Plaintiff Bank of the West seeks issuance of a writ of attachment as to defendants/guarantors Loreen Sanchez's and Juan Sanchez's interests in real property, accounts receivable, equipment and inventory of a going business, farm products, final money judgments, money on the premises where business is conducted, negotiable documents of title, instruments, securities, and minerals or the like. (Pl. Application, Schedule A.)

"Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought." (Code Civ. Proc., § 484.010.)

The plaintiff must serve upon the defendant/guarantor along with a copy of the summons and complaint, a notice of the application and hearing date, a copy of the application for writ of attachment, and the affidavits in support of the application within the time periods prior to the hearing prescribed in Code of Civil Procedure section 1005(b). (*Id.*, § 484.040.)

Here, the proof of service filed with the court declares that guarantors were personally served with the summons, complaint, and documents related to the hearing on the application for writ of attachment on September 30, 2022 (personal service on Loreen Sanchez) and October 4, 2022 (personal service on Juan Sanchez). Guarantors' corporation, L. Sanchez Enterprise, a California corporation dba Burger Lounge ("enterprise" or "borrower"), was served by substitute service on October 11, 2022. To date, there is no opposition to the application in the court's file. Due to the guarantors' failure to file and serve an opposition no later than five court days prior to the hearing, guarantors shall not be permitted to oppose the issuance of the order. (*Id.*, § 484.060(a).)

For the court to issue an order of attachment it must find all of the following: (1) the claim upon which the attachment is based is one upon which an attachment may be issued; (2) the applicant has established the probable validity of the claim upon which the attachment is based; (3) the attachment is not sought for a purpose other than the recovery on the claim upon which the request for attachment is based; and (4) the amount to be secured by the attachment is greater than zero. (Code Civ. Proc., § 484.090.)

Plaintiff's Claim Against Guarantors is One Upon Which an Attachment May Issue

"Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees." (*Id.*, § 483.010(a).) An attachment may not be issued on a claim secured by an interest in real property unless the security has decreased in value to less than the amount owing on the claim. (*Id.*, subd. (b).)

When the claim is against a defendant who is a natural person, such as in this action, "an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession[,]" and only if the goods, services, or money furnished were not used by the defendant primarily for personal, family or household purposes. (*Id.*, § 483.010(c).) An order of attachment may issue against an individual who guarantees corporate obligations or business debts if "the guarantee ... sued upon is part and parcel of an activity which occupies the time, attention and effort of the guarantor for the purpose of livelihood or profit on a continuing basis." (*Advance Transformer Co. v. Superior Court* (1974) 44 Cal.App.3d 127, 144.)

The court finds that the first element is met. Plaintiff's claim for money arises out a contract (i.e., certain written loan documents and related guaranties). (Pl. Application, Decl. of Raye Ann Johnson, ¶¶ 5–12 & Exs. 1, 2.) Borrower represented itself in loan applications as a California corporation, and guarantors represented themselves as sole

officers and directors of the enterprise and that they are active in the management of the business. (*Id.*, ¶¶ 5–6.) In March 2019 plaintiff extended a credit facility to borrower, including a U.S. Small Business Administration secured loan ("Note"). The proceeds of the credit facility were to be used for business purposes, not for personal, family, or household use. (*Id.*, ¶ 5.)

Also in March 2019, enterprise executed and delivered to plaintiff a Commercial Security Agreement together with the Note. (*Id.*, ¶ 8 & Ex. 2.) Under the Security Agreement, borrower/enterprise granted to plaintiff a security interest in all the inventory, equipment, accounts, and other personal property as collateral. (*Id.*, ¶ 9.) Guarantors obligations to plaintiff are not secured by any real or personal property, and guarantors have not pledged any real or personal property as security; i.e., the claims against guarantors are unsecured. (*Id.*, ¶ 18.)

The total amount of the claim is readily ascertainable and is well in excess of $500. (*Id.*, ¶ 14 & Ex. 4.) As of September 12, 2022, the amount still owing to plaintiff is a total of $172,376.13, plus attorney fees and costs. (*Id.*, ¶ 20.)

Probable Validity of the Claim

"A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (Code Civ. Proc., § 481.190.) "The application shall be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based." (*Id.*, § 484.030.) A verified complaint that satisfies the requirements of Section 482.040 may be used in lieu of or in addition to an affidavit. (*Id.*, § 482.040.) The opposition shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. (*Id.*, § 484.060(a).) Since attachment is a purely statutory remedy, it is subject to strict construction. (*Jordan-Lyon Productions*, *Ltd. v. Cineplex Odeon Corp*. (1994) 29 Cal.App.4th 1459, 1466.)

The court has reviewed the verified application, the declaration of Raye Ann Johnson, and the supporting documentary evidence. The facts presented establish that it is more likely than not that plaintiff would be entitled to judgment on the claim upon which the attachment is based. Plaintiff presented evidence of the loan documents and that plaintiff performed by providing a credit facility and lending money, which guarantors guaranteed to repay. Defendants/guarantors breached their obligations by failing to make the regularly scheduled payment due on April 5, 2022, or any payment due thereafter. Borrower/enterprise ceased business operations and closed one location, and it failed to comply with financial reporting requirements, including a material adverse change in its financial condition. (*Id.*, ¶ 13 & Ex. 3.) Plaintiff has demonstrated that it has suffered monetary damages due to defendants' failure to perform.

As stated earlier, guarantors did not file and serve an opposition to the application.

For the foregoing reasons, the court finds that the second element is met.

Attachment is Sought Only for Recovery on the Claim Upon Which the Attachment is Based

The verified application and documentary evidence establish that the attachment is not sought for any purpose other than preserving plaintiff's ability to recover in its claims against guarantors.

The Amount to be Secured is Greater Than Zero

As noted earlier, the amount to be secured by attachment against guarantors is $172,376.13. Thus, this element is met.

Undertaking

The only issue to resolve is the amount of the undertaking to be posted by plaintiff. "Before the issuance of a writ of attachment …, the plaintiff shall file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action." (Code Civ. Proc., § 489.210.) "The amount of an undertaking filed pursuant to this article shall be" $10,000. (*Id.*, § 489.220(a).) That amount may be

increased upon objection to the undertaking and the court finding that the probable recovery for a wrongful attachment exceeds the amount of the undertaking. (*Id.*, § 489.220(b).)

The undertaking is set as $10,000, subject to objection and evidence that the undertaking is insufficient.

In summary, plaintiff's applications for right to attach order are granted as requested. To reiterate, due to the guarantors' failure to file and serve an opposition no later than five court days prior to the hearing, guarantors shall not be permitted to oppose the issuance of the order. (*Id.*, § 484.060(a).)

TENTATIVE RULING # 3: PLAINTIFF'S APPLICATIONS FOR RIGHT TO ATTACH ORDER ARE GRANTED AS REQUESTED. UPON PLAINTIFF'S FILING OF AN UNDERTAKING IN THE AMOUNT OF $10,000, THE COURT WILL ISSUE WRITS OF ATTACHMENT FOR THE CLAIM AMOUNT SET FORTH IN THE APPLICATIONS.

4. PEREZ v. HERNANDEZ, ET AL., SC20180192

Review Hearing Re: Status of Bankruptcy

This matter was continued from July 8, 2022.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 9, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

5. JACOBS v. PAPEZ, ET AL., 22CV0891

Demurrer and Motion to Strike Portions of Complaint

On the court's own motion, matter is continued to December 16, 2022. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 5: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, DECEMBER 16, 2022, IN DEPARTMENT FOUR.

6. JONATHAN NEIL & ASSOCIATES v. CASEY, SC20210057

Motion Re: Sale of Defendant's Dwelling

This matter was continued from October 28, 2022, at the request of the parties due to their intention to engage in settlement negotiations. The corresponding deadlines for the opposition and reply were likewise continued.

To date, no opposition or reply has been filed, and the court has not received any further word concerning the status of settlement negotiations or of this motion.

TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 9, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

7. MAICO ASSET MGMT. v. WOODS, ET AL., PC20210228

Case Management Conference

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 9, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

8. MATTER OF WILSON, 22CV1427

OSC Re: Name Change

Mother petitions to change her minor child's last name. The biological father has not joined in the petition and petitioner was unable to locate his whereabouts in order to serve him notice. Petitioner submitted a due diligence statement outlining all her efforts to locate the father, including a declaration from the process server who attempted service at the father's last known address.

Having reviewed and considered the due diligence statement, the court finds that notice of the hearing to the father cannot reasonably be accomplished pursuant to Code of Civil Procedure sections 415.10 or 415.40.

Proof of Publication was filed on November 7, 2022.

To date, no written objections to the petition have been filed.

TENTATIVE RULING # 8: ABSENT OBJECTION, PETITION IS GRANTED.

9. LOZOYA, ET AL. v. HAMES, 22CV0130

Motion to Strike Request for Punitive Damages

This action arises from a motor vehicle collision allegedly caused by defendant while she was driving under the influence of alcohol, resulting in substantial injuries and damages to plaintiffs. Plaintiffs' First Amended Complaint ("FAC"), filed September 15, 2022, alleges causes of action for negligence and motor vehicle. Pending is defendant's motion to strike plaintiffs' request for punitive damages pursuant to Code of Civil Procedure section 436.

Legal Standard

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (*Pierson v. Sharp Mem. Hosp.* (1989) 216 Cal.App.3d 340, 342.) The grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code Civ. Proc., § 437(a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519.) A motion to strike is the procedure to attack an improper claim for punitive damages.

Discussion

Defendant's motion is made on the grounds that the claim for punitive damages is improper because it is based upon legal conclusions and is not supported by factual allegations such as the substance consumed or when it was consumed, or the amount consumed. Further, defendant contends that the complaint does not allege that defendant was impaired by the level of her intoxication or that her impairment was the proximate cause of the collision.

The basis for punitive damages is set forth in Civil Code section 3294. "In an action for the breach of an obligation not arising from contract, where it is proven by clear and

convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (*Id*., subd. (a).)

Plaintiffs allege that defendant's actions constitute malice. " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id*., subd. (c)(1).) "To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences. [Citations.]' " (*Hoch v. Allied–Signal*, *Inc*. (1994) 24 Cal.App.4th 48, 61.)

Malice, oppression, or fraud must be proven by clear and convincing evidence. (*Am. Airlines*, *Inc. v. Sheppard*, *Mullin*, *Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049.) "In the usual case, the question of whether the defendant's conduct will support an award of punitive damages is for the trier of fact, 'since the degree of punishment depends on the peculiar circumstances of each case.' [Citation.]" (*Spinks v. Equity Residential Briarwood Apts*. (2009) 171 Cal.App.4th 1004, 1053.)

Here, the court finds that the FAC adequately pleads a claim for punitive damages. State courts have permitted actions with punitive damages claims based upon injuries sustained as a result of an intoxicated defendant to proceed beyond the pleading stage. (E.g., *Taylor v. Superior Court* (1979) 24 Cal.3d 890; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82; *Peterson v. Superior Court* (1982) 31 Cal.3d 147.) The essential gravamen of the complaint is that defendant became intoxicated and drove a vehicle in that condition—despite the "very commonly understood risk which attends every motor vehicle driver who is intoxicated[,]" (*Taylor*, *supra*, 24 Cal.3d at pp. 896–897)—and caused a collision, resulting in physical injuries and damages to plaintiffs. Contrary to defendant's assertion, plaintiffs do allege that defendant's intoxication proximately cause the collision, albeit not expressly. "As a direct and proximate result of the acts and omission of the

Defendant," which would include the act of becoming intoxicated, plaintiffs were injured. (FAC, p. 4.) Further, any ambiguities, especially of facts presumptively within the knowledge of the moving party (i.e., what defendant consumed, the amount she consumed, etc.), can be clarified under modern discovery procedures. (*Khoury v. Maly's of Cal.*, *Inc.* (1993) 14 Cal.App.4th 612, 616.)

Reading the FAC as a whole and liberally construing plaintiffs' allegations, the FAC adequately sets forth the facts with sufficient precision to put defendant on notice about what the plaintiffs are complaining and what remedies are being sought. (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.)

The motion is denied.

TENTATIVE RULING # 9: DEFENDANT'S MOTION TO STRIKE REQUEST FOR PUNITIVE DAMAGES IS DENIED. DEFENDANT'S ANSWER TO THE FIRST AMENDED COMPLAINT 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.

10. PALANT v. DANIELS, ET AL., SCL20110012

Motion to Set Aside/Vacate Entry of Default and Default Judgment

On October 10, 2022, defendants/judgment debtors Laura Daniels and John Halverson filed a motion to set aside/vacate default and default judgment pursuant to Code of Civil Procedure section 473.

Code of Civil Procedure section 473 provides, in part, that "[t]he court may, upon any terms as may be just, relieve a party … from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief … shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (*Id.*, subd. (b).) "The six-month limit is mandatory; a court has no authority to grant relief under section 473, subdivision (b), unless an application is made within the six-month period." (*Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 340.)

Here, default and default judgment were entered on August 26, 2011, more than 11 years ago and well beyond the mandatory 6-month limitations period set forth in Code of Civil Procedure section 473. As such, the court lacks jurisdiction to grant relief.

Additionally, in the alternative, there is no proof of service of the motion on plaintiff/judgment creditor in the court's file.

Defendants'/judgment debtors' motion is denied.

TENTATIVE RULING # 10: MOTION TO SET ASIDE/VACATE DEFAULT AND DEFAULT JUDGMENT IS DENIED. 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.

11. RURAL COMMUNITIES UNITED v. COUNTY OF EL DORADO, PC20210189

Case Management Conference

TENTATIVE RULING # 11: AT THE PARTIES' REQUEST, MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, FEBRUARY 10, 2022, IN DEPARTMENT FOUR.

12. DEPPE, ET AL. v. TAHOE TRANSPORTATION, ET AL., SC20210030

Motions to Compel Plaintiffs' Responses to Discovery Requests

On November 8, 2022, defendants Tahoe Transportation District and John Treviso filed four motions to compel responses from plaintiffs Sarah Deppe and Evan Deppe to Supplemental Interrogatories (Set One) and Supplemental Request for Production (Set One). Defendants also request monetary sanctions. On December 2, 2022, plaintiffs filed a notice of non-opposition to the motions, but they do oppose defendants' request for sanctions. Plaintiffs assert that they did not unsuccessfully oppose the motions because they filed a non-opposition, and therefore there is no statutory basis to impose sanctions.

The court disagrees with plaintiffs. This issue was addressed in *Sinaiko Healthcare Consul., Inc. v. Pac. Healthcare Consuls.* (2007) 148 Cal.App.4th 390: "[O]nce a party has failed to serve timely [discovery] responses, the trial court has the authority to hear a propounding party's motion to compel responses under [the Discovery Act], regardless of whether a party serves an untimely response. If a party fails to serve a timely response …, then by operation of law, all objections that it could assert to [the propounded discovery] are waived. [Citation.] Unless that party obtains relief from its waiver, the propounding party is entitled to move under [the Discovery Act] for an order compelling the response to which the propounding party is entitled—that is, a response without objection, and that substantially complies with the provisions governing the form [citation] and completeness [citation] of [the discovery] responses. (*Id*. at p. 408.)

Here, plaintiffs failed to serve any responses to defendants' discovery requests by the deadline for doing so. As such, defendants are entitled to move this court for an order compelling responses, without objections, from plaintiffs. Plaintiffs have not obtained relief from this waiver, nor has they demonstrated good cause for relief from this waiver or from the imposition of sanctions. To permit a party to simply ignore a discovery request until the eve of the hearing on the propounding party's motion to compel "would remove an important incentive for parties to respond to discovery in a timely fashion." (*Ibid*.)

In this regard, "a party to whom [discovery requests] were directed could wait until the hearing on a … motion [to compel responses] was imminent, then serve a set of evasive and incomplete responses, and thereby unilaterally deprive the trial court of authority to hear the motion. Even though the responding party had waived all objections to the discovery, the burden would shift to the propounding party, first to meet and confer, and then to demonstrate the impropriety of the responding party's responses. The statutory language does not suggest such a result." (*Sinaiko Healthcare*, *supra*, 148 Cal.App.4th at p. 408.)

For the foregoing reasons, defendants' motions to compel responses are granted. The court has reviewed and considered the declarations from defense counsel, and the court finds that $1,170 (6 hours x $195/hour) is a reasonable sanction under the Discovery Act.

TENTATIVE RULING # 12: DEFENDANTS' MOTIONS ARE GRANTED. PLAINTIFFS MUST EACH SERVE CODE-COMPLIANT VERIFIED RESPONSES TO DEFENDANTS' (1) SUPPLEMENTAL INTERROGATORIES (SET ONE) AND (2) SUPPLEMENTAL REQUEST FOR PRODUCTION (SET ONE), AND PAY DEFENDANTS A TOTAL OF $1,170 IN SANCTIONS NO LATER THAN 30 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.

13. CAMPBELL v. HALL, ET AL., SC20210058

Issues Conference

TENTATIVE RULING # 13: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 9, 2022, IN DEPARTMENT FOUR.

14. WING v. DECKSIDE VILLAS HOMEOWNERS ASSN., 22CV0911

Small Claims Court Trial

Given defendant's objection to a temporary judge and the unavailability of a judicial officer on December 9, this matter is continued to December 16, 2022.

TENTATIVE RULING # 14: MATTER IS CONTINUED TO 2:00 P.M., FRIDAY, DECEMBER 16, 2022, IN DEPARTMENT FOUR.

15. WING v. BPC STRUCTURAL PEST CONTROL, 22CV0850

Small Claims Court Trial

Given defendant's objection to a temporary judge and the unavailability of a judicial officer on December 9, this matter is continued to December 16, 2022.

TENTATIVE RULING # 15: MATTER IS CONTINUED TO 2:00 P.M., FRIDAY, DECEMBER 16, 2022, IN DEPARTMENT FOUR.

16. WING v. DECKSIDE VILLAS HOMEOWNERS ASSN., 22CV0852

Small Claims Court Trial

Given defendant's objection to a temporary judge and the unavailability of a judicial officer on December 9, this matter is continued to December 16, 2022.

TENTATIVE RULING # 16: MATTER IS CONTINUED TO 2:00 P.M., FRIDAY, DECEMBER 16, 2022, IN DEPARTMENT FOUR.