07-28-23
Dept. 9
Tentative Rulings

1. ALLIANCE ONE v. JODAR VINEYARDS, ET AL PC20210494

Order of Examination Hearing

A default judgment against multiple Defendants was entered on March 11, 2022. As to Defendant Atherstone Foods, Inc. dba Glass Onion Catering, the amount of the judgment was $182,228.87. Writs of Execution were lodged with the court on March 17, 2023.

An Order to Appear for Examination dated June 27, 2023, was issued to Atherstone Foods, Inc. dba Glass Onion Catering, one of four defendants in the action.

Plaintiff has filed a Declaration in compliance with Code of Civil Procedure § 708.120(a).

Code of Civil Procedure § 708.120(b) requires that a copy of the Order be served personally or by mail on the judgment debtor. **There is no proof of service of the Order on file with the court. Unless a POS is provided, the court will take the matter off calendar.**

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 28, 2023, IN DEPARTMENT NINE.

PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

2. FERRER ET AL v. NISSAN NORTH AMERICA, INC. 22CV1636

Motion to Compel

Both parties complain that the other party failed to meet and confer in good faith. This matter is continued to allow the parties an opportunity to resolve their discovery disputes in a genuine attempt to narrow the scope of the conflict. The court requests that these efforts include in-person meetings and telephone conferences of counsel, and not merely through exchanges of written communication such that, if and when the matter is scheduled for hearing, the issue of the parties' genuine efforts to meet and confer is no longer an issue in dispute.

The court is willing to conduct an informal discovery conference to see if this matter can be resolved without the motion going forward. If both parties agree to having one, at least one party must appear tomorrow to see if it can be scheduled. Dept 9 is being covered by an assigned/retired judge this week and next, so the conference would have to be next week.

TENTATIVE RULING # 2: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, SEPTEMBER 15, 2023, IN DEPARTMENT NINE.

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. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

3. GOLDMAN SACHS BANK, USA v. SMITH 22CV0715

Claim of Exemption

This claim of exemption was filed on May 1, 2023. The supporting Declaration states that the funds being held in the bank account that was levied ($11,034.04) is exempt because it represents the proceeds of a Workers Compensation award and that it is required for the special needs of Defendant's minor child.

Plaintiff argues that a bank account, in itself, is not exempt from enforcement of a money judgment.

Code of Civil Procedure § 704.160(a) provides that after payment, funds that are traceable to a Workers Compensation award are exempt from the enforcement of judgments. Code of Civil Procedure § 703.080(a) provides that "a fund that is exempt remains exempt to the extent that it can be traced into deposit accounts or in the form of cash or its equivalent. Section 703.080(b) states that "[t]he exemption claimant has the burden of tracing an exempt fund."

Plaintiff points out that the burden of proof of exemption is on Defendant, Code of Civil Procedure § 703.580(b), and that a conclusory statement in a declaration is not sufficient to establish that a statutory exemption applies to funds in a bank account. To decide whether an exemption exists, the "lowest intermediate balance" Rule is used. See CCP § 703.580(c).

Plaintiff argues that in applying the lowest intermediate balance rule to identify exempt funds within a non-exempt account will require Defendant to provide an unbroken chain of documents establishing the deposit of exempt and non-exempt funds and withdrawals. Code of Civil Procedure § 703.080(c). Plaintiff is correct.

The application of that rule was discussed in the case of Chrysler Credit Corp. v. Superior Ct.:

> The common law rule applicable here is the "lowest intermediate balance rule" used in tracing trust funds. Witkin describes it: "If the trustee withdraws money and dissipates it, the trust funds are only those which remain on deposit. Subsequent deposits ordinarily do not inure to the benefit of the trust. Hence, the beneficiary can have his prior lien only upon the *lowest intermediate balance* left in the account. And if at any time the trustee withdraws and dissipates the entire fund, the beneficiary loses all prior claim and is merely a general creditor of the trustee." (11 Witkin, Summary of Cal. Law (9th ed. 1990) Trusts, § 144(3), p. 1000; [citations]. The court in *Ex Parte Alabama*

> *Mobile Homes, Inc.* (1985) 468 So.2d 156, 160, elaborates: "When proceeds of a sale of collateral are placed in the debtor's bank account the proceeds remain identifiable and a security interest in the funds continues even if the funds are commingled with other funds. [Citation.] The rules employed to distinguish the identifiable proceeds from other funds are liberally construed in the creditor's favor by use of the 'intermediate balance rule.' [Citations.] This rule provides a presumption that proceeds of the sale of collateral remain in the account as long as the account balance equals or exceeds the amount of the proceeds. The funds are 'identified' based on the assumption that the debtor spends his own money out of the account before he spends the funds encumbered by the security interest. If the account balance drops below the amount of the proceeds, the security interest in the funds on deposit abates accordingly. This lower balance is not increased if funds are later deposited into the account. [Citation.] This rule is analogous to the presumption which arises when a trustee commingles trust funds with his own. [Citation.]"

Chrysler Credit Corp. v. Superior Ct., 17 Cal. App. 4th 1303, 1315–16 (1993).

Proof of Service of the hearing was mailed on June 27, 2023, and filed with the court on July 10, 2023.

TENTATIVE RULING #3: Unless defendant/claimant provides that documentation, the Claim will be denied.

APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 28, 2023, IN DEPARTMENT NINE.

PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

4. WOOD v. TINGLER 22CV0920

Motion for Protective Order to Limit Discovery

Plaintiff's Complaint includes causes of action for breach of contract, accounting, demand for inspection for writings (Corp. Code § 1600), fraud by concealment, breach of fiduciary duty, judicial dissolution (Corp. Code § 1800) and fraudulent transfer. The dispute arises from the conversion of a general partnership into a corporation ("Wood Chuck, Inc.") and the distribution of assets and liabilities associated with the business as between the parties. Plaintiff alleges that Defendants concealed information, made false representations and misappropriated business assets, including the proceeds of a Small Business Administration (SBA) loan. Plaintiff alleges that Defendants plundered the corporation's assets in which Plaintiff had an interest to start a new business (New Leaf Tree Service) from which they could exclude Plaintiff, leaving Plaintiff responsible for Wood Chuck, Inc.'s liability to the SBA without sufficient assets to pay the loan.

Defendants responded to the Complaint with 16 affirmative defenses in their Answer.

Defendant's motion argues that the number of interrogatories propounded (1,381 as between two Defendants) is excessively voluminous, and that Plaintiff should be ordered to serve "a reasonable number of requests."

Code of Civil Procedure § 2025.420 provides, in part:

> (a) Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order. The motion shall be accompanied by a meet and confer declaration under Section 2016.040.
>
> (b) 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.

Defendants have submitted a "meet and confer" declaration that meets the requirements of Code of Civil Procedure § 2025.420(a).

Code of Civil Procedure § 2019.030 provides:

> (a) The court shall restrict the frequency or extent of use of a discovery method provided in Section 2019.010 if it determines either of the following:
>
> (1) The discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

(2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(b) The court may make these determinations pursuant to a motion for a protective order by a party or other affected person. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(c) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) 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.

Defendants suggest that Plaintiff should be required to seek corporate information from the corporation, because that would be a more convenient and less burdensome manner of obtaining the information. However, the central tenet of this lawsuit is that the individuals who control that corporation have committed fraud against the Plaintiff and misappropriated corporate assets. Under those circumstances, it does not seem rational to limit the Plaintiff's access to discovery on the assumption that he can trust the information provided by the Defendants through the corporation by means of a generic inquiry.

Defendants cite People v. Sarpas, 225 Cal.App.4th 1539 (2014) in support of their motion. In Sarpas, the decision of the trial court to impose a protective order was appealed and upheld. In that case, the propounding party issued approximately 6,000 interrogatories and received 1,300 pages of responsive information before the responding party requested a protective order from the court, arguing that what was requested was not relevant to the evidence that would be required at trial. The appellate court noted that the standard for review was an abuse of discretion standard, and the appellate court would inquire as to whether the trial court had "exceeded the bounds of reason" in issuing the order. Id at 1552. The appellate court upheld the trial court's determination that "substantial evidence" supported the findings that the second and third sets of interrogatories were unwarrantedly oppressive, or unduly burdensome or expensive, and that many of them were unnecessary to the issues presented at trial. Id. at 1552-1553. The trial court found that 5,300 of the interrogatories in the third set of interrogatories were duplicative of questions contained in the second set of interrogatories. Id. at 1553.

"[B]urden is inherent in all demands for discovery. The objection of burden is valid only when that burden is demonstrated to result in injustice." W. Pico Furniture Co. of Los Angeles v. Superior Ct. In & For Los Angeles Cnty., 56 Cal. 2d 407, 418. In this case, Defendants have made no showing of good cause apart from stating that there are a large number of interrogatories. Defendants have not provided any examples of duplicative interrogatories or of those that are

not relevant to the issues presented in the Complaint and Answer. Defendants conclude that there can be no explanation for the number of interrogatories other than Plaintiff's intent to annoy and harass.

Defendants raise objections to interrogatories that may call for production of privileged information, to which Defendants can respond with an objection based on privilege. If an interrogatory would require the Defendants to create a compilation, abstract, audit or summary of business records that does not already exist, "it is a sufficient answer to so state and to specify the records from which the answer may be derived or ascertained and to afford the other party reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, abstracts or summaries therefrom." Declaration of Glenn W. Peterson, dated May 22, 2023, Exhibit 3.

According to judicial precedent cited by Defendants, a specific showing of burden or of oppression is required to support a protective order:

> Oppression must not be equated with burden. The objection based upon burden must be sustained by evidence showing the quantum of work required, while to support an objection of oppression there must be some showing either of an intent to create an unreasonable burden or that the ultimate effect of the burden is incommensurate with the result sought.

W. Pico Furniture Co. of Los Angeles v. Superior Ct. In & For Los Angeles Cnty., 56 Cal. 2d 407, 417 (1961).

Defendants have offered no evidence in support of their motion beyond reciting the number of discovery requests.

When the motion for a protective order is made on the basis that the number of special interrogatories is excessive, the propounding party "shall have the burden of justifying the number of these interrogatories." Code of Civil Procedure § 2030.040.

Plaintiff has supplied Declarations and other supporting pleadings relating the information sought by the discovery requests to the issues at trial with specificity. Declaration of Paul L. Cass, dated July 17, 2023; Declaration of James Martin Wood, dated July 28, 2023; Memorandum of Points and Authorities in Opposition to Motion for Protective Order, July 28, 2023.

TENTATIVE RULING # 4: THE MOTION FOR A PROTECTIVE ORDER TO LIMIT DISCOVERY REQUESTS IS DENIED. SANCTIONS WILL NOT BE AWARDED TO PLAINTIFF BECAUSE HIS ATTORNEY'S MEET & CONFER COMPLIANCE WAS WOEFULLY INADEQUATE. SEE REPLY DECLARATION OF GLENN W. PETERSON REGARDING FAILURE OF PLAINTIFF'S COUNSEL TO MEET AND CONFER IN GOOD FAITH, FILED 7/21/23, AND CCP § 2019.030(C).

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5. DEOLIVEIRA v. DEOLIVEIRA 22CV0995

Prove Up Hearing

Plaintiff Jason Deoliveira co-owns real property with Defendant Aaron Troy Deoliveira, with each party owning an undivided 50 percent interest as tenants in common. Declaration of Jason Deoliveira, dated June 26, 2023.

Default judgment was entered as to Defendant Aaron Troy Deoliveira on February 24, 2023.

Plaintiff requests the court to order the partition of the real property by sale, with the proceeds to be used to pay the lienholder Citibank N.A./Citigroup, Inc. and the remainder to be divided by the parties according to their respective interests, with Plaintiff to be reimbursed for his expenses for property maintenance and repairs and for attorney's fees and costs in bringing this action. Plaintiff further requests that Citibank, N.A./Citigroup, Inc., be dismissed from the action without prejudice.

Proof of service of notice of this hearing by mail on June 27, 2023 was filed with the court on June 28, 2023.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 28, 2023 IN DEPARTMENT NINE.

PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

6. HARRINGTON v. EL DORADO COUNTY PC-20160402

Plaintiff's Motion for Summary Adjudication on the 2nd Amended Complaint.

At the conclusion of a two day jury trial, on June 4, 2019 the jury returned a special verdict that found a written claim for damages was not delivered or mailed to the clerk, secretary, or auditor of the County by plaintiff, or anyone else on her behalf, prior to the filing of this lawsuit on August 31, 2016. The parties having stipulated that a directed verdict be entered against plaintiff on the tort causes of action should the jury find that the government claim was not delivered or mailed to the clerk, secretary, or auditor of the County by plaintiff, or anyone else on her behalf before the action was filed, the court entered a directed verdict as stipulated and set trial on the remaining cause of action for inverse condemnation to commence on June 1, 2020. The bankruptcy stay has been lifted for the inverse condemnation claim to be decided.

Plaintiff moves for entry of summary judgment on the inverse condemnation cause of action on the following grounds: it is undisputed that in 2009 defendant County constructed a parking lot and water drainage system adjacent to plaintiff's property that directed excess rainwater to flow from the parking lot to an old, abandoned railroad culvert, which was contaminated with numerous toxic chemicals; it is also undisputed that this water then drained directly onto plaintiff's property causing a variety of damages to the plaintiff's real property, eventual mold infestation, and total destruction of her home, which had withstood approximately 60 years of weather conditions and never experienced water intrusion, saturated foundations, cracked walls and sheet rock and mold infestation until such problems appeared after the County built the subject parking lot; and the County is strictly liable in inverse condemnation for damages caused by its parking lot public improvement that was designed to direct water into the culvert and over plaintiff's property.

There is no Reply in the court's file.

Defendant County opposes the motion on the following grounds: the motion for summary adjudication must be denied, because (1) plaintiff failed to establish all elements of an inverse condemnation cause of action by leaving the determination of the amount of damages to a later jury trial; (2) plaintiff seeks entry of summary adjudication under the wrong legal standard of strict liability, rather than the reasonableness standard that applies to cases involving the discharge of surface waters whether the water is discharged onto the land of an adjoining owner or into a natural watercourse, which is the claim plaintiff is asserting in this case; (3) plaintiff failed to address the reasonableness factors, let alone demonstrate that no triable issues of material fact exist relating to each of those factors; (4) plaintiff failed to demonstrate that any inherent risk in the design, construction or maintenance of the parking

lot was a substantial cause of any damage to plaintiff's property; (5) the parking lot improvements did not cause plaintiffs purported damages; (6) numerous triable issues of material fact exist justifying denial of the motion; and (7) triable issues of material fact exist concerning defendant's affirmative defenses of the statute of limitations barring the action and that defendant had an easement by prescription or adverse possession over plaintiff's property concerning the long term flow of water over the subject property that pre-dates plaintiff's purchase of the property.

Defendant County's Objections to Evidence Submitted in Support of Motion for Summary Adjudication

Objection numbers 44, 46, 52, 55, 56, and 58 are overruled.

The court does not reach the remaining objections to evidence asserted by defendant County because the court finds that the evidence objected to is not material to its disposition of the motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code of Civil Procedure, 437c(q).)

Discussion on the merits of the MSA re Inverse Condemnation

General principles

"Summary adjudication must completely dispose of the cause of action to which it is directed. (*Ibid;* see *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 321, 39 Cal.Rptr.2d 296.)" (Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 251.)

"A plaintiff can obtain summary adjudication of a cause of action only by proving "each element of the cause of action entitling the party to judgment on that cause of action." As damages are an element of a breach of contract cause of action (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 229, 166 Cal.Rptr.3d 864), a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later." (Paramount Petroleum Corp. v. Superior Court (2014) 227 Cal.App.4th 226, 241.) The appellate court further stated: "As we have explained, the governing statute provides that a plaintiff can only obtain summary adjudication of a cause of action if the plaintiff establishes each element of the cause of action entitling it to judgment on that cause of action. The court specifically held that "[a] decision on the issue of liability against the party on whom liability is sought to be imposed does not result in a judgment until the issue of damages is resolved." (*Department of Industrial Relations v. UI Video Stores, Inc., supra,* 55 Cal.App.4th at p. 1097, 64 Cal.Rptr.2d 457.) Therefore, such a summary adjudication would be improper. We fully agree

with the court's reasoning." (Paramount Petroleum Corp. v. Superior Court (2014) 227 Cal.App.4th 226, 243.)

"For purposes of motions for summary judgment and summary adjudication: ¶ (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code of Civil Procedure, § 437c(p)(1).)

"The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493, fn. omitted.) "In moving for summary judgment, a 'plaintiff ... has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant ... may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Id.* at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493, quoting Code Civ. Proc., § 437c, subd. (*o*)(1); see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 10:224.1, p. 10–81.)" (Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal.App.4th 1076, 1091-1092.)

With the above cited principles in mind, the court will rule on plaintiff's motion for summary adjudication of the inverse condemnation cause of action.

Inverse Condemnation

Plaintiff moves for summary adjudication of only the issue of defendant County's liability for inverse condemnation (Plaintiff's Notice of Motion, page 2, lines 10-12.); and specifically acknowledges that the amount of damages remain a triable issue of material fact to be determined in a later jury trial (Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, page 14, lines 11-13.). Plaintiff has not cited any authority that

allows splitting of the determinations of liability from damages in an inverse condemnation cause of action by means of the summary adjudication procedure.

"Inverse condemnation is a procedural device for "insuring that the constitutional proscription that '[p]rivate property shall not be taken or damaged for public use without **just compensation** having first been made to ... the owner ...' is not violated. [U.S. Const., 5th Amend.; Cal. Const., art. I, § 19.]" (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345.) It " '... is the name generally ascribed to the remedy which a property owner is permitted to prosecute to obtain the **just compensation** which the Constitution assures him when his property without prior payment therefor, has been taken or damaged for public use.' " (*Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 732, 84 Cal.Rptr. 11, citing with approval Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power,* 19 Stan.L.Rev. 727, 730.) "In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the [owner] possesses and **the invasion or appropriation must directly and specially affect the [owner] to his injury**." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119–120, 109 Cal.Rptr. 799, 514 P.2d 111.) **Damages include compensation for the property taken or damaged and, if the owner has been deprived of possession before compensation is made, compensation for loss of use of the property.** Normally the value of use is legal interest. (*City of San Rafael v. Wood* (1956) 144 Cal.App.2d 604, 607, 301 P.2d 421, see 5 Witkin, Summary of Cal. Law (8th ed 1974) Constitutional Law, § 567, p. 3867.) An action lies for the taking of personal as well as real property. (*City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 65, 183 Cal.Rptr. 673, 646 P.2d 835; *Sutfin v. State of California* (1968) 261 Cal.App.2d 50, 53, 67 Cal.Rptr. 665; see also *County of San Diego, v. Miller* (1975) 13 Cal.3d 684, 691, 119 Cal.Rptr. 491, 532 P.2d 139.)" (Fresno Police Officers Assn. v. State of California (1987) 190 Cal.App.3d 413, 416–417.)

Therefore, the amount of damages to be awarded as compensation for the taking by inverse condemnation is a critical element of that cause of action.

The California Supreme Court has concluded that Code of Civil Procedure, § 1260.040, the eminent domain procedure for pre-trial determination of liability by the court leaving trial of the amount of damages for a later time, does not apply to inverse condemnation cases. Weiss v. People ex rel. Dep't of Transportation, 9 Cal. 5th 840, 468 P.3d 1154 (2020).

In inverse condemnation proceedings the issue of just compensation is to be tried before a jury (See Mt. San Jacinto Community College Dist. v. Superior Court (2004) 117 Cal.App.4th 98, 103.) There is no evidence before the court concerning the amount of damages allegedly sustained as a result of defendant County's alleged liability and plaintiff does not even set forth

in plaintiff's separate statement of undisputed material facts any purportedly undisputed material facts concerning the amount of damages sustained.

Plaintiff's evidence not having met the initial burden of proof and not having completely disposed of the inverse condemnation cause of action by establishing the amount of damages sustained, the motion for summary adjudication is denied.

The court also finds there are additional reasons to justify denial of the motion.

Rule of Reasonableness

Plaintiff's inverse condemnation cause of action alleges liability on strict liability grounds. The standard to apply in determining liability of defendant County for inverse condemnation in this action is not the general strict liability rule. This case involves the alleged discharge of surface waters from defendant's parking lot to a culvert and then allegedly onto the land of an adjoining owner or into a natural watercourse The below-cited legal authorities make it abundantly clear that the standard to apply in determining whether the County is liable for inverse condemnation in this case is the rule of reasonableness.

Plaintiff's separate statement of undisputed material facts makes no mention of material facts related to the issue of unreasonableness of defendants conduct and reasonableness of plaintiff's conduct related to the alleged water intrusion on plaintiffs land. For that additional reason, plaintiff's Motion fails.

This case does not involve the failure, replacement and relocation of a secret subterranean drain. It involves potential liability for the diversion of surface water. Where a public improvement is unreasonably a substantial cause of the plaintiff's damage, a public agency may be liable for its role in diverting surface water in order to protect urban areas from flooding. (See *Bunch v. Coachella Valley Water Dist., supra,* 15 Cal.4th 432, 63 Cal.Rptr.2d 89, 935 P.2d 796; *Locklin v. City of Lafayette, supra,* 7 Cal.4th 327, 27 Cal.Rptr.2d 613, 867 P.2d 724; *Belair v. Riverside County Flood Control Dist., supra,* 47 Cal.3d 550, 253 Cal.Rptr. 693, 764 P.2d 1070; *Arreola v. County of Monterey, supra,* 99 Cal.App.4th 722, 122 Cal.Rptr.2d 38.) In such cases, "[t]he reasonableness of the public agency's conduct must be determined on the facts of each individual case, taking into consideration the public benefit and the private damages in each instance." (*Belair, supra,* at p. 566, 253 Cal.Rptr. 693, 764 P.2d 1070.)" (Emphasis added.) (Skoumbas v. City of Orinda (2008) 165 Cal.App.4th 783, 795-796.)

"Historically, under the "natural watercourse rule," upstream property owners had "immunity for any damage to downstream riparian property caused by discharge of surface water runoff into a natural watercourse." (*Locklin, supra,* 7 Cal.4th at pp. 345–346, 27 Cal.Rptr.2d 613, 867 P.2d 724.) This immunity extended to public entities. (*Archer v. City of Los Angeles* (1941) 19 Cal.2d 19 [119 P.2d 1], overruled on another issue as stated in *Locklin,* at p.

337, 27 Cal.Rptr.2d 613, 867 P.2d 724.) ¶ The court in *Keys, supra,* 64 Cal.2d 396, 50 Cal.Rptr. 273, 412 P.2d 529 held that upper property owners could be liable if they failed to exercise reasonable care in the use of their property so as to avoid **118 injury to the adjacent property through the flow of surface waters. (*Id.* at p. 409, 50 Cal.Rptr. 273, 412 P.2d 529.) The court in *Keys* concluded that an uphill landowner, who altered the natural drainage of surface waters, could be liable for damages caused by the discharge of those waters onto adjacent property, under a reasonableness of conduct test. (*Id.* at pp. 408–409, 50 Cal.Rptr. 273, 412 P.2d 529.) The court explained that it is "incumbent upon every person to take reasonable care in using" his or her "property to avoid injury to adjacent property through the flow of surface waters.

Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to" his or her "property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury." (*Id.* at p. 409, 50 Cal.Rptr. 273, 412 P.2d 529.) Although not identical to a traditional negligence analysis, the central question to be determined under *Keys* is one of "reasonableness of conduct." (*Ibid.*) ¶ The *Keys* court set forth the rules for determining liability under the reasonableness test: "If the weight is on the side of" the person "who alters the natural watercourse, then" that person "has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule" (*Keys, supra,* 64 Cal.2d at pp. 409–410, 50 Cal.Rptr. 273, 412 P.2d 529) and "the lower owner wins" (*Burrows v. State of California* (1968) 260 Cal.App.2d 29, 32–33 [66 Cal.Rptr. 868]). ¶ In *Locklin,* the Supreme Court extended the rule of reasonableness to apply when a public entity contributes to an increase in volume and velocity in a natural watercourse resulting in downstream property damage. (*Locklin, supra,* 7 Cal.4th at pp. 337–338, 27 Cal.Rptr.2d 613, 867 P.2d 724.) As a result of upstream development, the watercourse in *Locklin* began carrying larger volumes of water, which caused significant erosion of the plaintiffs' properties. The defendant governmental entities were aware of the problem and could have acted to prevent the erosion. The owners of property along the watercourse sued on the basis that the upstream improvements, including the storm drain system, as well as the failure to maintain the watercourse, increased the volume and velocity of the water in the natural watercourse, causing the plaintiffs' damages. (*Id.* at pp. 339–340, 27 Cal.Rptr.2d 613, 867 P.2d 724.) The *Locklin* court held that the trial court erred in exempting the public entities from liability, but still concluded that the public entities were not liable because the plaintiffs failed to prove that any *unreasonable* public entity conduct caused their property damage. (*Id.* at p. 367, 27 Cal.Rptr.2d 613, 867 P.2d 724.) In the context of inverse condemnation, *Locklin*

holds that a public entity may be liable "for downstream damage caused by an increased volume or velocity of surface waters discharged into a natural watercourse from public works or improvements on publicly owned land. It will be liable if it fails to use reasonably available, less injurious alternatives, or if it has incorporated the watercourse into a public drainage system or otherwise converted the watercourse itself into a public work." (*Locklin, supra,* 7 Cal.4th at pp. 337–338, 27 Cal.Rptr.2d 613, 867 P.2d 724.) Such "liability exists only if the agency acts unreasonably, with reasonableness determined by balancing the public benefit and private damage in each case." (*Id.* at p. 368, 27 Cal.Rptr.2d 613, 867 P.2d 724.) "The reasonableness of the public agency's conduct must be determined on the facts of each case, taking into consideration the public benefit and the private damages in each instance." (*Id.* at p. 367, 27 Cal.Rptr.2d 613, 867 P.2d 724.) The departure from a strict liability standard was based on public policy: "[B]ecause strict liability would discourage construction of needed public improvements which affect surface water drainage, liability exists only if the agency acts unreasonably, with reasonableness determined by balancing the public benefit and private damage in each case." (*Id.* at p. 368, 27 Cal.Rptr.2d 613, 867 P.2d 724, see also *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 436 [63 Cal.Rptr.2d 89, 935 P.2d 796].)

The reasonableness test "requires consideration of the purpose for which the improvements were undertaken, the amount of surface water runoff added to the streamflow by the defendant's improvements in relation to that from development of other parts of the watershed, and the cost of mitigating measures available to both upper and downstream owners. Those costs must be balanced against the magnitude of the potential for downstream damage. If both plaintiff and defendant have acted reasonably, the natural watercourse rule imposes the burden of stream-caused damage on the downstream property." (*Locklin, supra,* 7 Cal.4th at p. 337, 27 Cal.Rptr.2d 613, 867 P.2d 724.)" (Emphasis added.) (Contra Costa County v. Pinole Point Properties, LLC (2015) 235 Cal.App.4th 914, 926–927.)

"…after *Locklin,* there is no valid reason for distinguishing between surface waters and those that flow through a natural watercourse when determining the obligations of landowners. (See *Locklin, supra,* 7 Cal.4th at p. 352, 27 Cal.Rptr.2d 613, 867 P.2d 724.) The court in *Locklin* held that the rule of reasonableness applies to cases involving the discharge of surface waters whether the water is discharged onto the land of an adjoining owner or into a natural watercourse. (*Id.* at p. 357, 27 Cal.Rptr.2d 613, 867 P.2d 724; see also, *Biron v. City of Redding, supra,* 225 Cal.App.4th at p. 1274, 170 Cal.Rptr.3d 848.)" (Contra Costa County v. Pinole Point Properties, LLC (2015) 235 Cal.App.4th 914, 928.)

The Third District Court of Appeal stated with regard to inverse condemnation and the rule of reasonableness: "*Albers, supra,* 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129, recognized two exceptions to the rule of strict liability: (1) where the damages were inflicted in the proper

exercise of the public entity's police power, and (2) where the public entity had a common law right to inflict damage, as where an upper riparian owner is privileged to protect against the common enemy of floodwaters. (*Bunch, supra,* 15 Cal.4th at pp. 440–441, 63 Cal.Rptr.2d 89, 935 P.2d 796.) This second exception is known as the "common enemy doctrine." (*Id.* at p. 441, 63 Cal.Rptr.2d 89, 935 P.2d 796.) It "holds that as an incident to the use of his own property, each landowner has an unqualified right, by operations on his own land, to fend off surface waters as he sees fit without being required to take into account the consequences to other landowners, who have the right to protect themselves as best they can." (*Keys v. Romley* (1966) 64 Cal.2d 396, 400, 50 Cal.Rptr. 273, 412 P.2d 529.) ¶ *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 253 Cal.Rptr. 693, 764 P.2d 1070 (*Belair*), represented a change in the analysis of a public entity's liability in inverse condemnation where, under *Albers, supra,* 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129, the public entity had a common law right to inflict damage under the common enemy doctrine. (*Belair, supra,* at p. 563, 253 Cal.Rptr. 693, 764 P.2d 1070.) *Belair* involved a levee failure after a series of heavy storms. (*Id.* at p. 555, 253 Cal.Rptr. 693, 764 P.2d 1070.) *Belair* reasoned that while strict inverse condemnation liability might not be appropriate in the case of public flood control improvements, such improvements should not be cloaked with the same immunity as private flood control measures. (*Id.* at p. 564, 253 Cal.Rptr. 693, 764 P.2d 1070.) *Belair* adopted a rule of reasonableness in such situations, which balanced public need against the gravity of private harm. (*Id.* at p. 566, 253 Cal.Rptr. 693, 764 P.2d 1070.) ¶ *Belair* adopted a rule of reasonableness rather than one of absolute liability because absolute liability would discourage beneficial flood control improvement, but would still compensate for losses that were unfairly incurred. (*Belair, supra,* 47 Cal.3d at p. 565, 253 Cal.Rptr. 693, 764 P.2d 1070.) ¶ The Supreme Court has since followed the *Belair* rule of reasonableness, refining its application in *Locklin, supra,* 7 Cal.4th 327, 27 Cal.Rptr.2d 613, 867 P.2d 724, and *Bunch, supra,* 15 Cal.4th 432, 63 Cal.Rptr.2d 89, 935 P.2d 796.¶ *Locklin, supra,* 7 Cal.4th at page 337, 27 Cal.Rptr.2d 613, 867 P.2d 724, held that the rule of reasonableness applies when alterations or improvements on upstream property discharge an increase of surface water into a natural watercourse, and the increased volume causes downstream property damage. In *Locklin,* the plaintiffs owned property that extended into a natural watercourse. (*Id.* at pp. 338–339, 27 Cal.Rptr.2d 613, 867 P.2d 724.) The watercourse began carrying more water because of upstream development, and the larger volume of water eroded the plaintiffs' property. (*Id.* at p. 339, 27 Cal.Rptr.2d 613, 867 P.2d 724.) The plaintiffs sued the City of Lafayette, alleging the failure to maintain the storm drainage system caused the erosion. (*Id.* at pp. 339–340, 27 Cal.Rptr.2d 613, 867 P.2d 724.) Although *Locklin* involved a natural watercourse, it made two pronouncements that are applicable here. First, it stated that a landowner's conduct in using or altering property in a manner affecting the discharge of surface waters onto adjacent

property is subject to a test of reasonableness. (*Locklin, supra,* 7 Cal.4th at p. 351, 27 Cal.Rptr.2d 613, 867 P.2d 724.) This test provides that " '[n]o party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.' " (*Ibid.*) Second, with the adoption of the reasonable use test for surface waters, there is no valid reason for distinguishing between surface waters and those that flow through a natural watercourse with respect to the obligations of the respective owners. (*Id.* at p. 352, 27 Cal.Rptr.2d 613, 867 P.2d 724.) *Locklin* held that the rule of reasonableness was applicable in the discharge of surface waters whether the water is discharged onto the land of an adjoining owner or into a natural watercourse. (*Id.* at p. 357, 27 Cal.Rptr.2d 613, 867 P.2d 724.) ¶ In *Bunch, supra,* 15 Cal.4th 432, 63 Cal.Rptr.2d 89, 935 P.2d 796, a water district owned flood control facilities consisting of a levee, dike, and channel, designed to protect property, including the plaintiffs' property, from historical flooding. (*Id.* at p. 437, 63 Cal.Rptr.2d 89, 935 P.2d 796.) The facilities failed during a tropical storm when floodwater overtopped the dike and levee, leading to the flooding of the plaintiffs' property. (*Id.* at p. 438, 63 Cal.Rptr.2d 89, 935 P.2d 796.) The plaintiffs argued that the rule of reasonableness should apply only where a party would have been privileged under the common law common enemy doctrine to divert floodwaters to the property of another. (*Id.* at p. 447, 63 Cal.Rptr.2d 89, 935 P.2d 796.) However, the Supreme Court agreed with the Court of Appeal, which opined that *Belair's* rule of reasonableness "applied to all cases involving unintentional water runoff, whether they involved facilities designed to keep water within its natural course or designed to divert water safely away from a potentially dangerous natural flow." (*Bunch, supra,* at p. 439, 63 Cal.Rptr.2d 89, 935 P.2d 796.)" (Biron v. City of Redding (2014) 225 Cal.App.4th 1264, 1273–1274.)

Wiith regard to the reasonableness rule and reasonable conduct of the downstream plaintiff: ""Today neither a private owner nor a public entity has the right to act unreasonably with respect to other property owners. Neither may disregard the interests of downstream property owners, and a public entity may no longer claim immunity in tort or inverse condemnation actions." (*Locklin, supra,* 7 Cal.4th at p. 367, 27 Cal.Rptr.2d 613, 867 P.2d 724.) With respect to flood control projects, the public agency is liable if its conduct poses an unreasonable risk of harm to the plaintiff, the unreasonable conduct is a substantial cause of the damage to the plaintiff's property, and the plaintiff has taken reasonable measures to protect his property. The rule of strict liability generally followed in inverse condemnation does not apply in this context. (*Locklin, supra,* 7 Cal.4th at pp. 367, 337–338, 27 Cal.Rptr.2d 613, 867 P.2d 724; see *id.* at p. 378, 27 Cal.Rptr.2d 613, 867 P.2d 724 (conc. opn. of Mosk,J.).)" (Hauselt v. County of Butte (2009) 172 Cal.App.4th 550, 557.)

"This "reasonableness" rule was deemed to best serve two competing concerns in the flood control context: on the one hand, a public agency that undertakes a flood control project must not be deemed an absolute insurer; on the other hand, the damage potential of a defective public flood control project is clearly enormous. (*Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 442–443, 63 Cal.Rptr.2d 89, 935 P.2d 796 (*Bunch)*, citing *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 565–566, 253 Cal.Rptr. 693, 764 P.2d 1070 (*Belair*).) Reasonableness, in this context, involves a balancing of public need against the gravity of private harm, and aligns with the basis for inverse condemnation liability: when a public agency has acted unreasonably, the damaged property owner should be compensated because the owner has contributed more than his or her proper share to the public undertaking. (*Bunch, supra,* 15 Cal.4th at p. 443, 63 Cal.Rptr.2d 89, 935 P.2d 796; *Locklin, supra,* 7 Cal.4th at pp. 337, 367–368, 27 Cal.Rptr.2d 613, 867 P.2d 724; see also *Paterno v.State of California* (2003) 113 Cal.App.4th 998, 1003, 1019–1020, 6 Cal.Rptr.3d 854.) ¶ This reasonableness rule of inverse condemnation liability has been applied in the following flood control contexts: (1) where a public flood control levee on the bank of a natural watercourse failed in an area historically subject to flooding (*Belair, supra, **349* 47 Cal.3d at pp. 555–557, 565–567, 253 Cal.Rptr. 693, 764 P.2d 1070); (2) where a public flood control system of dikes and levees that diverted and rechanneled water of a natural watercourse failed in an area historically subject to flooding (*Bunch, supra,* 15 Cal.4th at p. 447, 63 Cal.Rptr.2d 89, 935 P.2d 796); and (3) where downstream damage was caused by an increased volume or velocity of surface waters discharged into a natural watercourse from public activities or public infrastructure, or from the watercourse being converted into a public drainage system or public work (*Locklin, supra,* 7 Cal.4th at pp. 337–338, 27 Cal.Rptr.2d 613, 867 P.2d 724, see *id.* at p.378, 27 Cal.Rptr.2d 613, 867 P.2d 724 (conc. opn. of Mosk, J.))." (Emphasis added.) (Hauselt v. County of Butte (2009) 172 Cal.App.4th 550, 557–558.)

"When alterations or improvements on upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume and/or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage, a public entity, as a property owner, may be liable for that damage. The test is whether, under all the circumstances, the upper landowner's conduct was reasonable. This rule of reasonableness applies to both private and public landowners, but it requires reasonable conduct on the part of downstream owners as well. This test requires consideration of the purpose for which the improvements were undertaken, the amount of surface water runoff added to the streamflow by the defendant's improvements in relation to that from development of other parts of the watershed, and the cost of mitigating measures available to both upper and downstream owners. Those costs must be balanced against the magnitude of the potential for downstream damage. If both plaintiff and defendant have acted

reasonably, the natural watercourse rule imposes the burden of stream-caused damage on the downstream property. ¶ We also conclude that a governmental entity may be liable under the principles of inverse condemnation for downstream damage caused by an increased volume or velocity of surface waters discharged into a natural watercourse from public works or improvements on publicly owned land. It will be liable if it fails to use reasonably available, less injurious alternatives, or if it has incorporated the watercourse into a public drainage system or otherwise converted the watercourse itself into a public work. Compensation is compelled by the same constitutional principles which mandate compensation in inverse condemnation actions generally. The downstream owner may not be compelled to accept a disproportionate share of the burden of improvements undertaken for the benefit of the public at large. Because downstream riparian property is burdened by the servitude created by the natural watercourse rule, however, consistent with that rule the downstream owner must take reasonable measures to protect his property. Liability on an inverse condemnation theory will not be imposed if the owner has not done so. ¶ Finally, because the development of any property in the watershed of a natural watercourse may add additional runoff to the stream, all of which may contribute to downstream damage, it would be unjust to impose liability on an owner for the damage attributable in part to runoff from property owned by others. Therefore, an owner who is found to have acted unreasonably and to have thereby caused damage to downstream property, is liable only for the proportion of the damage attributable to his conduct. ¶ Although we conclude that the Court of Appeal erred in holding that the natural watercourse rule insulated defendants from both tort and inverse condemnation liability, we shall affirm the judgment. After a review of the record we are satisfied that the court properly held that Reliez Creek, the watercourse which is the focus of this litigation, had not itself become a public improvement at the time the damage of which plaintiffs complain occurred and that no public improvements in the creekbed contributed to the damage suffered by plaintiffs. That review also satisfies us that the evidence does not support a conclusion that the damage to any plaintiff's property was the result of unreasonable conduct by any defendant in the manner in which it discharged surface water runoff into Reliez Creek, or establish that there was damage to plaintiffs' properties that could not have been prevented had they undertaken reasonable measures to protect their properties." (Emphasis added.) (Locklin v. City of Lafayette (1994) 7 Cal.4th 327, 337–338.)

"A party moving for summary judgment or summary adjudication must support the motion with "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence." (§ 437c, subd. (b)(1) [motion for summary judgment]; see § 437c, subd. (f)(2) [motion for summary adjudication "shall proceed in all procedural respects as a motion for summary judgment"].) The party opposing the motion must file with

the opposition papers "a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." (§ 437c, subd. (b)(3).) [Footnote omitted.] The summary judgment statute provides that, if either party fails to comply with the applicable separate statement requirement, that failure may in the court's discretion constitute a sufficient ground to decide the motion adversely to the offending party. (§ 437c, subds.(b)(1), (3).) ¶ The separate statement requirement is further elaborated in California Rules of Court, rule 342(d), (f) and (h), which specifies both the content and format for the separate statement in support of the motion and the separate statement in opposition. [Footnote omitted.] The moving party's statement must utilize a two-column format and state in the first column the undisputed facts and in the second column the evidence that establishes those undisputed facts. (Rule 342(d).) "Citation to the evidence in support of each material fact must include reference to the exhibit, title, page and line numbers." (Rule 342(d).) The opposing party's separate statement of undisputed material facts in opposition to the motion must also use a two-column format, repeating in the first column each material fact claimed by the moving party to be undisputed followed by the evidence advanced by the moving party to establish that fact and then in the second column, directly opposite the recitation of each of the moving party's undisputed facts, stating whether the fact is "disputed" or "undisputed." (Rule 342(f).) In addition, as to those facts that are disputed, the opposing party must state in the second column, "directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, page, and line numbers in the evidence submitted." (Rule 342(f).) ¶ The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31, 21 Cal.Rptr.2d 104.) As explained by Division One of this court in *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335, 282 Cal.Rptr. 368 (*United Community Church*), ¶ "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are in dispute."" (Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co. (2005) 133 Cal.App.4th 1197, 1209–1210.)

There are disputed material facts

A. Exhibit 2 to the declaration of defendant County's expert civil engineer provides a portion of a watershed map dated January 2009. Exhibit 2 shows watersheds, water flows, and topographic contours prior to the County's work on the parking lot in September 2009; Exhibit 2 demonstrates that an existing shallow concentrated flow of water flowed through an existing wooden culvert and onto the subject property in a northwest direction into a channel flowing across the subject property; in his professional opinion, this demonstrates an existing natural watercourse flowing through the wooden culvert and onto the subject property before any construction in 2009; pictures of the culvert in the County's files that are attached as Exhibit 4 show the inlet of the culvert prior to the work performed in the parking lot as the electronic versions of the pictures demonstrate they were taken on July 29, 2009 before any work on the parking lot was performed; Exhibit 5 are photos taken of the culvert inlet on November 9, 2016 after the parking lot work was performed; the photos and construction plans and drawings show that the County did not change the location of the wooden culvert and did not do any work on the wooden culvert during the 2009 parking lot construction project; upon his inspection of the subject property several things were readily apparent, such as the water from the wooden culvert flows in a northwest direction and away from the home on the property, the home is a significant distance from the culvert water flow path and is located uphill from the water flow, and the home on the property is taking on surface water from various sources which do not include water coming from the wooden culvert; during his inspection of the property on January 9, 2017 he measured the grades on the subject property and, in particular, the difference in elevation between the location where the stream of water flows through the subject property, a swale from the wooden culvert, and the ground adjacent to the foundation of the home; he found the ground next to the home is approximately 1.9 feet higher in elevation from the elevation of the swale; he also found that the water stream from the culvert is approximately 100 feet from the foundation of the home at its closest location to the home; in order for the water flowing from the wooden culvert to reach plaintiff's home, it would have to deviate from its path and travel approximately 100 feet and nearly two feet uphill; Exhibit 8 illustrates the ground next to the home is approximately 1.9 feet higher than the swale; to determine whether water flowing from the wooden culvert caused, or could have caused water damage to the home on the subject property after the 2009 parking lot work he analyzed the water flow during a worst case scenario, such as a 100 year storm event; he used a hydraulic model software developed by the U.S. Army Corps of Engineers which calculates water surface elevation and direction of flow rates on the contours of the subject property; the hydraulic model simulation demonstrates that even in the most significant storm events, such as a 100 year storm, water from the wooden culvert does not reach the home on the subject property; for the purposes of context, there is a 1% chance of a 100 year storm event to occur in any given year; he reviewed precipitation data for Placerville

between 2009 and 2017 to determine if a 100 year storm event occurred at the subject property during that time and no such event occurred; the maximum two day precipitation total of 5.17 inches for Placerville occurred on February 20-21, 2017, which is estimated to be only a 25 year storm event; based upon all of the matters stated in the declaration it is his professional opinion that water flowing from the wooden culvert onto the subject property did not and could not have reached the location of the home on the property and, therefore, the water flowing from the culvert was not the cause of any damage to the home on the property; in his opinion, there is no need to compare pre and post 2009 construction water flows, because water flowing from the culvert did not reach the home even after the 2009 work on the parking lot; in any event, he performed a calculation of the change in 100 year peak flow rate at the wooden culvert as a result of the construction of the parking lot in 2009 using the guidelines developed by the El Dorado County drainage manual; he determined that before the parking was constructed, the 100 year peak water flow rate at the wooden culvert was approximately 3.6 cubic feet per second and after construction of the parking lot the 100 year peak water flow rate at the culvert was 3.7 cubic feet per second which represents a negligible increase in water flow even in a 100 year storm event; the construction of the parking lot in 2009 added only a negligible amount of water flow that previously existed during rain events prior to the 2009 work on the parking lot; in his professional opinion, the additional negligible amount of water added to the existing watercourse that flowed through the wooden culvert and onto the subject property during rain events as a result of the 2009 parking lot work did not and could not have caused any damage to the home on the subject property; he disagrees with plaintiff's expert's opinion that grading for the parking lot altered the drainage regime for Missouri Flat Road preventing the drainage from bypassing the entrance to the parking lot and instead directing the drainage from the road onto the Sierra Door parking and loading area and causing flooding of that during storm events; after review of the record drawings for the parking lot, it is his professional opinion that the parking lot did not significantly alter the drainage regime for Missouri Flat Road and water would make its way into the wooden culvert prior to the 2009 construction; his January 9, 2017 site inspection revealed that the subject property is taking on water from sources other than the wooden culvert outflow, including evidence of a water flow path just feet from the west side of the home on the property that is immediately adjacent to the home and water flow does not come from the culvert as it is a significant distance away from the water flow from the culvert; based upon review of the contours and elevations and based upon his site inspection, it is his professional opinion that surface water flows from the Old Depot Road towards the home on the subject property and this is consistent with Mr. Bahlman's declaration indicating that while he lived on the subject property water would pool up near the front porch; he also found significant that neighboring properties immediately east of the subject property on Old Depot Road and northeast on Penn

Road have reported water issues as stated in Mr. Bahlman's declaration and plaintiffs deposition testimony; and the outflow of water from the wooden culvert comes nowhere near those neighboring properties and, in his opinion, could not be the source of any water issues or damages on those properties. (Declaration of Don Trieu in Opposition to Motion, paragraphs 6, 9, 11, and 14-20.)

B. The former owner/resident of the subject home declares: he began living in the home located on the subject property in 1993; he lived in that home from 1993 to 2002; he sold the home to plaintiff in October 2004; the uphill opening for the wooden culvert is next to the Sierra Door and Supply building located at 4415 Missouri Flat Road; there is only one wooden culvert in the area that he is aware of; during the time he lived on the property water would flow through the wooden culvert and onto the subject property during rainstorms each rainy season; he witnessed water flowing from the wooden culvert and onto the subject property on many occasions while he lived on the property; during heavy rains the water would flow through the culvert at a significant and rapid pace and form a natural stream channel of water flowing from the culvert onto the property and in a north-westerly direction through the property and toward the back of the property; at some point during the time he lived in the property the water flowing from the culvert onto the property was so significant that he rented a backhoe and dug out a canal of sorts for the water coming from the culvert to flow to the back of the subject property; on multiple occasions during the time he lived on the property he also witnessed standing water that would pool and accumulate at the north west end of the property; he does not recall the water from the wooden culvert reaching anywhere near the foundation of the home on the property as the water from the culvert flowed away from the house; as far as he knows the home is still in the same location today as during the time he lived on the property; the home would take on water from other sources as it is located in a low spot; there were times when the water would pool near the front porch; at times when the septic system would back up there were problems with the leech lines when the ground water was high; he warned Mr. Hamilton when he rented the property to him about the situation; during the time he lived on the property the neighboring properties to the east of the property also had significant water problems as did the property located on Penn Road, which is located north east of the subject property; and after he sold the property, he observed from Missouri Flat Road that a big barn structure had been erected on top of where the leech lines existed when he lived on the property. (Declaration of Doug Bahlman in Opposition to Motion, paragraphs 4 and 9-16.)

Plaintiff's expert witness declarations submitted in support of the motion come to the opposite conclusion concerning the source of the water that purportedly caused damage to

the home on the subject property. (See Declaration of Jayson Manley in Support of Motion paragraph 2; and Declaration of Cheryl Bly-Chester in Support of Motion, paragraph 2.)

"The rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion applies in ruling on both the admissibility of expert testimony and its sufficiency to create a triable issue of fact. (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332–1333, 86 Cal.Rptr.3d 274; *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125–126, 128–130, 59 Cal.Rptr.3d 618.)" (Garrett v. Howmedica Osteonics Corp. (2013) 214 Cal.App.4th 173, 189).)

The above-cited expert and percipient evidence raises triable issues of material fact as to whether defendant County's conduct in design and construction of the parking lot where water is shed into the culvert was unreasonable conduct; and whether the water from the parking lot was a substantial cause of the claimed damage/injury to plaintiff's property.

TENTATIVE RULING # 6: PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION IS DENIED.

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).

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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. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

7. NAME CHANGE OF CARRILLO 23CV0821

Petition for Name Change

Petitioner filed a Petition for Change of Name on May 30, 2023.

There is nothing in the court's records indicating that the OSC has been published in a newspaper of general circulation for four consecutive weeks as required by Code of Civil Procedure § 1277(a). Petitioner is ordered to file the OSC in a newspaper of general circulation in El Dorado County for four consecutive weeks. Proof of publication is to be filed with the court prior to the next hearing date.

TENTATIVE RULING #7: UNLESS A PROOF OF PUBLICATION IS PROVIDED AT OR BEFORE THE HEARING, THE HEARING ON THIS MATTER IS CONTINUED TO 8:30 A.M., FRIDAY, SEPTEMBER 15, 2023, TO ALLOW PETITIONER TIME TO FILE PROOF OF PUBLICATION WITH 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).

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8. MILLER v. GRAU ET AL PC20210521

Motion to be Relieved as Counsel

Counsel for the Plaintiff has filed a motion to be relieved as counsel pursuant to Code of Civil Procedure § 284(2) and California Rules of Court, Rule 3.1362.

A declaration on Judicial Council Form MC-052 accompanies the motion, as required by California Rules of Court, Rule 3.1362, stating that there has been a breakdown in the attorney-client relationship that prevents the attorney from effectively representing the client in this case.

Code of Civil Procedure § 284(2) and California Rules of Court, Rule 3.1362 allow an attorney to withdraw after notice to the client. Proof of service of the motion on the Plaintiff at his last known address and the Defendants was filed on May 30, 2023.

At the time the motion was filed, the next scheduled court date was a case management conference on June 5, 2023. However, this motion was scheduled for hearing on July 28, 2023, and currently the next scheduled date for this matter is a case management conference scheduled for October 30, 2023.

TENTATIVE RULING #8: ABSENT OBJECTION, THE MOTION IS GRANTED, EFFECTIVE UPON THE FILING OF A POS FOR THE ORDER. COUNSEL IS DIRECTED TO PROVIDE THE COURT WITH A NEW ORDER FORM (FORM MC-053) CORRECTING THE DATE LISTED IN PARAGRAPH 7(a) OF THAT FORM, AND TO SERVE A COPY OF THE SIGNED ORDER ON THE CLIENT AND ALL PARTIES THAT HAVE APPEARED IN THE CASE IN ACCORDANCE WITH CALIFORNIA RULES OF COURT, RULE 3.1362(e).

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).

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9. TECHNOLOGY INSURANCE CO. v. CHRISTNER 22CV0654

Motion to File Interpleader Funds

This case arises from an automobile collision on December 4, 2019, between Defendant Timothy Christner and Francisco Romero. Romero was on the job at the time of the collision and his injuries were covered by Worker's Compensation. Defendant Technology Insurance Co. insured the Workers Compensation claim made by Romero's employer. Defendant Timothy Christner holds an automobile liability insurance policy through Plaintiff-in-Interpleader Mercury Insurance Company.

Plaintiff-in-Interpleader ("Mercury Insurance") requests permission to interplead the $15,000 insurance funds available through Defendant Christner's automobile liability policy and discharge Mercury from the case pursuant to Cal. Code Civ. Proc. § 386(b) and 386.5. Plaintiff argues that there are conflicting claims to the funds as between Technology Insurance and Romero.

Defendant-in-Interpleader Technology Insurance Co. ("Technology Insurance") objects to the motion, there being no controversy concerning the rights to the insurance proceeds because Technology Insurance Co. is the only party entitled to the funds pursuant to Labor Code §§ 3860, 3862. Technology Insurance argues that it has paid out $16,081.05 in medical benefits on behalf of Romero and is entitled to the full amount of the automobile liability policy proceeds.

Mercury Insurance counters that Romero has a conflicting claim to the funds based on the release in which he waives all claims in consideration for a payment of $15,000. Technology Insurance responds that Romero has been notified of the action in accordance with Labor Code § 3853 and has filed no Answer to the Complaint-in-Interpleader to assert any claim to the funds.

<u>Chronology</u>

May 27, 2022: Technology Insurance filed a Complaint for Workers Compensation benefits through Subrogation.

July 26, 2022: Romero signed a bodily injury release for Christner's automobile liability policy limits of $15,000.

August 29, 2022: Technology Insurance obtained a default judgment against Christner.

February 10, 2023: The default judgment was set aside on the motion of Mercury Insurance.

February 24, 2023: Mercury Insurance filed a Cross-Complaint-in-Interpleader naming Technology Insurance and Romero as Defendants, and an Answer to Technology Insurance's Subrogation Complaint.

March 15, 2023: Romero was personally served with notice of the Complaint-in-Interpleader.

March 24, 2023: Technology Insurance filed an Answer to the Interpleader.

Romero has not responded to the Complaint-in-Interpleader.

> Any person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims.

Code of Civil Procedure, § 386(b).

> Where the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld, such defendant may, upon affidavit that he is a mere stakeholder with no interest in the amount or any portion thereof and that conflicting demands have been made upon him for the amount by parties to the action, upon notice to such parties, apply to the court for an order discharging him from liability and dismissing him from the action on his depositing with the clerk of the court the amount in dispute and the court may, in its discretion, make such order.

Code of Civil Procedure, § 386.5.

> An interpleader action is an equitable proceeding. (*Union Mutual Life Ins. Co. v. Broderick* (1925) 196 Cal. 497, 502, 238 P. 1034; *Williams v. Gilmore*, supra, 51 Cal.App.2d at p. 688, 125 P.2d 539.) In an interpleader action, the court initially determines the right of the plaintiff to interplead the funds; if that right is sustained, an interlocutory decree is entered which requires the defendants to interplead and litigate their claims to the funds. Upon an admission of liability and deposit of monies with the court, the plaintiff then may be discharged from liability and dismissed from the interpleader action. (*Hancock Oil Co. v. Hopkins* (1944) 24 Cal.2d 497, 508, 150 P.2d 463; *City of Morgan Hill v. Brown*, supra, 71 Cal.App.4th at p. 1122, 84 Cal.Rptr.2d 361; *Van Orden v. Anderson, et al.* (1932) 122 Cal.App. 132, 140-141, 9 P.2d 572.) The effect of such an order is to preserve the fund, discharge the stakeholder from further liability, and to keep the fund in the court's custody until the rights of the potential claimants of the monies can be adjudicated. (*City of Morgan Hill v. Brown*, supra, 71 Cal.App.4th at pp. 1122, 1127-1128, 84 Cal.Rptr.2d 361; *Weingetz v. Cheverton* (1951) 102 Cal.App.2d 67, 80, 226 P.2d 742.) Thus, the interpleader proceeding is traditionally viewed as two lawsuits in one. The first dispute is between the stakeholder and the claimants to determine the right to interplead the funds. The second dispute to be resolved is who is

to receive the interpleaded funds. (*San Francisco Savings Union v. Long* (1898) 123 Cal. 107, 109, 55 P. 708; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 612, 109 Cal.Rptr.2d 256; *Lincoln Nat. Life Ins. Co. v. Mitchell* (1974) 41 Cal.App.3d 16, 19, 115 Cal.Rptr. 723.)

Dial 800 v. Fesbinder (2004) 118 Cal.App.4th 32, 42-43.

In this case, Mercury Insurance is protecting against potentially competing claims by Technology Insurance for Workers Compensation payouts, and Romero as potential claimant of the $15,000 consideration for his release of liability against Christner. Romero has not actually made any claim and has not filed an Answer to the Complaint-in-Interpleader.

However, Technology Insurance's payment of more than $16,000 for Romero's Workers Compensation claims does not guarantee that Romero will not reappear in this suit or in an independent action with claims of damages unrelated to the expenses already covered by Technology Insurance. The release signed by Christner and Romero is contractual, and as such is subject to a four-year statute of limitations. Because it is a matter of contract and not of tort, the doctrine of collateral estoppel might not apply to prevent a duplicative lawsuit. Although the time has passed for Romero to file an Answer to the Complaint-in-Interpleader it is still within the realm of possibility that he could do so, just as Christner had the default judgment against him set aside in this case.

While Technology Insurance paid out more than $16,000 for Romero's Workers Compensation claims. "The employee . . . may recover . . . a net judgment for the difference, if any, between the total tort damages and the workers' compensation benefits received." Demkowski v. Lee, 233 Cal. App. 3d 1251, 1258 (1991). It remains possible that Romero could claim additional damages from the collision that have not yet been compensated through Workers' Compensation.

In the interests of judicial economy the motion should be granted to resolve the issues as to Christner's auto liability insurance carrier in a single action.

Technology Insurance argues that there is no dispute as to its right to recover the full amount of the policy pursuant to Labor Code §§ 3860 and 3862. However, Labor Code § 3860 discusses the proceeds of a settlement. Romero has not been paid $15,000 and so that there is no "settlement" to which Section 3860 can be applied. Similarly, Section 3862 addresses an employer's lien on a judgment or award, neither of which yet exists in this case. There may be other grounds on which Technology Insurance is entitled to recover the interpleaded funds as reimbursement for Workers Compensation benefits its has paid, and that determination can be made in the second phase of the interpleader proceedings during which the rights of any potential claimants of the monies can be adjudicated.

TENTATIVE RULING #9: THE MOTION IS GRANTED.

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).

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10. VEGA v. VEGA 22CV1554

Demurrer

This is a demurrer to a Cross-Complaint filed by Nelson Vega against Alden Vega. The parties claim an interest as co-owners of a parcel of real estate located in El Dorado County as tenants in common. Both parties reside in Monterey County, and a related action is pending in Monterey County Superior Court (Case No. 22CV001866) that was filed on June 30, 2022, before this El Dorado County Superior Court case was filed on October 17, 2022.

The court grants Plaintiff/Cross-Complainant's request for judicial notice of the ongoing proceedings in Monterey County Superior Court, including a motion hearing scheduled at 8:30 a.m. on July 28, 2023, in Department 15 of the Monterey County Superior Court, the Settlement Conference scheduled for December 5, 2023, and the jury trial scheduled for March 11, 2024.

TENTATIVE RULING #10: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, APRIL 5, 2024, IN DEPARTMENT NINE.

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).

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