Tentative Rulings for May 11, 2023
Department 503

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

**** THIS COURT IS PRESENTLY IN JURY TRIAL. IF YOU ARE REQUESTING ARGUMENT ON ONE OF THE BELOW TENTATIVES, YOU MUST REQUEST SAME TIMELY PURSUANT TO THE CRC AND LOCAL RULES. ALL HEARINGS, THIS WEEK, WILL BE HELD THURSDAY MAY 11TH AT 3:30 P.M.**

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section.

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

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(34)

Tentative Ruling

Re: ***Barnett v. Cook***
Superior Court Case No. 22CECG02622

Hearing Date: May 11, 2023 (Dept. 503)

Motion: Defendant's Demurrer to the Complaint

Tentative Ruling:

To sustain the demurrer to each cause of action, on the ground that each of them fail to state facts sufficient to adequately state a cause of action. (Code Civ. Proc. §430.10(e).) Plaintiff is granted 30 days' leave to file the first amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations/language in the first amended complaint are to be set in **boldface** type.

Explanation:

In California, a complaint shall contain a statement of the facts constituting the cause of action, in ordinary and *concise* language; and a demand for judgment for the relief to which the pleader claims to be entitled. (Code Civ. Proc. §425.10.) If the recovery of money or damages is demanded, the amount demanded shall be stated unless it is an action brought to recover actual or punitive damages for personal injury or wrongful death, in which case the amounts sought shall not be stated. (Id.)

In other words, a cause of action must allege every fact which the plaintiff is required to prove in order to allege the facts, or elements, necessary to constitute a cause of action. Where plaintiff fails to allege essential facts, the pleading is subject to demurrer. (See Code Civ. Proc. §§ 425.10, 430.10.)

In testing a pleading against a demurrer, the facts alleged are deemed to be true, "however improbable they may be" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604) as it is "not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which [plaintiff] describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.]" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.)

To be "demurrer-proof," a complaint must allege sufficient ultimate facts to state a cause of action under a statute or case law. (*People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1484; CCP §425.10(a).) Although California courts take a liberal view of inartfully drawn complaints, "[i]t remains essential...that a complaint set forth the actionable facts relied upon with sufficient precision to inform the defendant of what plaintiff is complaining[.]" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.) Courts indulge in great liberality in allowing amendments to a complaint in order that no litigant is deprived of its day in court due to pleading technicalities. (*Saari v. Superior Court* (1960) 178 Cal.App.2d 175, 178.) Where the

complaint alleges facts showing that plaintiff is entitled to damages of some sort, amendment should be permitted. (*Ibid*.; see also *Smith v. Wells Fargo Bank, N.A*. (2005) 135 Cal.App.4th 1463, 1485.)

In the case at bench, Defendant demurs on the grounds the action is time barred, the complaint fails to state sufficient facts to constitute a cause of action, and is uncertain.

First Cause of Action: Fraud

Allegations of fraud must be pleaded "with specificity," requiring the following elements: misrepresentation (false representation, concealment or nondisclosure); knowledge of falsity ("scienter"); intent to defraud, i.e., to induce reliance; justifiable reliance; and resulting damage (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App4th 347, 363.) Every element of a cause of action for fraud must be alleged in full, factually and specifically. (*Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.) Accordingly, the policy of liberal construction of the pleadings "will not ordinarily be invoked to sustain a pleading defective in any material respect[;]" instead, this "particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73, internal citations and quotation marks omitted.)

Here, plaintiff has filed her complaint using Judicial Council forms. According to the "Cause of Action – Fraud, " she alleges that on August 24, 2019 defendant Cook advised plaintiff in writing that she needed to vacate 76 W. Sierra Ave, #108, Fresno, California, a condominium owned by plaintiff and defendant's mother, Rubyalys Cook. (Complaint, ¶¶ FR-1 and FR-2.) Plaintiff was informed by defendant that the condo needed to be sold in order to pay for their mother's care. (*Id*. at ¶ FR-2.) Defendant made these representations knowing they were false and never intended to sell the condo. (Id. at ¶ FR-3.)

The cause of action also alleges defendant obtained ownership of the condo through a forged signature on March 6, 2016. (Complaint, ¶ FR-2b.) Allegations of plaintiff's second and third causes of action also contain allegations that defendant fraudulently obtained Power of Attorney for Rubyalys Cook and fraudulently obtained ownership of the condo using a forged signature. (*Id*. at ¶¶ IT-1 and GN-1.) In July 2019 plaintiff began questioning defendant regarding the condo and he claimed he was the sole owner of the condo. (*Ibid*.) Plaintiff researched the ownership records for the residence. (*Ibid*.)

As set forth in the complaint, plaintiff has not stated a cause of action for fraud. Plaintiff has not identified how she was damaged by either the fraudulent representation regarding the need to sell the condo or the fraudulent transfer of ownership of the condo. Additionally, plaintiff has not identified any actions she took in reliance of the alleged misrepresentations. The Judicial Council form to plead a cause of action for fraud includes two pages, however only page one is included with the complaint. The demurrer for failure to plead facts sufficient to state a cause of action is sustained.

Given that the complaint references several actions by defendant alleged to have been fraudulent, it is unclear if plaintiff intends to pursue a cause of action for fraud based solely upon the misrepresentation regarding the need to sell the condo, the alleged fraudulent transfer of the condo by quitclaim deed, or both. As such, the special demurrer for uncertainty is sustained. Any amended complaint should make clear the precise conduct plaintiff alleges forms the basis of her fraud claims, as the current pleading is both uncertain and unintelligible in this regard.

Defendant also demurs on the basis that the complaint is untimely given the three-year statute of limitations for filing a claim for fraud once the alleged fraud is discovered. (Civ. Code § 338, subd. (d).) The complaint identifies August 24, 2019 as the date defendant misrepresented the reason plaintiff needed to vacate the condo in which she resided and indicates that in July 2019 plaintiff be questioned defendant's ownership of the condo and researched the claim. In her opposition to the demurrer, plaintiff notes she discovered the fraudulent transfer of the condo by quitclaim deed on August 24, 2019. Even considering July 2019 as the date plaintiff knew or could have known about the transfer, the cause of action is timely. Due to Emergency Rule 9, civil statutes of limitation were tolled from April 1, 2020 to October 1, 2020. (Cal. Rules of Court, Emergency Rule 9.) Thus, if the fraud was discovered or should have been discovered as of July 2019, the statute of limitations expired as of January 2023. The demurrer based on timeliness is overruled.

Second Cause of Action: Intentional Tort

The elements of a cause of action for intentional infliction of emotional distress ("IIED") are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) "A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' " (*Id.* at pp. 1050-1051.) "Liability for intentional infliction of emotional distress ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." ' " (*Id*. at p. 1051.)

Whether conduct is outrageous "is 'usually' a question of fact, [but] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356.)

The complaint alleges that the intentional acts of defendant occurred on August 24, 2019 and goes on to describe defendant's behavior when confronted with plaintiff's research and the fraudulent signature for the transfer of the condominium as "surly and emotionally manipulative speaking condescendingly" and "[h]e became extremely manipulative and hurtful." (Complaint, ¶ IT-1.) The complaint also describes plaintiff having been given a week to remove her mother's possessions from a storage unit in July 2020, which were packed indiscriminately with many items of value already gone. (*Ibid*.) Plaintiff believes the stress of the situation strongly contributed to or caused a stroke suffered in April 2021, nine months later. (*Ibid*.)

It appears that both events, occurring about eleven months apart are intended as the actions forming the basis for the cause of action. In order to overcome demurrer, the allegations must be alleged with great specificity the acts that are "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair*, *supra*, 46 Cal.4th at pp. 1050-1051.) The acts forming the basis of this claim have not been pled with the requisite specificity. Additionally, the plaintiff's having suffered severe or extreme emotional distress is not pled. As a result, the demurrer for failure to state facts sufficient to state a claim for intentional infliction of emotional distress is sustained.

The statute of limitations for intentional infliction of emotional distress, like other personal injury torts is two years. (Code Civ. Proc. §335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 144, 1450.) "A cause of action for intentional infliction of emotional distress accrues, and the statute of limitations begins to run, once the plaintiff suffers severe emotional distress as a result of outrageous conduct on the part of the defendant." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 889.)

Defendant's demurrer on the basis of timeliness is based on a statute of limitations of one year. The authority for this position predates the enactment of Code of Civil Procedure section 335.1, which increased the statute of limitations from one year to two years for acts resulting in personal injuries, whether intentional or a result of negligence.

The actions described in the complaint occurred in August 2019 and July 2020. Both dates are affected by the tolling of civil statutes of limitations by California Rules of Court, Emergency Rule 9. A cause of action accruing August 24, 2019 that would have needed to be brought by August 24, 2021 is timely if brought by February 24, 2022. Thus, the claim based upon the confrontation between that parties on August 24, 2019 is time-barred. However, the cause of action premised on the events of July 2020 was timely filed. Emergency Rule 9 tolled the statute of limitations from April 1, 2020 until October 1, 2020. Given that the cause of action appears to have accrued during the tolling period, the action was timely if brought on or before October 1, 2022. As such, it appears that plaintiff can amend the cause of action to *specifically plead all elements* of a cause of action premised on the events occurring in July 2020.

The demurrer to the cause of action for intentional infliction of emotional distress is sustained with leave to amend.

Third Cause of Action: General Negligence

To sufficiently allege a cause of action for negligence, "it should appear in what respect the defendant was negligent and that such negligence had a causal connection with plaintiffs' injury. [Citations.]" (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 12.) The elements of a cause of action for negligence are duty, breach of duty, legal cause, and damages. (*Friedman v. Merck & Co*. (2003) 107 Cal.App.4th 454, 463.)

Plaintiff's cause of action for general negligence includes the same narrative of allegations as the second cause of action for intentional infliction of emotional distress.

(See, ¶¶ IT-1 and GN-1.) Plaintiff has not identified any duty owed by defendant to plaintiff, breach of that duty, or how the breach of that duty caused plaintiff's damages.

As with the cause of action for intentional infliction of emotional distress, the two-year statute of limitations bars the cause of action to the extent is it based on the defendant's actions on August 24, 2019, as pled in the complaint. (Code Civ. Proc. § 335.1.)

Plaintiff has not sufficiently alleged the elements of negligence. Accordingly, the demurrer to Plaintiff's third cause of action is sustained with leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 5/9/23 .
(Judge's initials) (Date)

(41) **Tentative Ruling**

Re: ***Strohmaier v. Romero***
Court Case No. 20CECG01961

Hearing Date: May 11, 2023 (Dept. 503)

Motions: 1. Defendant's Motion to Compel Deposition, Production of Documents, and for Monetary Sanctions

2. Defendant's Motion to Compel Inspection of Vehicle and for Monetary Sanctions

Tentative Ruling:

1. To grant defendant's Motion to Compel Deposition, Production of Documents, and for Monetary Sanctions. Plaintiff is ordered to appear at newly noticed deposition dates of the defendant's choosing, and to produce for inspection any document or tangible thing described in the notice. Monetary sanctions against plaintiff Bradford Strohmaier are awarded in the amount of $1,160, payable within 30 days to defendant's counsel of record, William G. Buttry. Should plaintiff fail to appear at the newly noticed deposition, defendant may file a motion for terminating sanctions without first complying with the Superior Court of Fresno County, Local Rules, rule 2.1.17.

2. To continue the hearing on defendant's Motion to Compel Inspection of Vehicle and for Monetary Sanctions to June 7, 2023, at 3:30 p.m. in Department 503, to allow defendant's counsel to file a supplemental declaration by May 19, 2023, to support the motion.

Explanation:

Defendant's Motion to Compel Deposition, Production of Documents, and for Monetary Sanctions

Service of a deposition notice under Code of Civil Procedure section 2025.240 obligates a party to attend and testify, without necessity of subpoena. (Code Civ. Proc., § 2025.280, subd. (a).) The plaintiff's deposition was duly noticed five times and plaintiff failed to object and failed to appear. The request for production of documents that defendant served on plaintiff is reasonable and seeks information related to plaintiff's claims.

Where a party deponent fails to appear or to produce materials designated in the deposition notice, monetary sanctions are mandatory unless the court finds the person subject to sanctions acted with substantial justification or there are other circumstances making the imposition of sanctions unjust. (Code Civ. Proc. § 2025.450, subd. (g)(1).) Because no opposition was filed with the court, no justification was given for plaintiff's failure to appear that would make sanctions unjust. Sanctions must be limited to reasonable expenses, which include the time moving party's counsel spent in research

and preparation of the motion and court time on the motion. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262.) The court has awarded the full amount requested except for the estimated amount for the court reporter fee, and the time needed to prepare a reply and attend the hearing, on the assumption no hearing will be necessary. However, if defendant calls for a hearing and presents evidence of the actual amount charged by the court reporter, the court will consider increasing the sanction amount.

Defendant's Motion to Compel Inspection of Vehicle and for Monetary Sanctions

Defendant provides evidence in her attorney's declaration that she served plaintiff with a Demand for Inspection of Vehicle via his attorney, Joel D. Winter. Defendant argues in her memorandum of points and authorities that plaintiff failed to appear and produce the vehicle at the scheduled time, but defendant provides no evidence in her attorney's declaration to support this contention. (Plaintiff filed no opposition to the motion in this court.)

Without a declaration to provide evidence about plaintiff's failure to object and failure to comply with the demand, there is no evidence to support granting the motion regarding the vehicle inspection. Defendant has presented only *argument,* not *evidence*, which must be disregarded. (See *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [statements of fact contained in the briefs which are not supported by evidence must be disregarded].) Therefore, the motion must be denied unless defendant files a supplemental declaration to supply the necessary omitted factual evidence.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: jyh **on** 5/9/23 .
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***East Rocky Foods LLC v. Lee Perkins***
Superior Court Case No. 22CECG03212

Hearing Date: May 11, 2023 (Dept. 503)

Motion: By Plaintiff East Rocky Foods LLC to (1) Compel Responses to Form Interrogatories (Set One), Special Interrogatories (Set One), Production of Documents (Set One); (2) Have Admissions Deemed Admitted (Set One); and (3) for Monetary Sanctions

Tentative Ruling:

To grant plaintiff East Rocky Foods LLC's motions to compel for Form Interrogatories (Set One), Special Interrogatories (Set One), and Request for Production (Set One). Defendant Lee Perkins is ordered to serve verified responses, without objections, to plaintiff within 30 days of service of the minute order by the clerk.

To grant plaintiff East Rocky Foods LLC's request to deem Requests for Admissions (Set One) admitted. The truth of the matters specified in the Requests for Admissions are to be deemed admitted unless defendant Lee Perkins serves, before the hearing, a proposed response to the Requests for Admission that is in substantial compliance with Code of Civil Procedure section 2033.220.

To grant monetary sanctions against defendant Lee Perkins in the total amount of $1,290. Monetary sanctions are ordered to be paid within 30 calendar days from the date of service of the minute order by the clerk.

Explanation:

Motions to Compel

Defendant has had sufficient time to respond to the discovery propounded by defendant, and has not done so. Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and work product protection. (Code Civ. Proc., § 2030.290, subd. (a) [interrogatories]; Code Civ. Proc., § 2031.300, subd. (a) [production demands]; see *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905–906.)

Requests for Admissions

Plaintiff served Requests for Admissions on defendant on January 9, 2023. As of March 23, 2023, no responses had been received. The court has no information that any responses have been received as of the date of this ruling.

Failure to timely respond to requests for admissions results in a waiver of all objections to the requests, and upon proper motion the court *shall* deem them admitted.

(Code Civ. Proc., § 2033.280.) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.) However, the court may relieve the party who fails to file a timely response if, before entry of the order deeming the requested matters admitted, the party in default 1) moves for relief from waiver and shows that the failure to serve a timely response was due to "mistake, inadvertence or excusable neglect; and 2) the party has served a response in "substantial compliance with Code of Civil Procedure Section 2033.220. (Code Civ. Proc., § 2033.280(a)-(c); *see Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584.) Here, no responses have been received to date.

Sanctions

Regarding the interrogatories, where a party seeks monetary sanctions, the court "shall" impose such a sanction against the unsuccessful party, unless the court finds that party acted with substantial justification or other circumstances would render such sanctions as unjust. (Code Civ. Proc., § 2030.290, subd. (c).) Sanctions are mandatory against a party whose failure to respond timely necessitates a motion to deem admitted. (Code Civ. Proc., § 2033.280, subd. (c).) Pursuant to California Rules of Court, Rule 3.1030(a), this also applies where no opposition to the motion was filed. The sanction amount awarded allows $240 in motions fees. The court finds it reasonable to allow for a total of three hours for preparation of the substantially similar motions at the hourly rate of $350 provided by counsel. Therefore, the amount in sanctions is $1,290. In the event a hearing is necessary, the court will consider the costs incurred as a result.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 5/9/23.
(Judge's initials) (Date)