

Tentative Rulings for June 24, 2009
Departments 97A, 97B, 97C & 97D

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

08CECG00707 *JB Carter Enterprises, LLC v. United Security Bank*
(Dept. 97C) [Hearing on motion for summary
adjudication is continued to Thursday, July 2, 2009, at
3:30 p.m. in Dept. 97C]

(Tentative Rulings begin at the next page)

Tentative Ruling

Re: ***Cavazos v. City of Orange Cove***
Case No. 09 CE CG 01039

Hearing Date: June 24th, 2009 (Dept. 97D)

Motion: Demurrer to Complaint

Tentative Ruling:

To sustain the demurrer to the plaintiff’s complaint, with leave to amend, on the grounds that it fails to state facts sufficient to constitute a cause of action and is uncertain. (CCP § 430.10(e), (f).) Plaintiff shall serve and file his first amended complaint within 10 days of the date of service of this order.

Explanation:

Plaintiff’s complaint fails to allege any facts, nor are there any causes of action attached to the form complaint. Therefore, it is unclear what the basis of plaintiff’s claims is, and it is impossible to determine what type of wrongful conduct plaintiff contends defendants engaged in. Consequently, the complaint fails to state facts sufficient to constitute a cause of action, and it is also vague and ambiguous. (CCP § 430.10(e), (f).) The court therefore intends to sustain the demurrer with leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-23-09.
(Judge’s Initials) (Date)

Tentative Ruling

Re: ***Haney v. Aguirre, et al***
Superior Court Case No. 07CECG03665

Hearing Date: June 24, 2009 (**Dept. 97 A**)

Motion: By plaintiff for disclosure of peace officer records

Tentative Ruling:

To find good cause for disclosure of any records relating to allegations against defendant Aguirre for use of excessive force and against defendant Carlson for acts of retaliation or denial of medical care to inmates and to order the CDC to produce their complete personnel files along with any other records it may have in any other type of file relating to such allegations on Wednesday, July 15, 2009 at 3:30 in Dept. 97A for an in camera inspection pursuant to Evid. Code §1045. Arrangements will be made for plaintiff to appear at that hearing telephonically.

Explanation:

The opposition concedes that any records maintained by the CDC in relation to Aguirre and Carlson are relevant and discoverable to the extent they relate to complaints against Aguirre for use of excessive force and against Carlson for retaliation against inmates or denial of access to medical care. Any such records that were created on or after 12/30/01 would be discoverable under Evid. Code §1045.

The court will therefore order production of all files relating to these two officers so it can determine which, if any, such records exists and are relevant as defined in §1045(b). But since plaintiff is incarcerated and may not have access to this tentative ruling, a copy will be mailed to him and arrangements will be made for him to participate in the continued hearing date of 7/15/09.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: AMC on June 17, 2009.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Sivertson v. Canales-Selma LLC, et al***
Superior Court Case No. 08CECG04322

Hearing Date: June 24, 2009 (**Dept. 97C**)

Motion: By plaintiff for leave to amend

Tentative Ruling:

To grant except that plaintiff will not be permitted to verify the first amended complaint unless his attorney can provide the court with an adequate explanation of why verification is necessary in this case.

Explanation:

CRC Rule 3.1324(A)(3) requires a party seeking leave to amend to “state what allegations are proposed to be added to the previous pleading, if any, and where by page, paragraph and line number the additional allegations are located.”

Subsection (b) requires the moving party to identify the *effect* of the amendment and why the amendment is necessary and proper.

Here, plaintiff adequately explains why she wants leave to reassert a claim against the individual defendant, since the automatic bankruptcy stay is no longer in effect. However the only discernible difference between the original and first amended complaint is the fact that the latter is verified, a fact that is neither identified nor explained in the moving papers.

Allowing plaintiff to file a verified first amended complaint could be read to require both defendants to submit a new answer even though the substance of the allegations has not changed, since the defendant’s answer to a verified complaint cannot consist of a simple general denial but must include a specific response to each substantive allegation [CCP §431.30(d)] and must itself be verified [CCP §446].

The court will therefore allow the amendment only to the extent that the need for the amendment has been properly explained in the moving papers (i.e. the need to reassert the original claims against the dismissed individual defendant).

But since plaintiff has offered no explanation of why the proposed first amended complaint includes a verification, the court will not permit the proposed first amended complaint to include the verification.

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Tentative Ruling

Re: ***Beukers v. Via Montana, LLC***
Superior Court Case No.: 08CECG02993
Superior Court Case No.: 08CECG03804

Hearing Date: June 24, 2009 (Dept. 97D)

Motion: By Don Beukers, Teresa Beukers, and Bill Beukers to consolidate

Tentative Ruling:

To Grant.

Explanation:

No opposition has been filed. The factors of CCP § 1048 (a) have been met. Consolidation is being ordered based enhanced efficiency for the court, not because of an increase in filing fees for one of the parties. The lead case with be No. 08CECG03804. The previous stay of that case is hereby lifted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF **on** 6-23-09

(Judge's initials)

(Date)

Tentative Ruling

(5)

Re: ***Eya Dean v. City of Fresno, Davis and Borrego et al.***
Superior Court Case No. 04 CECG 00182

Hearing Date: June 24, 2009 (**Dept. 97C**)

Motion: By Defendants seeking bifurcation

Tentative Ruling:

To grant the motion pursuant to Civil Code § 3295(d).

Explanation:

On May 6, 2009 Defendants filed a motion seeking bifurcation pursuant to Civil Code § 3295(d). No opposition was filed.

Evidence of defendant's financial status is relevant in cases where exemplary damages are sought. See Civil Code § 3294(a) ("where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant") and *Love v. Wolf* (1964) 226 Cal. App. 2d 378, 388–89.

However, Civil Code § 3295(d) provides that, upon defendant's motion, the punitive damages issue must be bifurcated and no evidence of defendant's wealth is admissible until a verdict is reached finding actual damages plus malice, oppression or fraud. It states:

The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.

Accordingly, the motion will be granted.

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Tentative Ruling

Family Tree Farms v. R. Redfeairn Drilling, Inc. et al.
07CECG04259

Hearing Date: June 24, 2009 (Dept. 97A)

Motions: Motion by Plaintiff for Summary Adjudication of Third Cause of Action

Tentative Ruling:

To deny.

Explanation:

1. Evidentiary Objections

Defendants object to the request for judicial notice of two records obtained from the public website of the California Contractors Board. The two records are records of licenses issued by that Board, therefore they are of “official acts” of the executive branch of government. The records are authenticated by the accompanying declaration of Ms. Moriarty. Records of licensing actions by a government entity, or of other official government acts, is proper. For example, it is permissible to take judicial notice of the State Bar’s own actions regarding a particular lawyer. *In re Sodersten* (2007) 146 Cal. App. 4th 1163. A government produced general plan is also subject to judicial notice, for the same reasons. *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (5th Dist. 2007) 150 Cal. App. 4th 683, 733. Defendants’ Objection No. 1 is therefore overruled.

Defendants object to the exhibits to the Moriarty declaration that constitute the contractor board records, and a record from the California Secretary of State website containing information about a corporation. The contractor board records are admissible, as discussed above. The corporate record is not, as it does not involve any licensing or other act of government. A corporate record reflects a filing by non-governmental persons of information which may or may not be true. Defendants’ Objection No. 2 is therefore sustained as to Exhibit C to the Moriarty declaration, but otherwise overruled.

The basis for Defendants’ Objection No. 3 is not really an objection. It is notice to the Court and the parties that the declaration of Muxlow conflicts with the contents of the contracts referenced in the pleadings as well as with the allegations made by Family Tree. Mr. Muxlow did identify the contract at issue as that for the first well. This is not an evidentiary objection, it is a factual dispute, and is therefore overruled.

2. Admitted and Disputed Facts

Family Tree's Facts Nos. 1, 2, and 9 are admitted by defendants. Facts Nos. 6 and 7 are not effectively disputed. The rest of Family Tree's facts are disputed.

Fact No. 3 is disputed by exhibits A and C to the Muxlow declaration as well as by the contents of that declaration, and contradicts allegations of the 2nd and 3rd Amended Complaints. Family Tree is identified either as a limited liability company, a corporation, or without any designation in different documents, along with a gentleman named David Jackson. The names of several defendants appear in the first contract with the Family Tree entity, and the check asserted to involve that first contract is made out to yet another defendant not mentioned therein.

Fact No. 4 is also disputed due where it attempts to limit the contracting party with the license to one entity, when the contract lists more and the payments implicate yet another. Exhibits A and C to the Muxlow declaration furnish the disputing evidence.

Fact No. 5 is disputed in that the evidence offered (the printouts of websites containing information purportedly about defendants) is not admissible as to the corporations, as noted above.

Fact No. 6 is undisputed, as the contractor board information is admissible.

Fact No. 7 is not disputed, as the discovery is clear as to the work done by the person named.

Fact No. 8 is disputed in that there is no evidence as to the time work was ongoing regarding the contracts at issue, only as to the date the contracting license was issued.

Fact No. 10 is disputed by the Muxlow declaration and the exhibits thereto. Exhibit A does not reference the entity paid in Exhibit C. Plaintiff's pleading alleges that the party paid in Exhibit C was the party retained to do another well, see Ex. B to the 2nd Amended Complaint (also referenced in the 3rd Amended Complaint by the same exhibit, which was then not attached as advertised.) Further, the total amount of the two checks does not add up to the amount plaintiff contended it paid in the 3rd Amended Complaint for the first well. See paragraph 9, line 23. The two checks total \$242,200, not \$232,000. The \$100,000 figure in the complaint is listed therein as a deposit for well #2. See paragraph 9, line 19.

Tentative Ruling

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Re: ***Wilkerson v. Esquivel***
Superior Court Case No. 08 CECG 02582

Hearing Date: June 24, 2009 (Dept. 97C)

Motion: Motion for Leave to File Cross-Complaint

Tentative Ruling:

To grant.

Explanation:

If the Defendant's cause of action against the plaintiff and is related to the subject matter of the complaint, then the cross-complaint is compulsory and the defendant must file a cross-complaint in order to request affirmative relief. (Weil & Brown, *Civil Procedure Before Trial* (The Rutter Group 2008) "Pleadings" § 6:511.) Code of Civil Procedure section 426.10 defines "related cause of action" as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." The test to determine whether the cause of action in the cross-complaint is related to the original cause of action is whether the factual or legal issues are logically related. (Weil & Brown, *supra*, at § 6:513; *Currie Medical Specialties Inc. v. Bowen* (1982) 136 Cal.App.3d 774, 777.)

Code of Civil Procedure section 426.50 provides that,

A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action.

Therefore, the court "shall grant" leave to file the cross-complaint at any time during the course of the lawsuit, as long as the defendant acted in good faith. (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98-99) The law strongly favors granting leave to file a cross-complaint to avoid forfeiture of a defendant's related claim. (Code Civ. Proc. § 426.50) In order to deny leave to file, the court must find a strong showing of bad faith by the defendant. (*Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 718) It is not enough that the defendant is guilty of neglect, inadvertence or oversight in failing to file their

Tentative Ruling

(5)

Re: ***Imperial Capital Bank v. Johid A. Mohammed***
Superior Court Case No. 09 CECG 01521

Hearing Date: June 24, 2009 (**Dept. 97C**)

Motions: By Plaintiff seeking a preliminary injunction and
appointment of receiver

Tentative Ruling:

To deny without prejudice on the grounds that the proof of service filed on May 26, 2009 is defective. The proof of service will be stricken sua sponte pursuant to CCP § 436. The Defendant must be re-served and proof of service re-filed.

Explanation:

On May 1, 2006 Defendant borrowed the amount of \$4,585,000 from Pacific Premier Bank secured by a Deed of Trust for property located at 4585 East McKinley Avenue, Fresno, CA. See Exhibits A and B attached to the Declaration of Alfredo Eugenio consisting of the Promissory Note and the Deed of Trust. Plaintiff is the current owner and holder of the Note. On or about February 1, 2009, Defendant failed to pay the monthly installment due on the Note. He has also failed to pay property taxes on the realty consisting of a 96-unit apartment building. On or about April 7, 2009, the Plaintiff recorded a notice of default and election to sell.

On April 30, 2009 Plaintiff filed a complaint alleging a cause of action for breach of promissory note and seeking foreclosure and specific performance of the assignment of rents “by appointment of receiver under the deed of trust”, a preliminary injunction and two common counts. On May 4, 2009 the Plaintiff filed a motion seeking a preliminary injunction and the appointment of a receiver.

On May 26, 2009 proof of service was filed. It indicates that the Defendant was served on May 13, 2009 by substituted service upon “Jane Doe”, “a person at least 18 years of age apparently in charge at the office or usual place of business of the person served.” See page 2 at ¶ 5. However, the first page of the proof of service indicates that the Defendant was served at “home”—1532 Darius Ct., San Leandro, CA. The Declaration of Due Diligence indicates that the “residence address” for the Defendant is 2151 Santa Rita Street, Oakland, CA and an “alternate address” is 1532 Darius Ct., San Leandro. It also states that on May 5, 2009 the server learned that the “given address is incorrect. Subject is unknown to current male occupant of three years.”

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Tentative Ruling

Re: ***Perez v. Vend-Rite Manufacturing, et al.***
Superior Court Case No. 08CECG00533

Hearing Date: **June 24, 2009 (Dept. 97D)**

Motion: Motion to compel discovery responses and for
deemed admitted order against Western State Design

Tentative Ruling:

To GRANT. (Code Civ. Proc. § 2030.290, 2031.300, 2033.280.) Within 10 days, defendant Western State Design shall serve initial responses to Form Interrogatories and Request for Production of Documents, without objection, and shall produce all documents responsive to the requests for production. All objections are waived. The truth of all matters specified in the Request for Admissions is deemed admitted. (Code Civ. Proc. § 2033.280(b).)

To impose monetary sanctions in the amount of \$450 in favor of plaintiff and against Western State Design (Code Civ. Proc. §§ 2023.10(d); 2023.030(a)), to be paid within 30 days of service of the minute order by the clerk.

Explanation:

The discovery at issue was served on Western State Design on 4/14/09. (Harless Dec. ¶ 4.) No extensions of time to respond was requested or given, and no responses have been provided. (Id., ¶ 5.) Accordingly, an order compelling Western State Design to provide initial responses without objections (Code Civ. Proc. § 2030.290(a), 2031.300(a)), and ordering admitted all matters specified in the requests for admission (Code Civ. Proc. § 2033.280(b)), is warranted, and reasonable sanctions must be imposed (Code Civ. Proc. §§ 2023.010(d), 2023.030(a); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404). With respect to the requests for admissions, this will be the order of the court unless Western State Design serves, before the hearing on the motion, a proposed response that is in substantial compliance with CCP § 2033.220.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-23-09.
(Judge's initials) (Date)