JP MORGAN CHASE BANK v. MACLEAN

21CF13648

PLAINTIFF'S MOTION TO VACATE JUDGMENT

This is a limited jurisdiction, collections case. Before the Court is a motion by plaintiff to vacate the clerk's entry of a default judgment herein.

This action was commenced by way of complaint filed on 07/06/21. According to plaintiff, after several unsuccessful attempts at personal service, defendant was sub-served at home with the summons and complaint on 08/03/21.

On 09/20/21, plaintiff requested entry of default and a clerk's judgment based upon the amount in controversy, with no request for prejudgment interest or legal fees. That same day, the clerk entered default and a judgment thereon.

Nine months later, on 06/07/22, plaintiff filed a motion to have that default judgment set aside. That motion was summarily denied pursuant to Local Rule 3.3.7.

Plaintiff has now renewed the same motion. There is no memorandum of points and authorities accompanying the motion, as is required by CRC 3.1113. The declaration accompanying the motion indicates that the default judgment may have been secured in violation of the automatic stay for bankruptcy filings, but the purported "Exhibit A" as evidence thereof is not attached to that declaration. However, if the debt owing to plaintiff was included in her schedules and subject to discharge, plaintiff need only file a satisfaction of judgment. If not, a set aside and a dismissal "without" prejudice is not appropriate.

Motion DENIED on the merits, but without prejudice to a renewed motion with a proper Memorandum of Points and Authorities and proper evidentiary support. 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.

MURRAY v. SUCHY

20CV45088

PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

This is a dispute between neighbors involving allegations of trespass, nuisance, and – among other things – destruction of trees. Before the Court is plaintiff's motion for leave to file a First Amended Complaint, intended to consolidate allegations from the original and supplemental pleadings, and to add two new causes of action under Civil Code §3346. Plaintiff would also like to increase the number of "Doe" placeholders from 10 to 20. There is no opposition filed. According to the proof of service, notice of the motion was timely provided to defense counsel. According to plaintiff's counsel, defense counsel declined to stipulate to the request for leave.

To amend a pleading already at issue, the sponsoring party is required first to seek leave of court by way of noticed motion. (CCP §473(a)(1).) Pursuant to CRC 3.1324, the moving party must specify in the moving papers by page, paragraph, and line number the allegations proposed to be added and/or deleted; and include with the moving papers both a of the proposed amended pleading, a declaration specifying the effect of the amendment, why the amendment is necessary and proper, when the facts giving rise to the amended allegations were discovered, and the reasons why the request was not made earlier. Although the supporting declaration does not address the "when" or "why," the clear inference is that plaintiff's former counsel dropped the ball. Relief is therefore warranted, particularly because requests for leave to amend a pleading to conform to what the pleader actually knows are to be granted whenever possible, so long as doing so does not result in undue prejudice to the other side. (See *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428; *Central Concrete Supply Co v. Bursak* (2010) 182 Cal.App.4th 1092, 1101-1102.) Prejudice exists where amendment would require delaying the trial, resulting in loss of critical evidence, or significant added litigation burden/costs. (*Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 486-488.) Nothing of the kind is apparent here. (See *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175-176.)

Motion GRANTED. Plaintiff shall file a serve a First Amended Complaint within 10 days. The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.

HARDISTY, et al. v. LAGUNA GOLD MORTGAGE, et al.

19CV44041

DEFENDANTS' MOTION TO VACATE REFEREE DECISION

This case involves a convoluted dispute over encumbrance arrears and ownership interests associated with certain real property presently used as a sober recovery home. The action was commenced by way of a verified complaint filed on 04/03/19, which was the subject of several pleading attacks. Certain aspects of this dispute (discussed *infra*) were referred to a referee for decision. Defendant seeks an order "vacating" that decision, while plaintiff seeks an order confirming the decision. Although the parties (and at times, this Court) have liberally referred to the reference as an "arbitration," it was in actuality a consensual reference per CCP §638 et seq. References of this nature are not subject to trial court review for confirmation, correction or vacation as would an arbitration award. The referee's decision must be entered as the judgment. While that does not foreclose post-judgment relief, defendant's present motion to vacate is DENIED without prejudice. Plaintiff's related request to enter the decision as a judgment is technically moot, but GRANTED in spirit.

Factual Background

In 2005, plaintiffs Kathy Hardisty and Kenneth Kelley borrowed $250,000 from East-West Bank, and another $182,000 from the SBA, in order to purchase APN 044-005-023 (commonly referred to as 556 Toyon Drive, San Andreas, California), a 15-bedroom, 7,600 sq ft residence sitting on a half-acre lot (hereinafter "Subject Property"). Plaintiffs intended to use the Subject Property for a senior retirement home. Both loans were secured by deeds of trust (East-West being 1st DOT, and SBA being 2nd DOT).

In 2014, plaintiff Hardisty decided she had had enough of operating a retirement home, and reached an agreement with co-plaintiff Kelley to buy her out of the venture (both the business and the Subject Property) for $650,000. Hardisty accepted a promissory note secured by a 3rd DOT to the Subject Property. Kelley made monthly payments on all three encumbrances, paying the principal down on each, until he did not. Complaints, and alleged malfeasance, eventually led to the revocation of Kelley's operating license.

On 02/19/16, plaintiffs executed a modification to the loan agreement with East-West Bank. The agreement contained a Judicial Reference alternative dispute resolution clause pursuant to CCP §638 et seq. Pursuant thereto, the parties agreed that a private judge would "decide all issues in the action or proceeding, whether of fact or law," and would further "determine all issues relating to the applicability, interpretation, and enforceability" of the ADR reference agreement.

By early 2018, the retirement home was no more … and the building itself became vacant. Soon thereafter, co-defendant Ronald Regan approached plaintiffs and inquired of their interest in selling the Subject Property to his company (co-defendant Laguna Gold Mortgage). Plaintiffs expressed interest, and granted Laguna Gold confidential access to the East-West and SBA loan files.

In late 2018, Laguna Gold acquired both the East-West note (balance remaining of roughly $170,000) and the SBA note (balance remaining of roughly $92,000) for an undisclosed amount, and thereafter reduced its oral offer to Hardisty from $200,000 to $100,000. Although the Subject Property was abandoned, encumbered, neglected and unused, the Subject Property still had plenty of equity on paper. Hardisty declined the $100,000 offer and Laguna Gold commenced nonjudicial foreclosure proceedings.

While the nonjudicial foreclosure proceedings were underway, plaintiffs met with Robert Klinger, the founder and president of Valley Sober Living, Inc. An informal agreement was reached whereby the Subject Property would be immediately repurposed into a recovery and sober living home. Although the deal with Valley Sober Living was short-lived, the Subject Property continues to operate as a men's recovery and sober living home (operated by Gold County Haven, LLC.)

On 04/03/19, Hardisty, Kelley and Valley Sober Living filed suit against Regan and Laguna Gold.

On 05/01/19, this Court granted plaintiffs' TRO to halt the nonjudicial trustee's foreclosure sale.

On 05/24/19, this Court denied plaintiffs' application for a Preliminary Injunction, concluding in part that the request was moot (there being no pending Notice of Trustee's Sale).

On 07/17/19, Laguna Gold re-started the nonjudicial foreclosure sale with the service and recordation of a new Notice of Default.

On 08/21/19, plaintiffs moved this Court for an order to compel "arbitration" pursuant to a clause in a Modification Agreement accompanying the East-West loan. Plaintiffs also requested an order "restraining" Laguna Gold from foreclosing on either the 1st (East-West) or 2nd (SBA) trust deed. The motion was denied.

On 12/11/19, Laguna Gold caused to be recorded yet another Notice of Default, this time indicating arrears of $87,362 – which appears to represent not a periodic deficiency (as noted in the 07/17/19 NOD) but rather a fully-amortized balloon payment.

On 01/17/20, this Court sustained most of the defense demurrer to the First Amended Complaint, leaving plaintiffs limited actionable claims.

On 04/08/20, plaintiff Hardisty filed for Chapter 13 bankruptcy. The bankruptcy court approved a sale of the Subject Property to Gold Country Haven LLC, ordering the trustee to satisfy Laguna Gold's claims "in the full amount of [its] escrow demand

without deduction, offset, or setoff," but that Hardisty would retain "whatever rights she has or may have to seek a reimbursement or reduction of funds paid to [Laguna Gold]." Funds were placed into escrow sufficient to cover Laguna Gold's payoff demands of $131,125 for the East-West loan, and $235,927 for the SBA loan. The transaction closed, and the dispute returned to state court.

On 06/03/21, this Court granted plaintiff's renewed request to refer the pending dispute over "reimbursement or reduction of funds" paid to Laguna Gold in the bankruptcy transaction to private reference. The parties agreed to use Attorney Kenneth Foley.

On 11/11/21, Attorney Foley issued his initial (aka "tentative") decision, finding that Laguna Gold was not entitled to the $69,310.94 it received as "legal fees" in the payoff demands.

On 04/17/22, Attorney Foley issued his Final "Arbitration" Award, confirming the earlier ruling that Laguna Gold was not entitled to legal fees of $69,310.94, and augmenting the award with an additional $100,000 to Hardisty based on Laguna Gold's refusal to disclose the amount it paid to acquire the East-West and SBA notes. Of principal concern for Foley was the 04/18/18 agreement between plaintiff and defendants in which defendants gained valuable access to the East-West and SBA loan files based upon the seemingly false representation that defendants actually intended to satisfy "all three outstanding loans," would not use the information to Hardisty's "detriment," would not use the loan information for any purpose "except pursuant to a completed transaction" (which never occurred), and would deliver to Hardisty all evaluation material if no deal was reached (yet defendants refused to provide the buyout amounts). (See Para 2, 9.) Since, by all accounts, defendants had no genuine intention of satisfying Hardisty's $600,000 note with an offer of $100,000, and had no right to surreptitiously acquire the East-West and SBA notes without a firm deal with Hardisty, their refusal to disclose the cost of acquiring those loans established in Foley's mind sufficient estoppel and unclean hands to warrant the additional damage award of $100,000. (See, e.g., Evid. Code §412.)

On 08/03/22, defendant Laguna Gold filed a motion to "vacate" Foley's decision pursuant to CCP §1286.2(a)(4), which provides that an arbitration award may be vacated if the arbitrator exceeded his powers *and* the award cannot be corrected without affecting the merits of the decision. Plaintiff has opposed the motion, and asks this Court to enter judgment on the decision.

Legal Discussion

Pursuant to CCP §638, a referee may be appointed upon the motion of a party to a written contract that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

On 02/19/16, plaintiffs executed a Modification to the Loan Agreement with East-West Bank. The agreement contained a Judicial Reference alternative dispute resolution clause pursuant to CCP §638 et seq. Within the clause, the parties expressly agreed that a private judge would "decide all issues in the action or proceeding, whether of fact or law," and would further "determine all issues relating to the applicability, interpretation, and enforceability" of the ADR reference agreement. The agreement fully tracked the operative language of CCP §638, which led to this Court appointing Attorney Foley to serve as a judicial referee.

Although this Court's reference Order dated 06/03/21 provided that "the issues to be resolved ***include*** reimbursement for any overpayment by plaintiffs on the first and second notes, as well as the issue of the reasonableness of defendants' bankruptcy attorney's fees" [emphasis added], that was to provide minimal guidance to the parties, not as a definitive statement of the outer limits of the reference. To find that the referee exceeded his authority by rendering a decision on an issue which was beyond the reach of the reference, courts must consider the agreement itself, the scope of the submission, and the parties' conduct to determine whether an issue decided was indeed beyond the reference – giving due deference to the referee's own interpretation. (See *Yu v. Superior Court* (2020) 56 Cal.App.5th 636, 644; *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 463–464; in accord, *Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 526-546; *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, 467-468.) The parties have not adequately analyzed, let alone framed, the issue; nevertheless, since (1) the parties delegated the question of what is covered by the Judicial Reference in the 02/19/16 agreement to the referee, (2) the reference itself provided that the referee would resolve "all issues" in the action, and (3) the bankruptcy court preserved for Hardisty "whatever rights" she might have for reimbursement/reduction, this Court cannot find on the present record that the referee's decision went outside the lines of the referral. Quite the contrary, it seems to this Court that the referee had more he could have decided within the scope of the referral.

Even if the referee had gone too far, the parties failed to incorporate any provisions into the reference agreement or court order relating to pre-judgment review procedures. There was no request by the parties to incorporate arbitration review procedures like CCP §1286.2, and as such the grounds for review of the referee's decision pre-judgment are nonexistent. In the case of a consensual general reference pursuant to CCP §638 (which this was), "the decision of the referee must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." (CCP §644.) In other words, this was the equivalent of a bench trial, the referee's decision being the Statement of Decision, and the entry of judgment being a mere ministerial formality at the moment Foley filed his decision with this Court. (See CCP §645; *Yu v. Superior Court* (2020) 56 Cal.App.5th 636, 652.)

Based on the foregoing, defendants' motion is DENIED.

The referee's decision shall be immediately entered as a judgment herein, and the clerk is directed to give notice to the parties of entry thereof. No further orders shall be required.

LARSON v. MARK TWAIN MEDICAL CENTER

19CV44062

DEFENDANT'S MOTION TO DECERTIFY CLASSES

This is a wage/hour dispute involving alleged rounding and rest/meal deficiencies suffered by those in the employ of Mark Twain Medical Center. Before the Court this day is a defense motion to decertify the two classes previously certified (see Minute Order dated 05/20/22) based solely on the contention that the new substituted plaintiff is not typical enough to represent the classes.

This Court previously found that the initially-proffered class representative (Lorraine Larson) was not sufficiently typical to faithfully represent the classes because:

1. She had a pre-existing, and unrelated, adversarial relationship with the defendant, having lost her job under a discipline cloud;
2. She had an office with a door, and could eat at her workstation, removing her entirely from the concern regarding travel time tardiness;
3. She had a settlement agreement with defendant that could detour, if not derail, the focus on class concerns.

This Court gave plaintiff and counsel 30 days to find a replacement representative. Counsel complied with this directive, filing an amendment to the complaint, substituting in Barbara Kelling as the new proposed class representative.

Defendant contends that Barbara Kelling is also not sufficiently typical to faithfully represent the classes because:

1. Although having worked for defendant for nearly eleven (11) years, she was released from a new salaried position she held for just under three months;
2. She was unaware of defendant's tardiness policy;
3. She did not work on patient charting during her meal breaks.

First, even if Ms. Kelling were not sufficiently typical, decertification is not the answer. Decertification is generally appropriate when there has a been a material change in the law or the manageability of the action since the class was certified making the case no longer amenable to class treatment. (See *Duran v U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 29; *Williams-Sonoma Song-Beverly Act Cases* (2019) 40 Cal.App.5th 647, 657-658; *Lubin v The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 935.) A motion to decertify under CRC 3.764 requires the defendant to negate the conditions already found to exist for class certification, which defendant has not done. (See *Williams v Superior Court* (2013) 221 Cal.App.4th 1353, 1360.) Defendant here is only concerned with the adequacy of the new proposed class representative, which can be easily cured if the "perfect" representative came forward. Although the procedural mechanism for

this limited type of challenge is imprecise, the issue often presents by way of demurrer, motion to strike, or motion for summary judgment, which thereafter (if successful) frequently results in additional time for plaintiff to find a suitable replacement. (See *Payton v. CSI Elec. Contractors, Inc.* (2018) 27 Cal.App.5th 832, 848; *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986, 999; *Silva v Block* (1996) 49 Cal.App.4th 345, 349-352; in accord, *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 341.) There could, in theory, come a point in time when leave to find another representative might be fruitless – and therefore *dismissal* as a headless class proper – but in this case that time has not yet arrived. (See, *e.g.*, CCP §430.41(e)(1).)

Second, plaintiff has met its nominal burden of persuasion to demonstrate that Ms. Kelling is adequate. To be sufficiently typical to serve as a class representative, the proposed plaintiff must share many – but not necessarily all – of the traits common to the class members, and have a similar incentive and litigation objective as the other class members. (See, *e.g., Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1091; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1307; *Watkins v. Wachovia Corp.* (2009) 172 Cal.App.4th 1576, 1592; *In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1297; *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 664.)

In terms of traits, Ms. Kelling was an hourly employee, like all the others, for more than a decade before accepting her promotion to the ranks of exempt employees. She was subject to the same travel time tardiness issue facing all employees who did not have a private office with a door for many of the years within the class period. While she may not have known about the formal tardiness rule, she apparently still took her clocking-in requirements seriously. Whether her respect for the time clock was motivated by a desire to avoid discipline, or merely the product of good work ethic, she was tied to the time clock like everyone else – and lost time accordingly.

As for her motivation and litigation objectives, although she may harbor some animosity for leaving her established regular position to try her hand as a probationary “clinical informatics nurse,” the evidence is insufficient to permit an inference that she harbors a different incentive or litigation objective. She has arguably suffered some loss of paid time based on the initial report from Jarrett Gorlick. She has confirmed in a declaration her typicality, her commonality, and her focus, dedication, and commitment to the cause. It is hard to see how anyone else would be more suited to serve as a class representative – and why the defense would insist on plaintiff looking for an even better representative. Of course, plaintiff is free to continue looking for that “perfect” representative, and perhaps one will surface during the course of discovery. Until then, Ms. Kelling will do.

Motion to decertify is DENIED without prejudice to the filing of a proper motion to decertify one or both classes based on changed circumstances. Plaintiff’s Motion for Class Certification is GRANTED. The Clerk shall provide notice of this Ruling to the

parties forthwith. Plaintiff to prepare formal Orders pursuant to CRC 3.1312 in conformity with this ruling.