

BRUMBAUGH v. APPALOOSA ROAD COMM. SERVICE DIST.

21CV45171

PETITIONER'S OBJECTION TO VIOLATION OF STIPULATION, REQUEST FOR SANCTIONS

This is an administrative writ of mandate proceeding alleging “Brown Act” violations relating to the imposition of a real property parcel tax increase. Before the Court this day is petitioner’s motion for sanctions, pursuant to CCP §128.7, for respondent’s failure to withdraw the demurrer following receipt of a stipulation to amend.

Procedurally, this motion is defective because there is no indication in the moving papers that petitioner served a copy of the motion and waited the required 21 days “safe harbor” before filing this motion. (See CCP §128.7(c)(1); *Primo Hospitality Group, Inc. v. Haney* (2019) 37 Cal.App.5th 165, 173-174; *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698.) The safe harbor period is mandatory, and the full 21 days must be provided absent a court order shortening that time period for good cause. (See *Moofly Productions, LLC v. Favila* (2018) 24 Cal.App.5th 993, 999; *Li v. Majestic Industrial Hills, Inc.* (2009) 177 Cal.App.4th 585, 592–594; *Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 418-419.) Here, the motion was apparently served and filed *on the same day* –a patent violation of the statutory provision.

Procedurally, this motion is also defective because petitioner failed to include in the Notice of Motion the required information set forth in Calaveras County Superior Court Local Rule 3.3.7. Failure to include this language in the Notice is itself grounds for denial of the motion.

Substantively, this motion fails because petitioner has not shown by a preponderance of the evidence that the demurrer lacked a proper purpose, legal merit, or evidentiary support when filed, or that leaving it on file despite the signed stipulation was done for an improper purpose. (See CCP §128.7(b); *Musaelian v. Adams* (2009) 45 Cal.4th 512, 516; *McCluskey v. Henry* (2020) 56 Cal.App.4th 1197, 1205; *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440, 449; *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.) To qualify as an improper purpose under CCP §128.7, the moving party must show that the “primary” purpose for leaving the demurrer on calendar was “to harass or cause needless delay or expense.” However, if the papers are otherwise nonfrivolous, then as a matter of law the papers are not being presented for an improper purpose. (*Ponce v. Wells Fargo Bank* (2018) 21 Cal.App.5th 253, 265.) Here, the stipulation was *drafted* before the demurrer was filed, and did not address (1) withdrawing the demurrer or (2) a time limit for when the Third Amended Petition would be filed.) Thus, respondent was not *prohibited* from leaving the demurrer on calendar.

Based on the foregoing procedural and substantive reasons, Petitioner's motion is DENIED. Respondent's request for fees and costs is likewise DENIED. Although respondent prevailed, such award is discretionary, and this Court finds that – with the signed stipulation in hand – respondent should have informed the Court and worked with petitioner to take it off-calendar rather than making this Court analyze the papers and formally rule on the demurrer.

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

AURAN, et al. V. GORDON

15CV41331

PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT

This is a neighbor dispute over a fence and other constructs allegedly encroaching over the mutual property line. Before the Court is an unopposed motion to enforce a settlement.

On 03/25/19, the parties attended a Mandatory Settlement Conference. The minute order from that hearing indicates that the parties "have agreed to split the costs of the survey" and that a "further Settlement/Trial Setting Conference" will be scheduled. According to plaintiffs' counsel, the parties also agreed that if the survey showed encroachments, "they would be removed."

On 05/21/19, defendant Carol Gordon passed away. The oral settlement was never reduced to writing.

On 04/10/20, plaintiffs filed a "Creditor's Claim" in a related *Heggstad* petition for the ostensible purpose of protecting the oral settlement. (See 19PR8204.)

On 05/04/20, the estate tendered to plaintiffs a check in the amount of \$2,459.00 which, according to plaintiff's counsel, satisfied defendant's share of the professional survey invoice. Counsel indicates that defendant has also removed *some* of the encroachments; however, "we still have a portion of a barbeque and deck which needs to be removed."

Pursuant to CCP §664.6, if parties to pending litigation stipulate in a writing signed by the parties themselves, or in open court before a judge, the court, upon motion, may enter judgment pursuant to the terms of the settlement. The statute "was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809; in accord, *Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 328-329.)

In order to enforce an oral settlement made in court, it is necessary to show that the parties themselves were present and expressed unambiguous assent to all material terms. Neither the Minute Order datd 03/25/19, nor the supporting declaration, indicate that any party was subject to *voir dire* on the settlement terms, or otherwise expressed unambiguous assent. However, where the agreement was reached at a court hearing,

the court can fill in a factual abyss by reference to his or her own notes or recollection of what was agreed to – so long as the judge does not add new or different material terms. (See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 905, 911; *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1258; *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, 1623; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1459; *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1353-1355; *Richardson v. Richardson* (1986) 180 Cal.App.3d 91, 97.)

Based on (1) defendant's partial performance in removing the offending fence, and (2) this Court's independent recollection that the parties agreed defendant would remove – at her own expense – anything encroaching once the boundary was determined by survey, this Court concludes that the settlement reached in open court and placed on the record included defendant's commitment to remove that portion of the BBQ and deck which the survey found to be encroaching. Plaintiffs' Motion to Enforce Settlement is GRANTED. Defendant's estate is hereby ordered to effectuate that aspect of the settlement within 90 days or face a daily penalty of \$50.

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