POKER FLAT PROPERTY OWNERS ASSN v. HALTER, et al

22CV45853

DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

This is a limited jurisdiction, civil collection action involving an alleged failure to pay HOA dues. Before the Court this day is a motion by one of the residents – defendant Chet Cummins – to set aside the entered default judgment. Defendant contends that the default judgment entered against his was void *ab initio* for want of personal jurisdiction (inadequate service of summons). No opposition to the motion appears in the court file, although it does appear that plaintiff and creditor-assignee were provided notice by mail of today's motion. Nevertheless, the absence of opposition does not immediately equate with a grant of the relief requested.

Initially, the Court notes moving defendant failed to comply with Local Rule 3.3.7's required notice mandated to be included in the notice of motion. Said local rule additionally provides that failure to include the notice specifically is a grounds for denying a motion. However, in the interests of justice in light of the ramifications of denying the present motion on purely procedural grounds, and the lack of opposition, the Court will address and rule on the merits of the motion.

Based on the proof of service and accompanying declaration of diligence, defendant was sub-served via an unnamed female "co-occupant" at 2204 Belsera Drive in Oakdale on 03/06/22 at 1:30 p.m. The declaration further reveals that the process server made two prior attempts to pass the *community* gate, "with no success." Both the request for entry of default, and the notice of entry of default judgment, were mail-served to defendant at the same Belsera address. Curiously, though, the memo of costs was mail-served to defendant at a *different* address, to wit: P.O. Box 12230 in Oakdale.

Defendant avers that the Belsera address is neither his primary dwelling, nor his usual place of business. He indicates residence at a different location in the City of Oakdale, and implies that the Belsera property is one of his rental/investment properties only. He further avers that the tenants never informed him of the legal papers received. Finally, defendant avers that he first learned about the lawsuit (and ensuing default judgment) after receiving the memo of costs at his P.O. Box (noted *supra*).

Defendant has more than adequately demonstrated that both the entry of default and the default judgment were void for want of proper service. (See *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 134; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750; *Giorgio v. Synergy Mgmt. Group, LLC* (2014) 231 Cal.App.4th 241, 248-249; *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 185.) Initially, plaintiff's process server was not entitled to

graduate to sub-service after making only one attempt to personally serve defendant at the Belsera residence. (CCP §415.20(b).) The fact that this was an unmanned gated community is of no consequence. (See CCP §415.21(b).) Additionally, the declaration fails to include any showing that the process server confirmed defendant's occupancy, or made any effort to confirm defendant's connection to the property. (See *Corcoran v. Arouh* (1994) 24 Cal.App.4th 310, 315; *Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1415-1417.) The process server made only one attempt to personally serve defendant after breaching the community gate, and immediately converted to sub-service on the alleged "co-occupant". Defendant owns two units within the community on Thompson Lane/Poker Flat Road, but no effort to serve him there occurred – even though this is the address used by plaintiff for service of required statements and deficiency notices (see Rushkin Decl with exhibits, including CCR Art. VI(3)(d)).) Plaintiff apparently had a valid P.O. Box for defendant, and should have at minimum used that as well (even though that alone would not be sufficient – see CCP §415.20(a)).

Use of the wrong address for defendant until the time to seek post-judgment costs reveals two things: first, that plaintiff did not make a good faith attempt to convey actual notice to defendant of these proceedings; and, second, that neither the judgment entered, nor the original entry of default, can stand. The motion to set aside the default judgment is GRANTED. The entry of default is set aside. Defendant's proposed answer is accepted for filing. The writ of execution is hereby rescinded, as is the assignment of judgment.

A case management conference shall be set for April 5, 2023, at 1:30 p.m. in Department 4. The clerk is directed to give notice to the parties hereof. No further formal order shall be required.

HAMPTON v. EAST BAY MUNICIPAL UTILITY DISTRICT, et al

22CV46329

EBMUD'S DEMURRER TO FAC

This is a personal injury action. Plaintiff generally alleges that while recreating along the south shore of Lake Camanche, near the Arrowhead campground, he suffered serious life-altering injuries after diving into the water and striking a submerged boulder.

The operative pleading is the First Amended Complaint, filed 03/107/22. Before the Court this day is a demurrer by co-defendant East Bay Municipal Utility District (hereinafter "EBMUD") to both the first (general negligence) and second (premises liability) causes of action, as well as to the distinct count within the second cause of action for "dangerous condition of public property." The overarching theme of the demurrer is that the claims are not well-pled, and that statutory immunities prohibit plaintiff from maintaining a personal injury cause of action against this particular public-entity defendant for engaging in a hazardous recreational activity (diving into shallow water) and striking a natural condition (submerged boulder). Plaintiff contends that he has alleged enough facts to satisfy the pleading requirement, to fit into an exception to the referenced immunities, and further contends that should this Court finds the pleading inadequate, plaintiff has additional facts.

Defense Request for Judicial Notice

Defendant asks this Court to take judicial notice of the two operative pleadings, as well as plaintiff's prior sworn declaration. Asking a court to take judicial notice *of a document* is asking the court to take judicial notice of its existence and – to the extent it is not subject to dispute – the significance or legal effect of its existence, if any. Taking judicial notice of a document does not equate with any determination regarding the truth of its contents or accepting a particular interpretation of its meaning. There are, however, two exceptions to this limiting rule: first, a trial court can take judicial notice of facts found true and set forth in court orders/judgments; and second, a trial court can take judicial notice of facts set forth in the pleader's prior sworn statements (declarations and discovery responses) if truly inconsistent, with no plead around. (See, *e.g., People v. Franklin* (2016) 63 Cal.4th 261, 280; *Hearn Pacific Corporation v. Second Generation Roofing Inc.* (2016) 247 Cal.App.4th 117, 129-131; *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 659-660; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057; *Williams v. Southern Calif. Gas Co.* (2009) 176 Cal.App.4th 591, 600; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) Here, defendant has not asked this Court to take judicial notice of a fact set forth in plaintiff's prior

declaration, only the existence of that declaration. As such, and on that limited basis, the three requests for judicial notice are GRANTED.

Adequacy of Plaintiff's Causes of Action

A pleading is adequate if it contains a reasonably precise statement of the ultimate facts, in ordinary and concise language, and with sufficient detail to acquaint a defendant with the nature, source and extent of the claim. (CCP §§ 425.10(a), 459; in accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 236; *Tung v. Chicago Title Co.* (2021) 63 Cal.App.5th 734, 758-759.) A demurrer on the grounds of failure to state (CCP §430.10(e)) will be overruled if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants even though the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown. (*New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714; *Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 566; *Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 352.)

Turning first to plaintiff's statement of a claim, public entities can only be held liable for negligence if a statute specifically provides for such. (Gov. Code §815; *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803-804 [no common law negligence against public entities].) To adequately state a cause of action against a public entity, the pleader must set forth ultimate facts with particularity, averring "every fact material to the existence of its statutory liability." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795; *City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138.) This requires, at a minimum, that the pleader identify the precise statute or regulation creating the basis for liability. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1458; *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802.)

Plaintiff has identified for both causes of action (negligence and premises liability) Govt. Code §835. Pursuant thereto, a public entity may be held liable for a dangerous condition of its property only if (1) the condition complained of creates a substantial risk of injury when used with due care in a reasonably foreseeable manner; (2) the injury was proximately caused by the condition; (3) the condition created a reasonably foreseeable risk of the kind of injury suffered; and (4) either (a) the condition was created by an employee within the scope of his or her public employment, or (b) the entity had actual or constructive notice of the condition sufficiently in advance of the incident to have taken measures to protect against the risk involved, including repair, warnings, or safeguards. (See, *e.g., Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 519-520 [uneven walkway]; *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 753-754 [crosswalk with no signals]; *Hedayatzadeh v. City of Del Mar* (2020) 44 Cal.App.5th 555, 561-568 [lack of pedestrian barriers]; *Huerta v. City of Santa Ana* (2019) 39 Cal.App.5th 41, 48-51 [poor street lighting]; *Fuller v. Department of*

Transp. (2019) 38 Cal.App.5th 1034, 1042-1043 [narrow roadway]; *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1107 [raised sidewalk].)

Although the notice of demurrer indicates that plaintiff failed to state a claim – separate from the various immunities – defendant in fact did not brief or argue that the claim was inadequately stated sans immunities. Without expressly finding that plaintiff has indeed adequately stated a claim under Govt. Code §835, this Court will assume no such contention and move on to the immunities.

Since immunities are affirmative defenses (see *Quigley, supra* at 808), to prevail thereon at the demurrer stage defendant would have to show clearly and affirmatively, upon the face of the operative pleading or from matters subject to judicial notice, that the claims are necessarily and unquestionably barred as a matter of law – even if all facts pled turn out to be true. (See *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42; *Silva v. Langford* (2022) 79 Cal.App.5th 710, 723; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726; *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1324; *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183.) This is a high bar at the pleading stage, and one not easily surmounted. Critically, the hearing on demurrer may not be turned into a contested evidentiary hearing. (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477; *Silguero v. Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 64.)

Defendant points first to Govt. Code §831.2, which provides a purposefully broad immunity for injuries "caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." This statute was enacted to encourage public entities to keep open to the public unaltered recreational areas without fear of liability, or obligation to improve. Assuming the injury-producing instrumentality was natural, the immunity applies unless there was some human involvement creating, contributing to, or exacerbating the danger associated with it. The fact that some human intervention has occurred in the past does not remove the immunity if the resulting condition sufficiently mimics what would have occurred in nature. (See *City of Chico v. Superior Court* (2021) 68 Cal.App.5th 352, 361-365; *County of San Mateo v. Superior Court* (2017) 13 Cal.App.5th 724, 734-738; *Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, 1487-1489; *Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 362-363; *Meddock v. Yolo County* (2013) 220 Cal.App.4th 170, 178-179.)

Plaintiff alleges that he was injured after diving/jumping into lake waters, striking a submerged rock of which he was unaware. Were this the full extent of plaintiff's allegations, the immunity would apply. However, plaintiff further avers that (1) defendant actually placed the boulder near the edge of the shore in such a way as to conceal its presence, and (2) defendant purposefully manipulated the water level in a such as way as to make it harder for an invited user to see the submerged rock. If these facts prove to be true, the immunity likely fails.

Defendant relies heavily on the decision in *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184. In that case, the trial court decided on summary judgment that the county was immune from suit for injuries resulting after plaintiff dove into shallow water, striking a sand bar, because "this case contains no evidence of human alteration at the accident site." (*Id*. at 189.) Similar conclusions in cases involving injuries from shallow dives were reached in *Valenzuela v. City of San Diego* (1991) 234 Cal.App.3d 258, 262; *Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314-316; *Rombalski v. City of Laguna Beach* (1989) 213 Cal.App.3d 842, 852-853; *City of Santa Cruz v. Superior Court* (1988) 198 Cal.App.3d 999, 1005-1007; *Geffen v. County of Los Angeles* (1987) 197 Cal.App.3d 188, 195; and *Fuller v. State of California* (1975) 51 Cal.App.3d 926, 938. Though reaching seemingly opposite ends, *Morin* is also consistent with cases permitting plaintiffs to proceed, such as *Buchanan v. City of Newport Beach* (1975) 50 Cal.App.3d 221, 224; and *Keyes v. Santa Clara Valley Water District* (1982) 128 Cal.App.3d 882, 890. What unites all of these cases is a factual showing that the public entity had a direct hand in making what was once a harmless natural condition a hidden trap for the unwary. Plaintiff alleges that defendant did just that, which means this immunity cannot be decided as a matter of law at the pleading stage.

Defendant next points to Govt. Code §831.7. Pursuant thereto, a public entity may be immune from liability for injuries suffered by an individual "diving into water from other than a diving board or diving platform." The statute is intended to be expansive in scope and immunize public entities and their employees from liability for all injuries that can reasonably be deemed to have arisen out of an individual's participation in a hazardous recreational activity conducted on public property. However, and despite an intentionally broad reach, the immunity does not apply if the public entity (1) failed to warn of a known dangerous condition, (2) recklessly promoted diving in that manner, (3) was engaged in a substantial work of improvement causally related utilized in the hazardous recreational activity out of which the damage or injury arose, or (4) was grossly negligent. (See Govt. Code §831.7(c)(1); *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 154; *Mubanda v. City of Santa Barbara* (2022) 74 Cal.App.5th 256, 262-263; *Haytasingh v. City of San Diego* (2021) 66 Cal.App.5th 429, 445; *Perry v. East Bay Regional Park Dist.* (2006) 141 Cal.App.4th 1, 12-13; *Berry v. State of California* (1992) 2 Cal.App.4th 688, 692.)

There is no question that – as a matter of law – plaintiff was engaged in a hazardous recreational activity, which triggers the §831.7 immunity. Plaintiff admits that "I dived into the water from a rock," and as noted in many appellate opinions, with jumping off a rock into shallow waters, "the danger is obvious." (*Valenzuela*, *supra* at 262.) However, he claims that there are factual issues relating to the application of one or more exceptions to the rule of immunity. Although §831.7(c)(1)(A) [assumption of the risk], (1)(B) [fee for diving] , and (1)(D) [active promotion] do not apply, defendant has not established through the pleadings that (1)(C) [negligent work of improvement] and/or 1(E) [gross negligence] cannot – as a matter of law – do not apply in the case at bar in light of plaintiff's averment that defendant purposefully placed the large boulder near the

shoreline. This is the pleading, and both sides no doubt recognize that overruling the demurrer has no impact at all on any future motion for which actual evidence may be considered. Almost every “dive into public waters” case has resulted in a defense verdict, and in this instance plaintiff’s only claim – that defendant placed the subject boulder on purpose – might be easily refuted in discovery. That however is not before the Court at the initial pleading stage.

Demurrer OVERRULED. Defendant to answer in 10 court days. 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.