SMITH v. CARTWRIGHT

21CV45132

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

At its essence, this is a landlord-tenant dispute. Defendant is the record owner of 5348 Messing Road in Valley Springs, and leased the property to plaintiff with an option to purchase at a fixed sum within two years. According to plaintiff, defendant reneged on the agreement, and secretly recouped rent from tenants in the "front" house on the property despite plaintiff's rental agreement purportedly covering both residences. The history between plaintiff and defendant is complex, as reflected in the various legal proceedings between them. (See 20CH45068, 21UD13373, 21UD13416, and 21CH45278.) In this seemingly ordinary civil action, plaintiff alleges thirteen (13) causes of action, ranging from breach of contract to invasion of privacy and assault.

Before the Court is plaintiff's motion for judgment on the pleadings (defendant's answer, filed 09/02/21), and defendant's separate *ex parte* application for leave to file an amended answer. Defendant's answer is arguably deficient because it is not verified (CCP §446(a)) and defendant did not allege in the answer an exception to the verification requirement (see *Paul Blanco's Good Car Co. Auto Group v. Superior Court* (2020) 56 Cal.App.5th 86, 110). However, the proper way to address this deficiency is with a motion to strike under CCP §436(b), not a motion for judgment on the pleadings under CCP §438(c)(1)(A), and the failure to timely file a motion to strike waives the defect. (See *Zavala v. Board of Trustees* (1993) 16 Cal.App.4th 1755, 1760-1761.) Considering that defendant's former attorney filed the answer in haste just prior to withdrawing from the case, and that this answer has been of record for over 10 months, plaintiff's request for any dispositive relief is unwarranted.

A motion for judgment on the pleadings is only proper where "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." That is not the case here. Plaintiff's Motion for Judgment on the Pleadings is **DENIED**; Defendant's ex parte application for Leave to file a Verified First Amended Answer is **GRANTED**. Defendant shall have 20 days to file and serve a Verified First Amended Answer.

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 with this ruling.

BARR v. COUNTY OF CALAVERAS

18CV42976

PLAINTIFF'S MOTION FOR RECONSIDERATION

This is an employment dispute, based principally on the theory that plaintiff was retaliated against after blowing the whistle on department irregularities, and ultimately denied a promotion for which he was allegedly qualified. Before the Court is plaintiff's motion to revisit this Court's 01/07/22 ruling summarily adjudicating in defendants' favor plaintiff's 8th cause of action for *negligence per se* because it was not a stand-alone cause of action, also finding that in the context of public entity liability, it was surplusage.

Plaintiff's motion, which is described as a motion for reconsideration under CCP §1008, is defective in numerous respects.

First, a motion for reconsideration may only be pursued by the party aggrieved "within 10 days after service upon the party of written notice of entry of the order." (CCP §1008(a).) Plaintiff was served with notice of this Court's 01/07/22 order on 01/14/22 and (after plaintiff's objections were overruled) on 02/14/22. The pending motion filed 07/01/22 was obviously well outside the 10-day window. (See *Novak v. Fay* (2015) 236 Cal.App.4th 329, 335-336.) Although the "changed circumstance" underlying the motion only occurred a few days prior to the filing of this motion, the "changed circumstance" rule for reconsideration (CCP §1008(b)) as a renewed motion only applies to the "party who originally made an application for an order" and that was defendants, not plaintiff. (See *Torres v. Design Group Facility Solutions, Inc.* (2020) 45 Cal.App.5th 239, 243.)

Second, even if the motion for reconsideration were somehow timely, *negligence per se* is not – nor has it even been – a stand-alone cause of action distinct from ordinary negligence. Instead, it is an evidentiary doctrine which creates a rebuttable presumption affecting the elements of breach and duty when an identified statute, ordinance, or regulation is violated. Evidence Code §669 only addresses the breach, not the underlying legal duty to act. (See *Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1210-1211; *Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 596; *David v. Hernandez* (2014) 226 Cal.App.4th 578, 584; *Cal. Service Station and Auto. Repair Ass'n v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1178.)

Third, there is no such thing as garden-variety negligence when suing a public entity. The California Government Claims Act abolishes all public entity common law tort liability, which means that the underlying duty to act must exist within a specific statute imposing a duty to act on a public entity. (See Govt. Code §815; *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803-804; *City of Los Angeles v.*

Superior Court (2021) 62 Cal.App.5th 129, 138.) In that respect, "there is no legal difference" between a claim for negligence *per se* pursuant to Evidence Code §669 and a claim for breach of a mandatory duty pursuant to Govt. Code §815.6. (See *Bologna v. City and County of San Francisco* (2011) 192 Cal.App.4th 429, 435; in accord, *Hoff v. Vacaville Unified School District* (1998) 19 Cal.4th 925, 939; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 430; *Hernandez v. County of Marin*, WL1207231 at *5 (N.D. Cal. 2012).) This Court carefully considered every conceivable basis raised by plaintiff to support the 7th cause of action for breach of a mandatory duty, and found each basis lacking in law or fact. Since no viable basis exists for liability under Govt. Code §815.6, there can be no viable claim for "negligence per se" based upon the same enactments (as this Court has already observed).

The motion for reconsideration is **DENIED**.

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 with this ruling.

DAY v. GRIFFIN

19CV43812

PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES

This is a breach of contract action involving a joint venture to cultivate and sell marijuana. Before the Court are discovery motions by plaintiff seeking responses to Special Interrogatories and a Request for Production of Documents. No opposition has been filed.

On 10/15/21, plaintiff served on defense counsel, via electronic mail, Special Interrogatory No. 32. Defendant did not serve any response.

On 03/17/22, plaintiff served on defendant, via electronic mail, Request for Production of Documents Nos. 1-12. Defendant did not serve any response.

On 06/01/22, counsel for plaintiff emailed defense counsel to inquire about the overdue responses to the RPD. Defense counsel did not respond.

On 07/11/22, plaintiff filed and served the pending motion. Although the motion involves both the Special Interrogatory and the RPDs, thus requiring the tender of two filing fees per Govt. Code §70617, defendant has not responded to the motion (going so far as to mention his own discovery goals in the recent CMC statement, but failing to acknowledge these pending motions).

This Court would like to believe that the silence is explainable, but for present purposes all this Court has is a prima facie display of a discovery abuse. The motion to compel a substantive, verified, objection-free response to the Special Interrogatory and the RPDs is GRANTED. Defendant is ordered to answer the special interrogatory and provide a response, including all responsive documents in his care, custody, or control, verified, without objection, within 20 days. Moreover, pursuant to CCP §2023.030(a) and CRC 3.1348(a) (given the absence of opposition), defendant is ordered to reimburse plaintiff $510 (representing 1.5 hours at this community's going rate of $300 per hour plus filing fee) within the same 20 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, and to serve defense counsel both electronically and by certified mail, return receipt (to avoid any suggestion that email has failed defense counsel).

CALLISON v. ORTIZ

20CV45077

PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY

This case involves an allegedly broken promise to use the equity from the sale of real property to reduce an existing judgment. In 2017, plaintiff Dan Callison secured a stipulated judgment against co-defendant Dan Riordan for $965,000.00. In 2019, defendants Rose Ortiz and Dan Riordan executed an Assignment of Equity in favor of plaintiff, pledging "in reduction of that certain Judgment all right title and interest in any and all equity which they may hold in 2235 Skunk Ranch Road, Murphys." In 2020, defendant Ortiz transferred by way of grant deed the subject property, and reportedly failed to tender over to plaintiff any equity from that transaction – which plaintiff estimates to be in the range of $200,000.00.

Before the Court this day are eight (8) discovery motions, including Form Interrogatories, Special Interrogatories, Request for Production of Documents, and Requests for Admission to each defendant. All eight (8) sets of discovery were mail-served to defense counsel 03/04/22. Defendants did not respond. On 04/19/22, counsel for plaintiff inquired of the status of responses, to no avail.

Since defense counsel has appeared at case management conferences, the silence in the face of clear discovery obligations seems unusual. This Court would like to believe that the silence is explainable, but for present purposes all this Court has is a prima facie display of a discovery abuse. The motion to compel a substantive, verified, objection-free response to the Form Interrogatories, Special Interrogatories, and Request for Production of Documents is GRANTED. Defendant is ordered to comply within 20 days. With regard to the RFAs, so long as plaintiff's counsel confirms that substantially-compliant responses have not been received prior to the hearing, the request to have those matters deem admitted is GRANTED. Pursuant to CCP §2023.030(a) and CRC 3.1348(a) (giving to the absence of opposition), defendants are *each* ordered to reimburse plaintiff $1,000 (representing 0.5 hrs for each motion, plus filing fee) within the same 20 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, and to serve defense counsel by personal delivery to the office.

HARDISTY v. LAGUNA GOLD MORTGAGE

19CV44041

DEFENDANT'S MOTION TO VACATE ARBITRATION AWARD

This is a breach of contract action involving satisfaction of encumbrances as part of a bankruptcy proceeding. The dispute was referred to arbitration. Before the Court is a defense motion to vacate the arbitration award. There is no opposition.

Pursuant to Calaveras County Superior Court Local Rule 3.3.7 (adopted 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." Based on defendant's failure to include the required language, the motion is **DENIED**, without prejudice to refile, to the extent it otherwise is timely and appropriate pursuant to relevant statutes.

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

In re MATTER OF ZAMORA

19PR8129 (Related to 16CV41649)

RESPONDENT'S MOTION TO QUASH

This is a special probate proceeding to enjoin non-party Clyde Clapp from selling property in which decedent owns an equitable interest. Before the Court is a motion by respondent to "quash personal jurisdiction" and effectively block petitioner's efforts to serve respondent with a preliminary injunction. Although the Notice for this motion fails to comply with Calaveras County Superior Court Local Rule 3.3.7 (adopted 1/1/18), this Court elects to proceed given the time-sensitive nature of this anomalous proceeding.

In November of 2007, Gus Zamora (father), Dave Zamora (son) 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. [Because of the common last names, the court will refer to the parties by their first names in this ruling without intending any disrespect.] Each party contributed approximately $44,000.00 to the down payment, with the balance of the $415,000 purchase price covered by a loan from Indymac. Over the years, the parties contributed different efforts to the joint venture, and eventually a second rental dwelling was completed on the property. 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*.

The dispute was tried to this Court in April of 2021. Following witness testimony and the admission of nearly 200 exhibits, this Court reached the following material conclusions:

- A partnership was established between Gus, Dave, and Clyde to acquire and improve the subject property as an investment vehicle;
- The partnership was not impliedly terminated after Gus and Dave stopped making financial contributions to the ongoing operations;
- Clyde breached his fiduciary duties to the other partners (Gus and Dave) by:
    - Taking title to the property in his name alone (even though Clyde contended that the decision was mutual related to Gus' credit issues);
    - Refinancing the property in his own name (even though Clyde contended that refinancing to reduce the interest rate was beneficial for all); and
    - Renting the second dwelling and not sharing that profit with Gus or Dave.
- The statute of limitations was equitably tolled;
- Clyde's actions constituted elder financial abuse;

Judgment was entered for plaintiff. This Court ordered that the subject property was to be sold, with Clyde taking 1/3 of the net proceeds and plaintiff to receive the balance. The parties were ordered to work out a plan for selling the property. The Court further found that plaintiff was entitled to 2/3 of the rent receipts from the second property, as well as "costs and attorney fees." Plaintiff never submitted a Memorandum of Costs or a motion for attorney fees. Clyde filed an appeal (which is still active). Gus died on 12/06/18 while the civil action was ongoing. Dave commenced 19PR8129 with both a petition for appointment as special administrator and an *ex parte* application for an immediate appointment to substitute in as plaintiff. The petition and application were summarily approved. Since commencing the probate action, Dave has not filed an Inventory and Appraisal or any Probate Code 12200 status report. Nothing has occurred in the probate case save for the *ex parte* issuance, on 06/16/22, of a preliminary injunction ostensibly barring Clyde from selling the property.

The motion presently before this Court to "quash" personal jurisdiction over Clyde is premature and unnecessary. Pursuant to CCP §418.10, a party may make a motion to quash service of summons if that party believes that the court lacks personal jurisdiction over them. There is no summons to quash because there is no summons on file in the Register of Action and, as far as this Court knows, petitioner never attempted to serve Clyde with a summons for the probate case. Clyde is not a party to the probate case, but if Clyde were to be served with a summons, it is beyond question that he has sufficient minimum contacts with California to support the exercise of personal jurisdiction over him. (See *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269; *Epic Communications, Inc. v. Richware Technology, Inc.* (2009) 179 Cal.App.4th 314, 329-331.) In order to give practical effect to this Court's 06/16/22 order, Dave will need to serve Clyde with both a summons and the order in one of the enumerated methods consistent with due process. (This Court is not being asked to decide whether Clyde's appearance through counsel in the probate case on 06/14/22 was sufficient to submit for personal jurisdiction purposes.) Thus, the onus remains on Dave to effectuate service and bind Clyde to the order.

However, before more effort is expended with litigation, the parties are reminded that this Court merely ordered the parties to "meet and confer concerning methodology for market and sale of the property and the distribution of the proceeds." (Judgment 7:16-17.) By issuing the preliminary injunction, it was this Court's intention to maintain the status quo by reminding Clyde that he is required to work with Dave on selling the property (and not again proceed on a unilateral basis). By taking this property to market on 04/21/22, Clyde was acting (as before) as if the Zamora family had no claims on the property; this time in direct contravention of this Court's findings and Order. Although Clyde's appeal could in theory upend the "meet and confer" and "distribution" aspects of the Judgment, and render the recent preliminary injunction moot, Clyde's apparent desire to proceed with the sale is not itself something that the appeal automatically stays. Perfecting an appeal stays proceedings *in the trial court* which are embraced in or affected by the issue currently up on appeal. (CCP §916(a).) The

purpose of the automatic stay provision is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. Whether a matter is “embraced” or “affected” within the meaning of section 916 depends on whether the matter would impact the overall effectiveness of the appeal. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-191; *Gridley v. Gridley* (2008) 166 Cal.App.4th 1562, 1587; *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 453–455.) If Clyde still wants to sell the property, and Dave never challenged the order to sell in the trial court, nothing about the appeal touches that. Moreover, while the Court of Appeal could in theory give Clyde the option to sell or not, since Clyde never moved for JNOV in the trial court, it seems to this Court that Clyde’s best day on appeal is a do-over from scratch (aka, new trial). If both Clyde and Dave want the property sold (it has apparently now been removed from the market after 60 days of exposure), they should work together and make that happen , as was this Court’s express intent; alternatively, if Clyde no longer wants to sell, then everything remains on hold until the appeal is resolved.

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