

**Andrew Greer, et al. v. Calaveras County, et al.**

**18CV43460**

**MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND SUBSTITUTE NEW  
CLASS REPRESENTATIVES**

The matter is CONTINUED to September 21, 2021, at 10:30 a.m. in Dept. 3.

There does not appear a proof of service of the motion in the Court's file. However, as discussed hereinbelow, all parties have filed substantive responses, thereby waiving any defect in service of notice. "It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion." (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697, quoting *Tate v. Super. Ct.* (1975) 45 Cal.App.3d 925, 930.) "This rule applies even when no notice was given at all." (*Ibid.*)

The Notice of Motion asserts that *Plaintiffs* move, pursuant to Code of Civil Procedure sections 473, subdivision (a)(1) and 382, for leave to file an amended complaint substituting new named Plaintiffs/class representatives in place of the original named Plaintiffs/class representatives on the grounds that, because of changed circumstances, the original class representatives are no longer able to adequately protect the interests of all members of the putative class. The motion is signed by counsel (for Plaintiffs) Andrew F. Scher of the firm Henry G. Wykowski & Associates. It is supported by a Declaration filed by counsel (for Plaintiffs) William Panzer. For reasons that will become clear, the Court refers to these attorneys collectively as "Original Plaintiff's Counsel."

Defendants do not oppose the motion. However, the named *Plaintiffs*, purportedly represented by one Robert D. Finkle of the Finkle Law Office (Finkle), have filed an opposition. It is the Court's understanding and position that, as the class has not been certified, the named Plaintiffs and Defendants are the *only* parties to the action. We therefore have the exceptional circumstance in which attorneys are purporting to bring a motion on behalf of clients who appear to oppose it.

First, the substance of the opposition to the present motion strongly suggests that the following factual assertion is without evidentiary support: "Plaintiffs, on behalf of themselves...move this Court for leave to file an amended complaint in this class action..." (Notice of Motion at 2:4-6; see Code Civ. Proc., § 128.7, subd. (b)(3) ["[b]y presenting to the court, whether by signing [or] filing...a...written notice of motion...an attorney... is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances...[t]he...factual contentions have evidentiary support...".])

Second, although not specifically discussed in the moving papers – again in the context of the class having yet to be certified – it appears that a likely *consequence* of the present motion

would be to effectively dismiss the named Plaintiffs' claims against Defendants. "The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of a client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent." (*Price v. McComish* (1937) 22 Cal.App.2d 92, 97, quoting 6 Corpus Juris at p. 647; see also *Bowden v. Green* (1982) 128 Cal.App.3d 65, 73 ["[i]t is undeniable here that counsel's agreement to dismiss the cross-complaint 'impaired' that cause of action and, in the absence of consent, ratification or estoppel, was invalid"].) The substance of the declarations from the three named Plaintiffs strongly suggest that Original Plaintiff's Counsel lacks authority to take this step. (See Declaration of Adam Ray, at ¶¶ 4, Declaration of Crystal Keesey at ¶¶ 1 and 4, Declaration of Andrew Greer at ¶ 4.)

Third, there is evidence in the record that Plaintiffs have sought to terminate their relationship with the Original Plaintiff's Counsel. (See Declaration of William Panzer at ¶¶ 4 and 5.) In this context the Court notes that a client has a right to discharge his attorney at any time. "[I]n the absence of any relation of the attorney to the subject-matter of the action, other than that arising from his employment, the client has the absolute right to change his attorney at any stage in the action. The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney." (*Gage v. Atwater* (1902) 136 Cal. 170, 172.)

Unfortunately, however, because the putative opposition papers were filed by attorney Robert Finkle, and Mr. Finkle has not been formally substituted into the case by either the filing of a Judicial Council Substitution of Attorney Form MC-050, or by order of the Court following motion or application by Plaintiffs, these opposition papers may not be properly before the Court.<sup>1</sup> (See Code Civ. Proc. § 284.) "The newly appointed attorney will not be recognized by the courts and the attorneys' acts will be ineffective until formally substituted as the attorney of record or unless the opposing party, by dealing with the new attorney as an attorney, waives the failure to substitute." (1 Witkin, California Procedure (5th ed. 2008) Attorneys, at § 79, p. 114.)

Regardless of the status of the opposition papers, the tensions discussed herein above are inherent in the moving papers and apparent in the Declarations signed under penalty of perjury by the named Plaintiffs. Based on the foregoing, the Court elects to CONTINUE the present motion for a period sufficient to allow the named Plaintiffs to resolve the pending issues relating to their counsel of record.

The Court urges the Original Plaintiff's Counsel to consider carefully their position vis-à-vis the proposed consent to substitution of counsel. As noted herein above, the Court's understanding is that until the class is certified, putative class members are not parties to the

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<sup>1</sup> For this reason, the Court declines, at the present time, to rule on Plaintiff's evidentiary objections.

action. If that understanding is correct, then the only parties represented by Original Plaintiff's Counsel are the named Plaintiffs.<sup>2</sup>

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

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<sup>2</sup> The Court acknowledges that it has not been briefed on the issue. To the extent that Original Plaintiff's Counsel has authority suggesting otherwise, the Court's discussion herein is not meant to dissuade presentation of such authority in a procedurally appropriate manner.