1/27/23
Dept. 9
Tentative Rulings

1. ALL ABOUT EQUINE ANIMAL RESCUE V. ALEXANDER BYRD PC20200294

Cross-Defendant Georgetown Divide Recreation District's Demurrer to First Amended Cross-Complaint.

Cross-Defendant Georgetown Divide Recreation District (hereinafter "Cross-Defendant") seeks an order sustaining its demurrer to the First Amended Cross Complaint (hereinafter "FACC") filed by Alexander Byrd, Maynard Byrd, Debra Byrd, Laura Byrd Rodarte, Joshua Rodarte, Terey Wilson, and Dawn Wilson (collectively "Cross-Complainants"). The demurrer was filed and served on October 7, 2022. Cross-Complainants filed their opposition on November 18th. Thereafter, Cross-Defendant filed its reply brief on November 23rd.

The demurrer is brought on the basis that the FACC fails to state facts sufficient to constitute a cause of action and is uncertain.

Cross-Defendant is a public entity that provides and maintains Bayley Barn located in Pilot Hill. The present suit stems from a dispute over the existence, location and dimensions of an easement over Cross-Defendant's property used for ingress and egress by private property owners of adjacent parcels. On August 24, 2020, Cross-Defendants installed fencing and a gate that included the easement area. Cross-Defendant provided Cross-Complainants with the combination to the gate lock.

Request for Judicial Notice

In support of its demurrer, Cross-Defendant requests judicial notice of the following: (1) First Amended Complaint filed by Cross-Defendant on or about August 31, 2021; (2) First Amended Cross-Complaint filed on or about August 2, 2022; (3) Selected provisions of the El Dorado Zoning Code as cited in the FACC. Cross-Complainants have not opposed the Request for Judicial Notice.

Judicial notice is a mechanism which allows the court to take into consideration matters which are presumed to be indisputably true. California Evidence Code Sections 451, 452, and 453 govern the circumstances in which judicial notice of a matter may be taken. While Section 451 provides a comprehensive list of matters that must be judicially noticed, Section 452 sets forth matters which *may* be judicially noticed, including "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

Section 452 provides that the court "may" take judicial notice of the matters listed therein, while Section 453 provides a caveat that the court "shall" take judicial notice of any matter "specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request…to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." Cal. Evid. Code § 453.

Here, Cross-Defendant's request was filed on October 7, 2022, long before the present hearing. Copies of all documents were attached to the request which was filed to the court and served on all parties. As such, under the circumstances, the court shall grant the request.

Cross-Defendant's requests judicial notice of the following: (1) First Amended Complaint filed by Cross-Defendant on or about August 31, 2021; (2) First Amended Cross-Complaint filed on or about August 2, 2022; (3) Selected provisions of the El Dorado Zoning Code as cited in the FACC; are granted.

Demurrer Standard

A demurrer raises only issues of law, not fact, regarding the form and content of the pleadings of the opposing party. Cal. Civ. Pro. §§ 422.10 and 589. It is not the function of the demurrer to challenge the truthfulness of the complaint, instead, for the purposes of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts in the pleading. Aubry v. Tri-City Hosp. Dist, 2 Cal. 4th 962, 966-967 (1992); Serrano v. Priest¸5 Cal. 3d 584 (1971); Adelman v. Associated Int'l Ins. Co., 90 Cal. App. 4th 352, 359 (2001). A demurrer can only challenge defects that appear on the face of the pleading and other matters that are judicially noticeable, the challenging party cannot make allegations of fact to the contrary. Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985); Donabedian v. Mercury Ins. Co., 116 Cal. App. 4th 968 (2004); Harboring Villas Homeowners Assn. v. Sup. Ct., 63 Cal. App. 4th 426 (1998). For that reason, "[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." Fremont Indemnity Co. v. Fremont General Corp., 148 Cal. App. 4th 97, 114 (2007).

Failure to plead the ultimate facts supporting a cause of action subjects the complaint to a demurrer. Cal. Civ. Pro. § 430.10(e); Berger v. Cal. Ins. Guar. Ass'n, 128 Cal. App. 4th 989, 1006 (2005). However, "[t]o determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." Elliot v. City of Pacific Grove, 54 Cal. App. 3d 53, 56. Otherwise stated, the demurrer is to be overruled if the allegations of the complaint are sufficient to state a cause of action under any legal theory. Brousseau v. Jarrett, 73 Cal. App. 3d 864 (1977); see also Nguyen v. Scott, 206 Cal. App. 3d 725 (1988).

When a demurrer is sustained but "…the defect raised by …[the] demurrer is reasonably capable of cure, 'leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question.'" Price v. Dames & Moore, 92 Cal.App.4th 355, 360 (2001); Grieves v. Superior Court, 157 Cal.App.3d 159, 168 (1984). A pleading may be stricken only upon terms the court deems proper (§ 436, subd. (b)), that is, terms that are just. § 472a(c); Vaccaro v. Kaiman, 63 Cal.App.4th 761, 768 (1998). It is generally an abuse of discretion to deny leave to

amend, because the drastic step of denial of the opportunity to correct the curable defect effectively terminates the pleader's action. Vaccaro v. Kaiman, supra, at p. 768." CLD Const., Inc. v. City of San Ramon, 120 Cal.App.4th 1141, 1146-1147 (2004). Leave to amend may be granted "even though no request to amend [the] pleading was made." Cal. Civ. Pro. § 472(a); Eghtesad v. State Farm Gen. Ins. Co., 51 Cal. App. 5th 406 (2020).

Second, Fourth and Nineth Causes of Action – Government Claims Act

Cross-Defendant's demurrer to the second, fourth, and nineth causes of action are based solely on failure to comply with the Government Claims Act. Cross-Defendant anticipates that Cross-Complainants will argue they are exempt from compliance with the Government Claims Act because Cross-Defendant initiated the litigation by filing its First Amended Complaint. According to Cross-Defendant, this is not true. The commencement of an action by a government entity only allows a cross complainant to assert defensive matters by way of a cross complaint. No claims for affirmative relief may be made.

Cross-Complainants do argue that they are exempt from compliance with the Government Claims Act solely on the basis that the claims brought relate to the same action or event as those brought by the public entity (Cross-Defendant) in the underlying action. Further, Cross-Complainants note that the purpose of the Government Claims Act has already been satisfied given that Cross-Defendant has been apprised of those claims via discovery and motions brought in the present suit.

Cross-Defendant argues Cross-Complainants' abandonment of the second and fourth causes of action because they were not specifically addressed in the opposition. This is incorrect. The opposition states "Cross-Defendant asserts the Government Claims Act as a basis for their demurrer for the *Second through Ninth* and Twelfth Causes of Action in the FACC." Opp. to Demurrer, Nov. 18, 2022, p. 2:26-27 (emphasis added). Thus, the court is including these claims in reaching the merits of the demurrer.

Generally speaking, where one seeks to recover damages from a government entity, that person must first file a written claim with the specified entity. Gov't Code § 945.4 & 905. Such claim must include "a general description of the indebtedness, obligation, injury, damage or loss incurred…" Gov't Code § 910(d). "Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused, are subject to a general demurrer for not stating facts sufficient to constitute a cause of action. [citations]." Shirk v. Vista Unified School Dist., 42 Cal. 4th 201, 209 (2007). Here, the FACC does not allege facts asserting compliance with the Government Claims Act, thus, the court turns to whether or not the FACC falls within one of the recognized exceptions.

Cross-Complainants rely on *Krainock v. Sup. Ct*., 216 Cal. App. 3d 1473 (1990), to establish their argument that they are exempt from the notice requirements of the Government Claims Act. Such reliance is misplaced. The *Krainock* case states specifically and

repeatedly that it applies only to "defensive cross complaints." *Krainock* at 1477. Further, *Krainock* establishes "three rules for determining the applicability of claims requirements to defensive cross-complaints…First, ….the situations in which claims requirements would not apply should be limited to those cases initiated by the public entity…The second rule…is that the defensive pleading, to be exempt from claims requirements, must arise out of the same transaction or event forming the basis of the plaintiff's claim and may not introduce an unrelated claim…a third criterion for exemption from claims requirements: the cross-complaint may assert only defensive matter. That is, a cross-complaint may be filed without a governmental claim as a prerequisite if it is limited to claims '…which, if successful, would destroy or diminish the plaintiff's recovery, ***but not to claims for affirmative relief***. [Citations]" *Krainock* at 1478 (emphasis added).

The FACC at issue asserts affirmative claims for relief separate and apart from the underlying causes of action in the underlying complaint. Negligence, extortion under Civ. Code §52.1, breach of contract, breach of good faith, trespass, nuisance, ADA violations and false imprisonment are all claims for which Cross-Complainants seek affirmative relief separate and apart from the relief sought by Plaintiff in the underlying action. They do not simply destroy or diminish Plaintiff's recovery, as is required to be a defensive cross-complaint. Instead, the affirmative recovery of money damages is sought by Cross-Complainants in the form of special damages, general damages, punitive and exemplary damages, attorneys' fees and costs. In light of the affirmative recovery sought, Cross-Complainants are not relieved of their duty to comply with the Government Claims Act pursuant to the terms of *Krainock.*

Cross-Complainants argue that even if *Krainock* does not apply, the notice requirements of the Government Claims Act have been essentially satisfied as the purposes of the act have been fulfilled.

"The purpose of the claims statutes is not to prevent surprise, but 'to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." City of Stockton v. Sup. Ct., 42 Cal. 4th 730 (2007). Thus, the court must determine the sufficiency of claims brought before the government entity. The sufficiency of a claim depends on whether or not there was some compliance with the Government Claims Act. City of San Jose v. Sup. Ct., 12 Cal. 3d 447, 456 (1974). In instances where there has been some compliance with the Act, "courts employ a test of substantial rather than strict compliance in evaluating whether a plaintiff has met the demands of the claims act. [citations]" Elias v. San Bernardino County Flood Control Dist., 68 Cal. App. 3d 70, 74 (1977). In these instances, where the purpose of the act is satisfied and there is no prejudice to the government entity, substantial compliance will be found. *Id.* Where the claimant fails to comply with a particular statutory requirement in its entirety, courts are less lenient. City of San Jose v. Sup. Ct., 12 Cal. 3d 447, 456 (1974). In those instances, courts have recognized "substantial compliance cannot be predicated upon no compliance. [citations]." *Id.* Here, the applicable test appears to be the latter.

Cross-Complainants did not file a claim of any kind. Instead, they argue that a claim was not necessary because Cross-Defendant was appraised of the factual basis for their claim through discovery and previously filed motions. They argue that this constitutes substantial compliance. However, as noted above, "substantial compliance cannot be predicated upon no compliance." *Id.* Further, unless the discovery and prior motions specifically addressed the indebtedness, injury or damage sought to be recovered by Cross-Complainants, then the notice did not comply with the Government Claims Act and Cross-Defendant would not have had sufficient information to decide whether or not settlement would be appropriate.

For the foregoing reasons, Cross-Defendant's demurrer to the second, fourth and nineth causes of action is sustained with leave to amend. Cross-Complainants are to file the amended pleading no later than February 10, 2023.

<u>First Cause of Action: Unjust Enrichment</u>

Cross-Defendant argues the first cause of action for unjust enrichment fails to state facts sufficient to constitute a cause of action because unjust enrichment, by itself, is not a cause of action. Even if there is a stand-alone cause of action for unjust enrichment, there must be a breach of a statutory obligation or breach of contract to assert such a claim against a public entity under the Government Claims Act.

Cross-Complainants argue there is a recognized cause of action for unjust enrichment and in fact, some courts have gone so far as to establish the elements for such a cause of action.

Courts are split on whether unjust enrichment is itself a stand-alone claim. *See* Levine v. Blue Shield of California, 189 Cal. App. 4th 1117, 1138 (2010); *See also* Peterson v. Cello Partnership, 164 Cal. App. 4th 1583 (2008). Nonetheless, "even if unjust enrichment does not describe an actual cause of action, the term is synonymous with restitution, which can be a theory of recovery [citations];" title alone is not dispositive. O'Grady v. Merchant Exchange Productions, 41 C.A. 5th 771, 791, 792 (2019) (Trial court erred in dismissing cause of action entitled "unjust enrichment" without leave to amend). The reviewing court is to be "more concerned with the substance of the underlying allegations than how the plaintiff labels the cause of action [citataions]." *Id.* at 792.

Here, even if Cross-Complainants were mistaken in titling this cause of action, they are essentially pleading a claim for restitution and the demurrer cannot be granted simply due to the questionable title. Nonetheless, the demurrer as to this cause of action is granted for its failure to comply with the Government Claims Act as discussed above.

For the foregoing reasons, Cross-Defendant's demurrer to the first cause of action is sustained with leave to amend. Cross-Complainant is to file the amended pleading no later than February 10, 2023.

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Third Cause of Action: Negligence

Cross-Defendant argues the cause of action for negligence fails to state facts sufficient to constitute a cause of action because there is no common law tort liability for public entities. While the FACC cites El Dorado County Zoning Ordinance, Section 130.30.090, local ordinances are not considered a "statute" according to Cross-Defendant. Further, the ordinance itself specifically exempts the activities of local agencies including, as Cross-Defendant argues, Cross-Defendant. Additionally, Cross-Defendant argues Cross-Complainants' abandonment of this claim because it was not specifically addressed in the opposition. This is incorrect. The opposition states "Cross-Defendant asserts the Government Claims Act as a basis for their demurrer for the *Second through Ninth* and Twelfth Causes of Action in the FACC." Opp. to Demurrer, Nov. 18, 2022, p. 2:26-27. While the claim was not abandoned, the only argument addressed was that of the applicability of the Government Claims Act.

A public entity is not liable for injury to another unless such liability is otherwise provided for by statute. Gov't Code § 815(a). For purposes of the Government Claims Act, the term "statute" is narrowly defined as "an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act." Gov't Code § 811.8. A local ordinance is not included in this definition. *Id.; See also* McWilliams v. City of Long Beach, 56 Cal. 4th 613 (2013).

As noted above, Cross-Complainants do not specifically address the issue of the viability of their negligence claim other than in the context of compliance with the notice requirements of the Government Claims Act. Cross-Complainants have not established, and the FACC does not state, any statutory authority under which Cross-Defendant may be held liable for negligence. As such, the FACC fails to state facts sufficient to constitute a cause of action for negligence.

The demurrer as to this cause of action is sustained based on Cross-Complainants' failure to comply with the Government Claims Act (discussed above) and the FACC's failure to state facts sufficient to constitute a cause of action for negligence. The demurrer is sustained with leave to amend. Cross-Complainants are to file their amended Cross Complaint no later than February 10, 2023.

Fifth Cause of Action: Americans with Disabilities Act, Civil Code Sections 51 et. seq., and 54 et. seq.

According to Cross-Defendant, recovery under Civil Code Sections 51 et. seq. and 54 et. seq. is permitted only if the complaining party actually encountered the violation on a particular occasion, and Plaintiff was actually denied full and equal access because of the alleged violation. Cross-Defendants maintain that no such assertion is made by the FACC. Cross-Defendant argues that it is not a "business establishment" and therefore not subject to liability under Civil Code Section 51. Further, Cross-Defendant argues it is not subject to liability under

Civil Code Section 54.1 because the purpose of the locked gate is to keep the general public out to prevent illegal activity. Finally, even if the cited code sections do apply, the FACC fails to state that Cross-Complainants have complied with the Government Claims Act and therefore it is subject to demurrer.

Cross-Complainants argue that this cause of action has been properly pled as it alleges that certain Cross-Complainants are visually impaired or have reduced nighttime vision. The fact that the names of those individuals are not set forth in the FACC is irrelevant, according to Cross-Complainants, because Cross-Defendant already has that information and a demurrer for uncertainty should not be sustained if the ambiguous facts are already within the knowledge of the demurring party.

Cross-Complainants also argue that Cross-Defendant is subject to liability as a business establishment because it carries out activities that are akin to business activities. Such activities include renting out the Bayley Barn and providing parks and activities to the general public. This is distinct from *Brennon B. v. Sup. CT.*, 13 Cal. 5th 662 (2022) where the school district was not found to be a business establishment in its capacity carrying out the constitutionally mandated duty to provide public education.

California Civil Code Section 51 states, in pertinent part: "(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act. (b) All persons within the jurisdiction of this state are free and equal, and no matter…their ….disability [or] medical condition…are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(a)-(b). A violation of the Americans with Disabilities Act also constitutes a violation of Civil Code Section 51. Cal. Civ. Code § 51(f). "Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of…public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each offense for actual damages…" Cal. Civ. Code § 54.3(a). Thus, "…a plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her equal access to some public facility." Urhausen v. Longs Drug Stores California, Inc., 155 Cal. App. 4th 254, 266 (2007).

According to Cross-Defendant the FACC fails to allege that Cross-Complainants were actually denied access to a public facility and therefore no harm occurred as is required to bring suit for money damages. This is incorrect. The FACC states "[c]ertain Cross-Complainants' [sic] are visually impaired or have reduced nighttime vision which precludes them from opening the gate locks and entering or leaving Cross-Complainants' properties during the evenings, nights, and early mornings." FACC, pg. 14:1-3.

Cross-Defendant argues that it does not constitute a "business establishment" and is therefore not subject to the Unruh Civil Rights Act. This cause of action, however, does not plead only a violation of the Unruh Civil Rights Act, but a violation of the Americans with

Disabilities Act (ADA) as well. The ADA expressly applies to public entities. 42 USCA §12132. Thus, because a cause of action has been established under any legal theory, the demurrer on this basis is overruled. *Brousseau v. Jarrett,* 73 Cal. App. 3d 864 (1977); *see also Nguyen v. Scott,* 206 Cal. App. 3d 725 (1988). This does not, however, save this cause of action from Cross-Defendant's argument regarding the Government Claims Act and Cross-Complainants' failure to provide notice as required by the act. Thus, the demurrer as to this cause of action is sustained based on Cross-Complainant's failure to comply with the Government Claims Act. The demurrer is sustained with leave to amend. Cross-Complainants are to file their amended Cross Complaint no later than February 10, 2023.

Sixth Cause of Action: Trespass

According to Cross-Defendant, the cause of action for trespass is vulnerable to demurrer because an easement holder cannot state a cause of action for trespass against the servient estate because the essential elements of a trespass claim cannot be met. Namely, an exclusive possessory right. Additionally, there has been no statement of compliance with the Government Claims Act. Cross-Complainants did not address the argument regarding an exclusive possessory right. Instead, they argued against the allegation of noncompliance with the Government Claims Act.

"Trespass is an unlawful interference with possession of property. [citations]" Staples v. Hoefke, 189 Cal. App. 3d 1397, 1406 (1987). "The elements of trespass are: (1) *the plaintiff's ownership or control of the property*; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) defendant's conduct was a substantial factor in causing the harm. [Citations]." Ralphs Grocery Co. v. Victory Consultants, Inc., 17 Cal. App. 5th 245, 262 (2017) (emphasis added). "Thus, in order to state a cause of action for trespass a plaintiff must allege an unauthorized and tangible entry on the land of another, which interfered with the plaintiff's exclusive possessory rights. [Citations]." McBride v. Smith, 18 Cal. App. 5th 1160 (2018).

Here, Cross-Complainants are alleging trespass over an easement. Particularly on point is *McBride v. Smith.* In the *McBride* case, Plaintiff sued for, among other things, Defendant's trespass over Plaintiff's easement which was located on Defendant's land. The court in that case found the easement's dominant estate could not state a cause of action against the servient estate for trespassing regarding easement as a matter of law after servient estate allegedly erected chain and pole to impede dominant estate's passage, where servient estate owned the easement property and the dominant estate's easement did not give possessory right, not to mention exclusive possessory right, in that property. *See McBride* at 1173-1178. Essentially, the crux of the court's reasoning was that the easement did not afford Plaintiff either an ownership right, nor an exclusive possessory right, to the property. *Id.*

The facts at hand are essentially the same as those in *McBride*. Cross-Defendant owns property and Cross-Complainants have an easement across Cross-Defendant's property. Cross-

Defendant installed a gate across the easement. Doing so does not, as a matter of law, constitute trespass on the part of Cross-Defendant.

The demurrer as to this cause of action is sustained based on Cross-Complainants' failure to comply with the notice provisions of the Government Claims Act and the FACC's failure to state facts sufficient to constitute a cause of action for trespass. The demurrer to this cause of action is sustained without leave to amend.

Seventh/Eighth Cause of Action: Breach of Covenant of Good Faith and Breach of Contract

The demurrer to these causes of action is based on the fact that the FACC cites only the 1977 Grant Deed which does not establish any covenants that would require any action on the part of Cross-Defendants. Further, there is no claim of compliance with the Government Claims Act.

Cross-Complainants point to the implied covenant of good faith and fair dealing that is established with all contracts. By refusing to approve a map that would establish the exact location of the easement, Cross-Complainants claim they were prevented from receiving the benefit of the contract and therefore Cross-Defendant breached its duty to act in good faith.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) Plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the Plaintiff." Oasis West Realty LLC v. Goldman, 51 Cal. 4th 811, 821 (2011). "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. [Citations]." Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654 (1958). "The covenant is read into contracts and functions 'as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the party's rights to the benefits of the contract.'" Thrifty Payless, Inc. v. The Americana at Brand, LLC, 218 Cal. App. 4th 1230, 1244 (2013) *citing* Racine & Laramie, Ltd. V. Dep't of Parks & Rec., 11 Cal. App. 4th 1026, 1031-1032 (1992). A "…'breach of a specific provision of the contract is not…necessary' to a claim for breach of the implied covenant of good faith and fair dealing. [Citation]." *Id.*

Here, Cross-Complainants base their claims for breach of contract and breach of implied covenant of good faith and fair dealing on the 1977 Grant Deed. They note the provision of the deed which requires the successors and assigns, i.e. Cross-Defendant, to submit a land division map showing the precise location of the easement. According to the FACC, Cross-Defendant has not done so and has actively refused to do so. Taking the allegations of the FACC as true, this would be sufficient to constitute a cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing. That said, while these causes of action would survive the demurrer on the basis of failure to state facts to constitute breach of contract and

breach of implied covenant, they do not survive for failure to establish compliance with the Government Claims Act.

The demurrer as to these causes of action is sustained based on Cross-Complainant's failure to comply with the Government Claims Act. The demurrer is sustained with leave to amend. Cross-Complainants are to file their amended Cross Complaint no later than February 10, 2023.

Twelfth Cause of Action: Void Restrictive Covenant

A restrictive covenant based on creed, color, or other prohibited classification may not be contained in a deed. Cross-Defendant argues there are no such covenants in the 1977 Grant Deed and therefore this cause of action fails. Additionally, to the extent money damages are sought for this cause of action, the Government Claims Act must be complied with but, according to Cross-Defendant, nothing in this cause of action establishes compliance therewith.

Cross-Complainants assert the restrictive covenant is Cross-Defendant's refusal to approve a map. This is unlawful because it deprives Cross-Complainants of the benefit of the agreement and should therefore be void.

A restrictive covenant is one which forbids or restricts "the conveyance, encumbrance, leasing, or mortgaging" of real property to any person because of a protected characteristic of that person. Cal. Civ. Code § 53. According to the FACC, Cross-Complainants restrictive covenant claim is based on Cross-Defendant's refusal to record a map showing the specific location of the easement which thereby affects the marketability of the properties owned by Cross-Complainant. There is no protected class alleged, and no basis for their claim that the so-called restrictive covenant is premised on Cross-Complainants' inclusion in the restricted class. Thus, this cause of action fails to state facts sufficient to constitute a void restrictive covenant cause of action.

The demurrer as to the twelfth cause of action is sustained based on Cross-Complainant's failure to comply with the Government Claims Act and the FACC's failure to state facts sufficient to constitute a cause of action for a void restrictive covenant. The demurrer is sustained with leave to amend. Cross-Complainants are to file their amended Cross Complaint no later than February 10, 2023.

Cross-Defendant Georgetown Divide Recreation District's Motion to Strike Punitive Damages Allegation from First Amended Cross Complaint.

Concurrently with its demurrer, Cross-Defendant filed a Motion to Strike Punitive Damage Claims in the First Amended Cross Complaint. Cross-Complainants have not opposed the motion.

Cross-Defendant premises its motion to strike on the fact that punitive damages against a public agency are prohibited by Government Code Section 818 and are further prohibited for recovery under the ADA pursuant to the United States Supreme Court decision in *Barnes v. Gorman,* 536 U.S. 181, 189-190 (2002).

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: ¶ (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. ¶ (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." Cal. Civ. Pro. § 436. Generally, a public entity is not liable for punitive damages "…or other damages imposed primarily for the sake of example and by way of punishing the defendant." Gov't Code § 818. Likewise, punitive damages may not be awarded in claims for violations of the ADA. Barnes v. Gorman, 536 U.S. 181 (2002).

The punitive damage claim in the FACC as brought against Cross-Defendant is not in accordance with the law and therefore must be struck. Cross-Defendant's Motion to Strike Punitive Damage Claims is granted.

TENTATIVE RULING 1: CROSS-DEFENDANT'S REQUESTS FOR JUDICIAL NOTICE ARE GRANTED. CROSS-DEFENDANT'S DEMURRER TO THE SECOND, FOURTH AND NINETH CAUSES OF ACTION IS SUSTAINED WITH LEAVE TO AMEND FOR FAILURE TO COMPLY WITH THE GOVERNMENT CLAIMS ACT. CROSS-DEFENDANT'S DEMURRER TO THE FIRST CAUSE OF ACTION IS SUSTAINED WITH LEAVE TO AMEND FOR FAILURE TO COMPLY WITH THE GOVERNMENT CLAIMS ACT. THE DEMURRER AS TO THE THIRD CAUSE OF ACTION IS SUSTAINED BASED ON CROSS-COMPLAINANTS' FAILURE TO COMPLY WITH THE GOVERNMENT CLAIMS ACT AND THE FACC'S FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR NEGLIGENCE. THE DEMURRER IS SUSTAINED WITH LEAVE TO AMEND. THE DEMURRER AS TO THE FIFTH CAUSE OF ACTION IS SUSTAINED BASED ON CROSS-COMPLAINANTS' FAILURE TO COMPLY WITH THE GOVERNMENT CLAIMS ACT. THE DEMURRER IS SUSTAINED WITH LEAVE TO AMEND. THE DEMURRER AS TO THE SEVENTH AND EIGHTH CAUSES OF ACTION IS SUSTAINED BASED ON CROSS-COMPLAINANTS' FAILURE TO COMPLY WITH THE GOVERNMENT CLAIMS ACT. THE DEMURRER IS SUSTAINED WITH LEAVE TO AMEND. THE DEMURRER AS TO THE TWELFTH CAUSE OF ACTION IS SUSTAINED BASED ON CROSS-COMPLAINANTS' FAILURE TO COMPLY WITH THE GOVERNMENT CLAIMS ACT AND THE FACC'S FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR A VOID RESTRICTIVE COVENANT. THE DEMURRER IS SUSTAINED WITH LEAVE TO AMEND. FOR ALL CAUSES OF ACTION WHERE LEAVE TO AMEND HAS BEEN GRANTED, CROSS-COMPLAINANTS ARE TO FILE THEIR AMENDED CROSS COMPLAINT NO LATER THAN FEBRUARY 10, 2023. THE DEMURRER AS TO THE SIXTH CAUSE OF ACTION IS SUSTAINED BASED ON CROSS-COMPLAINANTS' FAILURE TO COMPLY WITH THE NOTICE PROVISIONS OF THE GOVERNMENT CLAIMS ACT AND THE FACC'S FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR TRESPASS. THE DEMURRER TO THIS

CAUSE OF ACTION IS SUSTAINED WITHOUT LEAVE TO AMEND. CROSS-DEFENDANT'S MOTION TO STRIKE PUNITIVE DAMAGES CLAIM FROM THE FIRST AMENDED CROSS COMPLAINT IS GRANTED.

All matters where there is a request for oral argument or an order to appear will be heard on the law and motion calendar at 9:00 a.m. on February 3, 2023, either in person or by zoom appearance unless otherwise notified by the court.

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2. BIOGGIO PIZARRO V. SHAWN ALLEN WHITAKER, ET. AL. 22CV0972

Motion to Compel Answers to Form Interrogatories

Plaintiff moves to compel answers to Form Interrogatories served on Defendant Shawn Allen Whitaker (hereinafter "Defendant") on September 22, 2022 and for sanctions in the amount of $3,500. The motion was served on December 8, 2022 and filed the next day. Defendant filed his opposition on January 17, 2023.

The subject Form Interrogatories were served on September 22, 2022. Having received no responses, Plaintiff sent a meet and confer letter on November 16th. As of the date of filing the motion, still no responses had been served. Defendant maintains that he intends to serve responses, without objections, prior to the hearing on this motion.

"The party to whom interrogatories have been propounded shall respond in writing under oath separately to each interrogatory by any of the following: (1) An answer containing the information sought to be discovered. (2) An exercise of the party's option to produce writings. (3) An objection to the particular interrogatory." Cal. Civ. Pro. § 2030.210(a). Generally speaking, responses to interrogatories are due within 30 days of the date of service. Cal. Civ. Pro. § 2030.260. If a party fails to provide timely responses, that party waive any right to object to the interrogatories and waives the right to produce writings in response. Cal. Civ. Pro. §2030.290 (a).

There does not appear to be any dispute between the parties regarding the fact that discovery is due, and objections have been waived. The court agrees. As such, Defendant is ordered to serve full and complete responses to Form Interrogatories, Set One, without objections, no later than February 24, 2023.

Regarding the request for sanctions, according to the declaration of Barry Zimmerman, 6 hours have been spent on the preparation and filing of this motion and the motion to deem matters admitted filed concurrently herewith. Mr. Zimmerman anticipates spending an additional 4 hours in responding to any opposition and appearing for hearing. At an hourly billable rate of $350, this amounts to the requested $3500 in sanctions.

Defendant acknowledges that sanctions may be awarded but asks that they be imposed only on counsel for his calendaring error, which was not the fault of Defendant. He agues the contended 10 hours of work is unreasonable and states that, if anything, one hour of time would have been sufficient to draft the motion which consists of twenty lines of text.

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process…pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct…If a monetary sanction is authorized by any provision of this title, the court *shall* impose that sanction unless it finds that one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction

unjust." Cal. Civ. Pro. 2023.030(a)(emphasis added) & 2023.020. Misuse of the discovery process includes, but is not limited to, failing to respond or submit to an authorized method of discovery and failing to engage in good faith meet and confer efforts. Cal. Civ. Pro. § 2023.010. Written interrogatories are an authorized form of discovery. Cal. Civ. Pro. §§ 2030.210. Despite the mandatory nature of discovery sanctions, the amount of sanctions is limited to only those that were reasonably incurred, and those which have already been incurred. *See* Tucker v. Pacific Bell Mobile Servs., 186 Cal. App. 4th 1548 (2010) (anticipated costs for future deposition could not be included in award of sanctions); *See also* Argaman v. Ratan, 73 Cal. App. 4th 1173 (the award may not exceed reasonable expenses incurred).

Defendant's objection to the proposed 10 hours of work is well taken. While it appears the request for sanctions is based on work done on this motion as well as the motion to have the truth of the matter deemed admitted, neither motion is particularly complex nor work intensive. Given the court's experience in this area, it seems reasonable for counsel to have spent approximately two hours on the preparation of this motion. Sanctions for the motion to have matters deemed admitted will be addressed therein. That said, Plaintiff is awarded sanctions in the amount of $700 to be paid by counsel Timothy Huber no later than February 23, 2023. This amount may be increased, at the discretion of the court, if Plaintiff incurs additional costs and fees associated with preparing for, and participating in, oral argument.

Motion to Deem Requests for Admission Admitted

Defendant moves for an order deeming admitted the truthfulness of the matters served in Requests for Admissions and for monetary sanctions in the amount of $3,500.

Requests for Admission were served on Defendant on September 22, 2022. Responses were not received by the due date, Plaintiff then sent a meet and confer letter regarding the missing responses on November 16, 2022. Plaintiff now seeks an order deeming the requests admitted. Plaintiff opposes the motion on the basis that responses in substantial compliance with Civil Code Section 2033.220 have been served.

Plaintiff is requesting $3,500 for attorney's fees incurred as the result of 10 hours spent preparing the present motion along with the motion to compel form interrogatory responses. Defendant acknowledges that sanctions are warranted but disputes the amount and asks that sanctions only be imposed on counsel due to a calendaring error.

Where a party fails to timely respond to requests for admission "…[t]he requesting party may move for an order that the…truth of any matters specified in the requests be deemed admitted…" Cal. Civ. Pro. § 2033.280(b). Such an order is mandatory unless the court finds that the responding party "…has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220." Cal. Civ. Pro. § 2033.280(c). When a motion is filed as a result of the untimely responses, "[i]t is mandatory that the court impose a monetary sanction…"

Here, Defendants have served responses to the requests for admission prior to the date of the hearing. While the responses have not been provided to the court, counsel has indicated that they are in substantial compliance with Section 2033.220. Thus, Plaintiff's requests to have admissions deemed true is denied. However, given the mandatory nature of sanctions, Plaintiff's request for sanctions is granted. The court finds approximately two hours spent on the present motion to be reasonable. Thus, counsel Timothy Huber is to pay sanctions in the amount of $700 no later than February 23, 2023. This amount may be increased, at the discretion of the court, if Plaintiff incurs additional costs and fees associated with preparing for and participating in, oral argument.

TENTATIVE RULING 2: PLAINTIFF'S MOTION TO COMPEL FORM INTERROGATORIES IS GRANTED. DEFENDANT IS ORDERED TO SERVE FULL AND COMPLETE RESPONSES TO FORM INTERROGATORIES, SET ONE, WITHOUT OBJECTIONS, NO LATER THAN FEBRUARY 24, 2023. PLAINTIFF'S REQUESTS TO HAVE ADMISSIONS DEEMED TRUE IS DENIED. PLAINTIFF IS AWARDED SANCTIONS IN THE AMOUNT OF $1,400 TO BE PAID BY COUNSEL TIMOTHY HUBER NO LATER THAN FEBRUARY 23, 2023. THIS AMOUNT MAY BE INCREASED, AT THE DISCRETION OF THE COURT, IF PLAINTIFF INCURS ADDITIONAL COSTS AND FEES ASSOCIATED WITH PREPARING FOR, AND PARTICIPATING IN, ORAL ARGUMENT.

All matters where there is a request for oral argument or an order to appear will be heard on the law and motion calendar at 9:00 a.m. on February 3, 2023, either in person or by zoom appearance unless otherwise notified by the court.

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3. BLAKE MOORE V. JAMES MENSE **22CV1159**

The underlying matter stems from a car accident that occurred on December 23, 2020 when Plaintiff was injured while on the job. Plaintiff sued the driver of the opposing car. Plaintiff's employer, United Parcel Service, Inc. (hereinafter "Intervenor") now seeks to intervene on the basis that Intervenor provided Plaintiff with workers' compensation benefits and Intervenor is entitled to reimbursement of those benefits from Defendant.

Intervenor's Motion for Leave to Intervene was filed and served on December 14, 2022. Neither Plaintiff nor Defendant have opposed the motion.

Where an employee is injured by a third party while in the course of his or her employment, "[a]ny employer who pays, or becomes obligated to pay compensation…may likewise make a claim or bring an action against the third person." Cal. Labor Code § 3852. In the event of suit against such third party, the employer may intervene "at any time before trial on the facts [citations]." State Compensation Fund v. Selma Trailer and Manufacturing Company, et. al., 210 Cal. App. 3d 258 (1989).

Intervenor appears to be a necessary party to the litigation. Plaintiff's recovery without reimbursing his employer for worker's compensation benefits would result in a windfall to him. Further, there appears to be no prejudice to either Plaintiff or Defendant as this matter is still in its infancy. Accordingly, Defendant's Motion to Intervene is Granted.

TENTATIVE RULING 3: DEFENDANT'S MOTION TO INTERVENE IS GRANTED.

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4. DARYL WHITESIDE V. DEREK TABER PC20200212

Defendant/Cross-Complainant, Derek Taber (hereinafter "Defendant") moves for an order compelling Plaintiff to serve full and verified responses, without objections, to Form Interrogatories – Construction Litigation, Set One, and Request for Production of Documents, Set One, served on Defendant on August 4, 2021 and for monetary sanctions in the amount of $1,780. There is a Proof of Service on file evidencing service of the moving papers on Plaintiff on December 13, 2022. Plaintiff has not opposed the motion.

The subject discovery was served on August 4, 2021, thereby making responses due on or before September 8, 2021. On September 9th Plaintiff's Counsel requested a two-week discovery, which was granted. With the extension of time, responses became due on September 23rd. To date, no such responses have been received.

"The party to whom interrogatories have been propounded shall respond in writing under oath separately to each interrogatory by any of the following: (1) An answer containing the information sought to be discovered. (2) An exercise of the party's option to produce writings. (3) An objection to the particular interrogatory." Cal. Civ. Pro. § 2030.210(a). Generally speaking, responses to interrogatories are due within 30 days of the date of service. Cal. Civ. Pro. § 2030.260. If a party fails to provide timely responses, that party waives any right to object to the interrogatories, and waives the right to produce writings in response. Cal. Civ. Pro. §2030.290 (a).

Likewise, the same goes for requests for production of documents. "A party to whom a demand for inspection, copying, testing, or sampling has been directed shall respond separately to each item or category of item by any of the following:" (1) a statement that the party will comply, (2) a statement that the party lacks the ability to comply, or (3) an objection to the demand or request made. Cal. Civ. Pro. §2031.210 (emphasis added). Where a party fails to provide timely responses the party to whom the discovery was directed waives "any objection…including one based on privilege or on the protection of work product…" Cal Civ. Pro. §2031.300(a).

Defendant has established proper service of the interrogatories and document requests on August 4, 2021. It has been well over a year since service was effectuated and Plaintiff has failed to provide responses of any kind. Thus, Defendant's motion to compel responses without objections is granted.

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process…pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct…If a monetary sanction is authorized by any provision of this title, the court *shall* impose that sanction unless it finds that one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Cal. Civ. Pro. 2023.030(a)(emphasis added) & 2023.020. Misuse of the discovery

process includes, but is not limited to, failing to respond or submit to an authorized method of discovery. Cal. Civ. Pro. § 2023.010. Written interrogatories and requests for production of documents are both authorized forms of discovery. Cal. Civ. Pro. §§ 2030.210, 2031.210. A party requesting sanctions for reasonable expenses that were incurred as a result of discovery abuse must already be liable for those expenses before the court can award the costs as sanctions. *See* Tucker v. Pacific Bell Mobile Servs., 186 Cal. App. 4th 1548 (2010) (anticipated costs for future deposition could not be included in award of sanctions).

According to the Declaration of Matthew R. Schoech, Defendant has incurred a total of $880 of attorney's fees associated with the preparation of the present motion. An additional $60 filing fee has been incurred as well, which results in a total of $940 costs and fees incurred to date. Mr. Schoech estimates another $800 of fees will be billed in association with responding to the opposition of this motion and preparing for a hearing on the matter. However, as such fees have not actually been incurred, and likely will not be incurred as Plaintiff has not opposed the motion, the court cannot award fees that have not been incurred. As such, Defendant is awarded sanctions in the amount of $940. This amount may be subject to increase in the event Defendant incurs additional costs and fees associated with the preparation for, and appearance at, oral argument.

TENTATIVE RULING 4: DEFENDANT'S MOTION TO COMPEL IS GRANTED. PLAITIFF IS ORDERED TO PROVIDED FULL AND COMPLETE RESPONSES, WITHOUT OBJECTIONS, TO FORM INTERROGATORIES – CONSTRUCTION LITIGATION, SET ONE AND REQUESTS FOR PRODUCTION OF DOCUMENTS, SET ONE, NO LATER THAN FEBRUARY 24, 2023. PLAINTIFF IS ORDERED TO PAY DEFENDANT'S COUNSEL $940 NO LATER THAN FEBRUARY 24, 2023. THIS AMOUNT MAY BE SUBJECT TO INCREASE IN THE EVENT DEFENDANT INCURS ADDITIONAL COSTS AND FEES ASSOCIATED WITH PREPARATION AND APPEARANCE FOR ORAL ARGUMENT.

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5. GEORGIA WANLAND V. BEST LEGAL SUPPORT TEAM, LLC. 21CV0383

Motion for a Protective Order and Monetary Sanctions

Defendants move for a protective order establishing conditions on the taking of Defendants' depositions as well as sanctions in the amount of $3,000 plus filing fees. Plaintiff filed her opposition papers on December 23, 2022. To date, no reply papers have been filed with the court.

Protective Order

Defendants seek an order imposing the following conditions on the taking of their depositions: (1) Prior to the taking of any depositions the court would need to first enter an order on Defendants' demurrer for lack of jurisdiction and, in the alternative, motion to stay pending the outcome of the divorce action between Plaintiff and Mr. Wanland; (2) The parties are to be timely served with deposition notices; (3) Plaintiff's deposition must either proceed or, minimally, run concurrently with those Plaintiff wishes to take, meaning Defendants will be immediately permitted to take her deposition at the conclusion of Defendants' PMQ depositions Plaintiff wishes to take; and (4) If Defendants appear for their deposition but Plaintiff fails to show for her deposition until completed for any reason, the transcripts of Defendants' PMQ depositions may not be used by Plaintiff until her deposition is completed and transcribed.

Defendants predicate a portion of their motion on the time, trouble, expense, burden and annoyance of submitting to depositions in a matter that may be dismissed pending a decision on their demurrer. In the event the depositions do go forward, Defendants ask that Plaintiff be concurrently deposed or immediately thereafter to ensure that she does not gain unfair advantage in the divorce case by taking Defendants' depositions but not submitting to her own. Defendants note the ongoing divorce proceedings between the parties wherein the same assets are at issue. Defendants are of the belief that Plaintiff is intending to use discovery in the civil matter to improperly obtain information to use in the divorce proceedings. They assert the proposed conditions to safeguard against this.

Plaintiff opposes the motion for protective order on the basis that it is untimely as it was filed 17 days after receiving the deposition notices, and after they failed to appear for their scheduled depositions without having served objections prior thereto. Plaintiff argues further that Defendants' purported meet and confer efforts were not made in good faith. Moreover, on November 4th, the court granted Plaintiff's Motion to Compel Answers to Interrogatories, thereby implicitly ruling that discovery in the present matter was to proceed regardless of the pending demurrer. By refusing to allow Defendants' deposition to proceed until after a ruling on the demurrer, Plaintiff argues that Defendants are simply improperly seeking to stay the matter indefinitely.

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"The court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." Cal. Civ. Pro. § 2025.420(b). The burden rests with the moving party to establish good cause for the requested protective order. Nativi v. Deutsche Bank Nat'l Trust Co., 223 Cal. App. 4th 261, 318 (2014).

At the time of filing of this motion the court had not yet ruled on Defendants' Demurrer/Motion to Stay. The court has since denied those motions and thus, any argument related to the time, trouble, expense, burden, and annoyance of submitting to depositions in a matter that could be stayed is now rendered moot. The remainder of Defendants' motion is predicated on the fact that they believe Plaintiff is improperly seeking discovery to be used in the dissolution proceedings. That said, the court notes the derivative nature of the present proceedings, which is the same basis the court cites for its denial of the demurrer and request for stay. In light of the nature of this matter as derivative and therefore separate and distinct from the divorce proceedings, the court finds it proper for discovery to proceed. As such, Defendants' request for a protective order is denied.

Sanctions

Defendants proposed to Plaintiff their conditions on the taking of their depositions. Plaintiff refused to agree thus necessitating the present motion. Defense Counsel estimates he spent no less than an hour reviewing and editing the moving papers. He expects to spend an additional hour reviewing the opposition and drafting the reply and another hour preparing for and attending the hearing on this motion. Counsel charges $1,000 per hour and is therefore seeking $3,000 in sanctions.

Plaintiff opposes Defendants' request for sanctions as Defendants have not provided facts to support their request for $3,000. Alternatively, Plaintiff requests sanctions against Defendants in the amount of $3,070.83 for having to oppose the motion, as well as an additional $1,050 for amounts incurred in association with appearing at the hearing should one be held.

"The court shall impose a monetary sanction…against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Cal. Civ. Pro. 2025.420 (h).

As discussed above, at the time Defendants filed this motion the court had not yet ruled on Defendants' demurrer. Defendants' concerns over being subjected to depositions while a dispositive motion is pending are valid. Thus, the court finds that Defendants acted with substantial justification in the filing of this motion at the time the motion was prepared and filed and therefore no sanctions are warranted. Likewise, Defendants' request for sanctions is denied given the denial of the requested protective order.

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Motion to Compel Appearance at Deposition and Production of Documents

Plaintiff moves for the following orders: (1) To compel Defendant Best Legal Support Team, LLC, California to appear at its deposition and produce documents as specified in the deposition notice; (2) To compel Defendant Best Legal Support Team, LLC, Nevada to appear at its deposition and produce documents as specified in the deposition notice; (3) Order Defendants to pay the sum of $1,567.50 as the reasonable costs and fees incurred in association with the present motion; (4) Order Defendants to pay sanctions in the amount of $1,567.50, plus additional amounts if Defendants oppose the motion. Plaintiff's moving papers were filed December 7, 2022. Defendants attempted to fax file their opposition papers on December 22, 2022 but the fax filing was rejected. It does not appear the Defendants refiled. Plaintiff replied on January 19th.

Deposition notices were sent to both defendants on November 18, 2022. Defendants did not object to the notices, nor did they file a motion for a protective order prior to the date their depositions were to be held. Neither defendant appeared for its deposition. It appears Defendants did not notify Plaintiff of their intention not to appear at the depositions as scheduled.

The requested $1567.50 in sanctions consists of attorney's fees in the amount of $1,207.50 and court reporter appearance fee of $175. Plaintiff's counsel charges $350 per hour and he spent 3.75 hours preparing and filing this motion. A $60 filing fee and Legal Services filing fee of $125 were also incurred. Plaintiff estimates an additional $1,400 will likely be incurred in the preparation of a reply brief and preparation for and appearance at oral argument.

Plaintiff, in her Reply, objects to the court considering Defendants' opposition to the motion as Plaintiff was not served with a readable version of the document. Plaintiff contacted Defense Counsel no less than 4 times in a span of two and a half weeks requesting a readable version but to no avail. On January 18th Defense Counsel indicated Plaintiff would be served with a pdf version of the document the same day. Nonetheless, no such document was received.

Defendants' opposition has not been considered due to lack of proper service.

It is well established law that any party may obtain discovery by way of an oral deposition. Cal. Civ. Pro. § 2019.010(a) & §2025.010. "The service of a deposition notice under Section 2025.240 is effective to require any deponent who is a party to the action…to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection and copying." Cal Civ. Pro. § 2025.280(a). In conducting discovery, each "party is permitted to use multiple methods of obtaining discovery and the fact that information was disclosed under one method is not, standing alone, proper basis for refusing to

provide discovery under another method." Irvington-Moore, Inc. v. Sup. Ct. 14 Cal. App. 4th 733 (1993).

Where a party fails to appear for its deposition, sanctions are to be imposed unless the party subject to the sanction acted with substantial justification or other circumstances make the imposition of the sanction unjust. Cal. Civ. Pro. 2023.030(a)(emphasis added) & 2023.020; *See also* Cal. Civ. Pro. § 2023.010 (Misuse of the discovery process includes, but is not limited to, failing to respond or submit to an authorized method of discovery). A party requesting sanctions for reasonable expenses that were incurred as a result of discovery abuse must already be liable for those expenses before the court can award the costs as sanctions. *See* Tucker v. Pacific Bell Mobile Servs., 186 Cal. App. 4th 1548 (2010) (anticipated costs for future deposition could not be included in award of sanctions).

The properly served deposition notice was sufficient to compel Defendants to appear at their depositions at the date and time noticed, and to bring any and all documents responsive to those requests to which they did not object. Defendants did ultimately file for a protective order, which, in light of the absence of a ruling on the Defendants' demurrer, the court found to be justified at that time. However, the motion for the protective order was not prepared prior to the date Defendants were to be deposed. Further, it appears that Defendants did not so much as notify Plaintiff of their intent not to appear at the deposition on the date and time notice. Thus, Plaintiff did incur the costs associated with appearing at the deposition and making a record of non-appearance.

Under the circumstances, the court does not find that Defendants acted with substantial justification in refusing to appear for their depositions, without giving Plaintiff notice and without having first filed their Motion for Protective Order. As such, Defendants are ordered to pay Plaintiff sanctions in the amount of $1,567.50. This amount may be subject to increase if Plaintiff incurs additional costs and fees associated with appearing at oral argument. Further, Defendants are ordered to appear for their depositions and produce any and all documents responsive to the document requests to which they do not object. The parties are to meet and confer in good faith to choose deposition dates and time. Plaintiff is to serve deposition notices for the agreed upon dates/times.

TENTATIVE RULING 5: DEFENDANTS ARE ORDERED TO PAY PLAINTIFF SANCTIONS IN THE AMOUNT OF $1,567.50. THIS AMOUNT MAY BE SUBJECT TO INCREASE IF PLAINTIFF INCURS ADDITIONAL COSTS AND FEES ASSOCIATED WITH APPEARING AT ORAL ARGUMENT. FURTHER, DEFENDANTS ARE ORDERED TO APPEAR FOR THEIR DEPOSITIONS AND PRODUCE ANY AND ALL DOCUMENTS RESPONSIVE TO THE DOCUMENT REQUESTS TO WHICH THEY DO NOT OBJECT. THE PARTIES ARE TO MEET AND CONFER IN GOOD FAITH TO CHOOSE DEPOSITION DATES AND TIME. PLAINTIFF IS TO SERVE DEPOSITION NOTICES FOR THE AGREED UPON DATES/TIMES.

1/27/23
Dept. 9
Tentative Rulings

All matters where there is a request for oral argument or an order to appear will be heard on the law and motion calendar at 9:00 a.m. on February 3, 2023, either in person or by zoom appearance unless otherwise notified by the court.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED.

If no request for oral argument is made by 4:00 p.m.on the day the tentative ruling is issued, the tentative ruling will be formally adopted on at 9:00 a.m. on February 3, 2023, either in person or by zoom appearance unless otherwise notified by the court.

PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR REMOTELY BY ZOOM ARE TO CONTACT THE CLERK'S OFFICE AT (530) 621-5867 FOR LOGIN INSTRUCTIONS.

6. RANDY BAUGH, ET. AL. V. GREENVIEW ASSETS, ET. AL. PC20190436

Defendants/Cross-Complainants David Kaufman and Kathryn Kaufman (hereinafter "Defendants") filed and served their Motion for Leave to File Supplemental Cross-Complaint on December 14, 2022. Plaintiffs filed and served their opposition papers on January 13th.

This matter stems from a dispute arising out of a landlord-tenant arrangement between Defendants and Plaintiffs which was codified in a lease agreement (the "Agreement") entered into by the parties. Plaintiffs filed their complaint on August 16, 2019. On October 25, 2019, Defendants filed and served their Cross-Complaint against Plaintiffs. According to Defendants, throughout the course of the lawsuit, Plaintiffs continued to commit new and additional breaches of the Agreement. Defense Counsel notified Plaintiff's Counsel of each breach as it occurred. Defendants seek to recover for these additional breaches and in doing so, they are requesting leave to file a Supplemental Cross Complaint.

Among the claims Defendants seek to include in their Supplemental Cross Complaint is a claim for a potential sale of the property which they allege fell through as a result of Plaintiffs' actions. Plaintiffs claim Defendants waited years, after all percipient and expert discovery was completed, to seek leave to amend. Plaintiffs argue they will be prejudiced if leave to amend is granted because discovery that has already been completed, and was closed on August 5, 2022, will need to be reopened. Further, Plaintiffs submit a declaration of James Czajkowski to support their assertion that the potential transaction was terminated for reasons that had nothing to do with Plaintiffs. Plaintiffs ask for the motion to be denied because Defendants have not been diligent in seeking leave to file, because there are no newly discovered facts, and the claims are not necessary or proper.

In the event the motion is granted, Plaintiffs request leave be granted only with the following conditions: (1) Cross-Complainants are required to first revise the proposed Supplemental Complaint so as to plead with specificity the factual basis for their claims; (2) No further amendments to the Cross-Complainants to be granted; (3) Plaintiffs are entitled to reopen discovery as to all newly-pled claims; (4) Trial to be continued for a reasonable period of time but not so late that it would be subject to dismissal under Civil Procedure Section 583.310; (5) Cross-Complainants must reimburse Plaintiffs for the reasonable costs associated with re-opening the pleadings and discovery in this case only so long as those costs are related to the newly pled complaints.

"The court may, in the furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading." Cal. Civ. Pro. §473(a)(1). "Courts should indulge in great liberality in permitting amendment so that no litigant shall be deprived of his day in court because of technicalities." Landis v. Sup. Ct., 232 Cal. App. 2d 548, 554 (1965). "When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered

necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just." Cal. Civ. Pro. § 473(2).

Although Plaintiffs' arguments regarding the vulnerability of the Supplemental Cross Complaint to demurrer are well taken, the court is not inclined to make that ruling without a demurrer pending before the court. That said, the court is to exercise liberality in allowing amendments to pleadings. Plaintiffs argue the amendment would be prejudicial to them given the upcoming trial date and the close of discovery. The complaint was filed in August of 2019, which affords Plaintiffs approximately a year and a half to bring the matter to trial, certainly enough time to conduct thorough discovery and still comply with Civil Procedure Section 583.310.

Defendants' Motion for Leave to File a Supplemental Complaint is granted. The trial date currently set for August 1, 2023 is vacated. The parties are ordered to appear to choose new trial dates. Discovery is reopened. Moving forward, discovery cut-off dates will be calculated based on the new trial date.

TENTATIVE RULING 6: DEFENDANTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT IS GRANTED. THE TRIAL DATE CURRENTLY SET FOR AUGUST 1, 2023 IS VACATED. THE PARTIES ARE ORDERED TO APPEAR AT 1:30 P.M. ON MONDAY MARCH 6, 2023 TO CHOOSE NEW TRIAL DATES. DISCOVERY IS REOPENED. MOVING FORWARD, DISCOVERY CUT-OFF DATES WILL BE CALCULATED BASED ON THE NEW TRIAL DATE.

All matters where there is a request for oral argument or an order to appear will be heard on the law and motion calendar at 9:00 a.m. on February 3, 2023, either in person or by zoom appearance unless otherwise notified by the court.

If no request for oral argument is made by 4:00 p.m.on the day the tentative ruling is issued, the tentative ruling will be formally adopted on at 9:00 a.m. on February 3, 2023, either in person or by zoom appearance unless otherwise notified by the court.

PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR REMOTELY BY ZOOM ARE TO CONTACT THE CLERK'S OFFICE AT (530) 621-5867 FOR LOGIN INSTRUCTIONS.

7. DALE DELLAGANA V. MERCURY INSURANCE COMPANY 22CV0888

TENTATIVE RULING 7: THIS MATTER IS CONTINUED TO MARCH 10, 2023 AT 8:30 IN DEPARTMENT 9.

8. GEORGE FOSTER V. LYON REAL ESTATE ET. AL. PC20200155

TENTATIVE RULING 8: THIS MATTER IS CONTINUED TO MARCH 3, 2023 AT 8:30 A.M. IN DEPARTMENT 9.