FOSTER v. IRBC2 PROPERTIES LLC et al

21CV45573

PLAINTIFF'S MOTION FOR RECONSIDERATION

This is a wrongful foreclosure case. The operative pleading herein is the Second Amended Complaint filed 01/05/23. Before the Court is plaintiff's motion for reconsideration of this Court's 01/03/23 order declaring that the lis pendens was to be expunged absent plaintiff's posting of a bond. No bond has been filed, which means that the lis pendens is ready to be expunged (if it has not been already).

Today's motion is procedurally defective. Pursuant to Calaveras County Superior Court Local Rule 3.3.7, "all matters noticed for the Law & Motion calendar shall include" specified language in the Notice of Motion, and "failure to include this language in the notice may be a basis for the Court to deny the motion." Although plaintiff is representing himself, he is still required to adhere to all the procedural requirements for law and motion; Moreover, as plaintiff has been involved in numerous law and motion matters on this case he has actual notice of the provision. Given that the Notice does not include the required language, and further given that defendant has objected to the motion on this very ground, the motion must be DENIED, without prejudice to refile, to the extent it otherwise is timely and appropriate pursuant to relevant statutes.

With that being said, however, since plaintiff may seek to refile the motion if expungement has not yet occurred, this Court would be remiss if it failed to point out that the motion as framed is without merit. CCP §1008(a) requires that any motion for reconsideration be supported by an affidavit from the moving party setting forth "what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown" that could not with reasonable diligence be presented earlier. (See also *Hennigan v. White* (2011) 199 Cal.App.4th 395, 406.) Nothing of the sort is shown here. Since a party filing a motion for reconsideration has an affirmative duty to do so in good faith, a frivolous motion for reconsideration might be the trigger for an award of sanctions to the opposing side. (See CCP §1008(d); *Bockrath v. Aldrich Chem. Co. Inc.* (1999) 21 Cal.4th 71, 82; *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830.)

Motion is DENIED without prejudice. The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal Order is required.

TORMEY et al v. JENNINGS et al

22CV46038

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This is a quiet title action involving an easement for ingress and egress between adjoining parcels APN 012-004-005 and APN 012-004-019, which plaintiffs describe as an easement of necessity given the remoteness of the cabin thereon and the loss of an access bridge previously available to plaintiffs.

Before the Court this day is plaintiffs' application for a preliminary injunction to bar defendants from "blocking" plaintiffs' use of the disputed easement, and to affirmatively remove barriers to that access. Since the sliding scale analysis associated with preliminary injunctions includes consideration of affirmative defenses (see *Aiuto v. City & County of San Francisco* (2012) 201 Cal.App.4th 1347, 1355), and given that there are motions set next week attacking the answer filed on 01/05/23, the hearing on this application is better suited for consideration alongside the demurrer and motion to strike. For this reason, the application for a mixed prohibitory/mandatory injunction is continued to March 3, 2023, at 9:00 am in this department.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal Order is required.

AHMAD v. BAYLESS

22CV46176

DEFENDANT'S MOTION TO AMEND RFA RESPONSES

This is a personal injury action, arising from an automobile accident occurring on July 5, 2022, at the intersection of Burson Road and SR-12. Plaintiff was traveling eastbound on SR-12. Defendant was northbound on Burson, crossing plaintiff's direction of travel with the intention of completing a left turn onto westbound SR-12.

On 09/08/22, plaintiff caused to be served upon defendant a set of Requests for Admission.

On 11/02/22, defendant caused to be served upon plaintiff a verified response to the Requests for Admissions. As it relates to RFA Nos 4-7, 9, and 13-22 (that plaintiff did no wrong and was not comparatively at fault for the accident), defendant responded as follows: "Admit. Discovery and investigation are continuing."

On 11/16/22, defendant sat for a deposition, at which time he reportedly opined that plaintiff may have been driving too fast and that but for his speed defendant would have safely crossed the intersection. This came as a surprise to defense counsel, who was unaware that his client was possessed of that opinion (especially given the RFAs completed just two weeks earlier).

On 12/14/22, and despite defendant's testimony in deposition regarding a basis for comparative fault, plaintiff filed a motion for summarily adjudicate concerning *all but* the First (failure to state), Fourth (litigation) and Eighth (set-off) affirmative defenses set forth in defendant's Answer filed 08/30/22. Plaintiff seeks summary adjudication of the remaining eight (8) affirmative defenses, based generally on defendant's sworn RFAs that plaintiff did no wrong and was not comparatively at fault for the accident. Plaintiff's MSA is scheduled to be heard next week (March 3).

On 01/05/23, defendant filed the pending motion for leave to revise the responses previously provided to RFA Nos 4-7, 9, and 13-22 agreeing that plaintiff did no wrong and was not comparatively at fault for the accident. For each RFA, defendant would now like to revise those sworn responses as follows: "Deny."

As a preliminary matter, "each response shall answer the substance of the requested admission, or set forth an objection to the particular request." (CCP §2033.210(b).) That answer "shall be as complete and straightforward" as possible, and consist of either (1) an admission, (2) a denial, or (3) a professed inability to do either because the information known or readily obtainable is insufficient to enable the responding party to admit or deny. Because admissions are designed to put triable issues to rest, and denials are subject to possible sanctions, it has become commonplace for lawyers to

insert “soft” admits like the one defendant offered here. (See CCP §2033.420(a); *Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529. *City of Glendale v. Marcus Cable Assocs., LLC* (2015) 235 Cal.App.4th 344, 354, 359; *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865.) However, an admission must be “as expressed in the request itself or as reasonably and clearly qualified by the responding party.” (CCP §2033.220.) In other words, the Code does not permit a party to “admit” a matter set forth in an RFA, but then claim that “discovery and investigation are ongoing” – as if to suggest that the admit is contingent. Although plaintiff did not move to compel a further response removing the “discovery and investigation are continuing” verbiage (CCP §2033.290), this Court views the original responses as unqualified admissions.

Pursuant to CCP §2033.300, a party seeking leave of court to revise a previous admission must first demonstrate by a preponderance of the evidence that the earlier sworn admission was “the result of mistake, inadvertence, or excusable neglect.” In determining whether that occurred, the court inquires whether a reasonably prudent person might have made the same error under the same or similar circumstances. Critical to this inquiry is the reasonableness of defendant’s misconception/confusion, the diligence performed, and the justification for proceeding without caution. (See *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1419; in accord, *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1112; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206; *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1141-1142; *Generale Bank Nederland, N.V. v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682-684.)

The evidence proffered by defendant and defense counsel is essentially this: defendant always felt that plaintiff might have been driving too fast but did not feel as though it was worth mentioning so never told counsel. This might show ignorance, but that is not excusable neglect – nor is it a mistake of fact. There is very little basis for concluding that the various admissions were made in error, especially as defendant *verified* the responses. Instead, it seems that the concern lies not with the truth of the discovery but rather with the impact the RFAs have on the pending MSA. However, since defendant offered his opinions of plaintiff’s wrongdoing in deposition four weeks *before* plaintiff’s MSA was filed, the degree of “prejudice” to plaintiff is not substantial in light of this Court’s options for redress. As there is policy favoring accuracy in evidence and bona fide revisions to RFA responses, denial of a motion for relief “is limited to circumstances where it is clear that the mistake, inadvertence, or neglect was inexcusable, or where it is clear that the withdrawal or amendment would substantially prejudice the party who obtained the admission in maintaining that party's action or defense on the merits.” (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420.) Defendant has shown enough here to meet the burden of proof, albeit barely.

When a motion to revise a prior RFA admission is granted, the trial court is empowered with wide latitude to remedy the condition and level the playing field. As set forth in §2033.300(c), a trial court may allow the plaintiff here “to pursue additional discovery

related to the matter" at defendant's expense, which may include reasonable attorney fees associated therewith. (See *Rhule v. Wavefront Tech., Inc.* (2017) 8 Cal.App.5th 1223, 1227-1228.) To that end, defendant's motion for leave to amend his responses to RFA Nos 4-7, 9, and 13-22 from "Admit. Discovery and investigation are continuing." to "Deny." is GRANTED. Defendant shall, within 5 calendar days, serve a revised verified RFA response consistent herewith, as well as a complete, substantive, objection-free, verified response to Form Interrogatory 17.1. Defendant's original responses to both the RFA and FI 17.1 may still be used as impeachment (see *Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 405), and his new RFA responses may be subject to a motion for prove-up costs (CCP §2033.420). Plaintiff is entitled to retake defendant's deposition, limited to the topics raised in the revised RFA and FI 17.1 responses, and defendant shall bear all costs associated with at deposition (including court reporter and plaintiff's counsel's time in deposition). Moreover, if defendant shall hereinafter designate an expert witness to testify regarding plaintiff's "fault" for the accident, the defense shall cover the cost of that deposition as well (expert time plus court reporter plus plaintiff's counsel's time).

As for plaintiff's MSA, despite defendant's contention, it is not clear to this Court that the MSA is necessarily moot *in toto* since plaintiff relied on his own evidence and other written discovery responses. However, in an abundance of caution, the MSA shall be continued at least four weeks – to a date agreeable by the parties – and plaintiff shall be entitled to raise in the reply papers information newly obtained as a result of today's order. Alternatively, if plaintiff elects to withdraw the MSA altogether based on today's order, this Court will entertain briefing on the question of whether §2033.300(c) goes far enough to reimburse a party for a MSA rendered moot when filed in reliance on original RFA responses.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendant to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity herewith.

BUTLER v. COMMERCIAL SITE IMPROVEMENTS

22CV46383

DEFENDANT'S DEMURRER TO COMPLAINT

This appears to be a wage-hour dispute. Before the Court is a defense demurrer to the operative Complaint. The demurrer is deemed off-calendar, without prejudice, for the following various reasons.

First, pursuant to Calaveras County Superior Court Local Rule 3.3.7, (effective since 1/1/18) "all matters noticed for the Law & Motion calendar shall include" specified language in the Notice of Motion, and "failure to include this language in the notice may be a basis for the Court to deny the motion." Defendant did not include this required language.

Second, it is not clear from defendant's general appearance what its legal status is. A properly-formed company/entity cannot appear "in pro per" in litigation in a court of general jurisdiction, and cannot appear through an officer or agent who is not an attorney. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 730; *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1149; *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284; *Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 547.) If Commercial Site Improvements is simply a dba of Ms. Batch, the general appearance must so state. (See *Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694, 701; *Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.)

Third, every demurrer must include a declaration attesting to a good faith effort to meet and confer with the pleader beforehand (CCP §431.40), and the papers on file here do not include any such declaration.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal Order pursuant to Rule of Court 3.1312 is required.

ZAMORA v. CLAPP

22CV46467

(Related to 16CV41649 and 19PR8129)

DEFENDANT'S DEMURRER TO COMPLAINT

This is a partnership dispute involving the management of real property and two residential units thereon. Before the Court is a demurrer to the operative verified Complaint, which includes causes of action for breach of fiduciary duty, fraud, negligence and waste. The basis for the demurrer is simple: this action should either abate or await the conclusion of the appeal in 16CV41649.

Pertinent Background

In November of 2007, Gus Zamora (father, now deceased), Dave Zamora (son and acting trustee of father's trust) and Clyde Clapp (Gus' close friend) pooled together their respective resources to acquire APN 073-044-006, commonly known as 1521 Country View Drive in Valley Springs. Although all three were to share equally in the $138,000 down payment, Dave or Gus (the pleading is unclear) advanced Clyde's share. The balance of the purchase price was covered by a loan from Indymac.

Over the years, the parties contributed different efforts to the property, which eventually came to house a second rental dwelling. Shortly after the second dwelling was rented, a disagreement arose between the parties regarding contributions and sweat equity, prompting Gus to file a lawsuit against Clyde (16CV41649). Given to his advanced years (91) and diminishing health, Gus was represented throughout most of the case by his son Dave, in the latter's capacity as a *guardian ad litem*. Gus died while the action was pending. The dispute was subject of a bench trial in April of 2021. Following witness testimony and the admission of nearly 200 exhibits, this court found that a partnership did exist, that it was not impliedly terminated by Gus or Dave, and that Clyde breached his fiduciary duties to the other partners by treating the property as his own (recording title and keeping rent checks). Judgment was entered for Gus and Dave. This Court ordered that the subject property was to be sold, with Clyde taking 1/3 of the net proceeds and Gus/Dave to receive the balance. (See Statement of Decision dated 06/21/21, and Judgment entered 09/07/21.) This Court denied Clyde's motion for a new trial. Clyde filed an appeal, which remains active in the briefing phase. (See C095440.)

On 04/21/22, Clyde listed the property sale for $589,000 (see CCARMLS #2006073) on his own and without involving Dave or this Court. Dave filed a motion for a preliminary injunction in the probate case (19PR8129), barring Clyde from proceeding with the sale without acknowledging Dave's interest therein. Clyde removed the listing two months

later in response to this Court's granting of a TRO (see Minute Order dated 06/16/22) and preliminary injunction (see Minute order dated 08/05/22). This Court advised the parties that they could sell the property if they wanted to work together and hold the funds in a constructive trust pending the resolution of the appeal, but to the extent Clyde may prefer to keep the property should the appeal go his way, any sale would have to wait. Although plaintiff herein contends that Clyde is causing waste to the property, that is arguably a matter to be taken up after the appeal (since if the property ends up belonging to Clyde, his "waste" is irrelevant).

The Pending Demurrer to Abate

First, pursuant to Calaveras County Superior Court Local Rule 3.3.7, "all matters noticed for the Law & Motion calendar shall include" specified language in the Notice of Motion, and "failure to include this language in the notice may be a basis for the Court to deny the motion." Defendant did not include this required language.

Second, every demurrer must include a declaration from the filing attesting to a good faith effort to meet and confer with the pleader beforehand (CCP §431.40), and the papers on file here do not include any such declaration. The declaration from Attorney Foley only addresses a proposed stay of the case, not the legal and factual issues supporting a demurrer.

Finally, this appears to be a special demurrer to the entire Complaint and all four causes of action therein on the singular ground that "there is another action pending between the same parties on the same cause of action." (CCP §430.10(c).) This is commonly referred to as a plea in abatement. (See *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 789.) There must be the same exact causes of action in both cases for abatement to apply (see *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1384), and defendant has not established this parity without a Request for Judicial Notice or other evidence to consider. There are certainly overlapping interests in the case at bar and 16CV41649, but as plaintiff notes, the claims relate not only to past wrongs but to ongoing shortcomings by Clyde as a partner (allowing the property to fall into disrepair and not making it as productive as possible).

Nevertheless, this Court agrees with the defense that a stay is warranted. Pursuant to CCP §128(a)(3), every court has the power to provide for the orderly conduct of proceedings. Courts should consider the interests of the plaintiff in proceeding expeditiously, the burden (if any) on the defendant, the convenience of the court in the management of its cases and the efficient use of judicial resources, and the overarching interest of the public in the pending litigation. (*Avant! Corp v. Superior Court* (2000) 79 Cal.App.4th 876, 884.) When the request for a stay is premised on related litigation in another forum, a court should consider the interests of justice and judicial economy, the cost of multiple and vexatious litigation, any risk of inconsistent rulings, the ability of the litigants to obtain full relief, and the convenience of the parties. (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574-575.) A stay is appropriate where there is a strong

probability that issues necessary to a determination of the action would be concluded, in whole or in part, in the other proceeding. (*Federal ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1373; *Belnap Freight Lines, Inc. v. Petty* (1975) 46 Cal.App.3d 159, 164.) Here, the appellate court most likely will resolve some of the issues herein. Moreover, to the extent ownership interests are subsumed within the appellate court's jurisdiction, a mandatory stay might also be in place. (CCP §916.)

Demurrer OVERRULED. This case is hereby stayed in the interests of justice. Case Management Conference scheduled for 4/12/23 is continued to August 30, 2023, at 1:30 p.m. in Department 4. The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this Ruling.