COMBRINCK v. CLERICO

23CV46872

MOTION TO STRIKE CROSS-COMPLAINT, DEMURRERS TO CROSS COMPLAINT and FIRST AMENDED ANSWER

Plaintiff suit seeks a partition by sale of the real properties located at: 1) 41 Purdy Road, Angels Camp; 2) 938 Purdy Road, Angels Camp; and 3) "Dead Horse Mine" (Calaveras County Assessor Parcel Number 062-002-094-000), and Declaratory Relief.

Defendant/cross-complainant seeks to quiet title, slander of title, cancellation of deed, and fraud.

Before the court are five separate motions brought by plaintiff/cross-defendant:

1. Motion to Strike Cross-Complaint;
2. Demurrer to Cross-Complaint;
3. Demurrer to Answer;
4. Demurrer to Cross-Complaint; and
5. Demurrer to Answer.

Notices of Non-Opposition have been filed on each as defendant/cross-complainant has did not file any opposition or response. The court is entitled to consider that lack of opposition to be an admission that the demurrers and motions to strike are meritorious. (*Sexton v. Superior* Court (1997) 58 Cal App.4th 1403, 1410.) Further, by failing to oppose the demurrers and motions to strike, defendant/cross-complainant has no standing to challenge the Court's rulings. (*In re Carrie W*. (2003) 110 Cal.App.4th 746, 755; *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1226-1227, fn. 13; *see* [*8] *also Duarte v. Chino Comm. Hospital* (1999) 72 Cal.App.4th 849, 856; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-85). However, the trial court must review the merits of a demurrer or motion to strike even when no opposition is filed.

Plaintiff/cross-defendant's motions to strike are construed as demurrers because a motion to strike cannot be used to challenge the legal sufficiency of a pleading. (*Pierson v. Sharp Memorial Hospital, Inc*. (1989) 216 Cal.App.3d 340, 342.)

The demurrers to Answer and Cross-Complaint are overruled. The allegations in the Cross-Complaint state a legally cognizable claim for relief. The allegations in the Answer contain a lengthy, "factual background," specific denials of material allegations of the complaint, and a statement of new matters constituting 37 affirmative defenses [Code Civ. Proc. § 418.30]. Leave to amend the complaint is denied because the complaint is legally sufficient as pled.

The motions to strike are denied in their entirety. Motions to strike are properly limited to redundant, immaterial, impertinent or scandalous matters. (CCP § 436.) Portions of a pleading that are relevant to a claim should not be stricken. (Pierson, supra at 342.)

Based on the foregoing, the Demurrers are OVERRULED and the motions to Strike are DENIED.

The Clerk shall provide notice of this Ruling to the parties forthwith. Moving party to submit a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling.

LENIOR, et al., v. PACIFIC GAS AND ELECTRIC COMPANY

22CV46442

DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

This case involves a dispute between utility customers and the utility company. At issue is a disputed unpaid bill in the amount of $126,691.66. Defendant considers the bill to be bona fide based on suspicious (and possibly illegal) use and/or tampering with meter equipment.

Before the Court is defendant's demurrer to the operative First Amended Complaint, which includes a challenge to each cause of action stated therein. A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. The challenge is limited to the "four corners" of the pleading (which includes exhibits attached and incorporated therein), or from matters outside the pleading which are judicially noticeable. The complaint is read as a whole. Material facts properly pleaded are assumed true, but contentions, deductions or conclusions of fact/law are not. In general, 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 n.10.)

Defendant's Request for Judicial Notice is GRANTED.

According to defendant, "adjudication of customer disputes regarding utility bills and termination of electric service are within the exclusive jurisdiction of the CPUC … This Court does not have subject matter jurisdiction to review, restrain, or interfere with the CPUC's regulation, authority, or supervision of billing disputes or termination of electric service." Defendants cite to Public Utility Code §1759(a), which provides as follows:

> "No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court."

There is an obvious overlap/conflict between §1759 and §2106 of the Public Utility Code. While §1759 was enacted to limit judicial review of CPUC actions, it was never intended to immunize or insulate a public utility from all civil actions brought in superior court. instead, courts are instructed to engage in a three-part test to determine if the

alleged wrongdoing is embraced within the preemption, or subject to civil litigation. To find preemption, defendant must establish that all three of the following questions are to be answered, as a matter of law, in the affirmative:

> 1) Does the litigation involve a regulatory policy?
>
> 2) Did the CPUC have the authority to promulgate said policy?
>
> 3) Does a civil action hinder, frustrate or interfere with the exercise of that authority?

(See *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 902-903; *Uber Technologies Pricing Cases* (2020) 46 Cal.App.5th 963, 970-972; *PegaStaff v. Pacific Gas & Electric* (2015) 239 Cal.App.4th 1303, 1315-1316; *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 150; *Mata v. Pacific Gas & Electric Co.* (2014) 224 Cal.App.4th 309, 315*; Koponen v. Pacific Gas & Electric* (2008) 165 Cal.App.4th 345, 350-354; *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 550; *Cundiff v. GTE California Inc*. (2002) 101 Cal.App.4th 1395, 1405; *Schell v. Southern California Edison Company* (1988) 204 Cal.App.3d 1 039,1 046.)

Although the California Supreme Court has previously held that §1759 preempts §2106 only if the ensuing award of damages would "hinder or frustrate" CPUC‘s supervisory and regulatory policies, that line in the sand has been sometimes hard to see. Published opinions have been abundant on just what the Supreme Court’s Covalt and Hartwell test (and usually the third element) means.

Here, plaintiffs’ claims may appear in some respects to relate to the defendant’s decision to investigate an alleged unauthorized use, and to terminate service thereon, but other aspects (namely slander, intentional infliction of emotional distress, and spoliation) do not. Simply put, it is one thing to investigate and decide, but quite another to defame and spoliate.

Nothing added in the First Amended Complaint’s new allegations address the above-discussed “third question” to find CPUC preemption. By the First Amended Complaint’s title alone, but also concerning the averments therein, it is clear to this Court that plaintiffs are complaining about how the defendant has implemented Electric Rule 17.2, a regulatory policy that defendant was required to promulgate.

This court in an earlier demurrer Ruling:

> “Thus, while the allegations will need to be refined, it does appear to this Court that plaintiffs may be able to restate the claim that defendant’s failure to comply with its own existing policy regarding preservation of evidence and giving the customer an opportunity to review and challenge the evidence does not offend the CPUC’s regulatory powers and is a

ministerial duty this Court could enforce (even if doing so is without monetary damages)."

Despite this invitation, no such further information or facts was provided in the First Amended Complaint.

Concerning the slander and intentional infliction of emotional distress ("IIED") causes of action, the First Amended Complaint does state additional facts when read in combination, and provides more details on the defendant's allegedly slanderous conduct, the nature of the duty owed, and the general damages. However, they remain conclusory and lack facts relating to the nature of any exemplary damages or intentional acts. (See *Taliaferro v. Salyer* (1958) 162 Cal. App. 2d 685; *Lopez v. City of San Diego* (1987) 190 Cal. App. 3d 678.)

Plaintiffs must ensure any new allegations are consistent with prior verified pleadings or explain why facts previously alleged under oath are no longer applicable. Overall, the first amended complaint fails to rectify the deficiencies identified by this Court in the prior demurrer ruling.

Assuming plaintiffs can adequately plead a cause of action for defamation, this Court will permit a claim for IIED to stand <u>if</u> plaintiffs can also allege sufficient facts of emotional distress of substantial or enduring quality.

Demurrer SUSTAINED to all causes of action, WITH 30 days leave to amend.

The Clerk shall provide notice of this Ruling to the parties forthwith. The defendant is to prepare a formal order pursuant to Rule of Court 3.1312 in conformity with this Ruling.

SCHAAD v. GC ORGANICS, LLC

23CV46798

MOTION FOR ORDER FOR APPLICATION OF FRANCHISE TOWARD SATISFACTION OF MONEY JUDGMENT

Judgment creditor Schaad filed a complaint against judgment debtor GC Organics, LLC ("GC Organics") for breach of contract. On August 21, 2023, the period expired for GC Organics to file an answer to said complaint and default was entered as requested, with a default judgment in plaintiff's favor of $106,917.17, in damages and reasonable attorney's fees and expenses.

GC Organics was the holder of a right-to-apply for a commercial cannabis cultivation permit, a limited number of which have been issued and acknowledged by Calaveras County. (See Calaveras County Code of Ordinances, tit. 17, art. 2, ch. 17.95.) Plaintiff argues that the right-to-apply is a government "franchise" that has substantial value and is transferable (i.e., saleable). In this matter, plaintiff sold GC Organics the subject right-to-apply before the present dispute.

As the judgment creditor, plaintiff now moves the court for an order applying this Right-to-Apply toward the satisfaction of the judgment under Code of Civil Procedure section 708.920.

An opposition to the motion has been filed by the County of Calaveras ("County"), arguing in sum that there is no franchise as argued by Schaad.

A "right to apply" is not a grant of rights or privileges by a public entity. There is no program through which the County issues something called a "right to apply" for a cannabis cultivation permit. The County issues commercial cannabis activity permits to qualified applicants under its cannabis regulatory program as described in Chapter 17.95. Only a person with a 'commercial cannabis cultivation permit' (one of several types of commercial cannabis activity permits) can legally farm cannabis commercially in Calaveras County. Those who have a "right to apply," as that term is described in County Code §17.95.050(D)(14), are not entitled to receive a cannabis cultivation permit or to otherwise cultivate cannabis in Calaveras County. They are entitled only to further review of their permit application.

The County goes on to differentiate a "right to apply," a "franchise," "successor-in-interest certification," and "a commercial cannabis cultivation permit."

A government franchise in California is a special privilege granted by the government to a particular individual or entity, rather than to all as a common right (*Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248.) This privilege often pertains to services and functions that the government is obligated to furnish to its citizens, such as water, gas, electricity, or telephone services, and the right to use public streets and ways to bring them to the general public (See *Copt-Air, Inc. v. City of San Diego* (1971) 15 Cal. App. 3d 984; *Pacific Bell Telephone Co. v. Southern California Edison Co.* (2012) 208 Cal. App. 4th 1400; *Saathoff v. City of San Diego* (1995) 35 Cal. App. 4th 697.) A franchise is not a mere license or a privilege personal in nature, but a special privilege that lies only in grant from the sovereign and does not exist at common law (*Subriar v. City of Bakersfield* (1976) 59 Cal. App. 3d 175.) It is a negotiated contract between a private enterprise and a governmental entity for the long-term possession of land, with franchise fees paid as compensation for the grant of *a right of way* (*Santa Barbara County Taxpayers Ass'n v. Bd. of Supervisors* (1989) 209 Cal. App. 3d 940.)

Although the right to apply that Schaad transferred to GC Organics does not meet the formal requirements of a government franchise as it confers no special privileges beyond applying for a permit, and the nomenclature of whether it is a "right to apply," a “franchise,” “successor-in-interest certification," or “a commercial cannabis cultivation permit” – this intangible right to apply can be returned to Schaad by this Court’s inherent equitable powers. Although the Court agrees with the County of Calaveras that plaintiff's request to characterize the "right to apply" as a "franchise" for purposes of CCP §708.910 is incorrect, no matter how defined or denominated the “right to apply” should be returned to him.

Based on the foregoing, the motion of Schaad to transfer the right to apply from GC Organics is GRANTED.

The Clerk shall provide notice of this Ruling to the parties forthwith. Moving party to submit a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling.

ZAMORA v. CLAAP

16CV41649

MOTION FOR ATTORNEY FEES and MOTION TO TAX COSTS AND STRIKE REPLY DECLARATIONS

Remittitur to trial court was filed Oct. 2, 2023; the Motion for Attorney's Fees was timely filed Oct. 27, 2023.

The court's authority to award attorney fees in California is governed by various statutes and case law. For instance, as relevant herein, under Welfare and Institutions Code Section 15657.5(a)(b), plaintiff was entitled to award of attorney fees and costs for financial abuse. An award of attorney's fees is a mandatory form of relief regardless of whether the plaintiff is awarded any other form of relief (*Arace v. Medico Investments, LLC* (2020) 48 Cal. App. 5th 977.) Similarly, a trial court's award of attorney's fees is reviewed for an abuse of discretion, and the appellate court will not disturb the trial court's judgment unless it is clearly wrong (See *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal. App. 5th 657; *Gutierrez v. Chopard USA Ltd.* (2022) 82 Cal. App. 5th 383; *Snoeck v. ExakTime Innovations, Inc.* (2023) 96 Cal. App. 5th 908.)

California Welfare and Institutions Code Section 15657.5(a)(b)(d)(e) provides in pertinent part:

> (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
> (b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.
>
> * * *

In an action under the Elder Abuse and Dependent Adult Civil Protection Act, the plaintiff is entitled to an award of attorney fees and costs for financial abuse. The plain language of Welfare and Institutions Code §15657.5 indicates that an award of attorney fees is a *mandatory* form of relief (Welfare and Institutions Code §15657.5.)

Defendant's Points and Authorities in Opposition to Plaintiff's Motion for Attorney Fees argues for an award:

> "Defendant believes that an award of $25,000.00 based upon the records produced would be a reasonable for the trial court fees unless the Court realizes the request is so excessive as to justify no award and $25,000.00 for the appeal court fees is reasonable."

The Declaration of Timothy L. Hamilton in Support of Plaintiff's Motion for Attorney's Fees timely sets forth attorney fees in the amount of One Hundred Eighty-Three Thousand, Four Hundred Nineteen Dollars ($183,419) and recoverable costs totaling Five Thousand Nine Hundred Seventy-Six and Ninety-Five Cents ($5,976.95).

Under California Welfare and Institutions Code §15657.5, an award of attorney's fees is mandatory Attorney's fees under §15657.5(a), may be awarded when a defendant is liable for financial elder abuse under §15610.30. (*Cameron v. Las Orchidias Properties, LLC* (2022) 82 Cal.App.5th 481.) The standard of review for attorney fees awards under §15657.5 is abuse of discretion, with the trial court's award of fees presumed reasonable. (*Save Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665.)

The Third Appellate District Court of Appeals at page 16 of its decision held:

> "Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, . . . in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs." (§ 15657.5, subd. (a), italics added.)
>
> "The trial court found Clyde's three violations of his fiduciary duties toward Gus also constituted financial abuse within the meaning of the Elder Abuse Act, and thus awarded attorney fees and costs to Gus's estate. Clyde argues these three acts were not financial abuse. We disagree." (*Zamora v. Clapp* (July 5, 2023, C095440 [p.16])

This Court hereby orders as follows:

> $114,021.50 for attorney's fees leading up to trial, attending trial, post-trial motions and mediation. Attorney's fees and costs for appeal, motions during appeal, respondent's brief, oral argument, defending a request for

re-hearing, petitions for review and costs and fees for this motion after remittitur for $69,197.50 and costs in the amount of $5,976.95, for **total attorney's fees of $183,219, and costs $5,976.95**.)

Defendant's Motion to Tax Costs for the foregoing reason is DENIED.

The Clerk shall provide notice of this Ruling to the parties forthwith. Moving party to submit a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling.