THE LAKES TREATMENT CENTER v. THE RESORT AT LAKE TULLOUGH et al

21CV45585

DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT

This is a dispute involving a commercial lease with a purported option to buy. Plaintiff (tenant) contends that defendants (current and former owners) failed to honor a right of first refusal or to maintain the property consistent with the terms of the lease agreement. Before the Court is a motion by co-defendant The Resort at Lake Tulloch, LLC to set aside entry of default. The motion is GRANTED.

Plaintiff reportedly effectuated service of the summons on The Resort at Lake Tulloch, LLC, by leaving a copy of the service package with an unidentified male answering the door at 1034 E. Belmont Abbey Lane, Claremont, CA 91711-1463. According to the POS, this was an attempt to sub-serve the agent for service of process. The POS indicates that the address where service occurred was a home, not a business.

Pursuant to CCP §415.20(a), an entity's agent for service of process can only be sub-served "by leaving a copy of the summons and complaint during usual office hours *in his or her office or, if no physical address is known, at his or her usual mailing address … with the person who is apparently in charge thereof.*" Emphasis added. In other words, you cannot sub-serve an entity's agent for service of process at the agent's personal residence if a business or mailing address is known. It appears from the papers that this agent – Jason Giambi – lives in Nevada. (See Greene Decl Para 4.) Nevertheless, it was error for the process server to mark box 5.(b)(2) on the POS. Since service was defective, the Request for Entry of Default was voidable upon inspection. As such, it must now be set aside.

Even without the service anomaly, this Court finds that relief is warranted under CCP §473(b) based on inadvertence, mistake and surprise. (See *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206; *Fasuyi v. Permatex* (2008) 167 Cal.App.4th 681, 701.) Although "mandatory" relief is also warranted since counsel confessed his confusion regarding the drop-dead date for filing a responsive pleading (see *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1414; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609), the right to recover costs is not triggered here since relief is warranted on other grounds. Thus, plaintiff's request to be reimbursed in lieu of simply stipulating to the set-aside is denied.

Default set aside. Defendant to file responsive pleading within 5 days.

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

FRENCH v. CALAVERAS COUNTY BOARD OF SUPERVISORS

21CV45707

RESPONDENT'S DEMURRER TO PETITION AND PETITIONER'S MOTION FOR WRIT OF MANDATE

This is a traditional mandamus action involving the County's alleged ministerial duty to honor petitioner's Sierra Vista Parcel Map 2005-082 (hereinafter "map") and approved as a tentative parcel map by the planning commission in 2008, to subdivide 27+ acres into four parcels. The issue is whether the planning commission's approval of the map expired, or whether it was extended pursuant to statute. The County deemed the map expired, and thus unavailable to record. The planning commission denied petitioner's appeal, as did the Board of Supervisors.

Before the Court first is respondent's demurrer to the Petition.

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.)

Although the demurrer is based on a number of grounds, this Court finds that the operative pleading does not include sufficient facts to support issuance of any mandate based upon breach of a ministerial duty. Where the demurrer is based on the pleading not stating facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown. (*New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714; *Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 566.) In other words, a general demurrer for failure to state fails it the pleading "states, however inartfully, facts disclosing some right to relief." (*Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 352.) Here, the allegations pled do not establish a basis for writ relief

under CCP §1085. The averments do not show a ministerial duty to permit recordation of the map, nor do they show a ministerial duty to grant an extension (since it does not appear that a request for an extension was in fact made).

In addition, this Court agrees with respondent that the petition is uncertain. Although demurring on grounds of uncertainty is generally disfavored, it is proper when the essential facts upon which a determination of the controversy depends are ambiguous, unintelligible, or otherwise impossible to discern from the allegations made. (See *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695; *Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) Here, respondent "assumes" that petitioner is challenging the Board's decision on his appeal, which would be more of a §1094.5 writ tethered to an administrative record. There is no administrative record. As noted, this Court views the pleading as one for §1085 relief, but then notes that petitioner contends in the opposition that "the cause of action sought to be compelled, is an act that the respondent is specially enjoined by law to do." This is the opposite of a ministerial duty, but nevertheless petitioner repeatedly references a ministerial duty. Because treating the case as one for traditional versus administrative mandamus makes a big difference, it is necessary to make plain at the forefront what petitioner is trying to accomplish.

Finally, this Court notes that the claim – depending on how it is framed – may indeed be time-barred. A demurrer on the ground of the bar of statute of limitations will not lie where the action may be, but is not necessarily barred. It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. This will not be the case unless the petition alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42; *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1324.) Here, Government Code §66499.37 provides a 90-day limitations period for "any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map." Thus, if indeed petitioner is challenging a "decision" regarding his map, he may be time-barred.

The demurrer to the petition is SUSTAINED. Petitioner shall be given 30 days leave to amend. In light of the required amendments, petitioner's motion for a writ of mandate, and motion for a peremptory writ in the first instance, are DENIED without prejudice.

The Clerk shall provide notice of this Ruling to the parties forthwith. Respondent to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.