TYLER et al v. OAKDALE IRRIGATION DISTRICT et al

17CV42319

DEFENSE MOTION FOR LEAVE TO FILE AMENDED ANSWER

This is an action for inverse condemnation. Plaintiff alleges that defendants' management of water levels in Lake Tulloch caused a hillside failure, causing the county to "flag" the home as uninhabitable, which ultimately led to its "fire sale" via foreclosure for pennies on the dollar. The critical background facts are as follows:

- Defendant Tri-Dam is a cooperative venture between co-defendants Oakdale Irrigation District and the South San Joaquin Irrigation District. Tri-Dam holds a federal license to operate and maintain a hydroelectric project, which effectively gives it authority to regulate events and activities affecting Lake Tulloch's shoreline.

- In 1986, plaintiff acquired ownership of the subject property (APN 098-022-003), a 1.2-acre lot in a newly-released section of Tract 378 in Lake Tulloch Shores (aka The Shores of Poker Flat). Plaintiff's lot (#551) sat at the top of a steep and rocky embankment along the shore of the Lake. Plaintiff caused to be constructed thereon a 2,400 square foot residence.

- In 2005, plaintiff observed surface slippage around the supports holding the bedroom decks and commissioned professional services to remediate the slippage (at a cost of roughly $50,000).

- In 2011, plaintiff observed additional slippage around the supports holding the bedroom decks, and new slippage around the supports holding up the "main" deck. Plaintiff commissioned professional services to remediate the slippage (at a cost of roughly $100,000).

- In 2016, a landslide occurred at the subject property, exposing support structures and leaving the residence in a precarious position. Calaveras County Code Compliance Unit caused to be recorded against the subject property a "red tag" notice. Two years later, the property was sold via nonjudicial foreclosure at a price point considered dramatically below fair market value had the landslide never occurred.

Before the Court is a motion filed on behalf of all three defendants for leave to file a First Amended Answer to revise its Fourth Affirmative Defense. The reason for the request is easily gleaned from this Court's 09/26/22 Order on defendants' motion for summary judgment, which provided in pertinent part as follows:

> "Defendants failed to properly preserve the defense because Defendants' fourth affirmative defense asserts that the inverse condemnation action is barred by the statute of limitations but cites CCP §340.6, a statute addressing legal malpractice actions, which has no application to this case."

The statute of limitations for an inverse condemnation cause of action is codified at either CCP §338(j) [if the dispute is over physical damage to property] or CCP §318 [if the dispute involves possession/control]. Defendants believe that the former controls the case at bar and wish to specify that in an amended answer. Despite the patently liberal rules regarding requests for leave to amend operative pleadings, plaintiff objects, contending that defendants (1) waited too long from first appearing in the action to realize they dropped the ball, (2) any limitations defense tied to inverse condemnation fails as a matter of law, and (3) a fix now would prejudice plaintiff in the form of (a) delaying trial, (b) creating new discovery demands, and (c) possibly adjusting expert witness testimony.

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 Rule of Court 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 a declaration specifying (1) the effect of the amendment(s); (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request was not made earlier. The supporting declaration by Attorney Matthews is woefully inadequate. There is no discussion as to why the amendment is necessary, or why it was not made earlier. The reason for the barren declaration, however, is rather clear to this Court, to wit: counsel's unwillingness to openly admit that he made a mistake and would like to fix his mistake so the clients do not pay the price. In order to properly preserve the defense, the defendant must either state the specific statute at issue or plead facts with sufficient particularity to clearly acquaint plaintiff with the limitations period at issue. (See CCP §458; *Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91.) The Answer filed 10/26/17 - which averred that plaintiff's claim was "barred by the applicable statute of limitations, including but not limited to, California Code of Civil Procedure section 340.6" (see 2:23-24), did neither. Although it is true that plaintiff missed this oversight, it first coming to light when this Court was called upon to make substantive rulings, the fact remains that since defense counsel refuses to admit that the reference to 340.6 was just one of many typos in defense filings that this Court notes, the only conclusion to draw is that counsel made a mistake of law regarding pleading an affirmative defense. A mistake of law is ordinarily imputed to the client. However, since this is curable with an amended

declaration properly "falling on the sword", this Court will forgive the declaration's shortcoming and reach the merits of the request for leave.

Assuming "340.6" was a scrivener's error and not a negligent legal decision, the fact that it carried over since October of 2017 is of no consequence since plaintiff's counsel could have brought forth a motion to strike (or summarily adjudicate) the affirmative defense at any time during the ensuing five years. Attorney Renfro does not contend in her 11/17/22 declaration that she recognized the typo and sat quiet hoping to gain a tactical advantage over her adversary intended to take advantage. Instead, a fair reading of her declaration permits the inference that she too failed to catch the issue until this Court brought it to light. A review of her brief in opposition to the summary judgment motion reveals that she actually believed CCP §338(j) was already subsumed within the existing Fourth Affirmative Defense. Thus, the concept of unfair delay causing prejudice is not present here. (See, *e.g.*, *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175-176; *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746; *Emerald Bay Community Assn v. Golden Eagle Ins Co.* (2005) 130 Cal.App.4th 1078, 1097; *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 693; *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159; *Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 649.)

Regarding plaintiff's concern that the proposed amendment has no bearing in the case as a matter of law, that is an overstatement of how motions to leave are vetted. Ordinarily, a court will not consider the validity of the proposed amendment in deciding whether to grant leave to amend (that can normally be dealt with via demurrer) and may not condition leave upon the submission of evidence substantiating the new claim(s). However, the court has limited discretion to deny leave to amend where the new claim is, on its face, fatally flawed or where the amendment is a sham. (See *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 912; *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 769-770. *State ex rel Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412; *Edwards v. Superior Court* (2001) 93 Cal.App.4th 172, 180; *Yee v. Mobilehome Park Rental Review Board* (1998) 62 Cal.App.4th 1409, 1429.) Although this Court has expressed doubt about defendants' success in pursuing a statute of limitations defense (see Minute Order dated 09/02/22 and Order dated 09/26/22), the parties already believed that inverse condemnation statute of limitations was a ripe issue for resolution, and plaintiff never sought a substantive ruling thereon. The defense is not fatally flawed or a sham, just unlikely to win given (1) the relative quiet between plaintiff's 2011 remediation and the April 2016 landslide, (2) the apparent lack of expertise establishing a nexus between the slippage in 2011 and the landslide (see defendants' UMFs 24-28), and (3) plaintiff is suing for the actual taking of his residence via landslide, not the partial taking for damage to his property in 2011.

Finally, plaintiff's concern that permitting this amendment will delay trial and require additional discovery is not warranted. Defendant is not requesting to reopen discovery, and this Court sees no reason to do so since both sides readily admit that they believed §338(j) was part of the case from its inception. Moreover, since both sides opined that

§338(j) was already part of the case, there is no basis for any plaintiff motion directed at the amended answer. However, to reduce the chance of confusion that might accompany the filing of a formal amended pleading making a very small change, and potentially opening other doors, this Court will grant the defense an *amendment* to the answer filed 10/26/17 via interlineation, crossing out §340.6 and substituting in its place §338(j). The motion for leave to file a first amended answer is therefore moot.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.

SANCHEZ et al v. SIMPSON et al

22CV46351

PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

This is a civil action stemming from an oddly-conceived real estate transaction between friends, neighbors, and distant cousins. The plaintiffs – elderly and/or infirm – sold their residence to defendants for $356,000, but obtained no cash in the deal. Instead, plaintiffs agreed to pay all escrow fees and carry back the entire purchase price (minus $1,000) as a promissory note with only 3% interest. Based on the amortization schedule provided by escrow, plaintiffs were not due to be paid in full until after two of three plaintiffs have reached the age of 107. Plaintiffs allege in their Complaint that many of the terms "understood" by the parties did not make it into the Residential Purchase Agreement actually signed by the parties, such as defendants' obligation to secure financing to pay off the promissory note in due course. There are also issues surrounding plaintiffs' access to the property to retrieve personal effects left behind after the close of escrow.

Before the Court this day is plaintiffs' application for preliminary injunction. Based on the initial papers, this Court issued in plaintiffs' favor a TRO, barring defendants from (1) selling the property, (2) selling or otherwise disposing of plaintiffs' personal effects left at the property, and/or (3) altering the property without plaintiffs' consent. The hearing was set for today, with an invitation to both sides to submit briefing. The parties stipulated between themselves as to the date those briefs would be due, and yet – at present – nothing is filed.

A preliminary injunction is an equitable remedy designed to preserve the existing status quo until the dispute between the parties can be finally resolved on the merits. Preliminary injunctions are generally available to avoid waste (CCP §526(a)(2)), to keep a party from violating the rights of another (CCP §526(a)(3)), and whenever sufficient grounds exist pursuant to caselaw (CCP §527(a)), such as when the applicant has demonstrated a likelihood of prevailing on the merits and yet is likely to suffer in the interim irreparable harm which cannot be adequately addressed with money. Courts refer to this as a sliding scale of considerations – how likely the party is to win versus how much harm it will suffer awaiting its day in court. See *White v. Davis* (2003) 30 Cal.4th 528, 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678; *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 551; *Amgen Inc. v. Health Care Services* (2020) 47 Cal.App.5th 716, 731.

Looking first to the Fifth Cause of Action for Conversion, conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim

are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort, meaning that the foundation of the action rests neither in the knowledge nor the intent of the defendant. Questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. *Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1404-1405; *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. *Spates v. Dameron Hospital Assn.* (2003) 114 Cal.App.4th 208, 221. Plaintiffs claim a conversion based upon defendants' refusal to permit them access to retrieve personal items left behind during the elongated move out process. Plaintiffs presented as Exhibit 4 a "partial list" of those items.

Since a preliminary injunction can only issue to preserve the status quo, it is necessary to first clarify what the "status quo" in this case really is. The status quo is defined as to the last actual peaceable, uncontested status which preceded the pending controversy. *Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1052; *People v. iMERGENT, Inc.* (2009) 170 Cal.App.4th 333, 343. As set forth in the partially verified complaint (plaintiff Antone does not verify the exhibits, only the 15-page complaint) and unauthenticated exhibits in the court record, on 05/03/22 the parties entered into a contract to sell the residence. In Para III, the parties made plain that "there shall be no personal property included in this Agreement or included in the purchase of the real property." The parties further made plain that "all removeable items from the real property, i.e. non-fixtures, shall be ***retained*** by the seller at closing." [Emphasis added.] Thus, the status quo was that plaintiffs were to retain the ownership interest in all personal items existing at the property on the date escrow closed, which cuts against any claim that items left behind were purposefully abandoned in favor of defendants. To the extent defendants are refusing to recognize their ownership interest, that amounts to conversion.

As for the balance of the claims set forth in the operative pleading, plaintiffs have not presented sufficient evidence from which to establish a likelihood of prevailing on the merits. That is a not to say that plaintiffs will not win at day's end, but just that the evidence presented to date leaves too many questions unanswered. For example, the written agreement provides that if defendants cannot secure a VA loan on the property to pay off the note, the plaintiffs would agree to carry the note until such time as the "property is rehabilitated for VA funding." See Pg. 6. Although this particular aspect of the agreement is unusual, if defendants have been making their monthly payments on the note, and made an effort to secure funding, plaintiffs have not shown fraud or breach of contract – at least not on the evidence presented here. Unconscionability is not a standalone cause of action. See *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 980. Constructive trust is not a standalone cause of action. See *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 362.

The application for preliminary injunction is GRANTED as to the provision in the TRO regarding personal property (Para A). Defendants are hereby ordered not to sell, donate, move, secret, convert, or dispose of in any way plaintiffs' personal items left at the real property following the close of escrow, some of which (but not all) are identified in Exhibit 4 to the complaint (incorporated herein by reference). Since defendants have no potential ownership therein, no bond shall be required of plaintiffs. In light of estimates set forth in Exhibit 4, and there being no challenge to that evidence, this Court sets defendants' counterbond at $50,000. The balance of the application for preliminary injunction, relating to the real property, is denied without prejudice.

The Clerk shall provide notice of this Ruling to the parties forthwith. This ruling shall be immediately effective. Plaintiffs shall forthwith prepare the CCP §1019.5 and CRC 3.1312 order, but should delays occur, the ruling is immediately effective without further order of this Court.

TORME et al v. JENNINGS et al

22CV46038

PLAINTIFFS' MOTION FOR JUDGMENT VIA DEFAULT; DEFENDANTS' MOTION TO SET ASIDE

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 are what amount to competing motions: one by the plaintiffs to secure a quiet title judgment via default; and the other by defendants to set aside the entry of default. Given the unique nature of default proceedings in quiet title actions, a quick primer/reminder is warranted.

In a quiet title action, after a defendant defaults, the plaintiff must prove the merits of its claim and the grounds for the relief sought with *admissible* evidence at a *live* hearing in *open* court, and the defendant has a due process right to notice of the hearing and an opportunity to actually participate therein. (CCP §764.010; see *Paterra v. Hansen* (2021) 64 Cal.App.5th 507, 532; *Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 524; *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 941-947; *Harbour Vista, LLC v. HSBC Mortgage Services Inc.* (2011) 201 Cal.App.4th 1496, 1504-1509.) Therefore, the entry of default in a quiet title action serves in essence the singular purpose of cutting off defendants' right to conduct discovery, but nothing else.

First, a review of the Proof of Service on plaintiff's motion to enter judgment, set for today, fails to include any address for the alleged mail-service on either defendant. (See Paragraph 5.) Since there is no competent evidence that defendants were provided due process notice for the hearing on *plaintiffs' motion* today, that motion must be continued. However, before doing so, this Court must determine if the default was properly entered.

The defendants were defaulted on 10/06/22 via clerk's entry. To determine whether they acquiesced by silence to this Court's jurisdiction more than 30 days prior, it is necessary to review plaintiffs' efforts to effectuate service of the summons.

- Plaintiffs contend that defendants are residents of California. (See Complaint Paragraph 3.)
- Plaintiffs learned "through their realtor" that defendants lived in Nevada, and attempted service at 94 Lake Village Drive Unit A, Zephyr Cove, NV 89448. According to the process server, the occupant therein informed the server that

defendants owned the property, but actually lived in California. This report is suspect since defendants are using this same address (albeit Stateline 89449, not Zephyr Cove 89448) on their motion to set aside the default.

- Plaintiffs performed a skip trace and formed the opinion that defendants resided in California at 1600 Woodhouse Mine Road in West Point. Plaintiffs' process server made two attempts to serve at this address, but was unable to pass the locked gate. The server was in contact with a property "caretaker" who neither confirmed nor denied defendants' residency. There is some indication that the Calaveras Sheriff attempted service as well. Notably, defendants concede receiving a copy of the Request for Entry of Default mail-served to this address within two days of its mailing (despite describing this as their vacation ranch).
- Plaintiffs secured authority from this Court to serve by publication in the Calaveras Enterprise, but in fact never caused the summons to be published therein. Although the court order stated that first-class mail with POS-30 would be sufficient, that does not effectively supersede publication for purposes of CCP §415.50(d). Instead, the service must still be by an authorized method, and first-class mail without a notice and acknowledgement is only effective when combined with publication when a service address is subsequently discovered. (See CCP §415.50(b).)

There are unresolved concerns regarding all forms of service allegedly employed. Even if service was sufficient, "it is the policy of the law to favor, whenever possible, a hearing on the merits … when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; in accord, *Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1478.) Defendants said they never received the summons and have quickly appeared and tendered first appearance fees once they learned of the default. This is sufficient basis to grant relief. (See CCP §473(b); in accord, *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300.)

Defendants' motion to set aside defaults is GRANTED. Defendants to answer in 10 court days, and to accept electronic service of all papers going forward. Plaintiffs' motion to enter default judgment is DENIED as moot.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.

HESSLER v. KAUTZ VINEYARDS

21CV45613

DEFENDANT'S MOTION TO COMPEL DISCOVERY

This is a personal injury action involving an alleged trip-and-fall at defendant's event facility. Before the Court is defendant's single, commingled motion to compel responses to Form Interrogatories, Special Interrogatories, and Requests for Production of Documents.

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." The notice of motion herein fails to include the required warning regarding tentative rulings, necessitating a DENIAL of the motion without prejudice to refile, to the extent it otherwise is timely and appropriate pursuant to relevant statutes.

Moreover, while there is no substantive opposition to the motion, plaintiff's counsel advises that plaintiff has passed away and the family requires additional time to determine whether a personal representative will substitute into the case to pursue that portion of the action surviving plaintiff's passing. Plaintiff's counsel expects to remain involved with the case, and concedes the righteousness of defense counsel's request for fees. It seems to this Court that plaintiff's passing provides substantial justification for avoiding sanctions, but these matters ideally should be resolved between the parties in a timely manner.

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