BETTENCOURT v NORCAL GOLD dba RE/MAX GOLD, et al

23CV47084

NORCAL GOLD'S DEMURRER TO SECOND AMENDED COMPLAINT

This matter involves a residential real estate dispute between Plaintiff Darren Bettencourt ("Plaintiff") and Defendants Norcal Gold, Inc. dba Re/Max Gold ("Gold"), Traci Hatt ("Hatt"), Kirk Kercielich ("Kercielich"), Arlene Vierra ("Vierra"), Anne Almeida ("Almeida") and Powerhouse Realty ("Powerhouse").

Now before the Court is a demurrer brought by Gold and Hatt (collectively "Moving Defendants") against Plaintiff's Second Amended Complaint ("2AC.")

It is not the Court's role to point out counsel's procedural errors; however, the Court notes that there are numerous procedural shortcomings here. First, the demurrer filed by Moving Defendants on July 6, 2026, was premature, as Plaintiff—despite apparently having served the 2AC on the at least some of the other parties—did not untimely file it with the Court until August 31, 2026! The proof of service attached to the demurrer shows that the demurrer was sent to Plaintiff's counsel at an address in Dos Palos, California [!] but Plaintiff's counsel's address is in Merced, California. Plaintiff failed to serve his opposition on pro se defendant Kirk Kerchelich, which is notable, and ironic given Plaintiff's entire opposition is based on improper service by Moving Defendants.

Given the inordinate number of procedural issues, the matter is dropped from the Court's calendar. The demurrer is not ruled upon, with leave to refile within the appropriate timeframe based on the filing of the 2AC on 8/31/26. Counsel are admonished to pay closer attention to detail and the rules of Civil Procedure and of this Court.

The clerk shall provide notice of this ruling to the parties forthwith. No further formal Order is required with regard to this Ruling.

SANCHEZ v SENDER'S MARKET, INC., et al

24CV47302

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

This is a breach of contract claim brought by Cynthia Sanchez ("Sanchez") against Slakey Brothers ("Slakey"), Sender's Market ("Market") and Roth Industries, Inc. ("Roth.")

Now before the Court is Sanchez's motion for leave to file a First Amended Complaint ("FAC.") Slakey and Roth have both filed oppositions.

The motion does not comply with Local Rule 3.3.7. All matters noticed for the Law & Motion calendar shall Include the following language in the notice:

> 3 3 7 Tentative Rulings (Repealed Eff 7/1/06, As amended 1/1/18) All parties appearing on the Law and Motion calendar shall utilize the tentative ruling system. Tentative Rulings are available by 2:00 p.m. on the court day preceding the scheduled hearing and can be accessed either through the court's website or by telephoning 209-754-6285. The tentative ruling shall become the ruling of the court, unless a party desiring to be heard so advises the Court no later than 4:00 p.m. on the court day preceding the hearing including advising that all other sides have been notified of the intention to appear by calling 209-754-6285. Where appearance has been requested or invited by the Court, all argument and evidence Is limited pursuant to Local Rule 3 3. All matters noticed for the Law & Motion calendar shall Include the following language in the notice:
>
> **Pursuant to Local Rule 3 3 7, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m. the court day before the hearing. The complete text of the tentative ruling may be accessed on the Court's website or by calling 209-754-6285 and listening to the recorded tentative ruling. If you do not call all other parties and the Court by 4:00 p.m. the court day preceding the hearing, no hearing will be held and the tentative ruling shall become the ruling of the court** [emphasis in original.]

> Failure to include this language in the notice may be a basis for the Court to deny the motion.

Despite the failure to comply with local rules, in the interest of judicial efficiency, the Court will consider the substance of the motion.

I. Relevant Facts and Procedural History

Sanchez filed her Complaint for breach of contract, breach of warranty, and negligence on April 5, 2024. In her Complaint, Sanchez alleges that on or about October 20, 2021, she purchased three Roth ISO-gallon potable water storage tanks from Market. (Complaint ¶ 8.) Market contacted Slakey to complete the order, and Slakey in turn ordered the tanks from Roth. (*Id*. ¶ ¶ 9, 10.) Sanchez received a written purchase order dated April 2022 (the "Agreement.") (*Id.* ¶ 11.) Installation of the tanks took place in September and October of 2022. (*Id*. ¶ 12.)

In January of 2023, Sanchez took a sample of water to a testing facility and on February 16, 2023, she learned that the water sample had Tetrachloroethene, a known carcinogen. (Complaint ¶ 13.) The tanks are filled with water from wells and testing of the wells showed no presence of contaminants – however the bottom of the tanks did. (*Id.* ¶¶ 14, 15.)

On or about April 2023, representatives for Slakey and Roth came to the property, confirmed the presence of the contaminants, and posited possible sources for the contamination that could have come from Sanchez's property. (Complaint ¶ ¶ 17, 18.) Sanchez alleges that she, her husband Jerry Jerstad ("Jerstad") and her pets have all become ill since the installation of the tanks and seeks damages.

II. Legal Standard

When a party moves to amend a pleading, "courts generally should permit amendment to the complaint at any stage of the proceedings, up to and including trial. [Citations.]" (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175.) Leave to amend should be granted liberally. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 488-489.) In ruling on such motion, the Court's main concern is prejudice to another party. (*Ibid*.) Prejudice means more than inconvenience, but instead focuses on delay in trial, loss of critical evidence or added costs of preparation. (*Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.)

A motion to amend a pleading before trial must include a copy of the proposed amendment or amended pleading. (Cal. Rules of Court, Rule 3.1324, subd. (a)(1).) The motion must also be supported by a declaration which specifies the following: (1) the effect of the amendment; (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 for amendment was not made earlier. (Cal. Rules of Court, Rule 3.1324, subd. (b).)

In ruling on a motion for leave to amend, courts generally do not consider the amended pleading's merits. (*Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 760.)

III. Discussion

Sanchez seeks to amend her Complaint to add additional facts, seek additional damages, and to add Jerstad as a Plaintiff. Roth and Slakey oppose the motion on the grounds that there was an inexcusable delay in seeking amendment, the amendment is barred by the statute of limitations, and allowing amendment at this point will severely prejudice the defendants.

Sanchez asks the Court to grant her leave to amend her complaint sixteen months after it was filed on the grounds that "facts have been developed over time since the filing of the original Complaint" and to add facts that "have been uncovered through discovery and investigation." (Declaration of Peter Winkler ("Winkler Decl.") ¶ ¶ 4, 5.) Mr. Winkler's declaration is inadequate to meet the standard required to allow amendment, particularly in light of the potential prejudice from the unexplained delay. The declaration fails to state what new facts were learned, when they were learned, and why the motion was not brought sooner. (See e.g. *Reason v. Reason* (1999) 73 Cal.App.4th 472.)

The Court is, however, cognizant of the strong preference for cases to be decided on their merits. Accordingly, leave to amend is **DENIED, but without prejudice**.

Sanchez's counsel is admonished to review the requirements of Rule 3.1324 before any further motions for leave to amend are filed. Additionally, as noted above, at this procedural stage the Court's decision is without consideration of the proposed pleading's merits; however, the Court notes that (as the contention was raised in the opposition) it appears there is a definite likelihood of the Court ultimately determining that the addition of Jerstad as a plaintiff may well be barred by the statute of limitations and urges counsel to meet and confer to determine if a stipulation to file a Third Amended Complaint (3AC) that avoids future further motions may be appropriate.

The clerk shall provide notice of this ruling to the parties forthwith. No further formal Order is required.

<u>10:00 a.m. CALENDAR</u>

MATTER OF PRESTON

20PR8275

SUCCESSOR ADMINISTRATOR'S MOTION FOR EXTRAORDINARY ATTORNEY'S FEES

Now before the Court is a Petition for Extraordinary Fees brought by Chad Preston ("Petitioner") as Successor Administrator of the Estate of Gregg Hall Preston ("Estate.") Petitioner seeks an order approving extraordinary compensation as follows: 1) $148,701.22 for attorney's fees, and 2) $1,150.25 in travel fees related to Petitioner attending trial.

There is no opposition on file.

I. Legal Standard

Probate Code section 10811 authorizes the court, in its discretion, to allow compensation to the attorney for the personal representative for extraordinary services, in addition to the statutory compensation provided by section 10810, in an amount the court determines is just and reasonable. (Prob. Code, § 10811, subd. (a).) A parallel provision, section 10801, governs extraordinary compensation to the personal representative. The award of extraordinary compensation rests within the sound discretion of the trial court. (*Est. of Gilikson* (1998) 65 Cal.App.4th 1443, 1448; California Rules of Court rule 7.703(a).)

California Rule of Court rule 7.303(b) sets forth a nonexclusive list of activities for which extraordinary compensation may be awarded to the attorney for the personal representative. These include "litigation undertaken to benefit the estate or to protect its interests" (subd.(b)(3)), "extraordinary efforts to locate estate assets" (subd. (b)(8)), and "coordination of ancillary administration" (subd (b)(10).)

Pursuant to California Rule of Court rule 7.702, a petition for extraordinary compensation must include, or be accompanied by, a statement of the facts which must:

(1) Show the nature and difficulty of the tasks performed;

(2) Show the results achieved;

(3) Show the benefit of the services to the estate;

(4) Specify the amount requested for each category of service performed;

(5) State the hourly rate of each person who performed services and the hours spent by each of them;

(6) Describe the services rendered in sufficient detail to demonstrate the productivity of the time spent; and

(7) State the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report.

Pursuant to Probate Code section 10801, the Court "may allow additional compensation for extraordinary services by the personal representative in an amount the court determines is just and reasonable."

II. Discussion

A. Attorney Fees

1. Nature and Difficulty of Tasks Performed

The court has reviewed the Petition and the supporting declaration of Carrie M. McKernan, Esq ("McKernan Decl.") Ms. McKernan avers that her law firm of Giannelli, Friedman, Jeffries, & McKernan ("GEJM") was hired by Petitioner to assist in removing the prior administrator of the estate, Scott Preston ("Scott"), and securing the appointment of Petitioner as the personal representative. (McKernan Decl. ¶ 1.) McKernan avers that her firm had to engage in significant litigation efforts, including but not limited to:

- Investigating the actions and omissions of Scott and his prior counsel, Ms. Schafer;
- Communications with Scott regarding delinquent status reports, with banks, financial institutions, and Petitioner regularly between October 2023 and July 31, 2026; with prior counsel Shafer including meet and confers, informal objections to accounting, issues with un-inventoried assets, and document requests;
- Preparing and attending hearing on the Petition to Remove Scott as PR;
- Attending nine (9) court hearings, including two in which Schafer failed to appear;

- Attending an additional four (4) court hearings after Petitioner was named personal representative, including motion to compel Schafer's deposition;

- Issuance of subpoenas to financial institutions and repeated discovery demands to Scott and Schafer (none of which were answered);

- Depositions of Scott and Schafer, the latter which required Petitioner to file a motion to compel and attend a hearing in this Court;

- Trial preparation work, including motions in limine and then attendance at trial (McKernan Decl. ¶¶5(a)-(u).)

Petitioner states that all of this significant extra work was necessitated because of Scott's failure to proceed with proper administration of the Estate, his absconding with Estate assets, and his failure to ensure the Estate was administered for the benefit of the beneficiaries. (McKernan Decl. ¶ 6.)

The Court finds that the nature and difficulty of legal services provided, largely necessitated by Scott's own behavior, are of the nature and type for which extraordinary compensation is allowed and reasonable.

2. Results Achieved/Benefit to the Estate

The significant extra work expended by GEJM benefited the Estate. Prior to Petitioner's appointment, Scott had failed to properly administer the Estate including failing to provide required status reports, failing to properly inventory the Estate assets, and failing to pay taxes and other obligations of the estate. By removing Scott and obtaining an order appointing Petitioner as personal representative, GEJM was able to benefit the Estate. Petitioner was able to locate missing assets, identify misappropriate funds, and ascertain missing tax returns (and eventually pay that liability). All told, GEJM was able to ascertain that Scott damaged the Estate in the amount of $450,000. Through their work and Petitioner's proper administration, proper accounting of the Estate was made, taxes paid, and the Estate was prevented from going insolvent. (McKernan Decl. ¶ 22.)

The Court finds that the services provided by GEJM benefited the Estate.

3. Relationship to Statutory Compensation

Probate Code 10810 sets forth the statutory compensation schemes for attorneys representing personal representatives, which is based on the value of the Estate. These fees are guaranteed by statute and encompass the type of legal services typically rendered for estate administration. The Court believes that the requested extraordinary fees are reasonable and additive to, and not duplicative of, the services compensated by the statutory fee.

B. Additional Compensation for Petitioner (Travel Costs)

Petitioner also seeks travel costs related to having to travel from Vermont to the trial in this matter. Inexplicably, Scott failed to appear at the trial.

The Court finds that under the circumstances, travel costs are reasonable and awards $1,150.25 to Petitioner.

III. Conclusion

The Petition is **GRANTED**. The Court finds that the services described in the petition were extraordinary services within the meaning of Probate Code sections 10811, 10801, and California Rules of Court, rule 7.703.

The clerk shall provide notice of this ruling to the parties forthwith. Plaintiff to submit a formal Order complying with Rule 3.1312 in conformity with this Ruling.