DEBT MANAGEMENT PARTNERS, LLC v. CALLAHAN

21CF13502

PLAINTIFF'S MOTION FOR ORDER TO DEEM MATTERS ADMITTED

This is a limited jurisdiction debt collection action. Before the Court is plaintiff's unopposed motion to deem admitted all matters contained in plaintiff's Requests for Admission and Genuineness of Documents, Set One.

On 06/30/21, defendant first appeared in the action by way of an answer, including her mailing address of 516 Rock Forge Loop, Angels Camp, CA 95222. On 07/21/21, plaintiff served upon defendant Requests for Admission, Set One, by regular US Mail at defendant's service address.

Pursuant to CCP §§ 1013 and 2033.250, defendant had 35 days from the mailing to provide a verified written response. Defendant did not timely (or ever) serve responses. (See Kenosian Declaration, Paragraph 5.)

Pursuant to CCP §2033.280(b), the party propounding RFAs may "move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction." The trial court "shall" grant the motion unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response in substantial compliance with Section 2033.220. (See *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 777-778.) Trial courts have no discretion but to grant the admission motion, usually with fatal consequences for the defaulting party. (See *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 971.)

The eight (8) matters and three (3) documents contained in the RFA are hereby deemed admitted and/or deemed genuine.

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

CERRUTI, et al. v. DEVOTO, et al.

17CV42758

(21CV45366)

PLAINTIFF'S MOTION TO CONSOLIDATE COMPLAINTS FOR QUIET TITLE TO THE

"GARIBALDI QUARTZ LODE MINING CLAIM"

This is an unlimited jurisdiction quiet title action involving potential clouds over the chain of title associated with APN 052-016-009, Lot Number 45, Survey No. 3502 embracing a portion of Section 24, Township 3 North of Range 12 East M.D.M. in the Angels Mining District, commonly referred to as the Garibaldi Quartz Lode Mining Claim, (hereinafter referred to as "subject property").

Before the Court is an unopposed motion to consolidate this civil action with a nearly-identical civil action filed by plaintiffs (21CV45366). Both lawsuits involve claims of adverse possession to the same property by the same putative owners against many of the same defendants. Both complaints were verified (though only the 2021 lawsuit was verified by *both* Gilbert and David). The cases are obviously identical to one another, and but for some anomalies, this motion would be easily granted.

First, there is a serious concern regarding service of the motion. Plaintiffs' motion to consolidate was filed 09/29/21 in only the 2017 action, and served by regular mail on defendants Vicki Brazil, Andrew Brazil, and Joan McCarthy. However, additional named defendants in the 2017 action – Charles Devoto, Christina Huberty, Annie Austin, and Sarah Singer – were not served with the motion. These unserved defendants happen to be the only defendants named in the 2021 action, and as such the only parties who might have reason to object to the motion to consolidate have not been served with the motion. Although plaintiffs are of the opinion that at least three of the four unserved defendants are "probably deceased," that is not sufficient for due process concerns.

Second, even without the service concern, the basis for the motion is suspect. Pursuant to CCP §1048(a), "when actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Trials courts have wide discretion in this regard, and are to be guided by the precept that consolidation is supposed to enhance trial court efficiency and avoid inconsistency and undue confusion. (*Todd-Stenberg v. Dalkon Shield Claimants Trust*

(1996) 48 Cal.App.4th 976, 979-980). Though technically tethered to the question of coordination, many courts consider the factors set forth in CCP §403 *et seq* and CRC 3.500 as relevant to the question of consolidation for all purposes. Those factors include (1) the existence of a significant and predominating common question of fact or law between the actions; (2) the convenience of the parties, witnesses, and counsel; (3) the relative development of the actions and the work product of counsel; (4) the efficient utilization of judicial resources; (5) the court's calendar; (6) the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and (7) the likelihood of settlement in the absence of coordination.

The concern here is not the practical benefit to be gained by consolidation (which is obvious), but rather the equitable underpinnings to the motion. According to plaintiffs' counsel, the 2021 lawsuit was filed solely because "plaintiffs could not complete service of [certain] defendants within the initial three year statute of service of summons." (Motion 2:27-3:1.) While counsel's candor is appreciated, those defendants – Charles Devoto, Christina Huberty, Annie Austin, and Sarah Singer – were entitled as a matter of law to possible dismissal of the action for failure to effectuate service of the summons pursuant to CCP §§ 583.210 and 583.250. Moreover, the statute provides that "no further proceedings shall be held in the action." §583.250(a)(1).

As one Court noted, "it is possible that actions may be thoroughly related in the sense of having common questions of law or fact, and still not be consolidated, if the trial court, in the sound exercise of its discretion, chooses not to do so." (*Askew v. Askew* (1994) 22 Cal.App.4th 942, 964.) That is the case here. Unless and until plaintiffs demonstrate an exception to statutory dismissal requirements, this Court will not proceed to consolidate as requested.

This hearing is continued to December 17, 2021 at 9:00 a.m. in Dept. 2. Any supplemental filings plaintiffs want this Court to consider, as well as updated complete proofs of service, must be filed and served at least 10 Court days prior to the next hearing.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiffs to provide notice of this Ruling to all defendants in both cases.

WEBER v. PAUL

21CV45397

DEFENDANT'S MOTION TO TRANSFER ACTION TO CONTRA COSTA COUNTY AND FOR ATTORNEY'S FEES

This is a personal services dispute regarding residential landscaping services. Before the Court is defendant's opposed motion to transfer the action to Contra Costa County.

The salient facts, which are admittedly hard to extract, appear to be as follows:

> On or about 03/05/20, plaintiff David Weber and defendant Denise Paul entered into a contract by which plaintiff (landscaper) agreed to provide defendant (homeowner) with landscape services for a fixed amount of $9,480.00. According to plaintiff, this was a heavily discounted estimate, offered on defendant's promise that she had more future projects. Apparently, those "other" projects never came to fruition, and the former working relationship degenerated.
>
> On 09/05/20, defendant filed a small claims action (apparently in Contra Costa or Alameda County) against plaintiff and his landscape company for $5,000. Weber did not appear for trial and default judgment was entered in the amount of $3,165.92. Weber's subsequent motion to vacate was denied, and his attempted appeal denied as untimely.

Four weeks after the small claims case came to an end, plaintiff commenced the present action in Calaveras County. The operative pleading – while far from any beacon of clarity – purports to contain six causes of action, ranging from equity to contract and tort. Each cause of action must be separately considered to determine whether Calaveras County represents a proper venue. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 488; *Capp Care, Inc. v. Superior Court* (1987) 195 Cal.App.3d 504, 508.)

Venue rules designate a particular county (or counties) within California as the proper place for trial. The purpose of venue rules is to give defendants some control in the choice of where they are sued. Venue is not jurisdictional in the fundamental sense, though certain actions can "only" be brought in specific counties. The test largely begins with whether the main relief sought in the original operative pleading relates to rights in realty (local) or personalty (transitory). Venue is to be determined at the outset of the action based on the averments set forth in the operative pleading when the motion to

transfer is first made. The burden of proof on a venue challenge rests with the moving party to overcome the strong presumption that the plaintiff has selected a proper venue. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482; *Dow AgroScience LLC v. Superior Court* (2017) 16 Cal.App.5th 1067, 1076-1078; *Fontaine v. Superior Court* (2009) 175 Cal.App.4th 830, 836; *K.R.I. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 505; *Alexander v. Superior Court* (2003) 114 Cal.App.4th 723, 731.)

Actions for breach of a contract are properly sited in the county where (1) a defendant resides, (2) where the contract was accepted, (3) where the contract is to be performed (if expressly specified in the writing) or, (4) if the contract was for personal, family or household services, where the buyer signed the contract.)See CCP §395; *Fontaine v. Superior Court* (2009) 175 Cal.App.4th 830, 838.)

Actions for defamation are properly sited in the County where the defendant resides. (*Graham v. Mixon* (1917) 177 Cal. 88, 93; *Williams v. Superior Court* (2021) WL5027187 at *3-5 (certified for publication 10/29/21).) So too are actions for common law fraud and declaratory relief.(See *Quick v. Corsaro* (1960) 180 Cal.App.2d 831, 834-835.)

Based on the operative pleading, it appears that *plaintiff* resides in Calaveras County (Complaint Para 1), *defendant* does business in Alameda County (Complaint Para 1), the properties needing landscape services were in Alameda County (Complaint Para 4), and the contracts were to be performed in Alameda County (Complaint Para 7). There is no averment regarding the place of making (where acceptance occurred).

The moving party provides her own evidence supporting the claim that Calaveras County is not a viable venue. Initially, she provides a declaration attesting to the fact that she lives in Contra Costa County, and that the work was for properties located in Alameda County. She provides a copy of the written contract, albeit one that is illegible. She also provides renderings for landscape work at three properties, all of which appear to be located within the County of Alameda. She provides Weber's answer from the small claims case, insisting that the action be moved to either San Joaquin County or Alameda County (which the Court declines to take Judicial Notice of, determining it to be of limited relevance at best). She also provides an e-Filing receipt for a related case filed in San Joaquin County Superior Court earlier this year.

Finally, with regard to the putative venue selection clause allegedly establishing Calaveras County as the County of choice for the parties, this Court declines to accept this possibility. First, the clause on page 7 (as described by the parties) is not a proper venue-selection clause, nor is it a "special contract in writing" for venue purposes, since the clause does not purport to specify the place of performance. (See *Mitchell v. Superior Court* (1986) 186 Cal.App.3d 1040, 1047; *Armstrong v. Smith* (1942) 49 Cal.App.2d 528, 537.) Second, plaintiff's failure to assert Calaveras County as a proper venue in the related small claims action raises serious doubt about the validity of the interlineated venue selection clause in the operative agreement. Third, given the situs of

work to be performed, there is no plausible explanation for selecting Calaveras as the county to try disputes, and trial courts are free to reject venue preferences if they offend the public policy behind statutory venue rules. (See, *e.g., Battaglia Enterprises, Inc. v. Superior Court* (2013) 215 Cal.App.4th 309, 315; *Alexander v. Superior Court* (2003) 114 Cal.App.4th 723, 731; *Arntz Builders v. Superior Court* (2004) 122 Cal.App.4th 1195, 1204.)

Based on the whole of the evidence submitted herein, this Court concludes that Calaveras is not a proper venue for the trial of this matter and therefore defendant's Motion to Transfer Venue is GRANTED. This action is properly tried in either Alameda County or Contra Costa County, and it remains defendant's choice to make; she has selected Contra Costa, and as such that is where this action shall be transferred.

Separately, defendant requests fees and costs associated herewith. Pursuant to CCP §396b(b), "in its discretion, the court may order the payment to the prevailing party of reasonable expenses and attorney's fees incurred in making or resisting the motion to transfer … the court shall take into consideration (1) whether an offer to stipulate to change of venue was reasonably made and rejected, and (2) whether the motion or selection of venue was made in good faith given the facts and law the party making the motion or selecting the venue knew or should have known." This Court finds that defense counsel engaged in an adequate meet and confer *with plaintiff* prior to filing this motion, and that there was sufficient opportunity for plaintiff to evaluate the propriety of venue here. Based on plaintiff's email to counsel dated 09/11/21, bad faith is evident. Plaintiff references suing defendant in three different forums, and suggests settlement, permitting the obvious inference that part of this campaign is to cause defendant financial ruin. Nowhere in the email does plaintiff explain why Calaveras County is a valid venue, and it is only after plaintiff retains a lawyer that the interlineated contract comes to light (metaphorically speaking since, again, this Court cannot decipher the copies provided).

As to the amount, defense counsel charges a reasonable $225/hr. Based on the relative straightforward nature of this motion, this Court finds that 2 hours is sufficient. That totals $450. Counsel has already offered to cover the transfer fee of $485.00, which is unusual given CCP § 399(a) and *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1037 [plaintiff's duty to tender transfer fees upon penalty of dismissal]. Nevertheless, since defense counsel already tendered it, the transfer fee is included, bringing the entire sanctions award to $935.00 to be paid by plaintiff to defense counsel within 10 days.

The Clerk to provide notice of this Ruling forthwith to the parties. Defendant to provide a formal Order complying with Rule of Court 3.1312 in conformity with this Ruling.

GUARANTY HOLDINGS v. RESORT OF LAKE TULLOCH, et al.

20CV44713

PLAINTIFF'S MOTION TO EXPUNGE LIS PENDENS

This is a civil dispute over the alleged unauthorized removal of fixtures from certain real property located at 108 Sanguinetti Court, Copperopolis, CA, which plaintiff acquired at a trustee's foreclosure sale. Before the Court is an unopposed motion to expunge a lis pendens recorded by the prior owners in underlying civil actions designed to stave off foreclosure (Plaintiff's Request for Judicial Notice is granted pursuant to Evidence Code Sections 452 and 453 as to all eight offered exhibits; see 18CV43734 and 19CV44032). (This is a *renewed* motion, the prior having been denied without prejudice for failing to comply with Local Rule 3.3.7.)

Pursuant to CCP §405.30, anyone with an interest in real property may move a court for an order expunging a *lis pendens*. A court "shall" grant a motion to expunge if either of the following conditions exist:

(1) The pleading upon which the lis pendens is based does not contain a real property claim (CCP §405.31); OR
(2) The claimant has not established by a preponderance of the evidence the probable validity of the real property claim (CCP §405.32).

The Legislature created expungement procedures to timely weed out groundless claims and mitigate against and control misuse of the lis pendens procedure. (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1375-1376; *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1023; in accord, *United Pacific Operations and Consulting, Inc. v. Gas and Oil Technologies, Inc.*, WL 4591062 at *6 (E.D. Cal. 2011)). As such, the ultimate burden of proof rests not with the party seeking expungement but rather with the party responsible for filing the lis pendens. (*Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, 1007; *Shah v. McMahon* (2007) 148 Cal.App.4th 526, 529.)

Here, the defendants cannot establish probability of success with regard to their real property claims asserted in 18CV43734 and 19CV44032 since both of those lawsuits have been dismissed adverse to the defendants.

There is the interesting issue of a lis pendens recorded for a lawsuit that is no longer active. A lis pendens is nothing more than notice of a <u>pending</u> lawsuit in which a real property claim is alleged. CCP §405.2. As observed by the Court in *Garcia v. Pinhero* (1937) 22 Cal.App.2d 194, 196-197: "The constructive notice which is afforded by the recording of a notice of lis pendens is notice that an action has been instituted and is pending. Its sole object is to afford constructive notice that this particular action is pending. When the action wherein the notice is filed ceases to be pending and is

terminated, the notice of its pendency has fully performed its office and may not be relied upon to afford constructive notice; in accord, *In re Remmert*, WL 6259959 at *4 (9th Cir. 2010) ["a lis pendens is ineffective where the action to which it pertains has been dismissed or no longer pending"]. However, this Court agrees with plaintiff that the cloud still surfaces in a title search, and is likely enough to cause a title insurer some angst before issuing a policy. Thus, formal expungement is merited.

Based on the foregoing, the motion to expunge is GRANTED.

Plaintiff requests fees and costs. Plaintiff is the prevailing party. (See *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1022-1023. Pursuant to CCP §405.38, "the court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust.") As to the former, the burden rests with the party resisting the sanction to show that its resistance was "clearly reasonable [and] well-grounded in both law and fact." (*Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1269; *Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 747-748.) Nothing of the sort has been shown; Moreover, due to defendants' silence, this Court has no basis upon which to find that an award would be unjust.

Counsel seeks an award of $4,197.50 based upon 11.5 hours at $365/hr. Initially, the Court notes it has long held $300 per hour to be the going market rate for practice in this area. Additionally, as to the number of hours asserted, the Court finds that this is in actuality a fairly simple motion, and unopposed. The first time this motion was made, counsel requested $2,380.00. Although that counsel was subbed out, his work product in the structure of the motion was a solid starting point for new counsel, and quite likely that new counsel used old counsel's work since new counsel had only been in the case a few days before the motion was filed. This Court concludes that a reasonable billing rate for this motion is $300/hr and that this motion should not have taken new counsel more than 2 hours to complete. Sanctions in the amount of $660.00 (said fees plus filing fee) are awarded, payable within 20 days, to plaintiff's counsel by defendants and/or their counsel.

The Clerk to provide notice of this Ruling forthwith to the parties. Plaintiff to provide a formal Order complying with Rule of Court 3.1312 in conformity with this Ruling.

PADILLA v. SKYLINE BEAR VALLEY MOUNTAIN RESORT

21CV45139

DEFENDANT'S MOTION FOR CHANGE OF VENUE

This is a personal injury premises liability action involving the alleged failure of the binding on a snowboard rented from defendant. Before the Court this day is an unopposed motion to change venue to Alpine County.

Venue rules designate a particular county (or counties) within California as the proper place for trial. The purpose of venue rules is to give defendants some control in the choice of where they are sued. Venue is not jurisdictional in the fundamental sense, though certain actions can "only" be brought in specific counties. The test largely begins with whether the main relief sought in the original operative pleading relates to rights in realty (local) or personalty (transitory). Venue is to be determined at the outset of the action based on the averments set forth in the operative pleading when the motion to transfer is first made. The burden of proof on a venue challenge rests with the moving party to overcome the strong presumption that the plaintiff has selected a proper venue. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482; *Dow AgroScience LLC v. Superior Court* (2017) 16 Cal.App.5th 1067, 1076-1078; *Fontaine v. Superior Court* (2009) 175 Cal.App.4th 830, 836; *K.R.I. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 505; *Alexander v. Superior Court* (2003) 114 Cal.App.4th 723, 731.)

Actions for physical injuries are triable either in the county where defendant resides or in the county where the physical injury occurred. (CCP §395(a).) When the defendant is a corporation, "residence" means principal place of business. (CCP §395.5.) However, defendants have no right to have the action tried at their residence if the action is filed where the injury occurred.

Here, the injury occurred at 2280 CA-207, Bear Valley, CA 95223 (see Para 5). Although, plaintiff alleges this to be in Calaveras County (see Complaint Para 1, this Court takes judicial notice that the location is just inside the western-most boundary of Alpine County.

Plaintiff separately claims that defendant "resides" in Calaveras County (see Complaint Para 1); however, unrefuted evidence establishes that Skyline Bear Valley Resorts, Inc. has its principal place of business at the resort itself, i.e., in Alpine County.

Based on the foregoing, the motion to transfer venue is GRANTED. As this case was filed in the wrong county, plaintiff is responsible for paying the costs and fees of transferring the action to Alpine County within 30 days after service of notice of the transfer order, upon risk of dismissal. (See CCP §399(a); *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1037.)

The Clerk to provide notice of this Ruling forthwith to the parties. Defendant to provide a formal Order complying with Rule of Court 3.1312 in conformity with this Ruling.

GOLD CREEK ESTATE OWNERS' ASSOCIATION v. VALLEY SPRINGS GOLD CREEK, INC., et al.

17CV42103

PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT

This is a complex construction defect action involving allegations of negligent design and implementation of common areas within a condominium complex. Before the Court is plaintiff's opposed motion for leave to file a Second Amended Complaint.

To amend a pleading already at issue, the sponsoring party is required first to seek leave of court by way of noticed motion. (CCP §473(a)(1).) Motions for leave are to follow the regular notice requirements contained in CCP §1005(b). Pursuant to California Rules of Court, Rule 3.1324, the moving party must:

a) Specify in the moving papers by page, paragraph, and line number the allegations proposed to be added and/or deleted; and
b) Include with the moving papers:
    - a copy of the proposed amended pleading; and
    - a declaration specifying:
        (1) the effect of the amendment(s);
        (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 was not made earlier.

Initially, there is no declaration accompanying the Court's copy of the motion. Although the points and authorities express that a declaration including the proposed new pleading and the 3.1324 factors accompanied the motion, no such declaration with attachments was filed with the Court, preventing further consideration of the motion at this time.

Based on the foregoing, Plaintiff's Motion to File Second Amended Complaint is Denied, without prejudice to refile and fully comply with all statutory and CRC requirements.

The Clerk to provide notice of this Ruling forthwith to the parties. No further formal Order is required beyond the Minute Order.