SLOAN v. FOX REALTY AND MANAGEMENT

22CV46287

DEBTOR'S CLAIM OF EXEMPTION AND MOTION TO SET ASIDE

This is an action between property owner and property management company regarding a particular tenant and alleged property damage. Before the Court is the continued hearing on defendant-debtor's claim of exemption for funds held on bank deposit, as well as a new motion to set aside.

The pertinent facts are as follows:

On 09/21/22, plaintiff effectuated *substituted* service of the summons and complaint on co-defendant Fox Realty and Management Co. by leaving a copy of the papers with Valerie Slagle – who is reported to be assistant to Colin Lightfoot, owner and principal of Fox Realty and Management Co, and she also is Fox' registered agent for service of process. Fox does not dispute receiving actual notice via the summons.

On 10/18/22, plaintiff effectuated *personal* service of the summons and complaint on co-defendant Cathy Nitchey. She worked at the Fox Realty company as a broker and property manager. She does not dispute being served.

On 01/09/23, this Court entered the default for both defendants. Thereafter, this Court entered a judgment after default in favor of plaintiff, and against both defendants, in the aggregate amount of $49,960.00. The request for default reflects service on Fox Realty/Nitchey on 1/6/23.

In April of 2023, the Amador County Sheriff's Office gave notice of intent to levy two accounts held at the Bank of Marin belonging to co-defendant Fox Realty, which collectively held funds in the amount of $7,787.48. Fox asserted a claim of exemption for that account, asserting that those accounts held only client trust funds, which are not subject to levy.

On 06/07/23, co-defendant Fox Realty amended its claim of exemption, describing the two accounts not only as client trust accounts but also as "deposit accounts via hardship" and "social security accounts" and "retirement benefit" accounts. In other words, Mr. Lightfoot has asserted – on behalf of Fox Reality – that the accounts are unlawfully commingled, but that each deposit therein is covered by a separate exemption.

On 06/08/23, plaintiff filed a second opposition to the claim of exemption, but only addressed the escrow account issue (not the claimed hardship, Social Security or retirement exemptions).

On 06/23/23, this Court continued the hearing on the claim of exemption, noting that most of the issues would be resolved following the debtor's examination. This Court ordered plaintiff to lodge a copy of the debtor's examination transcript (if any), and any supplemental opposition papers, at least 10 days prior to the next hearing.

On 07/18/23, defendants filed a motion to set aside the default and default judgment.

Motion to Set Aside Default and Default Judgment

According to plaintiff, defendants never served the motion to set aside, and as such "a formal opposition cannot be prepared and filed." (See 08/15/23 filing.) Some confusion exists regarding the motion itself, as it was first proffered via *ex parte* application as a request to shorten time – which was denied. This Court's order dated 07/19/23 directed defendants to "use regular noticed motion" process. That process involves service of the motion with sufficient lead time to permit timely opposition, and specified notice regarding this Court's tentative ruling system. (See CCP §1005 and CCSC Local Rules 3.3 and 3.3.7.) There is no evidence that defendants actually served the motion on plaintiff, much less provided the required tentative ruling notice. However, counsel for defendant did provide proof of having served the papers on plaintiff on 07/13/23 in conjunction with the ex parte application. Since CRC 3.1206 requires service of the actual papers "at the first reasonable opportunity" prior to the actual hearing, the email service effectuated on 07/13/23 and addressed in open court on 07/21/23 was sufficient to put plaintiff on notice that the motion to set aside would be heard on the merits this day. Plaintiff's failure to file opposition, and put the blame for that on defendants, is disingenuous. However, the Court also notes the claims in the declarations of Nitchey and Lightfoot that they default "without my knowledge …. A complete surprise" are even more disingenuous given both the request for default and request for entry of default judgment contain a proper proof of service. Moreover, as the default was entered on 1/9/23, the filing of the request to set aside on 7/18/23 is untimely, coming more than 6 months after the precipitating event. (Although the actual default judgment was entered on 1/23/23 making this motion filing within the 6 months by a matter of days, the Court considers this a procedural event as the precipitating substantive event was the entry of default.)

Based on the foregoing, the Motion to Set Aside Default is DENIED.

Claim of Exemption

Pursuant to CCP §704.220 and W&I Code §11452(a)(1), there is an automatic "hardship" exemption ($1,947.00 after accounting for adjustments) for a needy family of four. Debtor provides no evidence that he resides with anyone else, but even assuming that someone depends on him, this exemption only touches a small fraction of the bank account balances.

Pursuant to CCP §704.110(b), "all amounts held, controlled, or in process of distribution by a public entity derived from contributions by the public entity or by an officer or employee of the public entity for public retirement benefit purposes, and all rights and benefits accrued or accruing to any person under a public retirement system, are exempt without making a claim." Debtor has not provided any evidence from which to conclude that the funds held in those accounts are derived from a public entity retirement fund.

Pursuant to CCP §704.080(b)(2) and 42 USC §407, a deposit account into which social security benefits are *directly* deposited by the government is exempt without making a claim up to $3,825.00, and potentially exempt even further. Debtor has not provided any evidence from which to conclude that the funds held in those accounts are Social Security benefits deposited directly therein.

Pursuant to CA Finance Code §17410(a), "escrow or trust funds are not subject to enforcement of a money judgment arising out of any claim against the licensee or person acting as escrow agent, and in no instance shall such escrow or trust funds be considered or treated as an asset of the licensee or person performing the functions of an escrow agent." In other words, if the money belongs to someone else, and only temporarily in the debtor's possession as a fiduciary, that money is obviously not available to satisfy the debtor's personal obligations. Although funds held by a licensed escrow agent in an escrow account are presumably exempt (see §17411.1), there is no prerequisite that the debtor have an escrow license (contrary to plaintiff's assertion). The funds could be client funds even if the debtor is "just" a real estate agent – depending on the nature of the account and the source of the funds. Nevertheless, defendant's contention that the levied funds were client trust funds presents a factual issue on which defendant has the burden of proof. (See CCP §703.580(b); *Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626.) Debtor provided the required citation for the escrow funds exemption, but failed to include "a statement of the facts necessary to support the claim." (See CCP §703.520(b)(5) and (6).) Since it appears from the opposition that defendant is not a natural person (see CCP §703.020(a)), and does not hold an escrow agent license, the odds of this money righteously belonging to a client appears slim – especially since debtor now claims that the funds are personal to him.

Claim of exemption is DENIED without prejudice, but enforcement is stayed until completion of the debtor's examination at which time the Court will hear if any specific evidence was developed at the examination that establishes a basis for any of the otherwise denied claims.

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.

RYAN v. HUTCHINSON

19CV44070

PLAINTIFF'S MOTION FOR LEAVE TO SUBSTITUTE PARTY-DEFENDANT

This is a personal injury action stemming from an altercation between plaintiff and defendant occurring on 12/06/18. Defendant died on 11/21/22. Before the Court is a renewed motion by plaintiff to substitute defendant's estate as a party-defendant. Although the previous motion was expressly unopposed, it was denied based on abatement concerns.

Pursuant to CCP §377.41, "on motion, the court shall allow a pending action or proceeding against the decedent ***that does not abate*** to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, ***except that*** the court may not permit an action or proceeding to be continued against the personal representative unless proof of compliance with Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims is first made."

According to plaintiff, an estate has been opened on behalf of defendant/decedent (see 22PR8585) and a personal representative appointed (Christine Eberle). Pursuant to CCP §1250.220(b), she would be the proper individual to name. In addition, plaintiff provides proof of compliance with Probate Code §9370 by having filed a creditor claim which was denied, prompting what amounts to a motion to enforce (see 22PR8585).

Nevertheless, there is a service anomaly. Attorney Brian Chavez-Ochoa appeared on behalf of defendant early in the case, but then made an appearance on behalf of personal representative Christine Eberle (see 03/15/23 filling). However, on 07/28/23, he filed a "Request for Judicial Notice" stating that he did not represent the estate. This later filing is a nullity, as since he appeared on behalf of the "estate" on 03/15/23, a Substitution or Motion to Withdraw is required. This Court can see that the estate is also represented by Attorney Theresa Haefele – who did not receive notice of this motion, but of whom plaintiff's counsel is aware since he served plaintiff's creditor claim directly on her (as well as Attorney Chavez-Ochoa). This Court is confused as to why service of this motion was not also made on Attorney Haefele, who is apparently "lead" for the probate action.

Motion continued to October 6, 2023, at 9:00 a.m. in Department 2. Plaintiff shall immediately effectuate proper service of the motion on all lawyers representing the estate; and if there is no opposition intended, the parties are encouraged to file a

stipulation and order allowing the substitution so this civil case can proceed post haste. If there is to be opposition, it 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. No further formal Order is required.

DeREIS v. BURKE

21CV45133

MOTION TO RELATE CASES

This is a civil action for partition of real property. There exists in this Court a probate action (10PR7129) involving the same family members and patriarchal assets. A notice of related cases was recently filed and served by one branch of the family (defendant in the civil action) on 05/05/23, and no response (see CRC 3.300(g)) was made thereto.

Case are considered related to one another if they "(1) involve the same parties and are based on the same or similar claims; (2) arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact; (3) involve claims against, title to, possession of, or damages to the same property; or (4) are likely for other reasons to require substantial duplication of judicial resources if heard by different judges." (CRC 3.300(a).) Both the probate and the civil actions involve property that was allegedly devised by will to one or more individuals who claim adverse interests thereto. Although there is not perfect parity between the two actions, it is apparent that the "probate" issues overlap (and possibly consume) the "civil" issues. There is no opposition from the other branch of the family, which signals a strong concession that the two causes ought to be related.

Motion to relate is GRANTED. Per CRC 3.300(h)(1)(C), the cases shall be assigned to be heard in Department 2. Although the motion to relate did not include a typical request to consolidate for purposes of discovery, this Court finds that such an order is warranted to avoid the inevitable duplication. The probate action (10PR7129), as the earlier case filed, and the one specializing in the handling of decedent's assets, shall serve as the lead case, and all future filings shall be made in said case.

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

HAMPTON v. EAST BAY MUNICIPAL UTILITY DISTRICT

22CV46329

DEFENSE MOTION FOR SUMMARY JUDGMENT

This is a personal injury action. Plaintiff generally alleges that while recreating along the south shore of Lake Camanche, near the Arrowhead campground, he dove into the water from a rock wall and struck a submerged boulder, resulting in quadriplegia.

Before the Court this day is a summary judgment motion. Defendant Urban Park Concessionaires (“UPC”) contends that it is entitled to summary judgment/adjudication because neither of the two causes of action stated in the operative First Amended Complaint (negligence and premises liability) can succeed against it. According to UPC, it did not owe plaintiff any duty of care to protect him from injuries caused by diving into a submerged boulder because:

1. UPC had no control over the water level in the lake, and thus had no ability to warn or guard against a boulder that became invisible;
2. plaintiff’s injury was the result of a volitional act of diving into unfamiliar waters and colliding with an open and obvious danger;
3. plaintiff’s injury was the result of an inherent/unavoidable risk associated with shallow-water diving, and UPC did nothing to increase that risk.

When this motion was first heard, this Court observed that the papers made frequent references to “evidence” but failed to provide supporting pinpoints to permit this Court to locate the “evidence” referenced. The hearing was continued to permit plaintiff to (1) secure the referenced evidence via additional discovery and (2) provide said evidence in a supplemental filing with the precision needed in a case such as this. Plaintiff has done both to this Court’s satisfaction, demonstrating sufficient triable issues to reach a jury. The motion for summary judgment/adjudication is DENIED.

The first issue is duty. UPC points to a contract it has with co-defendant EBMUD which permits a liberal reading that UPC is not *contractually* obligated – as between itself and EBMUD – to maintain the rock wall, shoreline and/or water levels adjacent thereto. There are triable issues of fact regarding the scope of the *contractual* obligations assumed by UPC, but those are largely irrelevant to the question of whether UPC had a duty (in law or by assumption) to make said premises reasonably safe under the circumstances. For that question, the focus is on control over the premises, not the arrangement UPC had with another party. (See *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156; *Lopez v. City of Los Angeles* (2020) 55 Cal.App.5th 244, 250, 258;

Contreras v. Anderson (1997) 59 Cal.App.4th 188, 197-199; *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 489.) In a word, this is akin to duties that are nondelegable, regardless of contractual arrangements made with third-parties. Did UPC have *or assume* sufficient control over the rock wall and shoreline such that it would be reasonable to impose a duty upon it to make those premises safe? Neither side has focused on the *Rowland* factors or the *Alcaraz* "control" exception to answer this (see *Montes v. YMCA of Glendale* (2022) 81 Cal.App.5th 1134, 1140), but given the body of facts, there is clearly a question as to the scope of control.

The next issue is open and obvious. Since there is undisputed evidence that the water level changes, and the subject rock is sometimes submerged and sometimes not, it seems to this Court that no reasonable factfinder would conclude that the rock was *necessarily* open and obvious to someone in plaintiff's shoes, to wit: diving into the water that very day, at the same time. (See, *e.g., Zuniga v. Cherry Avenue Auction, Inc.* (2021) 61 Cal.App.5th 980, 995-996; *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1299-1300.) The fact that plaintiff was apparently intoxicated and careless certainly impacts comparative fault and recovery, but not the objective inquiry associated with conditions that are open and obvious. A condition that remains static can certainly be deemed open and obvious as a matter of law, but a condition that changes in character (as alleged here) cannot. There must be evidence of whether the rock was, on that day, open/obvious, and plaintiff alleges that it was not. Defendant has presented no evidence either way.

Finally, there is the question of assumption of the risk. Generally, each person has a duty to use ordinary care and is liable for injuries caused by a failure to exercise reasonable care under the circumstances. (Civil Code §1714.) Implied primary assumption of the risk is an exception to the rule, and arises when, as a matter of law and policy, a defendant owes no duty to protect a plaintiff from particular harms. Applied in the context of recreation, the doctrine precludes liability for injuries arising from risks inherent in the activity. The question is not what risks a particular plaintiff appreciated, but rather what was the fundamental nature of the activity undertaken. (*Avila v. Citrus Community College District* (2006) 38 Cal.4th 148, 161.) "Under the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162.) The key is to determine what risks are "inherent" in the activity. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 318.) Generally speaking, injuries resulting from going too fast, making sharp turns, not taking certain precautions, or proceeding beyond one's abilities are inherent. (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1222.) A risk is also considered "inherent" if its elimination would chill vigorous participation or alter the fundamental nature of that activity sport. (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253.) Judges are to use common sense, focusing on the risk of injury rather than the degree of harm suffered. (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 110; *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116.)

There is no question that diving into unfamiliar waters has a degree of risk assumption. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1005.) Drowning is a risk, as is hitting something beneath the surface. The question here is whether UPC did something to increase the risk of getting hurt diving off the rock wall (as contrasted with the degree of harm suffered), and to that extent plaintiff presents evidence that UPC participated with EBMUD in the selection of contractor and/or actual placement of the rock which plaintiff struck. Admittedly the evidence on this is somewhat ambiguous: on the one hand, the evidence clearly permits an inference that EBMUD "placed" the rock, and therefore increased the risk of injury associated with diving, but if UPC had any role in that placement, it too could be on the hook for increasing the risk. This is the "key" issue here, which in fairness it appears both sides have somewhat glossed over. Plaintiff says UPC participated, defendant says that is not relevant. Thus, the balance favors plaintiff – at least at this juncture – with application of the primary assumption of risk doctrine since that is an element of duty, which is part of UPC's initial burden to negate.

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.