



Superior Court of California County of San Benito

Tentative Decisions for January 27, 2025

Courtroom #1: Judge J. Omar Rodriguez

CU-18-00149 Essary, Kevin Scott et al. vs Agripharma Ltd et al.

The hearings on all Motions for Summary Adjudications in this matter are taken off calendar as they are moot since the parties have reached settlements.

CU-20-00189 Rocket Restrooms & Fencing, Inc vs. Leal, Frank

1. Motion to Quash

Defendant's Motion to Quash Notice to Appear at Trial directed to Ovidio Popescu is DENIED.

Generally speaking, proceeding to judgment in a party's absence is extraordinary and is a disfavored practice. (*Au-Yang v. Barton* (1999) 21 Cal. 4th 958, 962.) When a party fails to appear at trial, the court must determine whether the party was properly served with a timely notice to appear as required by Code of Civil Procedure section 594(a). Code of Civil Procedure section 581 addresses the requirements of a party's appearance at trial. According to Code of Civil Procedure section 1987(b), for parties to an action or proceeding "service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof is served upon the attorney of that party or person."

///

///

Here Defendant's objection is made pursuant to the requirements of a deposition claiming that it is unduly burdensome for Ovidiu Popescu to participate in trial and that he has no probative information to offer in testimony.

In assessing whether Defendant Popescu's testimony would be probative, the court looks to the complaint, which alleges that Defendant Leal, either himself or doing business as RentAFence, failed to pay Plaintiff for services provided. Plaintiff avers via declaration that Plaintiff learned during the deposition of Molina that Popescu owned RentAFence during the time many of the invoices at issue were created. Therefore, exploring if Popescu has information relating to RentAFence or Mr. Leal's failure to pay said invoices is directly relevant to the non-payment claims and the affirmative defenses raised by Mr. Leal and RentAFence. The testimony is relevant, and the appearance by the defendant who owned RentAFence at the time the contracts were entered is warranted. Defendant also argues that Mr. Popescu is unable to attend trial due to his health concerns lacks evidence.

The motion to quash the notice is therefore denied.

2. Motion for Leave to Complete Discovery

Defendant's Motion for Leave to Complete Discovery and Hear Discovery Motion is DENIED. Pursuant to the terms of statute, while the parties may agree to hold open discovery to a date after the cut off, such agreement, however informal, needs to be in writing.

While the parties engaged in extensive communication and appear, if the court views the correspondence in the light most favorable to Defendants, to have agreed to a date after the cut off ending on September 27, 2024. There is no agreement to extend the deadline beyond September 27th. Defendant proposed an extension beyond the date. There is no evidence to suggest that Plaintiff engaged in gamesmanship to mislead Defendants to think there was an agreement to an indeterminate date at some time in the future to complete discovery beyond September 27th.

Pursuant to Code of Civil Procedure sections 2024.020(a) and 2024.030, parties are entitled to complete discovery proceedings as a matter of right only until 30 days before the date set for the trial of the case, and to have motions concerning discovery heard until 15 days before the date set for the trial of the case, unless the discovery pertains to an expert witness identified under Code of Civil Procedure sections 2034.010 et seq. A continuance or

postponement of the trial date does not operate to reopen the discovery proceedings. (Cal. Code Civ. Proc. § 2024.020(b).) The parties to the action may agree to extend time for completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial on the action has been set. (Cal. Code Civ. Proc. § 2024.060.) The parties to the action may agree to extend time for completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial on the action has been set. (Cal. Code Civ. Proc. § 2024.060.) If the parties have an agreement, which may be informal in nature, it must be confirmed in a writing that specifies the extended date. Any party affected by the agreement must consent to it. And, in no event, may the agreement require the court to grant continuance or postponement of trial. (Cal. Code Civ. Proc., §2024.060)

Here, the partes engaged in negotiations about when to schedule a both depositions for Mr. Waldie, and while a date after the cut off for discovery was proffered by Plaintiff, it also appears that Defendant countered that proposal. If viewed in a light most favorable to Defendant, at best, the date for taking the depositions only was extended to September 23, 2024, by offer from Plaintiffs, as affirmed in the writings provided. There is no discussion nor is there agreement about extending such dates any further. While Defendant's assert that they offered to extend the deposition to September 27, there is no evidence that this was agreed to. Moreover, the extensive lack of diligence, and, presuming if further motion is necessary, the possibility of disrupting or delaying a trial that has already been continued, the Defendant's lack of diligence and the lack of any agreement to extend discovery beyond September 27, weighs against granting the Defendant's motion to allow discovery to continue after cut the discovery cut off date.

3. Defendant's Motion to Compel Mr. Burt's Testimony

Defendant's Motion to Compel the deposition of Mike Burt is GRANTED in part. The parties concluded the PMQ deposition of Mr. Burt on September 23, 2024, holding open time only to address text messages relied upon by Mr. Burt in his testimony that Defendant's counsel believed had not been produced. These items had been produced, and thus it appears the need for further questions relating to unproduced text message is nonexistent. As to the appearance and testimony of Mr. Burt as an individual, it is unclear if this aspect of the

deposition was conducted, and while Defense counsel sought to avoid having Mr. Burt return, it appears that this portion of the deposition should be allowed to move forward as previously noticed and agreed.

To promote trial on the merits, the Code of Civil Procedure provides for the deposition of parties (Cal. Civ. Proc. §2025.010); and authorizes motion to compel when a party refuses to proceed with deposition. (Cal. Civ. Proc. §2025.450 sub (a).) The court may grant an order to compel the completion of testimony at deposition on good cause pursuant to Code of Civil Procedure section 2025.450(a).

The Motion to Compel the Deposition of Mr. Burt as a PMQ is DENIED. According to the transcript provided, the proposal was to reserve some time on the second date to answer remaining questions about emails, which Defendant did not believe had been produced. The closing of the PMQ portion of the deposition from the record provided by the Plaintiff's counsel stated on the record at Mr. Burt's PMQ deposition that the deposition was concluding that day, but that there may be follow-up questions at a continued deposition based on the production of text messages and as a result of the text messages. Based on the evidence, while Defendants took issue as to the format of the text messages that had been produced, the text messages had been produced prior to the deposition.

The Motion to Compel the Deposition of Mr. Burt as an individual is GRANTED. He shall be made available to complete up to seven hours of party witness testimony within 14 days of this order unless stipulated to by the parties. The evidence presented supports Defendant's Motion to Compel Mr. Burt's deposition in his individual capacity. The parties understood that Mr. Burt was to be deposed in his individual capacity as well as his capacity as PMQ. The entirety of the September 23rd testimony was devoted to PMQ topics. While the PMQ portion of the deposition concluded, there is no indication that Mr. Burt's deposition, as an individual, commenced.

///

///

Defendant Kevin Moore's Motion to Compel Responses to Special Interrogatories, Set One, is GRANTED. Plaintiff failed to provide any responses, which were served on or about July 29, 2024. The parties consented to two extensions of time resulting September 20, 2024 as the new deadline for discovery. Defendant Moore declined any further extensions, which was a decision that was not made in bad faith.

Pursuant to the Code of Civil Procedure, if a party directed to respond to an authorized method of discovery does not respond within the time allotted, the propounding party may seek to compel responses. (Cal. Civ. Proc. §2030.290.) The failure to provide timely responses waives any objections to the discovery sought. (Cal. Civ. Proc. §2030.290(a).) The court may impose monetary sanction for the abuse of the discovery process which includes the failure to respond to an authorized method of discovery. (Cal. Civ. Proc. §2023.010 (d).)

Defendant Moore's Motion to Compel Responses to Special Interrogatories, Set One, is GRANTED. Plaintiff is to serve responses, without objection within 20 calendar days from the date of this order. Plaintiff shall pay sanctions of \$1,375.00 and court costs of \$60.00 for a total of \$1435.00 forthwith.

Defendant K2J Enterprises' motion to compel responses to request for production of documents presents the same fact pattern as described in Defendant Kevin Moore's motion to compel. Similarly, pursuant to statute, a party whose request for production of documents receives no timely response may make a motion to compel responses. (Cal. Civ. Proc. §2031.300(b).) Furthermore, the failure to provide timely responses waives any objection to the inspection demand, including those based on privilege (Cal. Civ. Proc. §2031.300(a).) Moreover, the court may impose sanctions on a party for misuse of the discovery process, including the failure to respond to an authorized method of discovery. (Cal. Civ. Proc. §2031.300(c).)

Defendant K2J Enterprises' Motion to Compel Responses to Requests for Production, Set One, is GRANTED. Plaintiff is to serve responses, without objection within 20 calendar days from the date of this order. Plaintiff will pay sanctions of \$1,375.00 and court costs of \$60.00 for a total of \$1435.00 forthwith.

The Demurrer as to the Seventh Cause of Action is SUSTAINED with leave to amend. A demurrer generally serves to test the legal sufficiency of the complaint's factual allegations. (*Genis v. Schainbaum* (2021) 66 Cal. App. 5th 1007, 1014.) A party may demur when any ground for objection to a complaint appears on the face of it, or from a matter from which the court is required or may take judicial notice. (Cal. Code of Civ. Proc. §430.30 (a); *Levy v. Neilson* (2000) 83 Cal. App. 4th 1061, 1063.) A demurrer lies where it appears on the face of the complaint that the plaintiff has not alleged facts sufficient to state a cause of action. (CCP§430.10(e); *James v. Sup. Ct.* (1968) 261 Cal. App. 2nd 415.) It does not test the factual accuracy or truth of the facts alleged. The court must assume the truth of all properly pled allegations. The process of a demurrer does not serve to test the merits of the Plaintiff's case. (*Tenet Health System Desert Inc. v. Blue Cross of CA.* (2016) 245 Cal App 4th 821, 834.) Because a demurrer only challenges the defects on the face of the complaint, it can only refer to matters outside the pleadings which are subject to judicial notice." (*Id.* at 831.) When any ground for objection to a complaint...appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." (Cal. Code of Civ. Proc §430.30 sub (a); *Levy v. Nielson* (2000) 83 Cal. App. 4th 1061, 1063.) For the purpose of demurrer, a judge must treat the demurrer as an admission of all material facts properly pled in the challenged pleading or that reasonably rise by implication, however improbable they are. (*Collins v. Thurmond* (2019) 41 Cal. App 5th 879, 894.) For the purpose of testing the sufficiency of a cause of action, contentions, deductions, or conclusions of law are not admitted as true, and must be ignored. (*Aubry v. Tri-City Hosp Dist.* (1992) 2 Cal. 4th 962, 966-67.) Additionally, a party may not allege facts inconsistent with the exhibits to the complaint. (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal. App. 5th 1131, 1145-6.)

Here, the Seventh Cause of Action for Nuisance arising from Civil Code section 3480 and related statutes. The "general rule that statutory causes of action must be pleaded with particularity" applies here. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal. 3d 780, 795.) A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Cal. Civil Code § 3493.) "The damage suffered

must be different in kind, not merely in degree, from that suffered by other members of the public.” (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1349.) Civil Code section 3493 limits who can file a public nuisance claim, limiting standing to private persons who can make a claim of public nuisance only “if it is especially injurious to himself, but not otherwise.” Further, the harm to the individual must differ in kind, not just in degree to the harm suffered by the general public. This element is again not pled, as required by statute, “with particularity.” (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal. 3d 780, 795.) That dictate is applicable here, and as noted the TAC is wanting in this regard. Plaintiffs have not pled as required that they have suffered harm that is different in kind, not just degree, from that suffered by the public generally, as is needed to put forward a prima facie case. (*Cal. Dept. of Fish and Game v. Sup. Ct.* (2011) 197 Cal. App. 4th 1323, 1352, citing to CACI 2021.)

The Third Amended Complaint does not plea with particularity and fails to plea the allege public nuisance is specially injurious to Plaintiffs. The Third Amended Complaint alleges, “(a)s a direct and proximate result of the continuing nuisance, plaintiffs have incurred and will continue to incur expenses, losses and damages set forth above. These costs are incurred to combat and remediate the nuisance.” (Third Amended Complaint ¶141.) Plaintiffs allegedly suffer from poor health, stress and emotional distress as a result of being in contact with the nuisance created by defendants. (*Id.* at ¶142.) There are no allegations that the suffered harm is different in kind from that suffered by the public generally. As a result, the demurrer is sustained with leave to amend.

The Motion to Strike is GRANTED as requested. California Code of Civil Procedure section §435(b)(1) allows a party to move to strike the whole or any part of a complaint, noting a motion to strike is proper when a pleading is “not drawn or filed in conformity with the laws of this state, a court rule, or order of the court.” (Cal. Code of Civ. Proc. §436(b).) Following an order sustaining demurrer with leave to amend a plaintiff may amend his or her complaint only as authorized by the court’s order. (*Peo. ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal. App. 2nd 770, 785.) “It is the rule that when a trial court sustains a demurrer with leave to amend, the scope of the grant of leave is ordinarily a limited one. It gives the pleader an opportunity to cure the defects in the particular causes of action to which the

demurrer was sustained, but that is all.” (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.*, (2011) 200 Cal. App. 4th 1317, 1329). A plaintiff may not amend the complaint to add new causes of action without first obtaining permission to do so, unless the new cause of action is within the scope of the order granting leave to amend. (*Patrick v. Alacer Corp.* (2008) 167 Cal. App. 4th 995, 1015.)

Here, the Fifteenth and Sixteenth causes of action are new causes of action added to the Third Amended Complaint without leave from the court permitted such an amendment. Nor is this amendment in conformity with the limited scope of the leave to amend granted when sustaining the demurrer to the Second Amended Complaint. Plaintiff’s reliance on *Patrick v. Alacer*, as explained in the Defendant’s reply to the Opposition, is without merit. The distinction in *Patrick* was that the new cause of action was allowed because the new relief in the cause of action added supported the standing claim in *Patrick*’s underlying complaint, showing that she had standing to pursue her claim as a beneficial share holder based on community property principles. The court noted therein that *Patrick* was not “free to add any cause of action under the sun to her complaint, but the court should have allowed this cause of action to establish her standing.” (*Patrick*, supra, 167 Cal.App.4th at 1015.) Here, Plaintiff’s new causes of action are not founded on facts or allegations that establish that the new causes of action directly respond to the court’s reason for sustaining the Demurrer to the Twelfth Cause of Action in the SAC. Thus, the addition of both new causes of action exceeded the scope of the court’s order allowing amendment to the SAC and were made without the court’s leave to make such amendments.

CU-23-00071 **Better San Benito v. County of San Benito**

Plaintiff/Petitioner’s Renewed Motion to Enforce the Court’s Prior Order is DENIED. Although there have been prior orders from this court requiring the County to produce non-exempt records and a log of documents redacted or withheld for exemptions, “(a)llowing a Public Records Act plaintiff to prosecute its public records request on a pretrial discovery motion allows the discovery process to preempt the adjudication of the merits of the litigation. (*County of San Benito v. Superior Court* (2023) 96 Cal.App.5th 243, 261.) The parties are in disagreement as to whether the County has complied with this order. The allegations made in

the Verified Petition for Writ of Mandate involve whether the County produced non-exempt public records regarding the Strada Verda Project, Measure R, Measure Q, and a buffer around the TriCal Facility, which Plaintiff/Petitioner requested on February 17, 2023. The County filed an answer denying the allegations of any wrongdoing. Petitioner sought, and obtained, an order requiring the County to produce non-exempt records responsive to Plaintiff's February 17, 2023 Public Records Act request.

In *County of San Benito v. Superior Court*, surpa, 96 Cal.App.5th 243, the trial court ordered “the County to produce ‘all non-exempt records’ subject only to ‘narrowly tailored’ redactions and a “code-compliant privilege log” identifying all records the County was withholding as exempt from disclosure under the Public Records Act.” (*County of San Benito*, 96 Cal.App.5th at 259.) The Sixth District rejected the “strategic resort to the Civil Discovery Act is a permissible shortcut to realizing (Petitioner’s) prayer for relief.” (*Ibid.*) “(W)hen a trial court grants a motion to compel the public entity to produce, under the Civil Discovery Act, the same universe of documents sought by plaintiff’s prayer for relief, the discovery order and its enforcement mechanism threatens to swallow the litigation whole.” (*Id.* at 264.) Here, the order sought to be enforced seeks the production of the documents that are the documents sought through the February 17th PRA request that is the subject of this pending litigation and the enforcement of such discovery order would, in effect, “swallow the litigation whole.” As a result, the request to enforce the order is denied.

Moreover, the updated declarations filed by both Petitioner and Respondent reveal that the parties continue their ongoing dispute over a relatively small number of remaining documents (609) out of the over 900,000 produced in response to Petitioner’s request. Petitioner’s argues that the “log” produced is insufficient. Petitioner demands the immediate production of 337 documents referenced in the current log (Ex. E), which are highlighted. Upon review of the exhibit, there are numerous instances where the highlighted items list the name of the County’s attorney. Moreover, it appears that Petitioner knows the names of said counsel because their names are referenced in Petitioner’s own correspondence to Respondent and are often included in the correspondence as recipients via carbon copy. The court therefore questions whether Petitioner engaged in sufficient review of the updated “log” of the

withheld and excluded items before filing their updated memorandum and raising their concerns to the court.

The Case Management Conference is continued to April 28, 2025 at 10:30 a.m. in light of the representations that the parties are taking steps to privately mediate the matter.

CU-24-00059 Mitchell & Danoff Law Firm, Inc. vs. Hoffman, Kimberly

Defendant's Motion for Reconsideration or Request for Leave to Amend is DENIED. There is no proof of service for this motion. Any motion requesting relief from the court must be served on the opposing party. Pursuant to California Code of Civil Procedure section 1005(a)(13), written notice must be given as prescribed in that section for "[a]ny other proceeding under this code in which notice is required, and no other time or method is prescribed by law or by court or judge." A motion for leave to amend pursuant to Code of Civil Procedure section 473(a) or a motion for reconsideration pursuant to Code of Civil Procedure section 1008 are motions that fall within this code section. Code of Civil Procedure sections 1005(b) and (c) define the timing for service of motions, and for the service of opposition or reply papers. California Rule of Court 1.21 requires that when a document is required to be served on a party, the service must be made on the party's attorney if the party is represented. (*Ibid.*) Since Defendant never served Plaintiff the motion, Defendant's motion is denied.

CU-24-00152 Baker vs. SAS Retail Services, LLC

In light of Plaintiff's Case Management Conference Statement, the Case Management Conference is continued to March 24, 2025 at 10:30 a.m.

CU-24-00157 Tate vs. Armon

The Case Management Conference is continued to February 10, 2025 at 10:30 a.m. to coincide with the new hearing date for Motion for Intervention.

///

///

PR-23-00045 In the Matter of Alcaraz

The review hearing is continued to February 24, 2025 at 10:30 a.m. The guardian is ordered to submit form GC-251 to the court no later than February 14, 2025. The court did review the declaration submitted by the guardian, but form GC-251 is a mandatory form.

PR-24-00130 In re the Jack & Phyllis Rosen 1987 Trust

The Petition for Order Determining Trust's Title is APPROVED as requested.

PR-24-00131 Guardianship of Cypress Villagomez

The hearing is continued to February 24, 2025 at 10:30 a.m. to allow for the completion of the investigation. The temporary guardianship is extended to the new hearing date.

PR-24-00132 Guardianship of Eusebio Rojas

The hearing is continued to February 24, 2025 at 10:30 a.m. to allow for the completion of the investigation. The temporary guardianship is extended to the new hearing date.

PR-24-00133 Guardianship of Mia Olivia Rojas

The hearing is continued to February 24, 2025 at 10:30 a.m. to allow for the completion of the investigation. The temporary guardianship is extended to the new hearing date.

END OF TENTATIVE DECISIONS