

Tentative Rulings for June 25, 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).)

- 07CECG01495 *Lafayette Cade v. Dunbar # T11379* (Dept. 97A)
- 06CECG01584 *Contreras v. County of Fresno* (Dept. 97D)
- 07CECG01654 *Dominique Grammont v. Saint Agnes* (Dept. 97D)
- 08CECG03039 *Arthur Semendinger v. Ca. Dept. of Corrections*
(Dept 97D)
- 08CECG00873 *Keith Pittman v. GSF Properties Inc.* (Dept. 97D)
-
-

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

- 08CECG04214 *Castaneda v. Castaneda*, Motion for Preferential Trial Setting, is continued to June 30, 2009, 3:30 p.m. in Dept. 97D
- 08CECG02902 *Ernest McKinney and Virginia Makini v. HomEq Servicing* (Dept. 97C) is being continued to July 2, 2009 in Dept 97B
- 06CECG03977 *Coletti & Hunter v. Chris Yakligian* is being continued to July 17, 2009 at 3:30 p.m. in Dept 97D.
- 08CECG00445 *Shun Ming Chen v. Kathy Gee* is being continued to July 14, 2009 at 3:30 p.m. in Dept 97A

08CECG04338

***Susan Jones v. Employment Develop Dept.* is being
continued to June 30, 2009 at 3:30 p.m. in Dept. 97B.**

(Tentative Rulings begin at the next page)

Tentative Ruling

Re: **Torres v. Allen, et al.**
Superior Court Case No: 08 CECG 00320 AMS

Hearing Date: Thurs., June 25, 2009 (**Dept. 97C**)

Motion: Motion for Summary Judgment/Adjudication brought by
Defendants Jim and Katherine Allen.

Tentative Ruling:

To DENY the motion for summary judgment. To GRANT the motion for summary adjudication as to the first cause of action. To DENY the motion for summary adjudication as to the second, third, and fourth causes of action. (CCP 437c.)

Explanation:

Defendant brings this motion for summary judgment. To prevail, defendant has the burden of proving that there is a complete defense or that plaintiff cannot establish one or more elements of each of his causes of action. (**Barber v. Marina Sailing, Inc.** (1995) 36 Cal.App.4th 558, 562, 42 Cal.Rptr.2d 697.) To show that plaintiffs cannot establish their claims, defendant may either (1) affirmatively negate one or more elements of each claim, or (2) by relying on plaintiffs' inadequate discovery responses, show that plaintiffs do not possess and cannot reasonably obtain needed evidence. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 855.)

The ultimate burden of persuasion rests on defendant, as the moving party. The initial burden of production is on defendant to show by a preponderance of the evidence, that it is more likely than not that a given element cannot be established or that a given defense can be established. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 850.)

If defendant carries this initial burden of production, the burden of production shifts to plaintiffs to show that a triable issue of material fact exists. Plaintiffs do this if they can show, by a preponderance of the evidence, that it is more likely than not that a given element can be established or that a given defense cannot be established. (**Aguilar v. Atlantic Richfield** (2001) 25 Cal.4th 826, 850, 852.)

Regarding the court's request for additional briefing on immunity of a property owner under **Civil Code 847**, there is insufficient evidence before the court to show whether Plaintiff was charged with burglary or attempted burglary.

(Civil Code 847 (b) (18) and (25); 847 (e).) Even assuming Plaintiff was charged with those enumerated offenses, there is insufficient evidence to show that he was convicted of those felonies or a lesser included misdemeanor. Even assuming Plaintiff's plea of no contest to criminal trespass under Penal Code 602 (l) constituted a conviction, it appears that criminal trespass is NOT a lesser included offense of burglary or attempted burglary. (**People v. Harper** (1969) 269 Cal. App.2d 221; **People v. Irizarry** (1979) 37 Cal. App. 4th 967, 973.) Accordingly, the court cannot grant summary adjudication on the basis of immunity under Civil Code 847.

As to the first cause of action for premises liability. Defendants James and Katherine Allen move for summary adjudication as to the first cause of action because the injury did not occur on their property. Defendants Jim and Katherine Allen testify that Plaintiff was injured on land owned by Ross Allen, James Allen's brother. (Katherine Allen depo at 37; Jim Allen depo at 51, 53, 63, 77.) Ross Allen testified he was not sure whose property it was. (Ross Allen depo at p. 49.) The testimony of Osorio (pp. 23-24, 27, 43), Oropeza (pp. 95-97) and Camacho (p. 28.), cited by Defendants is inconclusive and gives no indication of where Plaintiff was injured.

Defendants carry their initial burden of producing evidence, so the burden of production shifts to Plaintiff to show a triable issue of fact.

In Opposition, Plaintiff fails to present any evidence to show where he was located when he suffered his injury. He merely points out that Ross Allen was unsure where the injury occurred. Plaintiff argues he had no knowledge that the other three men intended to burglarize the Allen home. And he argues that he was not wearing a mask. These points are irrelevant. Accordingly Plaintiff fails to show that a triable issue of material fact exists.

As to the second, third, and fourth causes of action, Defendants James and Katherine Allen move for summary adjudication on the ground that Ross Allen was not acting as their agent. However, Defendants fail to meet their initial burden of production because they fail to present any declarations or other evidence to show that they did not exercise any control over Ross Allen.

Defendants argue correctly that as a general rule, one who performs a mere favor for another, without being subject to any legal duty of service and without assenting to any right of control, is not acting as an agent. (**Flores v. Brown** (1952) 39 Cal.2d 622, 628; **Hanks v. Carter & Higgins of California, Inc.** (1967) 250 Cal.App.2d 156, 161.) Right to control may not be inferred from the fact the act is undertaken for the benefit of another. (**DeSouza v. Andesach** (1976) 63 Cal.App.3d 694, 699.)

But Defendants present no initial evidence on these points, nor do they carry their initial burden to negate Plaintiff's allegation that they controlled Ross

(18)

Tentative Ruling

Re: ***Contreras, et al., v. Cardoza, et al.***
Case No. 07CECG02700

Hearing Date: June 25, 2009 (Dept. 97C)

Motion: By defendant McCain: demurrer to third and fourth causes of action in the first amended complaint (FAC) of plaintiff Frank Contreras III; and motion to strike the prayer for punitive damages in the FAC

Tentative Ruling:

To sustain the demurrer to the third and fourth causes of action that involve defendant McCain, with leave to amend. To grant the motion to strike plaintiff's request for punitive damages, with leave to amend. The court grants plaintiff 20 days leave to amend.

Explanation:

The FAC does not define the term "Lot," yet the third and fourth causes of action involving defendant McCain use the term "Lot." Because this dispute involves the sale of real property involving a parcel split, the parcel at issue must be defined properly in the pleadings. Fraud has not been pled with the requisite specificity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184, citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Plaintiff has not established liability on a theory of negligence because plaintiff has not pled facts sufficient to establish duty, breach, causation, and damages. (*Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1205.) Based on California Code of Civil Procedure (CCP) section 436, the court grants the motion to strike plaintiff's request for punitive damages, as there are insufficient facts pled to demonstrate oppression, fraud or malice based on Civil Code section 3294 subdivisions (a), (b) or (c).

Pursuant to California Rules of Court, rule 3.1312, and CCP 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 A.M. Simpson

6-24-09

Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Merles v. PG&E***
Superior Court Case No. 07 CECG 03615

Hearing Date: June 25, 2009 (Dept. 97A)

Motion: Judgment on the Pleadings

Tentative Ruling:

To grant with leave to amend as to first and third causes of action for negligence and for intentional infliction of emotional distress; to grant without leave to amend as to second cause of action for abuse of process.

Explanation:

A motion for judgment on the pleadings has the same function as a general demurrer in that it is used to challenge pleadings that do not state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 438, subd. (c).) The court reviews the complaint liberally, giving it a "reasonable interpretation, reading it as a whole and its parts in their context." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1323; Code Civ. Proc., § 452.)

Negligence

Defendant contends that the cause of action fails to state facts sufficient because defendant cannot ascertain what duty it breached, i.e., whether it was not to place someone else on his bill, not to place his name on someone else's account, to resolve billing issues or "some other duty." In fact, it could be each of these duties, depending on the contract between the parties.

"A tort, whether intentional or negligent, involves a violation of a legal duty, imposed by statute, contract, or otherwise, owed by the defendant to the person injured." (5 Witkin, *Summary of Cal. Law* (10th ed. 2005) Torts, § 6, italics omitted; *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1078.) Without such a duty, any injury is injury without wrong. (5 Witkin, *supra*, § 6; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57-58 [duty is threshold element of cause of action for negligence].) "The existence and scope of duty are legal questions for the court. . . ." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.)

It is possible that plaintiff could allege a duty arising from a contract with PG&E to bill accurately in accordance with the meter usage. In *Lynch v. Warwick* (2002) 95 Cal.App.4th 267, the court observed that a "wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts" and a "cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed. . ." (*Id.* at p. 273.)

PG&E also asserts that the cause of action falls short for failure to allege damages, but having an extra \$1,300 or so placed on one's account and being expected to pay it adequately alleges damages.

Abuse of Process

"Process is a means whereby a court compels a compliance with its demands.' [Para.] Thus, the essence of the tort 'abuse of process' lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice." (*Meadows v. Bakersfield S. & L. Assn.* (1967) 250 Cal.App.2d 749, 753.) Plaintiff has not alleged any court involvement in PG&E's collection efforts. The motion for judgment on the pleadings is granted without leave to amend.

Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Id.*) "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.) The tort does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Id.*)

Plaintiff has not met this pleading standard. However it is conceivable that he could. If PG&E was calling at all hours of the night, cut of plaintiff's power during a heat wave, or used other abusive tactics to collect, that behavior might arise to that which could not be tolerated in a civilized society. However, plaintiff has not opposed the motion and indicated how this complaint could be amended. On the other hand, "[i]n the case of ... a motion for judgment on the pleadings, leave to amend should be granted if there is any reasonable possibility that the plaintiff can state a good cause of action." (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

The motion is granted as to this cause of action with leave to amend.

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.

(23)

Tentative Ruling

Re: ***Elina Vue v. Dr. Sue Vang, D.D.S., et al.***
Superior Court Case No. 08 CECG 01128

Hearing Date: Thursday, June 25, 2009 (**Dept. 97A**)

Motion: Defendants Su Vang, D.D.S.'s and Britecare Dental's Motion
for Summary Judgment

Tentative Ruling:

To DENY Defendants' Motion for Summary Judgment.

To OVERRULE Defendants' Objection No. 1. To OVERRULE
Defendants' Objection No. 2 as to authentication. To SUSTAIN Defendants'
Objection No. 2 as to hearsay.

Explanation:

1. **Summary Judgment Standard**

The moving party on a summary judgment motion bears the initial burden of production to make a *prima facie* showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850.) The Defendant moving for summary judgment must show that one or more elements of the cause of action in question "cannot be established" or that "there is a complete defense" thereto. (*Aguilar, supra*, 25 Cal. 4th at 850; Code of Civil Procedure § 437c(p)(2).) Where the Plaintiff has the burden of proof at trial by a preponderance of the evidence, the Defendant "must present evidence that would require a reasonable trier of fact not to find the underlying material fact more likely than not." (*Aguilar, supra*, 25 Cal. 4th at 851.) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. (Code of Civil Procedure § 437c(p)(2).)

California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.

(*Munro v. Regents of Univ. of Calif.* (1989) 215 Cal. App. 3d 977, 984-85.) If the Plaintiff is unable to do so, the Defendant is entitled to judgment as a matter of law. (*Saeizier v. Advanced Group 400* (2001) 25 Cal. 4th 763, 780-81.) Finally, the Plaintiff cannot use his own pleadings as evidence to oppose a motion for summary judgment. (*College Hosp., Inc. v. Superior Court* (1994) 8 Cal. 4th 704, 720 fn. 7.)

2. Plaintiff's Complaint: General Negligence (Dental Malpractice)

The Defendants challenge Plaintiff's first cause of action for general negligence on the ground that the Plaintiff cannot establish one or more of the elements of the cause of action. The essential factual elements of negligence are: (1) a legal duty to use due care; (2) a breach of such legal duty; and (3) the breach as proximate or legal cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal. 4th 913, 917.) "A medical practitioner [such as a dentist] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [dentists] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care'." (CACI 501.) Further, "[i]f a reasonably careful [dentist] in the same situation would have referred [patient] to a [medical specialist], then [Defendant] was negligent if [he/she] did not do so." (CACI 508.)

Defendants Su Vang, D.D.S. and Britecare Dental contend that the Plaintiff cannot establish the second element of her claim for dental malpractice because the Plaintiff cannot prove that Defendant Vang breached the appropriate standard of care. In order to establish that their conduct fell within the standard of care, the Defendants have submitted the declaration of Defendant Su Vang, D.D.S. Essentially, an expert's declaration submitted in connection with a summary judgment motion must not be speculative, lacking in foundation, and must be with sufficient certainty. "It is sufficient, if an expert declaration establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion. [Citation.]" (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal. App. 4th 703, 718.) A defendant's expert declaration must be detailed, explaining the basis for the opinion and the facts relied upon. (*Powell v. Kleinman* (2007) 151 Cal. App. 4th 112, 125; *Kelley v. Trunk* (1998) 66 Cal. App. 4th 519, 521, 524-25.) Moreover, the recent case of *Garibay v. Hemmat* (2008) 161 Cal. App. 4th 735 has held that because expert opinion may not be based on assumptions of fact that are without evidentiary support and experts may not recite hearsay as fact, properly authenticated medical records reviewed by the experts must be included in the motion for summary judgment. (*Id.* at. 743.)

Vang's declaration is sufficient to carry the Defendants' burden to establish facts negating Plaintiff's claim of breach of the standard of care. Vang's qualifications are established. (Vang Decl. ¶¶ 1-2.) The declaration has an

adequate foundation and appears to have the requisite personal knowledge. Vang's declaration provides the facts on which Vang has based his opinions and has a detailed discussion of the course of treatment. (Vang Decl. ¶¶ 3-25.) Finally, Vang opines that his care and treatment of the Plaintiff was within the standard of care and that he did not commit malpractice. (Vang Decl. ¶¶ 26-28.)

The Defendants have carried their burden to establish that the Plaintiff cannot prove the second element of his cause of action – defendant's breach of the legal duty of care towards the Plaintiff – with the declaration of Su Vang, D.D.S. Therefore, the Defendants have established a prima facie case that Plaintiff cannot establish one or more elements of Plaintiff's cause of action for general negligence. Therefore, the burden shifts to Plaintiff to show that a triable issue of material fact exists.

In opposition, the Plaintiff has submitted the declaration of Dr. Stuart C. White, D.D.S., PhD. White's declaration is sufficient to create a triable issue of material fact as to whether Dr. Vang violated the appropriate standard of care. White's qualifications are established. (White Decl. ¶¶ 1-2.) The declaration has an adequate foundation and appears to have the requisite personal knowledge. White's declaration provides the facts on which he has based his opinions. (White Decl. ¶¶ 4-13.) Dr. White states that, over the period from the first radiograph (11/11/2004) until just prior to the last radiographs (1/3/2006), there is an apparent failure to detect the abnormal condition of the jawbone, failure to refer the patient to a specialist, and failure to manage the patient appropriately to determine the nature of the lesion. (White Decl. ¶ 14.) White opines that Dr. Vang, D.D.S. failed to use the level of skill, knowledge and care in the diagnosis and treatment of Elina Vue that other reasonably careful and skillful general dentists would use in similar circumstances. (White Decl. ¶ 15.)

As the Plaintiff has provided conflicting expert testimony creating a triable issue of material fact regarding the breach of the standard of care, the Court denies the Defendants' motion for summary judgment.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 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: AMC on June 23, 2009.
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***Helmsman Management Services, Inc. v. Deron Hagopian, et al.***
Case No. 08CECG02173

Hearing Date: June 25, 2009 (Dept. 97D)

Motion: By plaintiff/cross-defendant, demurrer to and motion to strike cross-complaint

Tentative Ruling:

As to the allegations involving indemnity, contribution, and declaratory relief (*i.e.*, the entire cross-complaint) to sustain the demurrer without leave to amend. To grant the motion to strike without leave to amend.

Explanation:

Cross-complainants Hagopian concede that the causes of action for indemnity and contribution “should not be directed at [cross-defendant Leopoldo], but the declaratory relief cause of action is properly directed at him.” A third-party defendant cannot assert a cross-complaint against an employer when the employee is injured due to negligence or partial negligence of the third-party; the employer’s responsibility is limited to workers’ compensation remedies. (*State of California v. Superior Court (Glovsky)* (1997) 60 Cal.App.4th 659, 664.) Therefore, the court sustains without leave to amend the demurrer to the allegations involving indemnity and contribution. As to the request for declaratory relief, when a plaintiff or cross-complainant has other means of seeking a determination of their rights, then a trial judge may sustain a general demurrer to a declaratory relief claim. (*C.J.L. Constr. v. Universal Plumbing* (1993) 18 Cal. App. 4th 376, 390.) When an issue can be raised by means of an affirmative defense, a trial judge may therefore dismiss a declaratory relief claim raising the same questions in the cross-complaint. (*Ibid.*) Therefore, the court sustains without leave to amend the declaratory relief claim. Finally, as to the motion to strike, Cross-complainants Hagopian concede that they do not seek attorney’s fees from Leopoldo. The court grants the motion to strike without leave to amend as there is an insufficient contractual or statutory basis to support an award of attorney’s fees.

Pursuant to California Rules of Court, rule 3.1312, and California Code of Civil Procedure section 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** _____ **6-24-09** _____.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Central Valley Meat Co., Inc. v. Washington Mutual Bank, et al***

Superior Court Case No. 06CECG02746

Hearing Date: June 25, 2009 (**Dept. 97A**)

Motion: By defendant Wells Fargo for summary adjudication of two issues: **(1)** whether claims for checks deposited prior to 8/14/03 are barred by the 3 year statute of limitations, and **(2)** whether claims against Wells Fargo for checks accepted by WAMU are barred as “consequential damages”

Tentative Ruling:

To grant summary adjudication in defendant’s favor on both issues.

Explanation:

There are actually *three* issues raised by this motion, all of which are legal issues rather than factual ones. The facts in this case don’t appear to be seriously disputed, rather the parties disagree on the following:

1. whether a bank customer can state a cause of action for common law negligence based on conduct by the bank that falls within the scope of Comm. Code §3405(b) and §3420
2. whether, under either the Code or common law negligence, the bank customer is barred from recovering on checks deposited more than 3 years before the action was filed
3. whether, under either the Code or common law negligence, the customer can seek consequential damages beyond the value of the instrument wrongfully accepted by the defendant bank.

The authorities cited by defendant (and specifically ***Lee Newman, M.D., Inc. v. Wells Fargo Bank*** (2001) 87 Cal.App.4th 73, ***Stenseth v. Wells Fargo Bank*** (1995) 41 Cal.App.4th 457, and ***Zengen Inc. v. Comerica Bank*** (2007) 41 Cal.4th 239), all make it clear that any common law claims plaintiff would otherwise have are pre-empted if they are based on the same conduct as the statutory claims plaintiff has already pleaded.

Holcomb v. Wells Fargo Bank (2007) 155 Cal.App.4th 490, is distinguishable because the conduct there was the misrepresentation by a bank employee that the funds provisionally deposited into the customer’s account could be drawn on before the statutory time that the issuing bank could dishonor it. Since such misrepresentation is not addressed in the Code, the court found

the common law misrepresentation claim viable, though it noted that the same would not be true for a claim based on failure to comply with the statute allowing “charge back” of a dishonored item, i.e. Comm. Code §4124. 155 Cal.App.4th at 498.

It thus appears that plaintiff cannot state a common law claim for negligence under the fact of this case. But in any case one has not already been pleaded, and for purposes of a motion for summary judgment or adjudication, the “material facts” are those in the pleadings. See Weil & Brown, **Civil Procedure Before Trial** at 10:17.

As for whether plaintiff can claim “delayed discovery” or seek consequential damages under the statutory claims already pleaded, here too the authorities cited by defendant make relatively clear that both issues must be decided in defendant’s favor.

In relation to the statute of limitations issue, while **Wisper Corp. v. California Commerce Bank** (1996) 49 Cal.App.4th 948, did hold that a court could apply the delayed discovery rule to a case where the bank was charged with improperly diverting checks made out to the corporate plaintiff to an account opened up by the company’s employee, there were no statutory causes of action pending and no one raised the issue of whether the plaintiff *could* state a cause of action for common law negligence or conversion.

Here the only causes of action currently pending are statutory, and thus the holding in **AmerUS Life Ins. v. Bank of America** (2006) 143 Cal.App.4th 631, 640 appears to be controlling, i.e. that there can be no delayed discovery rule applied to causes of action governed by the Commercial Code.

And in relation to the issue of whether plaintiff can seek damages beyond those allowed under the Code [i.e. Comm. Code §1305(a) and §3420(a)], none of the authorities cited by plaintiff support a claim that a bank customer can seek damages incurred for instruments that never passed through the defendant bank.

The court will therefore grant the request for summary adjudication, finding that plaintiff cannot recover for checks deposited more than 3 years before this action was filed, and that it cannot recover from Wells Fargo for checks that were deposited with Washington Mutual that never passed through the moving party’s bank.

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.

(5)

Tentative Ruling

Re: ***Catalina Chavez v. Super Mercado Mexico***
Superior Court Case No. 07 CECG 01594

Hearing Date: June 25, 2009 (**Dept. 97D**)

Application: Enter Default Judgment as to Super Mercado Mexico

Tentative Ruling:

To strike the entry of default against Super Mercado Mexico pursuant to CCP § 436 on the grounds that it was an act in excess of jurisdiction and restore the Answer. See *Heidary v. Yadollahi (2002) 99 Cal.App.4th 857, 864.*

A court trial will be set for Friday, August 14, 2009 at 9.00 a.m. in Dept. 97D. Notice is given to Super Mercado Mexico, Inc. that it cannot represent itself. It must have an attorney. See *Merco Construction Engineers, Inc. v. Mun. Ct. (Sully Miller Contracting Co.) (1978) 21 C3d 724, 731.*

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

Tentative Ruling

(RA#24)

Re: ***Leticia Montes, et al. v. Jenelle Osterloh***
Court Case No. 08CECG04022

Hearing Date: **June 25, 2009 (Dept. 97C)**

Motion: 1) Defendant's Motion for an Order Setting Compensation of
Expert Witness Dr. John Arakelian, D.C.

2) Defendant's Motion for an Order Setting Compensation of
Expert Witness Dr. Charles Lewis, M.D.

Tentative Ruling:

To Grant.

Explanation:

Under CCP §2034.470, during the meet and confer process as to the setting of fees for the deposition testimony of expert witnesses, the party whose expert is being deposed, or the expert, must provide the deposing party with (1) proof of the ordinary and customary fee usually charged and received by that expert for similar services provided outside the subject litigation (2) the total number of times the presently demanded fee has ever been charged and received by that expert, (3) the frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion. Plaintiffs, or their experts, failed to timely provide the information required by the meet and confer process, necessitating this motion.

Pursuant to CCP §2034.470(d), this same information is also required to be provided to the court in opposing the motion, with that information to be used by the court in determining the "reasonable fee." In addition, the court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community "and any other factors the court deems necessary or appropriate to make its determination." [CCP §2034.470(e)] Plaintiffs, or their experts, have failed to timely file any Opposition and have failed to formally present any admissible evidence as to the experts' fees under the three criteria mentioned above.

The factors the court considers in making its ruling, as well as the amount deemed "reasonable," are within the trial court's sound discretion. [*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 303] The court is not bound to award the expert's "customary" fee for deposition testimony. It is merely one

factor considered in determining the “reasonable” fee the deposing party must pay for deposing another party’s expert. [*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 304—architect’s “customary” fee was \$360 per hour; court set \$250 as “reasonable” fee]

Since neither plaintiffs nor the experts have substantiated that they have received the fees demanded on a routine basis, or that those fees are within the range charged by similar experts in their field, the court has considered the information presented by defense counsel as to the normal and customary rates charged by similar professionals for deposition testimony. The fees demanded by Dr. Lewis and Dr. Arakelian are well above the amounts customarily charged by similar experts in their respective fields. Therefore, the court finds that reasonable compensation for the deposition testimony of Dr. Lewis in this case shall be set at \$500/hour, and that of Arakelian shall be set at \$350/hour.

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

Tentative Ruling A.M. Simpson **6-24-09s**
Issued By: _____ **on** _____ .
(Judge’s initials) (Date)

Tentative Ruling

Re: **Chen, et al. v. Gee, et al.**
Superior Court Case No. 08 CECG 00445 AMC

Hearing Date: Thurs., June 25, 2009 (**Dept. 97 A**)

Motion: Plaintiff's Motion to Compel Further Responses to Special Interrogatory 62 and RFP 17.

Tentative Ruling:

To GRANT the motion to compel. (CCP 2030.300; 2031.300.) Defendant shall provide further discovery responses and responsive documents within 10 calendar days after an appropriate confidentiality agreement and stipulated protective order has been signed by the court pursuant to the following timetable.

Defendant shall have 10 days' leave within which to fax-serve on Plaintiff a proposed confidentiality agreement and stipulated protective order. The parties shall have 10 days' leave within which to agree on the terms of the confidentiality agreement and stipulated protective order.

If the parties are unable to agree, the court will resolve any disagreements at a hearing to be held on July 22, 2009. The parties may submit briefs detailing their points of disagreement, if any, and setting forth their proposed language (with disputed phrases in boldface type) on or before July 17, 2009.

Time shall run from the clerk's service of the minute order.

Explanation:

The initial burden is on the moving party to present specific facts showing GOOD CAUSE to compel further answers or further production of the requested documents -- that is, that the requested facts or documents are relevant. (Weil & Brown, *Civil Procedure Before Trial*, ¶¶8:1155, ¶ 8:1495; CRC 3.1020 (c); CCP 2031.310 (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.). Then the burden shifts to the responding party to justify the objections or any failure to answer the interrogatories. (Weil & Brown at ¶ 8:1157; 8:1179; *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221; *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255.)

The court finds there is good cause to compel further responses to Special Interrogatory 62 and to compel production of documents in response to RFP 17. The information sought is relevant to uncover the alleged fraud, if any, surrounding the Running Horse Development. The burden shifts to Defendant to

