

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 6

Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: March 26, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

- (1) Court by calling (408) 808-6856 and
 - (2) Other side by phone or email that you plan to appear at the hearing to contest the ruling
- (California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:

https://www.scsccourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

https://www.scsccourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	19CV356936	CYTOBANK, INC. vs THE MCCLURE LAW FIRM, P.C. et al	Costanzo Law Firm's Motion to Strike, or in the Alternative, Tax David McClure and the McClure Law Firm's Costs is DENIED. Scroll to line 1 for complete ruling. Court to prepare formal order.
2	23CV417060	Annabella Gonzalez vs CITY OF PALO ALTO	Defendant City of Palo Alto's Demurrer to Plaintiff's First Amended Complaint is SUSTAINED with 20 days leave to amend. A notice of motion with this hearing date and time was served by electronic mail on February 27, 2024. Plaintiff filed a brief opposition asserting that (1) Plaintiff filed a first amended complaint, so the demurrer is moot and (2) the demurrer was procedurally defective because it did not include a supporting memorandum. Defendant's demurrer is to the FAC, not the original complaint, and it is supported by a memorandum of points and authorities. Thus, it appears it is Plaintiff who failed to identify and acknowledge the correct filings in the court docket, not the Defendant. While it appears to the Court that any amendment may be futile at least for failure to comply with the Government Claims Act, the Court will permit Plaintiff one last chance to state a claim. Defendant's demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Court to prepare formal order.
3	23CV419474	JPMorgan Chase Bank, N.A. vs Kayla Chen	Plaintiff's Motion for Judgment on Pleadings is GRANTED. A notice of motion with this hearing date and time was served by U.S. Mail on February 9, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (<i>Sexton v. Super Ct.</i> (1997) 58 Cal.App.4th 1403, 1410.) Defendant also states in her answer: "I, Kayla Chen owe a debt of \$7,473.57" and "I would like to pay off this debt with monthly payments between \$50 and \$155." Thus, Plaintiff's complaint is conceded. This order will be reflected in the minutes. Plaintiff is ordered to promptly prepare a form of judgment.
4	23CV424872	Silverio V. Zuniga vs Alesia Murrieta et al	Off calendar per moving party.
5	17CV314286	U.S. Bank National Association et al vs Fareed Sepehry-Fard	Defendant's motion is DENIED, as there does not appear to have been a trial, but rather a summary judgment motion that Defendant voluntarily left. Further, given the sheer nature and volume of materials in the docket, the Court is concerned that Defendant's litigation activities are vexatious, although no such motion is currently pending before the Court. Court to prepare formal order.
6	21CV378850	Bobbi Rodriquez vs Diane Rodriguez	The parties are ordered to appear and (1) report on whether Defendant's deposition has been taken (or take Defendant's deposition in the jury room if that has been so arranged) and (2) set this case for trial.
7	21CV378850	Bobbi Rodriquez vs Diane Rodriguez	See line 6, above.

8	22CV393384	Jessika Perez vs Pedro Perez et al	Defendant's Motion to Set Aside Default is GRANTED. Defendant's Motion to Quash is DENIED. The parties' cross motions for sanctions are DENIED. The Court reviewed the parties' correspondence regarding these issues and recalls the last case management conference during which the Court advised Defense counsel to obtain the proofs of service from the public portal, and the Court finds both parties acted unprofessionally regarding the issues of service and default. Defense counsel could have long ago addressed the service issue by taking action to (a) determine that Ms. Robles already made two general appearances (thus eliminating any improper service argument), (b) take affirmative action to obtain the proofs of service from the public portal to analyze the issue, (c) file a motion to quash if Defense counsel disagreed that the general appearances and substitute service still left room for argument that service was improper, and/or (d) asked for an extension of time to complete these activities. Defense did not do any of this. However, Plaintiff could have simply served the summons and complaint with an acknowledgement and receipt in response to Defense counsel's January 22, 2024 email stating: "I am willing to accept service via email for Lydia Robles should you provide [me] with the Summons and Complaint and a Notice of Acknowledgement of Receipt." Plaintiff did not do that. The parties' game of chicken regarding just answering the complaint has significantly and unnecessarily delayed this case to the detriment of both of their clients. The Court cautions the parties to not engage in such gamesmanship going forward; it serves no purpose. The default is set aside, and the Defendant is ordered to answer the complaint within 10 calendar days of service of this formal order. Court to prepare formal order.
9	23CV410240	Federated Mutual Insurance Company vs South County CDJR LLC et al	Plaintiff's Motion for Leave to File a First Amended Complaint is GRANTED. A notice of motion with this hearing date and time was served by U.S. Mail on February 1, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (<i>Sexton v. Super Ct.</i> (1997) 58 Cal.App.4th 1403, 1410.) Further, if a motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend; and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (<i>Nelson v. Superior Court</i> , 97 Cal.App.2d 78; <i>Estate of Herbst</i> , 26 Cal.App.2d 249; <i>Norton v. Bassett</i> , 158 Cal. 425, 427.)" (<i>Morgan v. Superior Court of Los Angeles County</i> (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). Here, it is early in the litigation, and Defendant will not suffer prejudice. Thus, leave to amend is appropriately granted. Plaintiff is ordered to file the First Amended Complaint within 10 days of service of this formal order. Court to prepare formal order. Court will conduct the CMC at 10:00.
10	23CV417492	Matthew Ford vs FORD MOTOR COMPANY et al	Defendant filed a notice of removal of this action to federal court on March 13, 2024. The petition to compel arbitration is accordingly off calendar.
11	23CV420525	Mendel Saturnino vs Arleen Ruiz	Plaintiff's Petition for Interlocutory Judgment is GRANTED. Scroll to line 11 for complete ruling. Court to prepare formal order; Plaintiff to promptly submit form of interlocutory judgment.

12	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Plaintiff's Motion for Reconsideration is DENIED. Motions for reconsideration are generally governed by Code of Civil Procedure section 1008, which represents the Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See <i>Standard Microsystems Corp. v. Winbond Electronics Corp.</i> (2009) 179 Cal.App.4 th 868, 885.) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. (<i>Gilberd v. AC Transit</i> (1995) 32 Cal.App.4 th 1494, 1500; see <i>Baldwin v. Home Sav. Of America</i> (1997) 59 Cal.App.4 th 1192, 1198.) The burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (<i>New York Times Co. v. Superior Court</i> (2005) 135 Cal.App.4 th 206, 212-213.) Plaintiff cites no legally cognizable basis under Code of Civil Procedure section 1008, or otherwise, for the court to reconsider its order granting defendants' motions to quash. Plaintiff's motion is accordingly DENIED. Court to prepare formal order.
13	24CV430940	In Re: T.B.	Parties are ordered to appear for argument regarding Assured Services Corporation's Petition for Approval of Transfer of Structured Settlement Payment Rights so the Court can confirm service, understanding, and approval of the petition with real party in interest.

Calendar Line 1

Case Name: *CYTOBANK, INC. vs THE MCCLURE LAW FIRM, P.C. et al*

Case No.: 19CV356936

Before the Court is Costanzo Law Firm's Motion to Strike, or in the Alternative, Tax, David McClure and the McClure Law Firm's Costs. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Patricia Ward hired Lori Costanzo to represent her in an employment action against Cytobank. Costanzo withdrew from that representation, recorded a lien for attorneys' fees she believed she was owed, and Ward later entered a settlement with Cytobank. Cytobank filed an action for interpleader, deposited the amount of lien Costanzo obtained against Ward's recovery, and named Ward, the Costanzo Law Firm, and the McClure Law Firm as defendants. Ward initiated a fee arbitration, and the arbitrators found Costanzo was not entitled to fees. Ward had already paid the arbitration fee, and the arbitrators ordered that Ward be responsible for that fee.

Costanzo filed cross claims against Ward, David McClure (Ward's brother-in-law and attorney), and the McClure Law Firm. After being sent to a trial department but before trial commenced, Costanzo dismissed her cross-complaint without prejudice for all cross-defendants. Ward moved to set aside the dismissal with respect to her and to confirm the arbitration award, which motions the Court granted. It is undisputed that David McClure and the McClure Law Firm remain dismissed without prejudice.

David McClure and the McClure Law Firm now seek their costs of suit. Costanzo asserts they are not entitled to costs because they were dismissed without prejudice before trial and are therefore not a prevailing party under the Code.

II. Legal Standard and Analysis

A plaintiff generally has an unfettered right to dismiss a cause of action before trial commences. (Code. Civ. Proc. §581; *Panakosta Partners, LP v. Hammer Lane Mgmt., LLC* (2011) 199 Cal.App.4th 612, 632-33.) The same procedures and rights apply to dismissals of cross-complaints by cross-complainants. (Code. Civ. Proc. §581(a)(2), (4)-(5).) A voluntary dismissal without prejudice does not automatically shield the plaintiff/cross-complainant from paying a defendant/cross-defendant's costs if the defendant/cross-defendant is the prevailing party.

Code of Civil Procedure section 1032 (Recovery of costs by prevailing party as matter of right) defines prevailing party to include: “the party with a net monetary recovery, ***a defendant in whose favor a dismissal is entered***, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant.” (Code. Civ. Proc. § 1032(4)(emphasis added).) “Nothing in the wording of [Code of Civil Procedure section 1032] indicates that a defendant’s right to recover costs is limited to certain *types* of dismissals Since the Legislature has not distinguished between types of dismissal in the statute, we will not read such a restriction into it.” (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal. App. 4th 124, 164 (internal citations omitted); see also *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal. App. 4th 87, 93 (“even a voluntary dismissal without prejudice triggers a potential award of costs”); *Cano v. Glover* (2006) 143 Cal.App.4th 326, 331 (“Defendant is entitled to costs regardless of whether the dismissal is with or without prejudice.”))

While *Hambrick* involved a judicial dismissal, *Mon Chong* involved a voluntary dismissal after a 998 offer, and *Cano* involved a voluntary dismissal by not including defendant in a fourth amended complaint after a demurrer was sustained with leave to amend, these cases unequivocally state that regardless of the type of dismissal, the trial court must determine whether costs are appropriate when a defendant is dismissed—regardless of the type of dismissal. *Mon Chong* explains: “A plaintiff may voluntarily dismiss a complaint by written request to the clerk at any time prior to the commencement of trial, upon payment of costs (§ 581, subd. (b)(1)). As the statute expressly states, a party in whose favor such a dismissal is entered is entitled to recover its costs (§ 1032, subd. (b)).” (*Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal. App. 4th 87, 93.)

Here, David McClure and the McClure Law Firm seek recovery of the following costs:

Filing and motion fees	\$1,445.85
Deposition costs	\$2,249.66
Service of process	\$140.16
Other	\$275.60

David McClure and the McClure Law Firm also seek an unknown amount of attorneys’ fees, which will be addressed by a separately noticed motion and is therefore not the subject of this order.

Kim O. Dincel's declaration explains the basis for each of these costs, which the Court finds reasonable for this litigation. The Court also finds Costanzo's arguments regarding the arbitration award unpersuasive. Neither David McClure nor the McClure Law Firm was a party to the arbitration. Nor does Costanza cite any authority to support the position that confirmation of an arbitration fee award between attorney and client applies to co-counsel or to cost awards to defend related court litigation.

Accordingly, Costanzo's motion to tax costs is DENIED.

Calendar Line 11**Case Name:** *Mendel Saturnino vs Arleen Ruiz***Case No.:** 23CV420525

Before the Court is Plaintiff's Partition Petition. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff filed this action on August 7, 2023 seeking partition of a single family residence located at 1775 San Ramon Ave., Mountain View, CA 94043 (the "Property"). Plaintiff Mendel Jermone Saturnino and Defendant Arleen Ruiz, siblings, are each 50% owners of the Property; that is not disputed. Ruiz has lived in the Property with her daughter nearly her entire life and cared for her parents in their later years. Ruiz has also been paying the taxes, costs for upkeep and maintenance for the Property, and a mortgage taken out in her name to buy out a third sibling who also inherited a portion of the Property upon their mother's death.

Ruiz maintains their mother's wishes were for her to be the sole heir to the Property, and that now Saturnino is forcing a sale because of a falling out related to an inheritance Ruiz's daughter received from an aunt that Saturnino expected to receive. Ruiz argues selling the Property could leave her homeless and provide Saturnino with an undeserved windfall.

II. Legal Standard and Analysis

In a partition action, the court must find (1) the plaintiff has a right to partition; (2) determine the ownership interests of the parties; and (3) direct the manner of partition. (Code Civ. Pro. §§872.710, 872.910.) If plaintiff has a right to partition and the ownership interests of the parties are indisputable, the court "shall" appoint a partition referee. (Code Civ. Pro. §872.010.) "A co-owner of property has an absolute right to partition unless barred by a valid waiver." (*Orien v. Lutz* (2017) 16 Cal.app.5th 957; Code Civ. Pro. §872.710(b); *Bacon v. Wahrhaftig* (1950) 97 Cal.App.2d 599, 603; *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1013; *Miranda v. Miranda* (1947) 81Cal.App.2d 61, 68.) A waiver may be found where there is a writing evincing "an agreement among co-owners of a property. . . ." (*Orien v. Lutz* (2017) 16 Cal.app.5th 957, 963.)

The parties do not dispute that each owns a 50% interest in the Property. Defendant's arguments center around waiver and fairness. Cases where courts have found waiver in the partition context are

rare and typically include a writing or known prior restriction. (See, e.g., *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1013; *Pine v. Tiedt* (1965) 232 Cal. A pp. 2d 733; *Thomas v. Witte* (1963) 214 Cal. App. 2d 322; *Miranda v. Miranda* (1947) 81Cal.App.2d 61, 68.) Neither of those circumstances are present here.

And, while the Court agrees that selling the Property will cause pain and difficulties, fairness or equity is not a basis for the Court to deny partition. In fact, the case law in this area suggests that it is precisely facts like those present here that partition is designed to address. While this issue is not before the Court on this motion and the Court is thus not making a determination at this time, if during the accounting phase of this proceeding Ruiz is found to have been paying the mortgage, taxes, and expenses for maintaining the Property, it may be found that she is entitled to a greater share of the sale proceeds to reimburse her for those expenses that Saturnino has not incurred. Thus, those concerns will be addressed during the accounting; they are not a basis for the Court to deny partition.

Accordingly, Plaintiff's motion for interlocutory judgment and appointment of partition referee is GRANTED.