SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20
Honorable Drew C. Takaichi, Presiding (for Hon. Socrates Manoukian)
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

PROBATE LAW AND MOTION TENTATIVE RULINGS
DATE: April 23, 2024 TIME: 9:00 A.M.

NOTICE

APPEARANCES IN DEPT. 20 MAY BE IN PERSON OR REMOTELY. IF APPEARING REMOTELY, PLEASE USE DEPT. 20 TEAMS LINK FROM THE COURT WEBSITE: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

To contest a ruling: before 4:00 P.M. today you must notify the: (1) Court by calling (408) 808-6856 and (2) other side that you plan to appear at the hearing to contest the ruling

State and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while on Teams or Zoom

Prevailing party shall prepare the order by e-file, unless stated otherwise below.

The court does not provide official court reporters for civil law and motion hearings. See court website for policy and forms for court reporters at hearing.

TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or your web browser cache (temporary internet files) is accessing a prior week's rulings. "REFRESH" or "QUIT" your browser and reopen it or adjust your internet settings to *see only the current version of the web page. Your browser will otherwise access old information from old cookies even after the current week's rulings have been posted*.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV366400	*Maria Elena Benitez et al vs Michelle Rodriguez et al*	Click or scroll to line 1 for tentative ruling.
LINE 2	20CV366400	*Maria Elena Benitez et al vs Michelle Rodriguez et al*	Tentative ruling is included in line 1.
LINE 3	23CV410545	*David Martin vs GOOGLE LLC et al*	Click or scroll to line 3 for tentative ruling.

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LINE 4	23CV410545	*David Martin vs GOOGLE LLC et al*	Click or scroll to line 4 for tentative ruling.
LINE 5	23CV424871	*LEVEL 5 SECURITY, INC. vs JULIE PUGA*	Click or scroll to line 5 for tentative ruling.
LINE 6	23CV427679	*Ally Liu vs You Wu et al*	Demurrer/motion to strike of defendants You Wu and UTA AI Inc. ("Defendants"). On April 10, 2024, plaintiff Ally Liu filed a first amended complaint ("FAC") with proof of service on defendants. The filing of the FAC renders the demurrer/ motion to strike of Defendants MOOT, and the demurrer/motion to strike is ordered OFF-CALENDAR.
LINE 7	23CV417271	*Yolanda Velasquez vs Star Elevator, Inc. et al*	Click or scroll to line 7 for tentative ruling.
LINE 8	23CV417271	*Yolanda Velasquez vs Star Elevator, Inc. et al*	Tentative ruling is included in line 7.
LINE 9	16CV295730	*Cyrus Hazari vs Mandy Brady*	Continued by court to May 9, 2024, 9:00 A.M. Dept. 20
LINE 10	16CV295730	*Cyrus Hazari vs Mandy Brady*	Continued by court to May 9, 2024, 9:00 A.M. Dept. 20
LINE 11	19CV345499	*Sergev Firsov vs Yevgeniy Babichev et al*	CCP 170.1 affidavit challenge to Judge Manoukian – erroneously set for hearing; therefore, the matter is ordered OFF-CALENDAR
LINE 12	20CV366973	*Louis Tran vs Lisa Tran et al*	Click or scroll to line 12 for tentative ruling.

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LINE 13	20CV373032	*BONNIE NIESEN et al vs INTUITIVE SURGICAL, INC., et al*	Motion of Defendant Intuitive Surgical, Inc.("Defendant") filed March 27, 2024 to continue trial set for June 24, 2024. Plaintiffs Bonnie Niesen and Travis Niesen have not filed opposition. Defendant does not show the existence of any of the grounds for continuance in subdivision (c) of Cal.Rules of Court, Rules 3.1332. However, the motion is timely filed relative to the proximity of the trial, there has not been a previous trial continuance, and Defendant asserts, and Plaintiffs do not contest, that no prejudice will result to parties or witnesses. The dates requested for the continued trial are not available. Defendants also assert, and Plaintiffs do not contest, that both sides have not completed discovery and are not ready for trial for that reason, and that Defendant's counsel has a rescheduled two-week trial in another matter on June 3, 2024. There is no information whether the rescheduled matter has priority over the instant case. Because dates assigned for trial are firm and parties and counsel must regard the date set for trial as certain (Cal.Rules of Court, Rule 3.1332, subdivision (a)), counsel are admonished that there will be no further continuances of trial to complete discovery or because of a conflict with another case. Motion for continuance of trial is GRANTED, and the trial is continued to February 18, 2024, 8:45 A.M., Dept. 20; MSC is set for February 5, 2024 at 8:45 A.M. in Dept. 20 and Readiness conference is set for February 13, 2024, 1:30 P.M. in Dept. 6. Pursuant to unopposed request of Defendant, the new trial date shall be considered the initial date for discovery purposes.

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PROBATE LAW AND MOTION TENTATIVE RULINGS

LINE 14	23CV420293	*American Express National Bank vs Eric Quick et al*	Motion of plaintiff American Express National Bank to vacate conditional dismissal and for entry of judgment pursuant to Code of Civil Procedure section 6644.6 is GRANTED. Proof of service of notice of motion on defendants Eric Quick and Natural Provisions LLC is on file. No opposition is filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54 (c).
LINE 15	23CV421040	*Kristina Lopez vs Francisco Ramirez et al*	Motion of attorney Lauren Landau to be relieved as counsel for plaintiff Michael Montoya. No opposition filed; however, no proof of service of notice of motion filed. If proof of service is filed prior to or presented at hearing, motion will be granted. If no proof of service and moving counsel appears, matter will be continued. If no proof of service and no appearance of counsel, the matter will be ordered off-calendar.
LINE 16	23CV422870	*Joanne Schwartz et al vs Marisol Arreola, et al*	Click or scroll to line 16 for tentative ruling.
LINE 17	2005-1-CV-039140	*G. GRELLAS vs D. CHONG, et al*	Motion of judgment creditor George Grellas for order compelling issuance of memorandum of garnishee Lenos Software ("Garnishee") is GRANTED. Proof of service of notice of motion on defendants Debbie Chong and Patti Tackeff and on Garnishee is on file. No opposition is filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54 (c).
LINE 18	21CV3822651	*Gregory Gilbert, M.D. v. The Leland Stanford Junior University,, et al*	Set by court for oral argument only for opposition to tentative ruling issued for hearing on April 16, 2024.
LINE 19	21CV3822651	*Gregory Gilbert, M.D. v. The Leland Stanford Junior University,, et al*	Set by court for oral argument only for opposition to tentative ruling issued for hearing on April 16, 2024.

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LINE 20	21CV3822651	*Gregory Gilbert, M.D. v. The Leland Stanford Junior University,, et al*	Set by court for oral argument only for opposition to tentative ruling issued for hearing on April 16, 2024.
LINE 21			
LINE 22			
LINE 23			
LINE 24			
LINE 25			
LINE 26			
LINE 27			
LINE 28			
LINE 29			
LINE 30			

Calendar lines 1-2

Case Name: *Maria Elena Benitez et al vs Michelle Rodriguez et al*
Case no.: 20CV366400

Background

On August 17, 2021, plaintiffs Maria Benitez and Rufo Rodriguez ("Plaintiffs") filed the operative first amended complaint ("FAC") against defendants El Culichi VIP Restaurant ("Restaurant"), Michelle Rodriguez, Capitol Commercial Center ("Business Park"), James Teng and Chask Teng, and Security Guard Services Company, for wrongful death of their son, Rufino Benitez ("Decedent"), alleging first cause of action for negligence-unprofessional inadequate security, second cause of action for commercial premises liability and third cause of action for failure to warn of dangerous condition on business premises.

According to the allegations of the FAC, on or about May 5, 2018, security personnel of Restaurant witnessed attacks unfolding inside Restaurant's premises involving Decedent and an alleged assailant. Security personnel instructed Decedent and the alleged assailant to "take it outside and take it elsewhere". The Decedent and alleged assailant left the Restaurant's premises and then left the Business Park where Restaurant was located, in separate cars. Thereafter, a short distance away from Restaurant, the assailant allegedly shot and killed the Decedent.

On February 15, 2024, Plaintiffs issued a subpoena to nonparty City of San Jose ("City") to produce full crime reports for 198 listed cases/incidents and synopsis of crimes for 448 listed cases/incidents (Subpoena").

On March 7, 2024, City filed motion to quash, or alternatively, for a protective order against the Subpoena. On April 10, 2024, Plaintiffs filed opposition, and on April 16, 2024, City filed reply.

On March 22, 2024, Plaintiffs filed motion for order directing compliance of City with the same Subpoena.

On April 10, 2024, City filed opposition and on April 16, 2024, Plaintiffs filed reply.

Plaintiffs and City acknowledge that the two motions involve the same Subpoena and issue of whether City should be ordered to comply with the Subpoena and produce records, in part or in whole, or whether the Subpoena should be quashed, or in the alternative, a protective order limiting the Subpoena be issued.

Analysis

The parties do not contest general principles of law pertaining to discovery, that the management of discovery is within the discretion of the court, that discovery is liberal in favor of disclosure where information sought is non-privileged, relevant to the subject matter in the action, is admissible in evidence or is reasonably calculated to lead to discovery of admissible evidence.

Relevant, non-privileged information may be protected from discovery if there exists a legally protected interest, an objectively reasonable privacy expectation, and a serious invasion in both nature and scope.

Additionally, if a nonparty is involved, discovery must not be overly burdensome or overly intrusive to privacy rights.

Here, Plaintiffs possess crime data relating to cases/incidents that occurred or were reported in the general area of Restaurant for 30+ years prior to the instant crime. The Subpoena directs City to produce full crime reports for 198 listed cases/incidents and synopsis of crimes for 448 listed cases/incidents, including specific facts about each case/incident, and identification of victims, arrestees (including personal information), witnesses and law enforcement or investigative personnel. There is an objectively reasonable privacy expectation of the persons identified in the cases/incidents, who have no relation or connection with the pending action, and production of their identities and other personal information is a serious invasion of their privacy rights.

That said, the right to privacy is not absolute. The right to privacy is balanced against the need for disclosure, and an invasion may be justified if it substantively furthers a legitimate interest.

The party seeking to invade privacy must show that the information is directly relevant, essential to a fair resolution, and cannot be obtained through less intrusive means. *Vinson v. Sup.Ct.* (1987) 43 Cal.3d 833, 843-44.

Here, Plaintiffs already possess crime data of cases/incidents that occurred in the general area of the restaurant for 30+ years prior to the incident. Plaintiffs fail to present sufficient evidence to show how the details and full file of each case/incident and the identities (and other information) of victims, arrestees, witnesses and law enforcement personnel is directly relevant to the subject matter of the case or essential to a fair resolution of the action.

The court finds that the balance of the right to privacy of crime victims, arrestees, witnesses and law enforcement personnel, and information that may identify or be personal to such nonparties, weighs in favor the right to privacy for protection of the information from disclosure, against the need for disclosure.

City has also submitted evidence of the efforts and substantial time required to comply with the subpoena which the court finds is unduly burdensome considering the absence of sufficient evidence showing the information is directly relevant to the subject matter of the case.

Disposition

The motion of City to quash the Subpoena is GRANTED.

The motion of Plaintiffs to compel compliance with the Subpoena is DENIED.

City shall prepare the order.

Calendar line

Calendar line 3

Case Name: *David Martin vs GOOGLE LLC et al*
Case no.: 23CV410545

(1) Motion for Vexatious Litigant Determination and to Require Plaintiff David Martin to Furnish Security Pursuant to Code of Civil Procedure sections 391 et seq

Factual and Procedural Background

Plaintiff David Martin ("Martin"), a self-represented litigant, filed his original complaint in this action on January 20, 2023, alleging 18 causes of action. In the original complaint, plaintiff Martin alleges defendant Jose A. Ramirez ("Ramirez") is his landlord and that defendant Ramirez (and/or agents, employees, co-conspirators) committed trespass on plaintiff Martin's apartment.

Plaintiff Martin's original complaint further alleged that defendant Emalee Ousley ("Ousley") and defendant Ramirez (and/or agents, employees, co-conspirators) committed an assault and battery.

Plaintiff Martin's original complaint also names as defendants the City of Sacramento ("Sacramento"), City of West Sacramento ("West Sacramento"), and Google LLC ("Google").

On June 14, 2023, defendant Ousley filed demurrer to the complaint.

On September 29, 2023, plaintiff Martin filed a first amended complaint ("FAC"). While plaintiff Martin's original complaint consisted of nine pages, plaintiff Martin's FAC ballooned to 177 pages in length. The FAC continued to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

On October 30, 2023, plaintiff Martin filed a second amended complaint ("SAC"), growing further to 195 pages in length. The SAC continued to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

On November 14, 2023, defendant Ousley filed demurrer to the SAC. Defendants Google LLC, City of Sacramento, and City of West Sacramento also filed demurrers to the SAC.

After the court (Hon. Kulkarni) took under submission various motions including demurrers to the SAC following a hearing on December 7, 2023, plaintiff Martin filed a request for dismissal on December 12, 2023 of "all causes of action only for Defendants: City of Sacramento, City of West Sacramento, Jose A. Ramirez, and Emalee Ousley." However, the court clerk did not enter dismissal as requested. Plaintiff Martin also filed an ex parte application (set for hearing on December 13, 2023) to dismiss defendants City of Sacramento, City of West Sacramento, defendant Ramirez and defendant Ousley, and to stay proceedings,

which defendant Ousley asserts was directed to the orders sustaining the demurrers and was not properly noticed.

On December 14, 2023, the court (Hon. Manoukian) issued an order "dismiss[ing] all causes of action … regarding the following Defendants: City of West Sacramento, City of Sacramento, Jose A Ramirez, and Emalee Ousley." The order indicates there was no opposition filed, but defendant Ousley asserts plaintiff Martin was informed by City of Sacramento that it would file opposition, but plaintiff Martin failed to so inform the Court. This prompted City of Sacramento to file an ex parte application to set aside the order which was granted on December 26, 2023 (Hon. Manoukian). The order further provides that "Plaintiff David Martin is not permitted to move Ex Parte before this Court absent a Stipulation by all parties."

On December 20, 2023, the court (Hon. Kulkarni) issued an order sustaining (some with and some without leave to amend) the defendants' demurrers. As to defendant Ousley, the court sustained the demurrer without leave to amend.

On January 3, 2024, plaintiff Martin submitted a third ex parte application to dismiss defendants, stay proceedings and to enter judgment as to defendant Google LLC. There was no stipulation of the parties authorizing the filing of the ex parte application. The application was denied ex parte. On January 9, 2024, plaintiff Martin submitted a fourth ex parte application, without stipulation of the parties, asking for similar relief.

On January 9, 2024, plaintiff Martin filed the operative third amended complaint ("TAC"), now 202 pages in length, continuing to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint, *including defendant Ousley*. Defendant Ousley has filed a demurrer to the plaintiff Martin's TAC set for hearing today as line 4.

On March 8, 2024, defendant Ousley filed the motion now before the court, a motion to declare plaintiff Martin a vexatious litigant pursuant to Code of Civil Procedure sections 391 et seq.

Discussion

Code of Civil Procedure section 391, subdivision (b) provides alternative definitions of a "vexatious litigant". The motion of defendant Ousley seeks determination that plaintiff Martin is a vexatious litigant pursuant to subdivision (b)(3) of the section which describes as a vexatious litigant a person who:

> "(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Plaintiff Martin's TAC is the operable complaint in the instant action, preceded by sustained demurrers to earlier versions, and various other proceedings, including the ex parte applications referenced above. Defendants assert that the cumulative evidence and inferences from the four versions of the complaint filed, the four ex parte applications of plaintiff, and rulings of the court, evidence a plaintiff who persists with frivolous pursuit of, and actions on,

meritless claims against defendants, at significant expense in time and money to defendants, and unnecessary expenditure of court resources.

Defendant Ousley also asserts that plaintiff Martin has filed two other identical actions with the Superior Courts in Sacramento County and Yolo County which plaintiff Martin insists on pursuing separately.

As a result, defendant asserts that the instant action and two identical actions in other courts has imposed unreasonable burdens on the courts and defendants.

In opposition, plaintiff Martin does not dispute the procedural history asserted by defendant Ousley, summarized above. Instead, plaintiff Martin contends defendant Ousley is misleading the court about plaintiff's actions, and that plaintiff has acted in good faith and intended only to direct the TAC toward defendants West Sacramento and Sacramento. Plaintiff Martin also asserts that plaintiff's ex parte applications were intended to expedite (and not delay) proceedings, the applications for stay of proceedings were to save judicial resources, were not in violation of court orders and did not prejudice defendant Ousley.

The TAC continues to name defendant Ousley as a defendant and asserts causes of action against defendant. Defendant was required to bring another demurrer to this version of the complaint even though defendant's demurrer to plaintiff Martin's SAC was clearly and unambiguously sustained without leave to amend. Plaintiff Martin's filing of the TAC with causes of action asserted against defendant Ousley is in violation of the order sustaining the demurrer without leave to amend, and the filing of the FAC against defendant Ousley is therefore frivolous, and allegations against defendant Ousley are therefore meritless. Plaintiff Martin's assertions to the contrary are unpersuasive and unavailing.

The submission of the ex parte applications of plaintiff further evidences a course of action that is frivolous, unproductive and without merit, serving to delay the proceeding and to cause significant expenditure of time and money to defendants in defending against such actions, and significant expenditure of court resources.

Disposition

The court determines that Plaintiff Martin is a vexatious litigant pursuant to Code of Civil Procedure section 391, subdivision (b)(3).

Defendant Ousley's submitted evidence of the filing of the four versions of plaintiff Martin's complaint filed against defendant Ousley and facts, circumstances and course of conduct of plaintiff relating to those filings, including ex parte applications, and the resulting court orders, is persuasive that there is reasonable probability that further actions of plaintiff Martin against defendant Ousley in this case will continue, and defendant will continue to incur expense in defending against such action, unless plaintiff Martin is required to furnish security. Defendant Ousley has submitted sufficient evidence to warrant imposition of security for defendant's expenses from the litigation, including attorneys' fees. The amount requested for security is reasonable. Plaintiff Martin is therefore ordered to post and furnish security in the amount of $2,767.33.

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Calendar line 4

Case Name: *David Martin v. Google LLC, et al.*

Case No.: 23CV410545

(1) Demurrer to Plaintiff's Third Amended Complaint

Factual and Procedural Background

Plaintiff David Martin ("Martin"), a self-represented litigant, filed his original complaint in this action on January 20, 2023. In the original complaint, plaintiff Martin alleges defendant Jose A. Ramirez ("Ramirez") is his landlord and that defendant Ramirez (and/or agents, employees, co-conspirators) committed trespass on plaintiff Martin's apartment.

Plaintiff Martin's original complaint further alleged that defendant Emalee Ousley ("Ousley") and defendant Ramirez (and/or agents, employees, co-conspirators) committed an assault and battery.

Plaintiff Martin's original complaint also names as defendants the City of Sacramento ("Sacramento"), City of West Sacramento ("West Sacramento"), and Google LLC ("Google"). Without much in the way of facts, plaintiff Martin's original complaint asserted the following causes of action:

(1) Trespass [against defendant Ramirez]
(2) Extortion [against defendant Ramirez]
(3) Violation of California Civil Code 1940.2 [against defendant Ramirez]
(4) Violation of California Civil Code 1942.5 [against defendant Ramirez]
(5) Violation of California Civil Code 1947.12 [against defendant Ramirez]
(6) Violation of California Civil Code 827 [against defendant Ramirez]
(7) Intentional Infliction of Emotional Distress [against defendant Ramirez]
(8) Negligence [against all defendants]
(9) Negligence per se [against defendant Ousley]
(10) Nuisance [against defendant Ramirez]
(11) Violation and/or conspiracy to violate California Civil Code 52.1 [against all defendants]
(12) Assault [against defendants Ramirez and Ousley]
(13) Battery [against defendant Ousley]
(14) Violation of Right of Privacy [against all defendants]
(15) False Advertising [against defendant Google]
(16) Unfair Competition [against defendant Google]
(17) Fraud [against defendant Google]
(18) Negligent Misrepresentation [against defendant Google]

On September 29, 2023, plaintiff Martin filed a first amended complaint ("FAC"). While plaintiff Martin's original complaint consisted of nine pages, plaintiff Martin's FAC ballooned to 177 pages in length. The FAC continued to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

On October 30, 2023, plaintiff Martin filed a second amended complaint ("SAC"), growing further to 195 pages in length. The SAC continued to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

After the court (Hon. Kulkarni) took under submission various motions including demurrers to the SAC following a hearing on December 7, 2023, plaintiff Martin filed a request for dismissal on December 12, 2023 of "all causes of action only for Defendants: City of Sacramento, City of West Sacramento, Jose A. Ramirez, and Emalee Ousley." However, the court clerk did not enter dismissal as requested.

On December 14, 2023, the court (Hon. Manoukian) issued an order "dismiss[ing] all causes of action … regarding the following Defendants: City of West Sacramento, City of Sacramento, Jose A Ramirez, and Emalee Ousley."

On December 20, 2023, the court (Hon. Kulkarni) issued an order sustaining (some with and some without leave to amend) the defendants' demurrers. As to defendant Ousley, the court sustained the demurrer without leave to amend on the ground that "there is another action pending between the same parties on the same cause of action."

On December 26, 2023, the court (Hon. Manoukian) issued an order setting aside the December 14, 2023 order which dismissed, among others, defendant Ousley.

On January 9, 2024, plaintiff Martin filed the operative third amended complaint ("TAC"), now 202 pages in length, continuing to assert the same eighteen causes of action asserted in the original complaint against the same parties identified in the original complaint.

On March 7, 2024, defendant Ousley filed the motion now before the court, a demurrer to plaintiff Martin's TAC.

I. Preliminary considerations.

As a preliminary matter, plaintiff Martin argues in opposition that defendant West Sacramento's demurrer is untimely. Plaintiff Martin cites Code of Civil Procedure section 430.40, subdivision (a), which states, "A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint."

As noted above, plaintiff Martin filed the TAC on January 9, 2024. Plaintiff Martin did not file an accompanying proof of service with regard to the TAC. Defendant Ousley filed her demurrer on March 7, 2024, a date plaintiff Martin contends is beyond the time allowed to file a demurrer.

The flaw with plaintiff Martin's argument is that the deadline to file a demurrer begins to run "after service" of the TAC. Here, plaintiff has made no evidentiary showing as to when he served the TAC. Even if the court accepted plaintiff Martin's assertion that he served defendant Ousley the TAC on January 9, 2024, the delay in Ousley's filing of a demurrer does not preclude the court from considering it now.

"Technically, defendants are 'in default' if they fail to file an answer, demurrer or other permitted response within the time allowed by law and without a court order excusing such filing. [] By itself, being 'in default' has no legal consequences because defendant can still appear in the action until the clerk has entered his or her default. [] Thus, even though the time to respond has expired, if no default yet has been entered, defendant can file a pleading or motion." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶¶5:2 - 5:3, p. 5-1 citing *Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 141-"it is now well established by the case law that where a pleading is belatedly filed, but at a time when a default has not yet been taken, the plaintiff has, in effect, granted the defendant additional time within which to plead and he is not strictly in default.") "An untimely demurrer may be considered by the court in its discretion." (Id. at ¶7:24, p. 7(I)-16 citing *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750 (*Jackson*).) The court will exercise such discretion here to consider Ousley's demurrer on the merits particularly in light of the fact that no default has been taken.

Plaintiff Martin also argues preliminarily that Ousley did not comply with her obligation to meet and confer in advance of the filing of the instant demurrer. Code of Civil Procedure section 430.41 requires a demurring party to meet and confer with the party who filed the challenged pleading to seek informal resolution of the demurring party's objections. (Code Civ. Proc., § 430.41, subd. (a).) Specifically, "If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading." (*Ibid*.) The meet and confer must be conducted in person or by telephone, and must address each cause of action to be included in the demurrer. (Ibid.) "The parties shall meet and confer at least five days before the date the responsive pleading is due." (Code Civ. Proc., §430.41, subd. (a)(2).) If these efforts fail, the demurring party must file and serve a declaration regarding the meet and confer process with the demurrer. (Code Civ. Proc., § 430.41, subd. (a)(3).)

Plaintiff Martin notes that defendant Ousley did not attempt to meet and confer until one day prior to the filing of her demurrer and did not respond to plaintiff's meet and confer efforts thereafter. Since a court may not sustain a demurrer based on the insufficiency of the meet and confer process (Code Civ. Proc., §430.41, subd. (a)(4)) and to avoid wasting any further judicial resources, the court will move on to the merits of the demurrer. The court will simply remind parties and counsel that compliance with Code of Civil Procedure section 430.41 is required.

As a third preliminary matter, plaintiff Martin contends the instant demurrer is unnecessary because plaintiff Martin has already dismissed Ousley as a defendant from this action. However, also noted above, the court set aside the order of dismissal.

II. Defendant Ousley's demurrer to plaintiff Martin's TAC.

After successfully demurring to plaintiff Martin's SAC, defendant Ousley now demurs again to plaintiff Martin's TAC on the ground that "there is another action pending between the same parties on the same cause of action." (Code Civ. Proc., §430.10, subd. (c).)

Plaintiff Martin acknowledges the court's (Hon. Kulkarni) December 20, 2023 order sustaining defendant Ousley's demurrer to the SAC without leave to amend on that ground. Plaintiff

Martin, a self-represented litigant, contends he acted in good faith in amending and intended only to direct the TAC toward defendants West Sacramento and Sacramento. However, plaintiff Martin provides no colorable argument against defendant Ousley's demurrer.

Accordingly, defendant Ousley's demurrer to plaintiff Martin's TAC on the ground that there is another action pending between the same parties on the same cause of action [Code Civ. Proc., §430.10, subd. (c)] is SUSTAINED WITHOUT LEAVE TO AMEND.

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Calendar line 5

Case Name: *Level 5 Security, Inc. v. Julie Puga*

Case No.: 23CV424871

(1) Demurrer to First-Amended Cross-Complaint

Factual and Procedural Background

In this action for declaratory relief, plaintiff Level 5 Security, Inc. ("Plaintiff") alleges that on May 15, 2022, an organizational meeting was held where Carol Stensrud ("Stensrud") and defendant Julie Puga ("Puga") were elected to Plaintiff's Board of Directors and as officers of the corporation. (Complaint, ¶¶2 – 3.) Among other things, Stensrud made a significant capital contribution and loan to Plaintiff in exchange for 80% ownership of the company. (Complaint, ¶3.)

Plaintiff corporation later prepared a written "Action by Unanimous Written Consent of the Board of Directors of Level 5 Security, Inc.," to formally document actions taken at the May 15, 2022 organizational meeting. (Complaint, ¶7.) The Unanimous Written Consent adopted new bylaws, documented a $207,000 loan from Stensrud, authorized the sale of shares pursuant to written subscription agreements. (Complaint, ¶¶8 – 10.)

As of April 30, 2023, only Stensrud paid money for the purchase of shares. (Complaint, ¶14.) Plaintiff corporation executed and delivered a share certificate to Stensrud for 800,000 shares reflecting Stensrud's payment of $8,000. (Id.) Although it was discussed that defendant Puga would be a 20% owner of Plaintiff corporation, defendant Puga did not pay $2,000 for 20% of the shares of Plaintiff corporation. (Complaint, ¶¶15 – 16.)

On September 11, 2023, Stensrud, the sole shareholder of Plaintiff corporation, took action to protect Plaintiff corporation from improper financial transactions by defendant Puga, removing Puga as a director and officer and terminating Puga's employment. (Complaint, ¶17.)

On October 20, 2023, Plaintiff corporation filed this action against defendant Puga asserting a single cause of action for declaratory relief seeking a judicial declaration that the Subscription Agreement is valid; defendant Puga did not purchase shares of the Plaintiff corporation; and defendant Puga is not a shareholder of the Plaintiff corporation.

On December 14, 2023, defendant Puga filed an answer to Plaintiff's complaint and also filed a cross-complaint against Troy Carson, Stensrud, and Plaintiff corporation asserting claims of (1) fraud; and (2) breach of fiduciary duty.

On February 5, 2024, Plaintiff/ cross-defendant corporation filed a demurrer to defendant/ cross-complainant Puga's cross-complaint which prompted Puga to file the now operative first amended cross-complaint ("FAXC") on February 9, 2024.

The FAXC alleges Puga's son, Bryce Fernandez ("Fernandez"), formed Plaintiff corporation on January 27, 2022 at the urging of cross-defendant Troy Carson ("Carson"). (FAXC, ¶9.) Carson had worked in private security and offered to help Fernandez get a private

security company up and running. (Id.) When Plaintiff corporation was founded, Fernandez owned 100% of its shares. (FAXC, ¶10.)

In the spring of 2022, Carson advised Puga that it would be beneficial for business if she were involved as an owner in order to be eligible for certain contracts. (FAXC, ¶11.) Fernandez agreed and transferred sixty percent of his shares to Puga. (*Id*.)

In May 2022, Carson advised Puga of an opportunity for Plaintiff to purchase an existing security company, Griffin Protective Services, Inc. ("Griffin"). (FAXC, ¶13.) To fund the purchase of Griffin, Carson suggested Plaintiff get a loan from Stensrud. (*Id*.) Stensrud and [Plaintiff] entered into a loan agreement for the purchase of Griffin and Puga agreed to be personally liable for the loan. (FAXC, ¶14.)

Over the remainder of 2022, Puga continued working as an owner of Plaintiff including, among other things, contributing $15,000 in capital in an effort to obtain business funding for Plaintiff from a bank. (FAXC, ¶15.)

In February 2023, Plaintiff (by Puga as owner and officer) signed a new lease with Puga acting as guarantor. (FAXC, ¶16.)

In late February/ early March 2023, Carson advised Puga that it would be best for Fernandez to step away from Plaintiff corporation and for Stensrud to become an owner. (FAXC, ¶17.) Puga, Stensrud, Carson, and Fernandez agreed Fernandez would step away from Plaintiff corporation and Stensrud would assume eighty percent ownership and Puga would own 20% of Plaintiff corporation. (FAXC, ¶18.) Carson assumed the role of Operations Manager. (*Id*.) The loan previously issued to Puga would be assumed by Plaintiff corporation in consideration for Stensrud's ownership interest. (*Id*.)

In March 2023, Puga and Stensrud agreed to have the bylaws of Plaintiff corporation revised and amended. (FAXC, ¶20.) The most discussed and negotiated provision was for protection of a minority shareholder because Puga held only 20% of Plaintiff's stock. (*Id*.) Puga and Stensrud reached an agreement on the amended bylaws in late April 2023. (FAXC, ¶22.)

Despite shares of Plaintiff corporation having already issued, Stensrud had a Subscription agreement prepared which purportedly required Puga and Stensrud to contribute money to purchase shares of Plaintiff corporation which they already owned. (FAXC, ¶23.) Since Puga already owned her shares, Puga did not provide the amount requested by Stensrud. (*Id*.)

In September 2023, Stensrud and Carson terminated Puga's employment from Plaintiff corporation and claimed she held no ownership. (FAXC, ¶24.)

Carson intentionally concealed from Puga the fact that he was a convicted felon and pursuant to a stipulated order, Carson agreed he would not work for, have authority to act on behalf of, or have control over any private security company. (FAXC, ¶25.) Carson advised Puga that the money Stensrud loaned to Plaintiff corporation to purchase Griffin was his but he had to run it through Stensrud to conceal it from authorities due to a $1.9 million restitution judgment against him. (*Id*.) Carson and Stensrud made representations to Puga that they

wanted her to be a part of Plaintiff corporation causing Puga to invest her own funds into the company and work at below market compensation. (*Id*.) At Carson's direction, Puga agreed to take a below market salary and no other distributions from Plaintiff corporation despite being an owner while Carson and Stensrud routinely took money from Plaintiff corporation for personal expenses (including the purchase of Carson's personal vehicle) without documentation. (*Id*.) Carson and Stensrud falsified tax records for 2022. (*Id*.)

Puga's cross-complaint asserts causes of action against Carson and Stensrud for:

(1) Fraud [against cross-defendants Carson and Stensrud]
(2) Breach of fiduciary duty [against cross-defendant Stensrud]

On March 14, 2024, cross-defendants Carson and Stensrud filed the motion now before the court, a demurrer to Puga's FAXC.

I. Cross-defendants Carson and Stensrud's demurrer to the first cause of action [fraud] of cross-complainant Puga's FAXC is OVERRULED.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*); see also CACI, No. 1900.)

"Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) The *Lazar* court did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Lazar, supra,* 12 Cal.4th at p. 645.)

Though the particularity requirement generally mandates that a plaintiff plead facts establishing the aforementioned items, it is much more difficult to apply this rule in a case of non-disclosure because, as one court explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc*. (2009) 171 Cal.App.4th 1356, 1384.) One of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charged which can be intelligently met." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, internal quotations omitted.) However, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the

controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party …." (*Id*., at p. 217.)

Such is the circumstance here. As cross-defendants note, Puga's first cause of action for fraud includes an allegation that, "CARSON and STENSRUD repeatedly made material statements to Puga … [including] … that CARSON could legally participate in LEVEL 5." (FAXC, ¶27(a).) The court does not read this allegation in isolation but rather in conjunction with Puga's earlier allegation that, "CARSON intentionally hid this from PUGA and worked at LEVEL 5 for more than year [sic] in direct violation of this Stipulation [i.e., he would not work for, have authority to act on behalf of, or have control over any private security company flowing from Carson's felony conviction for crimes involving moral turpitude.]" (FAXC, ¶25.) Although Puga would have been clearer by denoting such as "concealment" rather than affirmative "misrepresentations," it is sufficiently clear to this court that Puga is alleging concealment. As such, the court is inclined to relax the specificity normally needed in pleading affirmative fraud.

Puga's first cause of action does also allege affirmative misrepresentations for which specificity would be required. However, a defendant (or cross-defendant) cannot demur to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action;" *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274—"A demurrer challenges a cause of action and cannot be used to attack a portion of a cause of action.")

Consequently, cross-defendants' Carson and Stensrud's demurrer to the first cause of action in cross-complainant Puga's FAXC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for fraud is OVERRULED.

II. Cross-defendant Stensrud's demurrer to the second cause of action [breach of fiduciary duty] of cross-complainant Puga's FAXC is OVERRULED.

In *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1178 (*Stephenson*), the court wrote, "The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors." The *Stephenson* court went on to explain that, under certain circumstances,

> "the minority shareholders could state a cause of action for breach of fiduciary duty against the majority shareholders. We rejected the earlier rule that majority shareholders owed no fiduciary duty to minority shareholders absent reliance on inside information. Instead, we declared that "Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business." We adopted "the comprehensive rule of good faith and inherent fairness to the minority in any transaction where control of the

> corporation is material," and declared broadly that "[t]he rule applies alike to officers, directors, and controlling shareholders in the exercise of powers that are theirs by virtue of their position and to transactions wherein controlling shareholders seek to gain an advantage in the sale or transfer or use of their controlling block of shares."

(*Id*.; internal citations omitted.)

In demurring, Stensrud contends she owed no fiduciary duty to Puga who was merely an employee of Plaintiff corporation. While Plaintiff's complaint alleges Puga no longer holds any ownership in the company, the court is confined to the operative pleading and in Puga's FAXC, Puga alleges that she is a minority 20% shareholder of the company. For purposes of a demurrer, the court accepts this allegation to be true.

Accordingly, cross-defendant Stensrud's demurrer to the second cause of action in cross-complainant Puga's FAXC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of fiduciary duty is OVERRULED.

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Case Name: *Yolanda Velasquez vs Star Elevator, Inc. et al*
Case no.: 23CV417271

Motion to Compel further Reponses to Special Interrogatories (set one) and Form Interrogatories (set one)

On January 5, 2024, plaintiff Yolanda Ruiz Esparza Velasquez ("Plaintiff") filed motion to compel defendants Star Elevator Inc. and Nicholas Gordon Hess ("Defendants") to provide further responses to special interrogatories, set one (line 7) and motion to compel further responses to form interrogatories, set one (line 8).

Special Interrogatories, set one.

The special interrogatory at issue is no. 26. Tentative ruling is as follows:

Technically, the special interrogatory is compound; nonetheless, the special interrogatory is clear, unambiguous, and not misleading. Objection as to form is OVERRULED.

The objections for attorney work product and attorney-client privilege are OVERRULED.

Defendant also objects to the special interrogatory because it seeks information protected from disclosure by the right of privacy.

A party is entitled to discovery of non-privileged information that is relevant to the subject matter in the action, including information that is admissible in evidence or is reasonably calculated to lead to discovery of admissible evidence.

Relevant, non-privileged information may be protected from discovery if there exists a legally protected interest, an objectively reasonable privacy expectation, and a serious invasion in both nature and scope. Memberships, finances, medical records, and personnel records are examples of legally protected privacy interests.

That said, the right to privacy is not absolute. The right to privacy is balanced against the need for disclosure, and an invasion may be justified if it substantively furthers a legitimate interest.

The party seeking to invade privacy must show that the information is directly relevant, essential to a fair resolution, and cannot be obtained through less intrusive means. *Vinson v. Sup.Ct.* (1987) 43 Cal.3d 833, 843-44.

Here, the special interrogatory asks for defendant's cell phone number and cell phone carrier at the time of the subject motor vehicle accident. It does not ask for content of any communication.

There is an expectation of privacy for the content of a person's cell phone conversations. The expectation of privacy is much less for disclosure of a cell phone number, which is disclosed each time a phone call is made. Similarly, there is a lower expectation of privacy from disclosure of the identity of a person's cell phone carrier.

Here, the information is directly relevant to the subject matter of the litigation and may lead to discovery of other admissible evidence. While defendant may deny using the cell phone at the time of the accident and a witness may corroborate the testimony, this is not a fact proved at this stage of the litigation or for purposes of relevancy for discovery. The information may also lead to discovery of information relevant for impeachment. The information is reasonably essential to a fair resolution and cannot be obtained through less intrusive means. The weighing of these interests against the right the privacy here favors disclosure.

The objection for privacy is OVERRULED. The motion to compel further response from Defendant Nicolas Hess is GRANTED.

Defendant shall serve a code-compliant further response to special interrogatory no. 26, without objections, to Plaintiff on or before May 3, 2024.

Form Interrogatories, set one.

The form interrogatory at issue is no. 13.1 which asks for information of whether a surveillance was conducted of any individual involved in the incident, and the identities and contact information of the person subject to surveillance, the person conducting the surveillance, and the person who has possession of any surveillance photos or video.

Defendants objected on grounds of attorney – client privilege and attorney work product.

The objections are OVERRULED. The information sought by form interrogatory 13.1 neither involves any confidential communication between Defendants and their attorneys, nor do Defendants show that the information sought by the form interrogatory includes the attorneys' impressions, conclusions, opinions, legal research, or theories.

Defendants shall serve a code-compliant further response to form interrogatory no. 13.1, without objections, to Plaintiff on or before May 3, 2024.

Plaintiff also asserts that Defendants' verification to the responses to form interrogatories has not been served, and an order to compel is sought. Defendants' attorney's declaration attaches copies of Defendants' verifications to responses to special interrogatories and request for production of documents, but not for responses to form interrogatories.

The motion to compel service of a verification to the responses GRANTED.

Defendants shall serve verifications to the responses to form interrogatories on or before May 3, 2024.

Sanctions

Plaintiff's compliance with meet and confer requirements was technically sufficient, but not necessarily in the spirit of the Discovery Act. Defendants for their part, while in technical compliance, could have done better to conform with the intent of effective meet and confer. For these reasons, it would be unjust to award sanctions, and each party's request for sanctions is DENIED.

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Case Name: *Louis Tran vs Lisa Tran et al*
Case no.: 20CV366973

Motion for Attorney's fees and costs

On May 22, 2020, plaintiff Louis Tran ("Plaintiff") filed complaint against defendants Lisa Tran and Kathy Tran Phan ("Defendants") alleging first cause of action to quiet title and second cause of action for partition sale of a home and real property located in San Jose, CA.

On July 28, 2020, defendants filed cross complaint alleging first and second causes of action for partition (by each defendant), third cause of action for breach of contract, fourth cause of action for breach of covenant of good faith and fair dealing and fifth cause of action for specific performance.

On June 23, 2023, Plaintiff's motions for summary judgment on the complaint and cross complaint were granted, and on November 7, 2023, judgment was entered in favor of Plaintiff.

On January 8, 2024, Plaintiff filed the instant motion for attorney's fees pursuant to Civil Code section 1717.

On March 1, 2024, Defendants filed opposition.

On March 7, 2024, Plaintiff filed reply declarations.

Analysis

Civil Code Section 1717 subdivision (a) in pertinent part, provides:

> "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

<u>Attorneys' fees and costs to prevailing party pursuant to contract and Civil Code section 1717</u>

Defendants do not contest that Plaintiff is the prevailing party in the action that included Plaintiff's complaint and Defendants' cross complaint. Instead, a material dispute is whether the causes of action and relief sought in the action are based on contract or pursuant to statute, which is dispositive of whether Plaintiff is entitled to attorney's fees and costs pursuant to Civil Code section 1717.

Here, Plaintiff's complaint alleges first cause of action to quiet title pursuant to Code of Civil Procedure section 760.020 and second cause of action for partition sale pursuant to Code of Civil Procedure section 872.210. Neither cause of action is based on a contract between the

parties. The only reference to a contract between the parties is that the contract failed and became unenforceable. The two causes of action seek only remedies pursuant to statute, and not pursuant to a contract. This includes the request for attorney's fees and costs which Plaintiff alleges were incurred for the "common benefit" of the parties and therefore recoverable by statute under a partition action. The prayer contains the same request for attorney's fees for the common benefit of the parties.

Defendants' cross complaint asserts a cause of action for breach of contract and specific performance that are based on the contract between the parties. That said, the cross complaint neither includes an allegation referencing the provision in the contract for attorney's fees and costs, nor a request for attorney's fees and costs pursuant to the contract. Instead, the cause of action for the partition in the cross complaint alleges entitlement to attorney's fees and costs incurred for the "common benefit" of the parties based on statute and not a contract. The prayer requests attorney's fees and costs associated with the lawsuit, and the complaint and cross-complaint which frame the claims seek attorney's fees and costs pursuant to statute and not contract.

Plaintiff's complaint is therefore not an action on a contract, and accordingly, is outside the express provision of Civil Code section 1717. The complaint infers that Plaintiff did not intend to pursue an action based on contract between the parties or invoke the provision in a contract for attorney's fees and costs. This intent is further evidenced from Plaintiff's demand letter to Defendants of February 23, 2022 where counsel states "Our request for attorney's fees will be based under the partition statutes for the common benefit of the parties and under sections 128.5 and 128.7 of the Code of Civil Procedure."

Although the cross complaint includes two causes of action based on the contract, neither cause of action invokes the provision in the contract for attorney's fees and costs, and like the complaint, only seeks attorney's fees and costs incurred for the common benefit of the parties pursuant to the partition statute. The pleadings evidence an intent of all parties not to request (or be subject to) attorney's fees and costs to the prevailing party pursuant to the contract.

While the cross complaint included causes of action on a contract, and Plaintiff was the prevailing party in the action, the court finds that the parties nonetheless intended that the provision in the contract for attorneys' fees and costs would not be invoked for relief in the lawsuit. The court finds to do so now would be inequitable and unjust under the facts and circumstances.

The motion for attorney's fees and costs pursuant to the provision for attorney's fees and costs in the contract is DENIED.

Attorney's fees and costs pursuant to statute

Code of Civil Procedure sections 874.010 and 874.040, provide for apportionment of attorneys' fees and costs incurred for the common benefit of the parties to the partition action. Because Plaintiff is the prevailing party, the Court will consider Plaintiff's attorney's fees for apportionment.

The complaint and cross complaint allege seven causes of action, including three causes of action for partition by sale pursuant to statute. The court will consider apportionment of fees determined reasonable between the causes of action for partition where fees will be apportioned between the parties, and the other causes of action where fees will not be apportioned between the parties.

Additionally, in opposition, Defendants contest the reasonableness of the fees sought by Plaintiff which is responded to by Plaintiff in reply.

Plaintiff seeks an award of $217,140, in attorneys' fees. Plaintiff submits declarations, request for judicial notice and exhibits in support of services rendered, hourly rates charged, and time incurred.

In determining reasonable attorneys' fees, the court determines the lodestar figure which is the number of hours reasonably expended multiplied by the reasonable hourly rate for each attorney. See PLCM Group, Inc. v. Drexler (2000) 22 Cal4th 1084, 1095-96. The court may adjust this figure upward or downward based on factors specific to the case to fix the fee at the fair market value for the services rendered. Id at p. 1095.

The reasonableness of hourly rates of defendants' attorneys, Damian Castaneda ($525) and lead attorney Matthew McElroy ($325) are not contested by Defendants. Instead, the dispute concerns the reasonableness of hours incurred by the attorneys relative to the services rendered. Defendants assert that hours incurred are excessive, and evidence inefficiency and duplication when viewed with the "straightforward" and "not complex" complaint and motion for summary judgment. Defendants also assert that Plaintiff's attorney's fees are six time higher than Defendants' attorney's fees incurred in the same litigation.

The court finds that the hourly rates charged by Plaintiff's two attorneys are reasonable and within ranges of attorneys in Santa Clara County with comparable experience. However, the circumstances of the case, causes of action and law and motion matters, in the experience of the court, are relatively straightforward and not complex. The evidence and information derived from the complaint, cross complaint, motions for summary judgment and papers filed in support of and opposition to the instant motion, are persuasive that there were no extraordinary or unusually difficult issues of law or fact. The evidence is persuasive that hours incurred are excessive, duplicative, or redundant in many instances, such that fees requested are not reasonable in amount.

The court has also found that the contract and statutory claims are not inextricably intertwined, and that apportionment of fees between the contract and statutory claims is appropriate.

The court will also apportion plaintiff's attorney fees allocated to the statutory claims between the parties pursuant to Code of Civil Procedure sections 874.010 and 874.040. This apportionment also considers that Defendants are solely responsible for payment of their attorney's fees incurred in the litigation, including those incurred for the statutory claims.

Disposition

After consideration of the authority, evidence, and argument of counsel in the papers filed in support, opposition and reply, and the analysis and findings summarized above, Defendants are ordered to pay to plaintiff attorney's fees and costs in the total sum of $44,000.

Defendants shall prepare the order.

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Case Name: *Joanne Schwartz et al vs Marisol Arreola, et al*
Case no.: 23CV422870

Background

On September 14, 2023, plaintiffs Joanne Schwartz and David Geraci, trustees of the J.A. Geraci and Juanita Geraci Trust ("Plaintiffs"), filed complaint against defendants Marisol Arreola ("Defendant"), Antonio Arreola, and Miriam Robles (collectively "Defendants"), alleging first cause of action for breach of contract and second cause of action for foreclosure under equitable mortgage.

On January 23, 2024, Defendant filed demurrer to the complaint which was set for hearing on March 26, 2024.

On February 22, 2024, Defendant filed the instant motion for protective order to stay all discovery until the case is at issue. On February 29, 2024, n ex parte application for a protective order to stay discovery pending the hearing on the demurrer was granted by the Hon. Socrates P. Manoukian.

On March 12, 2024, Plaintiffs filed opposition to the motion for protective order. No reply is filed by Defendant.

Also, on March 12, 2024, Plaintiffs filed first amended complaint ("FAC") which rendered the demurrer moot, and the hearing for the demurrer was cancelled.

Summary of contentions

Defendant asserts that discovery is unwarranted, unduly burdensome, and oppressive and premature, and that requiring Defendant to respond to discovery propounded by Plaintiffs pending the outcome of Defendant's demurrer, is contrary to the interests of justice.

In opposition, Plaintiffs assert that the motion for protective order is untimely because it was filed after discovery responses from Plaintiffs were due, and that the right to discovery is not dependent on the condition of the pleadings or that the case be at issue. Plaintiffs additionally assert that the claims alleged in the complaint are supported by facts, but that additional information is needed to support a request for attachment which the discovery is in part directed. Further, the demurrer to the complaint is no longer pending because of the filing of the FAC.

Analysis

The temporary protective order staying discovery expired by its terms on March 12, 2024, the date the FAC was filed which rendered the demurrer moot and cancelled the hearing on the demurrer.

On December 21, 2023, Plaintiffs served Defendant with special interrogatories, requests for admission, requests for production of documents, and form interrogatories.

Plaintiffs also noticed deposition of Defendant. Responses to discovery were due from Defendant on January 22, 2024, and the deposition of Defendant was set for February 8, 2024.

Defendant did not serve responses to the written discovery or produce documents responsive to the requests for production of documents when due and did not appear for Defendant's deposition.

Where written discovery has been propounded, the responding party may promptly move for a protective order, and the court for good cause may issue an order that justice requires to protect a party from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. Plaintiffs assert that application for a protective order must be made before expiration of the deadline to respond, but authority cited does not support the assertion. While there are consequences for not responding to written discovery when due, denial of Defendant's otherwise promptly filed motion for a protective order on the ground of untimeliness, does not appear to be one.

Proceeding to the merits of the motion, Defendant fails to provide persuasive authority to support the assertion that discovery is not permitted at this stage of the case and fails to file reply to contest the authority to the contrary cited in opposition. Defendant also fails to prove that the propounded discovery is unwarranted, or unduly burdensome and oppressive at this point in the litigation. In opposition, Plaintiffs have shown a sufficient, reasonable ground for the discovery based on the facts before the court. The argument that discovery is premature because of the pending demurrer is moot.

Disposition

Defendant fails to show good cause for issuance of the requested protective order; the motion for protective order is DENIED.

Defendant's request for attorneys' fees and costs is DENIED.

The temporary protective order has expired, and discovery may proceed.

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