1. PEOPLE v. BOSWELL PCL-20210626

Petition for Forfeiture.

On August 19, 2021 the People filed a petition for forfeiture of cash seized by the El Dorado County Sheriff's Department. The petition states: $9,360 in U.S. Currency was seized by the El Dorado County Sheriff's Office; such funds are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Health and Safety Code, § 11488.4(a).)

On September 28, 2021 the People filed a disclaimer of interest apparently executed by potential claimant Boswell, which declares the following under penalty of perjury: he is not the owner of the currency in the amount of $9,360 and has no claim for its return to him; he gives up and relinquishes any right that may exist for him to possess or own the listed currency and/or property; he has been advised and understands that by signing the disclaimer of ownership he is waiving and giving up any rights to the currency and/or property; he understood that he possessed certain rights to be provided notice of seizure and the intent of the State or Federal government to seek forfeiture of $9.360 in currency and/or property; and

he voluntarily waived and gave up all rights to any further notice of seizure and of the intention to seek seizure by the State or Federal government.

Under the circumstances presented, it appears appropriate to grant the petition.

TENTATIVE RULING # 1: THE PETITION IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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 TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30

A.M. ON FRIDAY, OCTOBER 8, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

2. MATTER OF CORDOVA PC-20210428

OSC Re: Name Change.

TENTATIVE RULING # 2: THE PETITION IS GRANTED.

3. CHASE v. SAMPLES FAMILY TRUST PC-20210027

Plaintiffs' Motion to Consolidate Case Number PCL-20200094 Pursuant to Code of Civil Procedure, § 1048(a).

In October 2020 the Samples filed an unlawful detainer action against the Chases, the Chases vacated the premises before the unlawful detainer case could be brought to trial; and after the Chases vacated the premises, the Samples filed an amended complaint converting the unlawful detainer case into a limited civil action for holdover damages and attorney fees.

On January 25, 2021 plaintiffs filed an action against defendants asserting causes of action for breach of contract by promissory estoppel and fraud allegedly arising out of a written two year commercial lease agreement, an alleged promise to provide plaintiffs with an additional three year term, and an option for a five year extension. (Case Number PC-20210027.)

On June 30, 2021 the court entered its order compelling arbitration of the complaint in PC-20210027 and staying that civil action pending binding arbitration.

On August 28, 2021 plaintiffs Chase filed a motion to consolidate the limited civil action (PCU-20200094) with the stayed civil action (PC-20210027) on the grounds that the actions involve common issues of law or fact as they relate to the same commercial property and all issues can be considered during the arbitration already ordered; and if the cases are not consolidated, there is a risk of inconsistent results where the arbitrator may find the Chases should have been allowed to remain on the commercial property and the Samples are liable to the Chases, while the court may find in the limited civil case that the Chases should not have been allowed to remain on the property and are liable for the holdover rental value.

Defendants oppose the motion on the following grounds: the court lacks jurisdiction to rule on the motion to consolidate after it ordered the case to arbitration and stayed further

proceedings in this case; the notice of motion does not comply with Rules of Court, Rule 3.350(a); plaintiffs seek to consolidate to have the unlawful detainer action for holdover damages and attorney fees to be arbitrated where the lease agreement between the parties expressly provides that unlawful detainer actions are not subject to the arbitration agreement (Request for Judicial Notice, Exhibit B – Declaration in Support of Motion to Compel Arbitration – Commercial Lease Agreement, Dispute Resolution, paragraph 35B(2).); these two cases do not involve common issues of law and fact, because the unlawful detainer/limited civil case involves holdover damages and recovery of attorney fees and costs incurred in the unlawful detainer case, while the unlimited civil action involves whether there was a separate oral agreement for a new lease; and while the two cases may be related, they should not be consolidated.

At the time this ruling was prepared, there was no reply in the court's file.

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (Emphasis added.) (Code of Civil Procedure, § 1048(a).)

"…Consolidation under section 1048 is permissive, and the trial court granting consolidation must determine whether the consolidation will be for all purposes or will be limited. (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 92, 52 Cal.Rptr. 460, 416 P.2d 492.)" (Committee for Responsible Planning v. City of Indian Wells (1990) 225 Cal.App.3d 191, 196, fn.5.)

The court has discretion to consolidate actions, which have common questions of fact or law. Code of Civil Procedure, § 1048(a). "…Therefore it is possible that actions may be

thoroughly "related" in the sense of having common questions of law or fact, and still not be "consolidated," if the trial court, in the sound exercise of its discretion, chooses not to do so." (Askew v. Askew (1994) 22 Cal.App.4th 942, 964.)

The Third District Court of Appeals has held: "Consolidation is not a matter of right; it rests solely within the sound discretion of the trial judge, and his decision to consolidate, or his refusal to do so, will not be reviewed except upon a clear showing of abuse of discretion. *Realty Const. & Mfg. Co. v. Superior Court*, 165 Cal. 543, 546, 132 P. 1048." (Fisher v. Nash Bldg. Co. (1952) 113 Cal.App.2d 397, 402.)

- Stay Pending Arbitration

"Once a court grants the petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration. This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law should be dismissed because of the res judicata effects of the arbitration award *Division of Labor Standards Enforcement v. Williams* (1981) 121 Cal.App.3d 302, 309, 175 Cal.Rptr. 347; Rest.2d Judgments, § 84) or not (at which point the action at law may resume to determine the rights of the parties). (Cf. *Lord v. Garland* (1946) 27 Cal.2d 840, 851, 168 P.2d 5; *Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 217, 136 Cal.Rptr. 527 [discussing effect of interlocutory judgment pursuant to § 597 abating second action at law pending resolution of first action of law].) The court also retains a separate, limited jurisdiction over the contractual arbitration which was the subject of the section 1281.2 petition: "After a petition has been filed *under this title* [i.e., "Title 9" (§§ 1280–1294.2)], the court in which such petition was filed retains jurisdiction to determine *any subsequent petition* involving the same agreement to

arbitrate and the same controversy, and *any such subsequent petition* shall be filed in the same proceeding." (§ 1292.6 [emphasis added].)" (Brock v. Kaiser Foundation Hospitals (1992) 10 Cal.App.4th 1790, 1796.)

""The purpose of the statutory stay [required pursuant to section 1281.4] is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved. [Citations.] [¶] In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective. [Citation.]" (*Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374–1375, 71 Cal.Rptr.2d 164 (*Federal Ins. Co.*).) ¶ In *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1199–1200, 58 Cal.Rptr.3d 904 (*SWAB Financial*), the Court of Appeal emphasized that, after granting a petition to compel arbitration and staying a lawsuit, the scope of jurisdiction that a trial court retains is extremely narrow: ¶ "The trial court was ... authorized under Code of Civil Procedure section 1281.4 to stay pending judicial actions. But beyond that, the trial court's power to interfere in the pending arbitration was strictly limited. [Citations.].... [¶] ... Once a petition is granted and the lawsuit is stayed, "the action at law sits in the twilight zone of abatement with the trial court retaining merely vestigial jurisdiction over matters submitted to arbitration." [Citation.] During that time, under its "vestigial" jurisdiction, a court may: appoint arbitrators if the method selected by the parties fails ([Code Civ. Proc.,] § 1281.6); grant a provisional remedy "but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief" ([Code Civ. Proc.,] § 1281.8, subd. (b)); and confirm, correct or vacate the arbitration award ([Code Civ. Proc.,] § 1285). Absent an agreement to withdraw the controversy from arbitration, however, no judicial act is authorized.' [Citation.]"" (MKJA, Inc. v. 123 Fit Franchising, LLC (2011) 191 Cal.App.4th 643, 658–659.)

Once the court stayed the unlimited civil action pending binding arbitration, that civil action is effectively no longer pending before the court exempt for extremely narrow purposes.

The motion before the court is not a motion to determine upon conclusion of the arbitration proceedings as to whether there was an award on the merits, in which case the action at law should be dismissed because of the res judicata effects of the arbitration award, to correct or vacate the arbitration award, or to determine a subsequent petition involving the same agreement to arbitrate and the same controversy. "Absent an agreement to withdraw the controversy from arbitration, however, no judicial act is authorized.' [Citation.]"" (MKJA, Inc. v. 123 Fit Franchising, LLC (2011) 191 Cal.App.4th 643, 659.)

The court's extremely narrow scope of jurisdiction that a court retains after granting a petition to compel arbitration and stay of the litigation pending arbitration does not appear to extend to considering a motion to consolidate a civil case pending in court with the stayed civil case now before the arbitrator. The motion is denied due to lack of jurisdiction while this case is in the hands of the arbitrator and the unlimited civil litigation is stayed pending arbitration.

TENTATIVE RULING # 3: PLAINTIFFS' MOTION TO CONSOLIDATE CASE NUMBER PCU-20200094 WITH CASE NUMBER PC-20210027 PURSUANT TO CODE OF CIVIL PROCEDURE, § 1048(a) IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY

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4. 12FIVE CAPITAL, LLC v. GRANITE SPRINGS WINERY, LLC PC-20210112

Plaintiff's Motion to Compel Elizabeth Ramos to Attend Deposition and Provide Testimony.

Plaintiff moves to compel non-party deponent Elizabeth Ramos to attend her noticed deposition and testify. Plaintiff further requests an award of $2,810 in sanctions imposed against deponent Ramos for her failure to comply with the deposition notice served on her, which necessitated the filing of this motion and plaintiff incurring attorney fees and costs.

The proofs of service declare that on August 19, 2021 Elizabeth Ramos was personally served the notice of hearing of this motion and on August 12, 2021 she was personally served notice of the hearing and the moving papers. There is no opposition in the court's file.

"Any party may obtain discovery within the scope delimited by Chapter 2 (commencing with Section 2017.010), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by taking in California the oral deposition of any person, including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency." (Code of Civil Procedure, § 2025.010.)

"(a) Any of the following methods may be used to obtain discovery within the state from a person who is not a party to the action in which the discovery is sought: ¶ (1) An oral deposition under Chapter 9 (commencing with Section 2025.010). ¶ (2) A written deposition under Chapter 11 (commencing with Section 2028.010). ¶ (3) A deposition for production of business records and things under Article 4 (commencing with Section 2020.410) or Article 5 (commencing with Section 2020.510). ¶ (b) Except as provided in subdivision (a) of Section

2025.280, the process by which a nonparty is required to provide discovery is a deposition subpoena." (Code Civil Procedure, § 2020.010.)

"Section 2020 states that among the methods for discovery from a nonparty is an oral deposition under section 2025, with the nonparty's attendance secured by a deposition subpoena. (§ 2020, subd. (a).) When a subpoenaed nonparty fails to appear for a deposition or produce documents that were properly requested, the party who subpoenaed the witness may move to compel compliance with the subpoena." (Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh (2005) 131 Cal.App.4th 1342, 1351.)

A legal assistant working for plaintiff's counsel declares: she received proof of service verifying Ms. Ramos was personally served with the deposition subpoena and notice of taking deposition and was paid the witness fee (Plaintiff's Exhibit 2.); Ms. Ramos' deposition was scheduled for June 28, 2021; and she was not contacted between the time of personal service and the June 28, 2021 deposition by Ms. Ramos or anyone on her behalf regarding her appearance. (Declaration of Laura Simar in Support of Motion, paragraphs 1, 3, and 4; and Plaintiff's Exhibit 2.)

Plaintiff's Counsel declares: on June 28, 2021 deponent Elizabeth Ramos failed to appear at her noticed deposition (Plaintiff's Exhibit 3.); on July 23, 2021 he followed up with the deponent by sending a letter to her last known address inquiring about her failure to appear at the deposition and advised her that plaintiff would be seeking to compel her attendance by the court and request an award of sanctions, attorney fees, and costs if plaintiff failed to respond by August 2, 2021 (Plaintiff's Exhibit 4.); no response has been received; plaintiff incurred $2,300 in preparing the motion and it is anticipated an additional $450 in attorney fees will be incurred for an additional hour expended by appearing at the hearing; and plaintiff incurred a

filing fee in the amount of $60. (Declaration of John Samburg in Support of Motion, paragraphs 5-7; and Plaintiff's Exhibits 3 and 4.)

The authenticated proof of service of the deposition subpoena declares: on April 26, 2021 a registered process server personally served Elizabeth Ramos the Notice of Taking the Deposition of Elizabeth Ramos and Deposition Subpoena for Personal Appearance and paid witness fees in the amount of $35. (Declaration of Laura Simar in Support of Motion, paragraph 3 and Exhibit 2)

Absent opposition, under the circumstances presented, it appears appropriate for the court to order deponent Elizabeth Ramos to appear and testify at her deposition.

Sanctions

"(b) If a deponent on whom a deposition subpoena has been served fails to attend a deposition or refuses to be sworn as a witness, the court may impose on the deponent the sanctions described in Section 2020.240." (Code of Civil Procedure, § 2025.440(b).)

"A deponent who disobeys a deposition subpoena in any manner described in subdivision (c) of Section 2020.220 may be punished for contempt under Chapter 7 (commencing with Section 2023.010) without the necessity of a prior order of court directing compliance by the witness. The deponent is also subject to the forfeiture and the payment of damages set forth in Section 1992." (Emphasis added.) (Code Civil Procedure, § 2020.240.)

"A person failing to appear pursuant to a subpoena or a court order also forfeits to the party aggrieved the sum of five hundred dollars ($500), and all damages that he or she may sustain by the failure of the person to appear pursuant to the subpoena or court order, which forfeiture and damages may be recovered in a civil action." (Emphasis added.) (Code of Civil Procedure, § 1992.)

"A contempt proceeding is commenced by the filing of an affidavit and a request for an order to show cause. (§ 1211, subds.(a), (b).) [Footnote omitted.] After notice to the opposing party's lawyer, the court (if satisfied with the sufficiency of the affidavit) must sign an order to show cause re contempt in which the date and time for a hearing are set forth. (§ 1212; *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408, 42 Cal.Rptr. 441, 398 P.2d 777 ['an order to show cause must be issued']; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1999) § 9:715, p. 9(II)-47.) [Footnote omitted.] The order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why a certain thing should not be done. (*Morelli v. Superior Court* (1968) 262 Cal.App.2d 262, 269, 68 Cal.Rptr. 572.) Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show cause; otherwise, the court lacks jurisdiction to proceed. (§ 1015 [in civil actions in which a party is represented by an attorney, 'the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt']; see also § 1016; *Arthur v. Superior Court*, supra, 62 Cal.2d at p. 408, 42 Cal.Rptr. 441, 398 P.2d 777; and see Weil & Brown, supra, § 9:716, p. 9(11)-47.) [Footnote omitted.]" (Cedars-Sinai Imaging Medical Group v. Superior Court (2000) 83 Cal.App.4th 1281, 1286-1287.)

"A contempt proceeding arising out of a civil action is, in a broad sense, regarded as a criminal proceeding. (12 Cal.Jur.2d 74 and cases cited.) The right of an alleged contemner to be heard in his defense is the same as that which is secured to a person accused of a crime. (*Freeman v. Superior Court*, 44 Cal.2d 533, 282 P.2d 857; *In re Burns*, 161 Cal.App.2d 137, 326 P.2d 617.) Due process in constructive contempt cases includes a reasonable opportunity to the accused to prepare and present his defense (*Ingold v. Municipal Court*, 85 Cal.App.2d

651, 193 P.2d 808; Collins v. Superior Court, 150 Cal.App.2d 354, 310 P.2d 103), and the right to be represented by counsel (*In re Larrabee*, 29 Cal.App.2d 240, 84 P.2d 224). The right to be represented by counsel may be waived either expressly (People v. Ansite, 110 Cal.App.2d 38, 241 P.2d 1036; People v. Linden, 52 Cal.2d 1, 338 P.2d 397), or by implication (*In re Jingles*, 27 Cal.2d 496, 165 P.2d 12; People v. Rogers, 150 Cal.App.2d 403, 309 P.2d 949)" (Application of Shelley (1961) 197 Cal.App.2d 199, 202.)

An affidavit in support has not been presented and an OSC Re: Contempt has not been issued and personally served on the non-party deponent. In addition, the plaintiff has not established a civil action was brought against the deponent to recover damages of attorney fees and costs. Therefore, it appears that the court can not proceed to determine whether monetary sanctions should be imposed against this non-party for contempt in not appearing at the noticed deposition.

TENTATIVE RULING # 4: PLAINTIFF'S MOTION TO COMPEL ELIZABETH RAMOS TO ATTEND DEPOSITION AND PROVIDE TESTIMONY IS GRANTED IN PART AND DENIED IN PART. ELIZABETH RAMOS IS ORDERED TO ATTEND AND TESTIFY AT HER NOTICED DEPOSITION AT THE TIME AND LOCATION NOTICED BY PLAINTIFF. THE REQUEST FOR AN AWARD OF DISCOVERY SANCTIONS PAYABLE BY A NON-PARTY DEPONENT WHO IS NOT AFFILIATED WITH A PARTY TO THIS ACTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF

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5. AORAKI HOLDINGS PTY, LTD v. LABMOR ENTERPRISES, INC. PC-20190488

Plaintiff's Motion to Strike Pleadings and Enter Default Against Suspended Entities.

On September 11, 2019 plaintiff file an action asserting 10 causes of action against defendants Labmor Enterprises, Inc., Casey Labbitt, Stephanie Labbitt, and DOES 1-50. On September 26, 2019 plaintiff filed a DOE amendment naming CMP Agg Innovations, LLC. as DOE 1, CMP Agg Innovations, LLC. as DOE 2, Constantly Growing, Inc. as DOE 3, Gardensmart, Inc. as DOE 4, Callarick Business, Inc. as DOE 5, Labtech Greenhouses, Inc. as DOE 6, Callarick Enterprises, LP as DOE 7, and 2nd Hand Hydro, LLC as DOE 8. On October 23, 2019 defendants Labmor Enterprises, Inc., Casey Labbitt, Stephanie Labbitt, CMP Agg Innovations, LLC., Constantly Growing, LLC, Constantly Growing, Inc., Callarick Business, Inc., Labtech Greenhouses, Inc., and Callarick Enterprises, LLC filed their answer to the complaint. On December 11, 2019 default was entered against defendant 2nd Hand Hydro, LLC.

Plaintiff moves to strike the answers of Labmor Enterprises, Inc., CMP Agg Innovations, LLC, Constantly Growing, Inc., Gardensmart, Inc., Callarick Business, Inc., and Labtech Greenhouses, Inc. on the grounds that such answers are improper as these defendants have been suspended by the FTB, as a matter of law they cannot prosecute or defend against this action, and they have not revived their corporate status.

On October 4, 2021 plaintiff filed a proof of service, which declares that defense counsel was personally served the notice of motion and moving papers on September 16, 2020. (Supplemental Declaration of Christopher D. Strunk in Support of Motion, paragraph 6; and Exhibit DD.) There is no opposition to the motion in the court's file.

Plaintiff filed a statement of non-opposition and supplemental declaration on October 4, 2021. The court did not consider the last minute argument in the statement of non-opposition that asserted the motion to strike may also be granted, because the suspended entities have since failed to respond to discovery. To consider such an argument would violate the fundamental principles of due process as the matter was raised for the first time in what can be considered a reply without any opportunity to respond even if the suspended entities had revived their status.

"Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited, if any of the following conditions occur: ¶ (a) If any tax, penalty, or interest, or any portion thereof, that is due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, either at the time the return is required to be filed or on or before the 15th day of the ninth month following the close of the taxable year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the taxable year. ¶ (b) If any tax, penalty, or interest, or any portion thereof, due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, upon notice and demand from the Franchise Tax Board, is not paid on or before 6 p.m. on the last day of the 11th month following the due date of the tax. ¶ (c) If any liability, or any portion thereof, which is due and payable under Article 7 (commencing with Section 19131) of Chapter 4 of Part 10.2, is not paid on or before 6 p.m. on the last day of the 11th month following the date that the tax liability is due and payable." (Revenue and Taxation Code, § 23301.)

"During the period that a corporation is suspended for failure to pay taxes, it may not prosecute or defend an action (*Reed v. Norman* (1957) 48 Cal.2d 338, 343, 309 P.2d 809), appeal from an adverse judgment (*Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, 20-21, 68 P.2d 968 (*Boyle*)), seek a writ of mandate (*Brown v. Superior Court* (1966) 242 Cal.App.2d 519, 522, 51 Cal.Rptr. 633), or renew a judgment obtained prior to suspension (*Timberline*, supra, 54 Cal.App.4th at p. 1367, 64 Cal.Rptr.2d 4). The purpose of Revenue and Taxation Code section 23301 is to "prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern" (*Boyle* at p. 19, 68 P.2d 968), and to pressure it to pay its taxes (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371, 105 Cal.Rptr. 29, 503 P.2d 285). ¶ Under Revenue and Taxation Code section 23301, the powers of a domestic corporation are "suspended," not dissolved, due to its failure to pay taxes. (*Graceland v. Peebler* (1942) 50 Cal.App.2d 545, 547, 123 P.2d 527.) A suspended corporation may be sued, and service of process upon a suspended corporation is effected in the same manner as service upon a corporation that is not suspended. (Code Civ.Proc., §§ 416.10, 416.20; *Boyle*, supra, 9 Cal.2d at p. 19, 68 P.2d 968; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 301-313, 78 Cal.Rptr.2d 892; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 77, p. 133.) In addition, a suspended corporation is not protected against a judgment by default upon its failure to answer within the time allowed. (See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 112, pp. 521-522.)" (Grell v. Laci Le Beau Corp. (1999) 73 Cal.App.4th 1300, 1306.)

In reversing a trial court's denial of a motion to strike a defendant suspended corporation's response to the complaint and to enter a default judgment, the appellate court in Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal.App.2d 46 stated: "In view of the provisions of section 23301 of the Revenue and Taxation Code, and the authorities

hereinbefore cited, we believe that there is no escape from the conclusion that respondent corporation had no right to defend in the instant action, or even to participate therein during the time that its corporate rights were suspended. Therefore the trial court should have granted appellants' motion to strike the pleadings of respondent and certainly the trial court had no right to consider the defenses of the statute of limitations, laches, and estoppel which respondent set up in its answers. Section 23301 expressly deprived respondent corporation of all 'corporate powers, rights and privileges', and the right to defend against an action is included in such powers, rights and privileges. It is true that in the instant case the point was not raised by appellants until the final day of the trial and long after the action was commenced, but that does not aid respondent because the fact remains that the powers, rights and privileges of respondent corporation were not revived and restored before the entry of the judgment appealed from." (Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal.App.2d 46, 50-51.)

Plaintiff's Counsel declares: at the time this litigation was commenced, the suspended defendants were active corporate entities; on August 18, 2021 as he was in the process of preparing written discovery and noticing depositions he made a routine check on the status of each suspended defendant; the California Secretary of State records state the statuses of defendants Labmor Enterprises, Inc., Callarick Business, Inc., Labtech Greenhouses, Inc., CMP Agg Innovations, LLC., Gardensmart, Inc., and Constantly Growing, Inc. are "FTB Suspended" (Exhibit A.); the Secretary of State's records also state that Constantly Growing, LLC was cancelled by defendant Stephanie Labbitt in January 2021; these records show that each of the suspended defendants are participating in the litigation while they are legally barred from doing so; on August 20, 2021 he advised counsel for the suspended defendants that his clients were suspended and that plaintiff intended to appear ex parte on August 24,

2021 to present a motion to strike the answers and enter their defaults; plaintiff's counsel and defense counsel met and conferred on August 23, 2021 and it was determined that it was appropriate to give the suspended defendants time to obtain a reviver before the motion to strike and enter defaults was made; on September 8, 2021 plaintiff advised defense counsel by email that it had reserved a hearing date of October 8, 2021 for the motion and that plaintiff would proceed with the motion should revivors not be entered (Exhibit C.); on September 16, 2021, the filing deadline for the motion set for October 8, 2021, counsel performed another check of the Secretary of State's records and determined that none of the entities had obtained a revivor and all suspended defendants were still suspended; and plaintiff's counsel then emailed defense counsel to apprise him that the motion would be filed. (Exhibit D.) (Declaration of Christopher D. Strunk in Support of Motion, paragraphs 3-16; and Exhibits A, B, & D.)

The supplemental declaration declares, among other things, as of the date of filing of this brief, the six defendants against whom this motion is directed are still suspended or in forfeited status as reflected in updated printouts from the Secretary of State attached as Exhibit AA; and that on September 22, 2021 plaintiff's counsel discussed with defense counsel the issue of the status of the suspended defendants and was told by defense counsel that defendants Labbitt would not be seeking revivor of four of the entities. (Supplemental Declaration of Christopher D. Strunk in Support of Motion, paragraphs 2 and 5; and Exhibit AA.)

Plaintiff requests the court to take judicial notice of the aforementioned Secretary of State records. The court takes judicial notice of those records.

Under the circumstances presented and there being no opposition, it appears appropriate to grant the motion.

TENTATIVE RULING # 5: PLAINTIFF'S MOTION TO STRIKE PLEADINGS AND ENTER DEFAULT AGAINST SUSPENDED ENTITIES IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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 TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 8, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. FURIO v. SAFEWAY, INC. PC-20210272

Defendant Furio's Demurrer and Motion to Strike Portions of Safeway, Inc.'s Answer to the Complaint.

On July 22, 2021 defendant Safeway, Inc. filed its answer to plaintiff's verified complaint, Plaintiff filed a demurrer to the answer and motion to strike paragraph 12 of the answer and the 3rd through 13th, 15th through 23rd, and 25th affirmative defenses asserted in the answer. Plaintiff contends that paragraph 12 is a sham as it states that Safeway lacks information sufficient to form a belief as to the accuracy of the plaintiff's allegations in paragraph 12 of the complaint and on that basis denies each and every allegation in that paragraph, because plaintiff knows, is presumed to know, or has means of ascertaining whether the facts alleged in the complaint in that paragraph are true or false; and the cited affirmative defenses are fatally defective and improper as they only state legal conclusions without supporting facts.

On September 27, 2021 defendant Safeway, Inc. filed an opposition to the demurrers and motion to strike and also filed a verified amended answer to the complaint.

Plaintiff replied to the opposition seeking to have various affirmative defenses stricken from the initial answer to the complaint and the amended answer to the complaint. (Emphasis the Court's.) (Reply, page 3, lines 3-5 and line 21; and page 4, line 27 to page 5, line 1.)

"A party may amend its pleading once without leave of the court at any time before the answer or demurrer is filed, or after a demurrer is filed but before the demurrer is heard if the amended complaint, cross-complaint, or answer is filed and served no later than the date for filing an opposition to the demurrer…" (Emphasis added.) (Code of Civil Procedure, § 472.) Defendant Safeway, Inc. exercised its option to file an amended answer prior to the hearing on the demurrer and not later than the date for filing an opposition to the demurrer. (See Code of

Civil Procedure, § 472(a).) The Amended Answer supersedes the Answer, making the demurrer and motion to strike moot.

""The filing of the first amended complaint rendered [the defendant]'s demurrer moot since ' "an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. [Citations.]" [Citation.]' " (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054, 18 Cal.Rptr.3d 882.) ¶ When Strathmann filed the amended complaint, the hearing on the demurrer should have been taken off calendar. (*Barton v. Khan, supra,* 157 Cal.App.4th at p. 1221, 69 Cal.Rptr.3d 238.)" (People ex rel. Strathmann v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 506.)

The same logically applies to other amended pleadings, such as an answer, and, therefore, the amended answer supersedes the entire initial answer, including the affirmative defenses, rendering all of plaintiff's challenges to the initial answer moot as the initial answer ceases to perform any function as a pleading. Plaintiff can not simply state in a reply that the demurrer and motion to strike is redirected from the initial complaint to the amended complaint, which had not been filed prior to the demurrer and motion to strike. It would violate the fundamental principles of due process to allow a plaintiff to demur and move to strike an amended pleading in the reply and thereby cut off defendant from any opportunity to respond to the demurrer and motion to strike in light of the amended allegations in the amended answer, which superseded the initial answer. Plaintiff's remedy is to demur and move to strike the amended answer, thereby providing defendant with due process.

The court drops the demurrer to the answer and motion to strike portions of the answer from the calendar as having been mooted by the filing of an amended answer.

TENTATIVE RULING # 6: THE DEMURRER AND MOTION TO STRIKE IS DROPPED FROM THE CALENDAR AS MOOT.