SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: October 3, 2023 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV387252	Southern Glazer's Wine and Spirits, LLC v. My Bar, LLC et al.	Order of examination of Wayne Brenckle: parties to appear.
LINE 2	21CV392344	Valley Water v. Fareed Sepehry-Fard	Parties are requested to appear. Click on LINE 2 for more detail in lines 2-4.
LINE 3	21CV392344	Valley Water v. Fareed Sepehry-Fard	Parties are requested to appear. Click on LINE 2 for more detail in lines 2-4.
LINE 4	21CV392344	Valley Water v. Fareed Sepehry-Fard	Parties are requested to appear. Click on LINE 2 for more detail in lines 2-4.
LINE 5	23CV414140	Mike Patton v. Carol Sandman	Click on LINE 5 or scroll down for ruling.
LINE 6	22CV396395	Monita Dukhia v. Akihiro Tsujimura et al.	OFF CALENDAR
LINE 7	22CV403081	Camhong Pham v. David Glen Abel et al.	Click on LINE 7 or scroll down for ruling in lines 7-9.
LINE 8	22CV403081	Camhong Pham v. David Glen Abel et al.	Click on LINE 7 or scroll down for ruling in lines 7-9.
LINE 9	22CV403081	Camhong Pham v. David Glen Abel et al.	Click on LINE 7 or scroll down for ruling in lines 7-9.
LINE 10	17CV313947	Louis P. Barbaccia, Sr. et al. v. GBR Magic Sands MHP, LLC	OFF CALENDAR
LINE 11	20CV367732	A-1 Advantage Asphalt, Inc. v. Ann Rubino et al.	Click on LINE 11 or scroll down for ruling.
LINE 12	23CV414483	Jesse Henry Razo Jr. v. Bernard Lopez	Parties are requested to appear. Click on LINE 12 or scroll down for ruling in lines 12-13.

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LINE 13	23CV414483	Jesse Henry Razo Jr. v. Bernard Lopez	Parties are requested to appear. Click on LINE 12 or scroll down for ruling in lines 12-13.

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Calendar Lines 2-4
Case Name: *Valley Water v. Fareed Sepehry-Fard*
Case No.: 21CV392344

These three motions have been pending since December 16, 2022. On April 7, 2023, the moving party, defendant Fareed Sepehry-Fard, filed a notice of unavailability, based on various medical issues. He attached doctors' notes to his notice. As a result, in an order dated June 2, 2023, the court continued the hearing on these motions to October 3, 2023. At the same time, the court expressed some concern that Sepehry-Fard "has previously used doctors' notes to delay the proceedings in this case while simultaneously filing voluminous documents with the court during the time periods in which he has allegedly been unavailable." (See June 2, 2023 Order at p. 2:4-14.) Because a trial in this matter has been set for October 16, 2023, the court invited the parties to address the feasibility of proceeding with that trial date at the October 3, 2023 hearing. (*Ibid.*)

On September 25, 2023, Sepehry-Fard filed a new notice of unavailability, attaching a new doctor's note, which states that he is not available for any court proceedings "until at least May 1, 2024."[1] Given these circumstances, and given the fact that Sepehry-Fard has had no appearances at court hearings in Department 10 for the last several months, the court is inclined to take these motions off calendar, without prejudice to Sepehry-Fard's ability to re-notice them for a hearing. In addition, the court is also inclined to reset the trial date in this matter from October 16, 2023 to May 28, 2024 at 8:45 a.m. (with a mandatory settlement conference on May 22, 2023).

The court invites the parties to appear to address these calendaring issues at the October 3, 2023 hearing.

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[1] The doctor's note is marked "Confidential," and so the court does not describe the first and third paragraphs of the note—it quotes only from the second paragraph, which is clearly non-confidential, and which must be described in order to address scheduling in this case.

Calendar Line 5
Case Name: *Mike Patton v. Carol Sandman*
Case No.: 23CV414140

I. FACTS

This is an action for partition by sale brought by Plaintiff Mike Patton against Defendant Carol Sandman for property owned by SandPatt, LLC, an entity in which Patton and Sandman are co-owners. The real property is located at 200 Blossom Lane, Mountain View, California (the "Property"). (Complaint, ¶ 3.)

The complaint, filed on April 4, 2023, alleges the following causes of action:

1. Partition by Sale;
2. Accounting;
3. Breach of Fiduciary Duty; and
4. Judicial Dissolution of LLC Pursuant to Cal. Corp. Code § 17707.03.

According to the complaint, Patton and Sandman jointly own real property through SandPatt, LLC. (Complaint, ¶¶ 1-3.) In 1999, SandPatt, LLC formed with the sole business of acquiring and operating the Property. (*Id*. at ¶¶ 9-10.) Patton was a 40% owner and manager of SandPatt, LLC, while Sandman was a 60% owner and manager of SandPatt, LLC. (*Id*. at ¶¶ 11-12.) The parties agreed that Sandman's company, API Design, Inc. would enter into a 21-year lease with SandPatt, LLC for the Property from November 1, 1999 to October 31, 2020. (*Id*. at ¶¶ 14-15.)

Sandman has now filed a demurrer to the first cause of action, arguing that it fails to allege sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

II. LEGAL STANDARD

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, [citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318].) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In liberally construing the allegations within a pleading, the court draws inferences favorable to the pleader. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1239.)

III. ANALYSIS

Sandman contends that Patton seeks to sell SandPatt, LLC's sole asset under the guise of a partition action, in violation of Code of Civil Procedure section 872.210, subdivision (a), which provides as follows:

> (a) A partition action may be commenced and maintained by any of the following persons:

> (1) A coowner of personal property.
>
> (2) An owner of an estate of inheritance, an estate for life, or an estate for years in real property where such property or estate therein is owned by several persons concurrently or in successive estates.

(Code Civ. Proc., § 872.210, subd. (a).)

Patton concedes that non-party SandPatt, LLC is the sole owner of record of the Property. (Opposition, p. 2:1-2.) Nevertheless, he insists that because SandPatt, LLC is a closely held company by the parties, it is a "legal fiction," through which Patton and Sandman actually own the Property, allowing him to sue as a coowner. (Opposition, p. 2:2-3.) Patton fails to cite any statutory or case law authority to support this theory. His reliance on *Black v. Bank of America* (1994) 30 Cal.App.4th 1 ("*Black*") is misplaced, because *Black* did not involve an issue of ownership or partition. Rather, that case involved a demurrer to a tort claim alleging conspiracy between the corporation and its employees. The court's sole reference to "legal fiction[s]" was in the context of the agent immunity rule, which attributes the acts of an entity's agents to the entity itself, preventing an entity from "conspiring" with itself. (*Id*. at pp. 5-6.)

Patton's argument that strict adherence to the statutory language places "form over substance" is better directed to the California Legislature, which enacted section 872.210, rather than to the court.

Because Patton has failed to allege ownership in compliance with Code of Civil Procedure section 872.210, the court SUSTAINS Sandman's demurrer to the first cause of action under Code of Civil Procedure section 430.10, subdivision (e). The court is highly skeptical that Patton can properly amend the first cause of action—he certainly has not demonstrated how he would do so in his opposition. Nevertheless, because this is the first pleading challenge in the case, the court grants 10 days' leave to amend.

Patton is reminded that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the cause(s) of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court, an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. (See *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023.)

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Calendar Lines 7-9
Case Name: *CamHong Pham v. David Glen Abel et al.*
Case No.: 22CV403081

Plaintiff CamHong Pham has filed three nearly identical motions to compel responses to discovery (document requests, form interrogatories, and special interrogatories). Defendant David Glenn Abel failed to provide timely responses to the discovery requests.[2] After these motions were filed on June 1, 2023, however, Abel served belated responses on August 1 and 10, 2023. In reply, Pham acknowledges that she has received the responses now, but she requests monetary sanctions of $2,480.00 for each motion, for a total of $7,440.00.

The court finds that monetary sanctions are warranted, given that Abel did not act with substantial justification in serving responses that were six months too late (and more than two months after Pham filed her motions). At the same time, the court finds that the amount requested per motion is excessive, given that the issue presented here is exceedingly simple and straightforward, and given that Pham has filed essentially the same opening and reply brief for each motion. Accordingly, the court grants sanctions against Abel and his counsel in a ***total*** amount of **$2,480.00**, covering all three motions. Abel and his counsel are jointly and severally responsible for paying this amount, which must be paid within 30 days of the date of this order.

Postscript: Finally, the court understands that Pham has already filed new motions to compel further responses to these discovery requests (filed last week, with a hearing date not yet set). The court urges the parties to meet and confer *again* before any submitting additional briefing on these motions, as it does not appear that there has been sufficient communication between the parties regarding these requests. In addition, the court would like to stress to Abel and his counsel that a change in counsel—to the extent this occurs (as is implied in the moving papers)—will likely *not* be a proper excuse for either a failure to meet and confer or a failure to provide discovery, and it will likely not be a basis for avoiding sanctions, either.

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[2] "Glenn" is apparently spelled with two "n's," notwithstanding the caption.

Calendar Line 11
Case Name: *A-1 Advantage Asphalt, Inc. v. Ann Rubino et al.*
Case No.: 20CV367732

Cross-complainant Home Depot, U.S.A., Inc. ("Home Depot") has filed yet another motion (its third) for terminating sanctions against cross-defendant Crius Corporation ("Crius"). Home Depot states repeatedly in its briefing that it was "forced" to bring this motion, and that it is the "fifth motion Home Depot has been forced to make for Crius' [sic] initial failure to comply with its discovery obligations." (MPA at p. 2:9-11.) The court takes issue with this characterization. No one is forcing Home Depot to bring these serial discovery-related motions. The most recent of these was a meritless motion for entry of an interlocutory money judgment, based on prior discovery sanctions, which the court denied on August 22, 2023.

The court DENIES this third motion for terminating sanctions for the same reason that it denied the second motion: Home Depot fails to show "whether a sanction short of dismissal . . . would be appropriate to the dereliction" committed by Crius. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797.) In particular, Home Depot fails (and does not even attempt) to show that any other less-drastic, non-monetary sanctions, such as evidence or issue sanctions, would be insufficient to remedy any prejudice to Home Depot arising out of any discovery violations by Crius. In this case, it appears that Home Depot's motion is based solely on Crius's non-payment of court-ordered monetary sanctions. That makes terminating sanctions particularly inappropriate.

In contrast to the court's prior order denying Home Depot's second motion for terminating sanctions, the court DENIES Home Depot's request for additional monetary sanctions here in the amount of $951.00, because it is apparent to the court that Home Depot is more interested in bringing serial discovery motions than focusing on the merits of the case.

IT IS SO ORDERED.

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Calendar Lines 12-13
Case Name: *Jesse Henry Razo Jr. v. Bernard Lopez*
Case No.: 23CV414483

Two motions are currently before the court: (1) plaintiff Jesse Henry Razo Jr.'s ("Razo's") motion for interlocutory judgment of partition and appointment of referee; and (2) defendant Bernard Lopez's motion to set aside any pending default or default judgment. The court requests that the parties appear. The court is inclined to CONTINUE the hearing on the first motion to November 21, 2023 at 9:00 a.m., based on a lack of proper notice, and the court GRANTS the second motion under Code of Civil Procedure section 473, subdivision (b).

1. Motion for Interlocutory Judgment of Partition and Appointment of Referee

Razo claims that notice is proper for this motion, but there is no amended notice of hearing on file, as required by the court's local rules. According to Razo, "On June 24, 2023, Defendant was notified of this Motion via mail" (Notice of Non-Opposition at p. 2:1), but because the motion was originally filed only two days earlier, no hearing date was yet assigned at the time of service. The local rules require that the moving party notify the other side of the assigned hearing date—which is supposed to be reflected in the file by an amended notice of hearing—and here, it appears Razo failed to do so. It is therefore no surprise to the court that there is no opposition on file.

The court requests that the parties appear to address the apparent lack of notice. The court is inclined to continue this hearing to **November 21, 2023** at 9:00 a.m. in Department 10.

2. Motion to Set Aside Default

Lopez's motion acknowledges that a default has not yet been entered in the case, but he brings this motion out of an abundance of caution, given the delays in the clerk's office in processing papers. The court finds that the motion to set aside has been brought within a reasonable time and is adequately supported by a showing of "mistake, inadvertence, surprise, or excusable neglect" on the part of Lopez. (Code Civ. Proc., § 473, subd. (b).) As noted in the moving papers, Lopez is a layperson who does not speak fluent English, and he may well have been the recipient of some bad legal advice after being served with the complaint in this case (but before briefly retaining counsel who filed the present motion on his behalf).

Razo acknowledges that Lopez's motion is "compelling," but he still opposes the motion on multiple grounds, all of which the court finds to be unavailing. First, Razo notes repeatedly that the motion was not properly served on him. While the lack of proper service is indeed problematic, Razo is not exactly in the best position to complain about service, given his own failure to serve an amended notice of hearing on his partition motion. More pertinently, a lack of service is not a basis to deny the motion on the merits—at best, it would warrant a continuance. In this case, however, Razo has filed a full written response to the motion, and so there is no need for a continuance.

Second, Razo points out that Lopez's proposed answer and cross-complaint are procedurally improper, as they including a general denial of the complaint (rather than specific responses to each allegation) and lack verifications. Again, while these are certainly valid concerns, they are not a basis for denying the motion. The court expects these issues to be fixed by Lopez forthwith upon the granting of this motion.

Third, Razo argues that Lopez has no defenses to the partition action, and so the court should simply proceed to judgment. Once more, this is not a basis for denying the motion. In fact, it is a basis for *granting* the motion. If there truly is no substantive defense to Razo's partition action, then the court should decide that on the merits, rather than via a default judgment. There is a strong public policy in California that favors deciding cases on their merits over a default. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685.) Razo's argument elevates efficiency over due process and must be rejected.

Finally, Razo makes the puzzling argument that this motion is "unripe"—because a default has not yet been entered by the clerk's office—and that it therefore must be denied and a "default should be entered as of May 21, 2023, so that both parties can avoid any further delays . . . ." (Opp. at p. 10:4-5.) In other words, Razo appears to be arguing that the fact that a default has not yet been entered is actually a basis for entering it now. The court finds this argument to be illogical on its face.

3. Order

The court grants the motion to set aside. The court orders Lopez to fix the errors in his proposed answer (and his cross-complaint, if he chooses to file it) and file his pleading(s) *within 30 days* of the date of this order.

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