KRPAN v. SLIGHT et al

20CV44854

REALTOR DEFENDANTS' MOTION FOR TERMINATING SANCTIONS AGAINST PLAINTIFFS

This is a civil action based on a residential real property transaction allegedly tainted by construction and undisclosed defects. Before the Court this day is a motion by the "realtor defendants" for a dismissal from plaintiffs' operative pleading as a terminating sanction for their alleged failure to comply with this Court's 12/17/21 order that plaintiffs provide "substantive, verified, objection-free responses" to form interrogatories, special interrogatories, and requests for production of documents. Although plaintiffs missed the stated deadline for doing so, counsel explains that he succumbed to COVID and was innocently delayed in serving what has now been served. He further points out that even a hint of a meet and confer would have revealed counsel's plight. Further, in the interests of justice and judicial economy, the Court recognizes the basis upon which CCP 473 relief would ultimately be granted is contained in the responsive papers.

While the content of plaintiffs' responses may be less than ideal, and is the subject of new motions set for hearing 03/18/22, this Court finds that plaintiffs have substantially complied with the 12/21/21 order – save for the motion involving RPDs. For that motion, this Court ordered not only written responses but also "the actual production of the requested documents" within the time allowed. Plaintiffs' expression that they "will produce non-privileged responsive documents" is neither Code-complaint nor substantially compliant with this Court's 12/21/21 order. However, terminating sanctions is a consequence too extreme – at this time.

Once a motion to compel is granted, a willful failure to adequately comply with an order may result in more elevated sanctions. (CCP §§ 2030.290(c), 2030.300(e); *Liberty Mut. Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) The discovery statutes evince an *incremental* approach to discovery sanctions, starting with monetary sanctions and potentially ending with the ultimate sanction of termination. (*Cedars–Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12.) The trial court has broad discretion in selecting which discovery sanction to impose in the face of discovery abuses, but either way California readily adheres to a "lesser sanction first" philosophy. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293.) The sanction must be appropriate to the dereliction and not a windfall to the propounding party. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) A decision to order terminating sanctions should never be made lightly. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279–280; in accord, *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516.)

The motion for a terminating sanction is DENIED. Short of a terminating sanction, and since it reasonably appears that counsel's shortcomings are not willful, this Court concludes that defendants' request for $1,450.00 in additional sanctions is reasonable. This is within the range of permissible sanctions under CCP §177.5. This order is made jointly against plaintiffs and their counsel of record, and must be paid in full within 20 days.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare a formal Order for their respective motions pursuant to CRC 3.1312 in conformity with this ruling.

GOLD CREEK ESTATES v. VALLEY SPRINGS GOLD CREEK

17CV42103

DEFENDANTS' DEMURRER TO SECOND AMENDED COMPLAINT

This is a construction defect action involving allegations of negligent design and implementation of common areas within a condominium complex. Before the Court this day is a demurrer filed by defendants Valley Springs Gold Creek Inc, CRV Enterprises, Cleigh Voorhees (hereinafter "the Voorhees Defendants"), directed at the Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth causes of action set forth in the operative Second Amended Complaint. The pleading is very challenging to navigate, due in large part to plaintiffs' reference to defendants by multiple code names.

With regard to the Second (nuisance), Fifth (fiduciary duty), and Tenth (implied warranty) causes of action, defendants contend that these common law claims are displaced (aka preempted) by the statutory Right to Repair Act. The California Supreme Court, in *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, held that the Right to Repair Act "was designed as a broad reform package that would substantially change existing law by displacing some common law claims and substituting in their stead a statutory cause of action with a mandatory prelitigation process … claims seeking recovery for construction defect damages are subject to the Act's prelitigation procedures regardless of how they are pleaded." (*Id*. at 256, 259.) The Act provides a number of exceptions, and is not intended to displace the entire field; instead, it only preempts non-exempt claims falling within the scope of the Act. (*State Farm General Ins. Co. v. Oetiker, Inc.* (2020) 58 Cal.App.5th 940, 952-953; *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55, 71-72.) Those exceptions include breach of contract, fraud-based claims, statutory claims, personal injury, or class actions. (Civil Code §§ 931, 943.) Although nuisance can be a statutory claim, as pled here it is nothing more than construction defect. Fiduciary duty involves breach of a duty personal to the plaintiff, and in that instance requires something more than construction defect. If it can be pled at all, it is outside the scope of the Act. Implied warranty against the builder is just another name for construction defect. Demurrer to the Second and Tenth causes of action is SUSTAINED Without leave to amend. Demurrer to the Fifth cause of action is OVERRULED.

With regard to the Third (negligent misrepresentation), Fourth (intentional misrepresentation) and Eighth (fraudulent nondisclosure) causes of action, defendants contend that these are not adequately pled. These are fraud-based claims, and fraud-based claims must be plead with particularity rather than with general or conclusory allegations. This particularity requirement necessitates pleading facts which show how,

when, where, to whom, and by what means the representations were made. To state the claim against an entity, the plaintiff must also include allegations regarding the speaker's authority to bind the entity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Morgan v. AT & T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1261–1262.) To establish a claim for misrepresentation, plaintiff must allege with particularity: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and, (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. (*Bowers v. AT&T Mobility, LLC (2011) 196 Cal.App.4th 1545, 1557; Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248; *Perias v. GMAC Mortgage, Inc.* (2010) 187 Cal.App.4th 429, 434.) To establish a claim for concealment, plaintiff must allege with particularity: (1) the defendant actively concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact to the plaintiff; (3) the concealment/suppression was done with the intent to defraud the plaintiff; (4) plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.) The problem here is that plaintiff's fraud-based claims are anchored by generalized allegations regarding vague "express and implicit" representations (see SAC Para 76, 78, 94, 96, 128) made by unidentified individuals, and to unidentified individuals, about the general condition of the common areas. These fraud-based requires far more particularity. Demurrer to the Third, Fourth and Eighth causes of action is SUSTAINED, with 20 days leave to amend.

Finally, with regard to the Ninth cause of action for breach of contract, defendant is correct that – as pled – this cause of action is uncertain. That uncertainty stems largely from plaintiff's liberal use of interchangeable pseudonyms for parties, rather than their actual names. It is still not clear to this Court who the "contractor defendants" are that entered into a written agreement. Demurrer to the Ninth cause of action is SUSTAINED, with 20 days leave to amend.

The Clerk shall provide notice of this Ruling to the parties forthwith. Voorhees Defendants to prepare a formal Order for their respective motions pursuant to CRC 3.1312 in conformity with this ruling.

VALLES v. TRICORP GROUP, INC.

21CV45611

PLAINTIFF'S APPLICATION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

This is a putative class action, seeking redress for alleged wage/hour violations in the construction industry. The operative pleading is the original Complaint, which contains eleven (11) causes of action and a single proposed class as follows: "all non-exempt employees who have or continue to work for Defendants in California from May 7, 2017 to the present."

Before the Court this day is the initial hearing on plaintiff's application for provisional certification of a class, preliminary approval of class settlement, and approval of a PAGA settlement. The gross settlement amount ("GSA") is $170,000.00, which is intended to cover an unknown number of non-exempt hourly employees suffering one of many wage/hour violations. This is a non-reversionary settlement (meaning nothing goes back to the defendant). The proposed deductions/allocations from the GSA are as follows:

Attorney Fees:	$ 59,500.00 (35%)
Litigation Costs:	$ 10,000.00
Administrator Costs:	$ 6,500.00
Service Enhancement:	$ 7,500.00
LWDA share of PAGA:	$ 15,000.00
Class size:	125 members

Based on the proposed deductions/allocations, there should be an average payout per class member of $530.00.

The PAGA Portion – ***Approved***

On a proposed PAGA settlement, the trial court must review and approve the settlement, making sure it is fair to both the LWDA, as well as the employees subjected to one or more of the alleged Labor Code violations. Courts generally look to whether the settlement is genuine, meaningful and consistent with the underlying purpose of PAGA, to wit: protecting employees, augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance. Some of the factors to consider, subject to a sliding scale, include (1) the LWDA's views, or lack thereof, on the settlement; (2) the likelihood of any discretionary reduction

of PAGA penalties under §2699(e)(2); (3) the value of any nonmonetary relief (such as changes in company policies); and (4) whether the same employees entitled to PAGA penalties are already recovering monetary relief as part of a class settlement. See, *e.g.*, *Williams v. Superior Court* (2017) 3 Cal.5th 531, 548-549; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382; *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742-744; *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 865-866; in accord, *Haralson v. U.S. Aviation Services Corp.*, 383 F.Supp.3d 959, 971-974 (N.D. Cal. 2019); *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F.Supp.3d 1074, 1075 (C.D. Cal. 2017); *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110, 1133 (N.D. Cal. 2016).

Here, plaintiffs set aside $20,000 for the PAGA claim. This is a deduction for the myriad of alleged violations relating to hourly rates, overtime rates, business expenses, and meal/rest periods for those entitled. However, since counsel confirms that the PAGA funds for aggrieved employees will pour over into the NSA for all class members, the deduction is acceptable.

Provisional Certification of the Class – ***Approved***

After parties to a putative class action settle the dispute, they must present that settlement to the trial court for approval. If the class has not yet been certified, part of the motion will include a request for provisional certification for purposes of settlement only. See CRC 3.769. Although the provisional process is less demanding than a traditional motion for class certification, a trial court reviewing an application for preliminary approval of a settlement must still find that the normal class prerequisites have been met. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-627 (1997); in accord, Carter v. City of Los Angeles (2014) 224 Cal.App.4th 808, 826.

The moving party must establish by admissible evidence: (1) the existence of an ascertainable and sufficiently numerous class; (2) a well-defined community of interest; and (3) substantial benefits from certification that render proceeding as a class superior to the alternatives. These elements are typically referred to as ascertainability, numerosity, commonality, typicality, adequacy, and superiority. A class is ascertainable when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible, and that is sufficient to allow a member of the class to identify himself or herself as having a right to recover. In other words, a class is ascertainable if it is relatively easy to see who is in the class, and who has viable claims. A community of interest exists there if predominant common question of law or fact which will impact all class members, if the proposed class representative has similar individual claims to the class, and if the proposed class representative and counsel will adequately represent the class. *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980-986; *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 28-29; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.

Here, the proposed class of "all non-exempt employees who have or continue to work for [Tricorp Group Inc.] in California from May 7, 2017 to the present" – which totals 125 persons – is ascertainable, numerous, common and typical.

The Class Settlement – Clarifications and Revisions Required

At the preliminary approval stage, the proponent of the settlement bears the burden of showing that the settlement is within the reasonable range such that a trial court will likely be able to approve it at a final hearing, taking into consideration these four factors: (1) have putative class members been adequately represented by experienced counsel and a vested representative; (2) was the settlement a result of a serious, informed, non-collusive, arm's length negotiation; (3) whether the relief obtained has any real value to class members when compared to what those claims might yield; and (4) are certain segments of the class entitled to preferential treatment. Because this is not the final approval hearing, the level of scrutiny at this stage is often described as something less than a "finding" of fairness and more of a "feeling" of fairness. (See *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1166.)

Despite what may appear to be a rather amorphous standard at this juncture, it is in the best interests of all involved to have some real scrutiny. Thus, even at the preliminary hearing stage, courts should still keep the fairness elements in mind, to wit (1) the strength of plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement when compared to the potential recovery; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) any evidence of collusion, fraud or overreaching by the negotiating parties; and (8) due regard to what is otherwise a private consensual agreement. (See *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986, 998; *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 581; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.)

The GSA appears to be in the reasonable range provided that counsel inform this Court unambiguously as to the number of class members. However, there are additional factors this Court would like clarification on before preliminary approval can be granted.

1. Paras 14.c.i and 14.c.ix. Counsel appears unwilling to modify the settlement agreement in such a way as to soften "final and non-appealable" authority of the claims administrator. Any dispute which cannot be resolved between counsel, class member and claims administrator must be submitted to this Court for resolution. This includes both the basic calculation, as well as the workweek data relied upon by the claims administrator. Preliminary approval will not be granted without this adjustment absent agreement among all involved.
2. Para 18.b. In the case of actual undeliverables after skip tracing efforts – meaning an affirmative representation that the putative class member did not get notice – those class members are not part of the settlement class. (See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985); *Carter v. City of Los*

Angeles (2014) 224 Cal.App.4th 808, 826.) Although this Court is aware of those federal cases cited by plaintiff that "best practices" is good enough for due process, but those are not binding on this Court, nor are they persuasive. Undeliverables should be treated as opt-outs and their share shall pour into the NSA for allocation amongst the notified class members. Given that there are only 125 members to notify, success should be easy to come by.

3. Para 20. Rather than send uncashed checks to the State Controller for safekeeping, the parties prefer to treat uncashed checks as reverting to Koinonia Family Services and Capital Pro Bono, Inc. as co-equal *cy pres* recipients The use of a cy pres is ordinarily reserved for those instances when there are more funds remaining than class members, and the parties do not want a defensive reverter. (*State of Calif. v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 716.) The use proposed here effectuates a forfeiture against the class member who has been put on notice of the claim, declined to opt-out, and yet is delayed in depositing a settlement check. That is not consistent with the purpose behind the settlement. (See CCP §384(b).)
4. Paras 21 and 22. This Court prefers the use of opt-out and objection forms to promote continuity, and for ease of resolution. The class administrator and counsel must report to this Court all opt-outs and objections, regardless of any perceived irregularity therein. Disputes about the effectiveness thereof shall be resolved by this Court, erring on the side of the class member.
5. Claim Form. The process employed is confusing. The requirement that class members complete and submit a "required claim form" in order to be eligible for any recovery is akin to an opt-in, which is not permissible. (*Los Angeles Gay & Lesbian Ctr. v. Superior Court* (2011) 194 Cal.App.4th 288, 304-305.) The class members received notice, and the claims administrator advises how much. Although this Court understands counsel's position vis-à-vis the benefits of claim forms for IRS purposes, it is the "required for eligibility" issue that triggers due process concerns.
6. Counsel now agrees to provide Notice in English and Spanish.

Hearing continued to March 25, 2022, at 9:00 a.m. in Department 2. All filings responsive hereto must be filed and served at least 10 calendar days prior to the next hearing date.

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

LARSON v. MARK TWAIN MEDICAL CENTER, et al.

19CV44062

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Counsel are ordered to appear personally at the hearing on 2/25/22 at 9:00 a.m. in Department 2 for purposes of limited oral argument.