SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16
JUDICIAL OFFICER: BENJAMIN REYES
HEARING DATE: 03/05/2025

INSTRUCTIONS FOR CONTESTING TENTATIVE RULING IN DEPARTMENT 16

The tentative ruling will become the ruling of the Court unless by 4:00PM of the Court day preceding the hearing, notice is given of an intent to argue the matter. Counsel or self-represented parties must email Department 16 (Dept16@contracosta.courts.ca.gov) to request argument and must specify, in detail, what provision(s) of the tentative ruling they intend to argue and why. Counsel or self-represented parties requesting argument must advise all other counsel and self-represented parties by no later than 4:00PM of their decision to argue, and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (Pursuant to Local Rule 3.43(2).)

ALL APPEARANCES TO ARGUE WILL BE IN PERSON OR BY ZOOM, PROVIDED THAT PROPER NOTIFICATION IS RECEIVED BY THE DEPARTMENT AS PER ABOVE.
Zoom link-
https://www.zoomgov.com/j/1619504895?pwd=N0V1N3JFRnJ0TEVoSDNrTGRzakF3UT09

ID: 161 950 4895
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Law & Motion

1. 9:00 AM CASE NUMBER: C22-00742
CASE NAME: PHILIP FERREIRA VS. WILLIAM MYERS
***HEARING ON MOTION IN RE: TO STRIKE PORTIONS OF CROSS-COMPLAINANTS' FIRST AMENDED CROSS-COMPLAINT**
FILED BY: BARABI, MINOU
TENTATIVE RULING:

Before the Court is a motion by cross-defendant Minou Barabi to strike portions of the first amended cross-complaint filed by Philip Ferreira and Crystal Ferreira. For the reasons set forth, the motion is **denied**.

Background

This action involves a property dispute between adjoining landowners (plaintiffs the Ferreiras and defendants the Myers) over the construction of a fence by the Myers that the Ferreiras contend encroaches on their property, as well as other related claims. (Compl. filed 4/4/2022.) The Myers filed a cross-complaint against the Ferreiras alleging that the Ferreiras repeatedly trespassed on their

property and disparaged their title to their property by claiming their fence encroaches on the Ferreiras' property. The Myers also allege that the Ferreiras have improperly graded their property or failed to install or maintain erosion control measures, allowing stormwater runoff to cause flooding, erosion and other damages to the Myers' property. (Myers' X-Compl. filed 7/14/2022.)

After the Myers filed their cross-complaint, the Ferreiras filed a cross-complaint against another property owner, cross-defendant Minou Barabi, the cross-complaint at issue in this motion. The Ferreiras' first amended cross-complaint ("Ferreira FACC") alleges claims for equitable indemnity, contribution, and declaratory relief against cross-defendant Barabi, seeking indemnity or contribution for any liability the Ferreiras may have to the Myers on the Myers' claims of erosion and related property damage as alleged in the Myers cross-complaint. (Ferreira FACC filed 9/26/2024.) The Ferreira FACC alleges that stormwater runoff from Barabi's property passed over the Ferreiras' property and onto the Myers' property causing or contributing to the damage to the Myers. (Ferreira FACC ¶¶ 17-22.)

Legal Standards for Ruling on Motion to Strike

The Court may strike allegations that are "irrelevant, false or improper matter" or any portion of a pleading "not drawn . . . in conformity with the laws of this state." (Code Civ. Proc. § 436(a) and (b).) "Irrelevant matter" includes an "immaterial allegation" as defined in Code of Civil Procedure section 431.10(b), which in turn includes an allegation "not supported by an otherwise sufficient claim" or a demand for relief "not supported by the allegations" of a cross-complaint. (Code Civ. Proc. § 431.10(b)(2) and (b)(3).) Pleadings must be liberally construed. (Code Civ. Proc. § 452 ["In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."].)

"A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53 [citing *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255].) Like a demurrer, the grounds for a motion to strike must appear on the face of the pleading or be based on a matter subject to judicial notice. (Code Civ. Proc. § 437; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53 [citing *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255].) It is in the Court's discretion under Code of Civil Procedure section 436 whether to strike portions of the complaint. (Code Civ. Proc. § 436; *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 242; *Colden v. Broadway State Bank* (1936) 11 Cal.App.2d 428, 429.) The Court does not have discretion, however, to strike allegations necessary to a cause of action. (*Clements, supra,* 43 Cal.2d at 242.)

Ferreiras' Request for Judicial Notice

The Ferreiras request judicial notice of the Myers cross-complaint and the Ferreira FACC. (Ferreira RJN Exhs. 1 and 2.) Barabi objects to the Court taking judicial notice of the Myers cross-complaint on the grounds, among other things, of relevance. The objection is overruled on that ground. The Court considers these pleadings, including the Myers cross-complaint, as they are filings made in this case. Further, as to the Myers cross-complaint, the Ferreira FACC makes specifically allegations regarding the Myers cross-complaint in paragraph 6, as the Ferreiras are seeking equitable indemnity and contribution from Barabi related the claims in the Myers cross-complaint. The existence and nature of

the claims made by the Myers are relevant to the issues raised in the motion. The request for judicial notice is granted as limited under applicable law. (Evid. Code § 452(d); *StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [court does not take judicial notice of content of document where reasonably disputable.)

Analysis

Barabi moves to strike portions of the FACC that allege the Ferreiras have a right to recover attorneys' fees as part of any indemnification or contribution and to strike two references to "tort of another" as one of the grounds for the right to recover attorneys' fees.

"California follows the 'American rule,' under which each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award. [Citations omitted.]" (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237.) "Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127-128.) The Ferreira FACC cites Code of Civil Procedure section 1021.6 as a statute authorizing an award of attorneys' fees under the circumstances stated and the doctrine "tort of another" as exceptions to that general rule which they plead as the basis for their claim for attorneys' fees as part of a laundry list of damages they assert they may recover. (Ferreira FACC ¶¶ 25-27, 30-32 [seeking indemnity or contribution for all losses suffered or judgment paid by cross-complainants, including attorneys' fees].)

Relevant Allegations of the Ferreira FACC

As the Ferreiras point out in their opposition, the Ferreiras deny any liability or wrongdoing related to the water erosion or property damage alleged in the Myers cross-complaint. (Ferreira FACC ¶¶ 25, 26, 30, 31].) The Ferreiras also allege that if they are found liable to the Myers, their liability "would be based either on their passive or secondary negligent conduct, and would arise as a proximate result of the primary and active negligence of the Cross-Defendants herein, and each of them." (Ferreira FACC ¶¶ 25, 30.) But in addition to denying any liability whatsoever for the Myers' claims, they also allege the Ferreiras "may suffer liability herein for the acts or the failure to act of the Cross-Defendants, and each of them, as aforesaid." (Ferreira FACC ¶¶ 26, 31 [emphasis added].)

The "aforesaid" allegations include several paragraphs of allegations regarding Barabi's failure to clear storm drains on her property which caused water to flow onto the Ferreiras' property and then onto the Myers' property. They allege that if Barabi had properly maintained her property, including the drains on her property, the stormwater would not have flowed onto the Ferreiras' property and thereafter onto the Myers' property, such that Barabi's acts and omissions were the proximate cause of any excess water flowing onto the Myers' property and damage to the Myers' property. (Ferreira FACC ¶¶ 17-22.)

Attorneys' Fees Under Code of Civil Procedure Section 1021.6

Code of Civil Procedure section 1021.6 states: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand

to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict." (Emphasis added.)

In addressing a good faith settlement motion and its effect in that case, the Court in *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524 explained the history of Code of Civil Procedure section 1021.6, which was enacted to overturn in part the California Supreme Court's decision in *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal. 3d 1, 5-8, in which Mosk dissented. (*John Hancock, supra,* 42 Cal.App.4th at 1533.) (*See also Uniroyal Chem. Co. v. Am. Vanguard Corp.* (1988) 203 Cal.App.3d 285, 297.) The Court explained, "[T]he Legislature also appears to have adopted Justice Mosk's characterization of the 'tort of another' doctrine as just another form of "implied indemnity." (§ 1021.6.) Indeed, section 1021.6 is arguably broader than the 'tort of another' doctrine, in that provides attorney fees to any 'innocent indemnitee' who has incurred attorney fees to defend itself and has otherwise satisfied the requirements of section 1021.6 [citation omitted], including one who has been found to be a joint tortfeasor but has been relieved of all responsibility in the fault allocation (citation omitted], or one who claims implied contractual indemnity (citation omitted]. (*Id.* at 1533-1534 [citing among other decisions, *Uniroyal, supra*, 203 Cal.App.3d at 299-301].)

The determination of whether Code of Civil Procedure section 1021.6 applies and will give rise to a right by the Ferreiras to recover attorneys' fees against Barabi is hypothetical at this stage in the proceeding, but the allegations of the FACC and the circumstances are sufficient to make recovery under that statute potentially available to the Ferreiras. The Ferreiras allege in effect that they are innocent indemnitees, which the Court accepts as true on this motion, and that it was water from the Barabi property that flowed onto the Myers' property via the Ferreiras' property. Reasonably construing the allegations of the FACC in their entirety, they allege they were sued by the Myers in the Myers' cross-action as a result of the tortious conduct of Barabi and that they may be found to be without fault in the Myers' cross-action (which would satisfy subsections (a) and (c)). (*See generally Wilson v. Am. Qualified Plans* (1999) 70 Cal.App.4th 1030, 1037 [defendant (AQP) sued in principal case who was sued by co-defendants in cross-actions for indemnity which APQ defended; APQ cross-complained against the cross-complainants and was held entitled to attorneys' fees under Code of Civil Procedure section 1021.6, stating the cross-complaint for indemnity brought against APQ "was separate and distinct from the cross-complaint for indemnity Wilson filed against AQP. That AQP's cross-complaint for indemnity against Wilson and Stanton alleged they were joint tortfeasors does not suggest they were a single entity. AQP was forced to defend itself against Stanton's indemnity cross-action due to Wilson's tortious conduct. Stanton is therefore a "third person" within the meaning of section 1021.6."].) They cannot allege at this point that they have been determined to have been without fault because that determination will be made through the trial in this litigation, but that does not mean that the allegation they may be entitled to attorneys' fees under Code of Civil Procedure section 1021.6 should be stricken.

The Ferreiras contend that the filing of the cross-complaint seeking indemnity and contribution from Barabi satisfies the demand provision of subsection (b). Barabi cites no authority that holds to the

contrary.

Attorneys' Fees as Damages Based on "Tort of Another" Doctrine

Barabi contends the facts alleged in the FACC do not support damages under a "tort of another" theory because the FACC alleges that the Ferreiras and Barabi are joint tortfeasors, such that the tort of another doctrine does not apply.

The California Supreme Court summarized the tort of another doctrine as follows: "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North American Title Guaranty Corp*. (1963) 59 Cal.2d 618, 620.).) The "tort of another" doctrine is a form of economic damages in a tort case. (*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal. App. 4th 1318, 1339.) "The tort of another doctrine is not really an exception to the American rule, but simply 'an application of the usual measure of tort damages.' [Citations omitted.]" (*Id.* at 1337 [quoting *Prentice, supra,* 59 Cal.2d at 620 and *Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310].) The Ferreira's cross-complaint is separate from the cross-action filed by the Myers, and Barabi is not named as a joint tortfeasor in that action.

Though the *Mega RV* case discusses the parameters of the tort of another doctrine, the case is factually inapposite and distinguishable from the circumstances here. As the Court explained in that case, there was no tort claim alleged against any party and no claim for property damage other than a defective part in the motorhome subject to the suit as the case involved breach of warranty claims. (*Mega RV, supra,* 225 Cal.App.4th at 1338 [finding not only that no tort was alleged for negligence "or any other tort" and that it was questionable a tort claim could have been alleged since the only claim of damage was economic loss].) Further, the Court explained as a basis for its ruling that it was "unaware of any authority for the existence of a special relationship or traditional tort duty between a retail seller/servicer of consumer goods and a component part manufacturer," the parties involved in that action for breach of warranty under the Song-Beverly Act. (*Id.* at 1340.) The portion of the decision quoted by Barabi is factually inapposite and does not describe the circumstances here. (*See* MPA ISO Mot. p. 7.)

In *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, the Court of Appeal reversed an award of attorneys' fees by the trial court in favor of plaintiff Vacco Industries against one of three defendants sued for misappropriation of trade secrets and related claims after a jury verdict in favor of Vacco. The Court held that pleadings and evidence showed the three defendants, all sued in the same action by Vacco, "jointly committed the tortious acts of which Vacco complained." (*Id.* at 57.) In that context, the Court held: "There is nothing about their relationship or their conduct that justifies singling out Van Den Berg as the one whose conduct caused Vacco to have to prosecute a legal action against the other two. Yet, this is the justification which Vacco offers for the imposition of *Prentice* fees against Van Den Berg. The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages." (*Id.*) (*See also Electrical Electronic Control, Inc. v. Los Angeles Unified School Dist*. (2005) 126 Cal.App.4th 601, 616 [stating the same rule that the tort of another doctrine does not apply to joint tortfeasors, and holding that the plaintiff could not recovery attorneys' fees under the tort of another doctrine in that case because "EEC was

not required to bring the underlying action at all. It could have been made whole in this action; there are no damages EEC recovered in the underlying action that it could not also have recovered in this matter directly from LAUSD for its failure to require Wareforce to obtain a bond. EEC's attorney fees were caused by its decision to pursue a joint tortfeasor, rather than simply seek a recovery based on LAUSD's negligence. As a result, EEC may not recover those fees from LAUSD."].)

Vacco Industries is distinguishable as is *Electrical Electronic Control*, as the excerpt cited above illustrates. The Myers filed in their cross-complaint for damages from the stormwater flows solely against the Ferreiras; they do not allege any claim against Barabi as a jointly responsible party or joint tortfeasor, but the Ferreiras allege in their cross-complaint that the party whose tortious conduct was the cause of the property damage suffered by the Myers is "really" Barabi and that Barabi is ultimately responsible for the damage, not the Ferreiras though the Ferreiras are being "forced" to defend the Myers cross-complaint as a result of Barabi's negligent conduct. The Ferreiras deny any liability or wrongdoing related to the water erosion or property damage alleged by the Myers, and they bring this cross-action against Barabi for indemnity and contribution on the theory that Barabi is responsible for the damage to the Myers' property. (Ferreira FACC ¶¶ 17-22, 25, 26, 30, 31].)

The Ferreiras may or may not be able to prove these facts, and they may or may not be able to prove that they are not joint tortfeasors with Barabi which may impact whether the tort of another doctrine is available to them for recovery of attorneys' fees, but these are not determinations the Court can make as a matter of law on the motion to strike based on a fair reading of the totality of the allegations of the FACC. The Court does not read the single sentences in paragraphs 25 and 30, which speculate as to the legal theory of a potential future liability determination that might be made on the Myers' cross-complaint, in isolation from the remainder of the allegations of the FACC, including the allegations that Barabi's acts and omissions were the cause and source of any excess waterflow that may have ended up on the Myers' property. Barabi has not demonstrated based on the allegations of the Ferreira FACC that the tort of another doctrine as a matter of law cannot apply under the circumstances.

Conclusion

The right to attorneys' fees under either Code of Civil Procedure section 1021.6 or the tort of another doctrine will be a fact-dependent determination based on the evidence, findings at trial or time of judgment, and other future events. To the extent that at trial or time of judgment there is a determination that the Ferreiras are joint tortfeasors with Barabi, or to the extent the Ferreiras are otherwise found to be at fault, then they may not be able to recover attorneys' fees as damages or under Code of Civil Procedure section 1021.6, but that does not mean the allegations should be stricken from the Ferreira FACC at this stage of the proceedings.

The Court exercises its discretion and declines to strike the allegations claiming attorneys' fees under Code of Civil Procedure section 1021.6, allegations regarding the tort of another doctrine, and the prayer for attorneys' fees at this time. (Code Civ. Proc. § 436; *Clements, supra,* 43 Cal.2d at 242; *Colden, supra,* 11 Cal.App.2d at 429.)

2. 9:00 AM CASE NUMBER: C23-00093
CASE NAME: BARBARA DUBUC VS. UNION OIL COMPANY OF CALIFORNIA
***HEARING ON MOTION IN RE: APPLICATION/MOTION TO APPEAR AS COUNSEL PRO HAC VICE RE: ANTHONY P. MASTROIANNI**
FILED BY: DUBUC, BARBARA
****TENTATIVE RULING:****

Motion for an Order Permitting Anthony P. Mastroianni to appear Counsel *Pro Hac Vice for* Plaintiffs Barbara DuBuc individually and as successor in interest and administrator for Estate of Larry DuBuc. Filed 11/15/2024 by Mary Alexander (& associates), Keith Patton (Pro Hac Vice- Santa Fe) and Andrew DuPont (Pro Hac Vice- Philadelphia)

Background

This is a toxic tort case against Union Oil Company of California ("Union Oil") and Texaco Inc. ("Texaco") (collectively "Defendants"). All other named defendants have been dismissed. Plaintiff Barbara DuBuc alleges that her late husband developed and passed away from a blood disease called myelodysplastic syndrome ("MDS") as a result of his occupational exposure to Texaco gasoline and automotive products containing Union Oil solvents.

Analysis

California Rules of Court (CRC) 9.40 allows this Court to grant a written application for leave to appear as Counsel *Pro Hac Vice* to an applicant who is not a member of the State Bar of California, but who is admitted into and is in good standing with the highest court of any other state.

The Court finds that the moving papers, memorandum of points and authorities and the Declaration of Mr. Mastroianni and Ms. Alexander state facts to support the application under CRC Rule 9.40. Anthony P. Mastroianni is an attorney licensed to practice in New York. He is associated with the Locks Law Firm and with Mary Alexander & Associates. He is not a member of the California State Bar, nor is he a resident of the State of California, nor does he have regular employment or substantial business in California. He has represented to the Court that he not been suspended, disbarred or resigned as counsel. There are no disciplinary charges pending against him in New York.

Ruling

No timely opposition was filed by the Defendants.

Plaintiff's motion is **granted**. Anthony P. Mastroianni is admitted to appear as Counsel *Pro Hac Vice* for the duration of this case. Prevailing party is ordered to prepare and submit an order that conforms to this ruling.

3. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY TO COMPEL FURTHER RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION NOS. 1-19,21-25,27-36, 38, SET ONE**
FILED BY: LUBBE, MAYA
****TENTATIVE RULING:****

Hearing on motion to compel further responses to Plaintiff's Request for Production Nos. 1-19, 21-25, 27-36, 38, Set One.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

4. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY TO COMPEL FURTHER RESPONSES TO SPECIAL INTERROGATORIES NOS. 3, 5, 8, 9, 12, 13, 17, 20, 21, 24-26, FORM INTERROGATORIES - EMPLOYMENT NOS. 200.4 AND 211.3 FORM INTERROGATORIES - GENERAL NOS. 12.1, SET ONE AND FOR SANCTIONS**
FILED BY: LUBBE, MAYA
****TENTATIVE RULING:****

Hearing on motion for discovery to compel further responses to Plaintiff's to Special Interrogatories Nos. 3, 5, 8, 9, 12, 13, 17, 20, 24-26, Form Interrogatories Employment Nos. 220.4 and 211.3, General Form Interrogatories Nos. 12.1, set one and for Sanctions.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

5. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY FOR AN ORDER COMPELLING THIRD-PARTY ZAINAB AL-DHAHER, M.D. TO COMPLY WITH DEFENDANT'S DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**
FILED BY: CONTRA COSTA PATHOLOGY ASSOCIATES
****TENTATIVE RULING:****

Hearing on motion for discovery for order compelling third-party Zainab Al-Daher, M.D., to comply with Defendant's Deposition subpoena for production of business records.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

6. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY FOR AN ORDER COMPELLING THIRD-PARTY WILLIAM FISHER, M.D. TO COMPLY WITH DEFENDANT'S DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**
FILED BY: CONTRA COSTA PATHOLOGY ASSOCIATES
****TENTATIVE RULING:****

Hearing on motion for discovery for order compelling third-party William Fisher, M.D., to comply with Defendant's Deposition subpoena for production of business records.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

7. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY FOR AN ORDER COMPELLING THIRD-PARTY NICOLE IONASCU, PSY.D. TO COMPLY WITH DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**
FILED BY: CONTRA COSTA PATHOLOGY ASSOCIATES
****TENTATIVE RULING:****

Hearing on motion for discovery for order compelling third-party Nicole Ionascu, Psy.D, to comply with deposition subpoena for production of business records.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

8. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY FOR AN ORDER COMPELLING THIRD-PARTY MARA GEIB JOHNSON, M.F.T. TO COMPLY WITH DEFENDANT'S DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**
FILED BY: CONTRA COSTA PATHOLOGY ASSOCIATES
****TENTATIVE RULING:****

Hearing on motion for discovery for order compelling third-party Maria Geb, MFT, to comply with deposition subpoena for production of business records.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

9. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY FOR AN ORDER COMPELLING THIRD-PARTY AMARPREET KAUR GIL TO COMPLY WITH DEFENDANT'S DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**
FILED BY: CONTRA COSTA PATHOLOGY ASSOCIATES
****TENTATIVE RULING:****

Hearing on motion for discovery for order compelling third-party Amarpreet Kaur Gil, to comply with deposition subpoena for production of business records.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

10. 9:00 AM CASE NUMBER: C23-02515
CASE NAME: MAYA LUBBE VS. CONTRA COSTA PATHOLOGY ASSOCIATES
***HEARING ON MOTION FOR DISCOVERY FOR AN ORDER COMPELLING THIRD-PARTY MICHAEL RUBINO, PH.D. TO COMPLY WITH DEFENDANT'S DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**
FILED BY: CONTRA COSTA PATHOLOGY ASSOCIATES
****TENTATIVE RULING:****

Hearing on motion for discovery for order compelling third party, Michael Rubino PHD, to comply with deposition subpoena for production of business records.

The Court continues this motion *sua sponte*. The Court refers this and all further discovery motions by the Parties to a Discovery Referee pursuant to the Court's prior tentative rulings and orders. The Parties are ordered to meet and confer and ordered to jointly present three proposed names and curricula vitae to the Court at the hearing of this motion on March 3, 2025. These discovery referees shall be consulted regarding their availability. The Court will appoint a discovery referee from the three names to hear this motion. The Parties shall pay the initial fees charged by the Discovery Referee. The Court will prepare and execute an order on Judicial Council Form ADR-110. The Court will review any reports and recommendations submitted by the Discovery Referee, including any award or allocation of attorneys' fees.

11. 9:00 AM CASE NUMBER: C24-00557
CASE NAME: JAMES RUIZ VS. SHAWN YOUNG
HEARING IN RE: REVIEW HEARING: STATUS OF ARBITRATION
FILED BY:
TENTATIVE RULING:

Review Hearing: Status of Arbitration

Tentative Ruling: On September 4, 2024, the Court granted Defendants' Motion to Compel. This action is stayed pending the completion of arbitration. The Court set a hearing regarding the status of the arbitration and stay on March 5, 2025, at 9:00 a.m. in Department 16. The parties were ordered to file a joint status report at least 10 calendar days before the hearing. No such joint status report was filed.

The Court issues an Order to Show Cause to all Counsel and to all parties to provide an explanation to Court as to why a timely status report was not filed, to explain why the deadline was missed or why the court's orders or rules were not followed.

Parties and Counsel shall appear via Zoom in Department 16. This case is stayed.

12. 9:00 AM CASE NUMBER: C24-01703
CASE NAME: BLACK DIAMOND PAVER STONES AND LANDSCAPES, INC. VS. HIRSCH CLOSSON
***HEARING ON MOTION IN RE: FOR AWARD OF ATTNY FEES AND COSTS OF DEF HIRSH CLOSSON PURSUANT TO CCP 425.16(C)**
FILED BY: HIRSCH CLOSSON
TENTATIVE RULING:

Hearing on motion for award of attorney's fees pursuant to CCP Section 425.16(C).

Plaintiff's filed a notice of non-opposition to motion for attorney's fees filed by Defendant Hirsch Closson, A Professional Corporation, on 12/24/2024. Accordingly, Defendant's Motion for Attorneys' Fees is Granted. Plaintiff shall pay the amount of $28,800 in attorneys' fees to Defendant Hirsch Closson by no later than April 15, 2025 pursuant to Cal. Code of Civ. Proc. Section 425.16. Defendant's proposed order lodged on 11/15/2024 will be executed by the Court.

13. 9:00 AM CASE NUMBER: C24-02486
CASE NAME: TODD SARAN VS. ANDRES BERGERO
HEARING ON DEMURRER TO: COMPLAINT
FILED BY: BERGERO, ANDRES
TENTATIVE RULING:

Defendants Bank of Montreal, Bank of the West and Andres Bergero's demurrer to cause of action three is **sustained with leave to amend**. Plaintiffs may file and serve an amended complaint by

March 20, 2025.

Plaintiff Todd Saran ("Saran") was employed by Bank of the West starting in April 2022. Bank of the West merged with Bank of Montreal during Plaintiff's employment. Defendant Bergero was Plaintiff's manager. On July 11, 2023, Plaintiff was given notice that his employment would be terminated. Plaintiff brings claims for whistleblower retaliation, wrongful termination in violation of public policy and defamation. Plaintiff's wife, Mayara Saran, sued for loss of consortium.

In the defamation claim, Plaintiffs allege that Defendants knowingly made false and unprivileged statements with malice, including:

a. That Saran's performance was substandard and inadequate;

b. That Saran failed to perform his job duties to fulfill the minimum requirements for the position;

c. That Saran had not properly prepared for continuity of operations;

d. That Saran had failed to properly prepare the foreign exchange team on the allocation report that was to be submitted for bankers to receive credit;

e. That Saran was stealing and inappropriately allocating revenue from one group to another, and misrepresenting the revenue.

(Comp. ¶45.)

Defendants Bank of Montreal, Bank of the West and Andres Bergero (together, "Defendants") demur to cause of action three for defamation arguing that the claim fails because it is time-barred, fails to allege publication and because the statements are privileged.

Statute of Limitations

A claim for defamation must be brought within one year of the wrongful conduct. (Code Civ. Proc. § 340(c).) Defendants argue that Saran's alleged poor transition interview occurred in February or March 2023 and that Plaintiffs did not file this complaint until September 17, 2024, which was not within one year of when the alleged statements were made. Plaintiffs argue that the statements are alleged to have occurred on or after May 3, 2023, when Plaintiff returned from leave. (Comp. ¶21.) Plaintiffs acknowledge that normally the statute of limitations would have run in May 2024, however, they point out the parties had a tolling agreement. In reply, Defendants acknowledge that the tolling agreement applies to them. The tolling agreement, however, is not alleged in the complaint and without the tolling agreement the complaint shows a statute of limitations issue for the defamation claim. Therefore, the demurrer is sustained with leave to amend for Plaintiffs to allege the tolling agreement applies to Defendants.

In the reply, Defendants also argued that defamation occurred in 2022, citing to paragraphs 15-17 in the complaint. The complaint alleges that Saran started making complaints about the Bank of the West's practices in May 2022 and that immediately after that Bergero started accusing Plaintiff of

workplace failures. (Comp. ¶¶15-16.) However, the complaint also alleges that Bergero spread falsehoods about Plaintiff throughout the bank, damaging Plaintiff's reputation, after May 3, 2023. (Comp. ¶21.) Although neither paragraph alleges exactly what statements were made when, the complaint alleges that Bergero made statements damaging Plaintiff's reputation at work on or after May 3, 2023. Thus, the complaint shows at least some statements were made on or after May 3, 2023 and when considering the six-month tolling agreement a defamation claim based upon those statements is timely.

Publication

Defendants argue that Plaintiffs have not alleged publication of the statements. In response, Plaintiffs point to paragraphs 21 and 45 in the complaint. In paragraph 21, Plaintiffs allege that Bergero falsely accused Plaintiff of failing to perform assigned tasks (which were handed off while Plaintiff was on parental leave) and spreading falsehoods to others throughout the bank. (Comp. ¶21.) In paragraph 45, Plaintiffs list the alleged defamatory statements. The Court's review of these allegations, and the complaint overall, show that Plaintiffs have not alleged facts showing publication of statements. Plaintiffs have alleged very generally that the statements were published, but it is not clear who Bergero told. The allegations that Bergero "spread falsehoods to others throughout the bank" needs more specificity.

In general, a plaintiff cannot manufacture a cause of action by publishing the statements to third persons, however, one exception to this rule is when it is "foreseeable that a defendant's act would result in publication to a third person, the plaintiff may maintain a libel action." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284.) Here, Plaintiffs also argue that Saran had to self-publish that he was terminated for misconduct. (Comp. ¶46.) This allegation is insufficient to show self-publication. Plaintiffs have not alleged when or who Saran made the statements to.

The demurrer is sustained with leave to amend for Plaintiffs to allege publication of the defamatory statements, either by Defendants, or facts showing self-publication by Saran.

Privilege

Code of Civil Procedure section 47(c) provides a qualified privilege for statements made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

Defendants argue that the allegations of malice are insufficient because Saran's employment was terminated as part of a reduction in force and the statements about his work were related to that process and not related to the alleged retaliation. Plaintiffs allege that the statements were made with "negligently, recklessly, and intentionally published in a manner equaling malice". (Comp. ¶51.) Although this allegation is somewhat general, it is supported by allegations in the complaint that Defendants engaged in retaliatory conduct after Plaintiff made several whistleblower complaints.

Taken together, these allegations are sufficient to show malice at the pleading stage. On this ground the demurrer fails.

14. 9:00 AM CASE NUMBER: C24-02625
CASE NAME: TRENEISHA THOMAS VS. BENIHANA NATIONAL CORP.
***MOTION/PETITION TO COMPEL ARBITRATION**
FILED BY: BENIHANA NATIONAL CORP.
****TENTATIVE RULING:****

No appearance necessary. The Court sets a case management conference for 8:30 a.m. on September 8, 2025. The parties shall file updated CMC statements.

15. 9:00 AM CASE NUMBER: C24-03173
CASE NAME: NATIONAL DEFAULT SERVICING CORPORATION VS. ALL CLAIMANTS TO FUNDS FROM 2145 SUGARTREE DRIVE
HEARING ON PETITION IN RE: PETITION RE: DEPOSIT OF SURPLUS FUNDS
FILED BY:
****TENTATIVE RULING:****

Hearing on Petition to Deposit Surplus of Funds.

Petitioner / Trustee, National Default Servicing Corporation, filed a notice of petition pursuant to Cal. Civil Section 2924(j)(c) to deposit surplus funds with the Clerk of the Court. Petitioner serves as Trustee under a deed of trust executed by Paul K. Tavares, a single man, secured by real property commonly known as 2145 Sugartree Way, Pittsburg, CA 94565. The real property was sold at a non-judicial foreclosure sale on 11/6/2023. The receipt of funds by Petitioner / Trustee exceeded the amount of funds due and owing under the Deed of Trust foreclosed upon and the costs and expenses of such sale. Petitioner seeks to deposit surplus funds with the Clerk of the Court. Said Petition was granted and an order was signed by the Court on 12/12/2024. Petitioner was further ordered to provide notice to all Claimants to Funds.

The Parties are ordered to appear via Zoom to show compliance with the Court's prior orders to provide Notice to All claimants.

16. 9:00 AM CASE NUMBER: L23-03143
CASE NAME: ONEMAIN FINANCIAL GROUP, LLC VS. ROBYN SWAN
***HEARING ON MOTION IN RE: MOTION FOR JUDGMENT ON THE PLEADINGS FILED BY PLN ON 8/23/24**
FILED BY: ONEMAIN FINANCIAL GROUP, LLC
****TENTATIVE RULING:****

Hearing for motion for judgment on the pleadings filed by Plaintiff 8/23/2024

Plaintiff One Main Financial Group LLC filed notice of motion for judgment on the pleadings on

8/23/2024 against Defendant Robyn Swan, who is a self-represented litigant. The motion seeks to enter a judgment in the amount of $4,893.33, plus costs and reasonable attorneys' fees. The motion is supported by a Request for Judicial Notice, a Memorandum of Points and Authorities and the Declaration of Douglas Agne, who serves as Plaintiff's counsel. An amended notice was filed and served on 9/30/2024.

Background

Defendant Robyn Swan entered into a Loan Agreement and Disclosure Statement with Plaintiff One Main Financial LLC dated 4/13/2021 in the amount of $4,500 for credit card debt. The Court grants judicial notice of its prior findings and orders and specifically, the findings issued at the 7/10/2024 hearing of a subsequent discovery motion, wherein Court previously found:

Since the defendant has been duly served with the Requests for Admission, has failed to serve any response, has been told in court what she needed to do, and has not taken any appropriate action to protect her rights, the court grants the plaintiff's Request to Deem Admitted certain Admissions. The court finds the following facts are admitted: 1) the defendant had an account with plaintiff One Main Financial and the account ended in 6047; 2) the monthly account statements were sent to the defendant relating to minimum required payments; 3) the defendant never notified the plaintiff disputing the balance of the account; 4) as of June 30, 2023, the account balance was $4,893.33; 5) the defendant has not paid the balance or any amount on the account since June 30, 2023; 6) the defendant owes the plaintiff $4,893.33 as of June 30, 2023; 7) the loan agreement was attached to the
Request for Admissions as Exhibit A; 8) Exhibit A contains a provision for prevailing party attorney's fees; 9) the defendant does not have a credit defense; and 10) even if defendant did have a credit defense, defendant does not qualify for its benefits.

Analysis

The Court may grant a judgment on the pleadings pursuant to Cal. Code of Civ. Proc Section 438(b)(1), which states, " A party may move for judgment on the pleadings" on matters judicially noticed. Specifically, Section 438(d) states, "(d) The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. Where the motion is based on a matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, the matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit."

"Judicial admissions may be made in a ... response to request for admission." *Barsegian v. Kessler & Kessler* (2013) 215 Cal App 4th 446, 451. "In discovery when a party propounds requests for admission, any facts admitted by the responding party constitute judicial admissions." *Barsegian v. Kessler & Kessler* at 452, citing *Wilcox v. Birtwhistle* (1999) 224 Cal App 3d 973, 978-979. "A judicial admission is therefore conclusive both as to the admitting party and as to that party's opponent." *Barsegian v. Kessler & Kessler* at 452. "Thus, if a factual allegation is treated as a judicial admission, then neither party may attempt to contradict it - the admitted fact is effectively conceded by both sides." *Id.* A judicial admission ... is not merely evidence of fact; it is conclusive concession of the truth of a matter which has the effect of removing it from the issues." *Addy v. Bliss & Glennon* (1996) 44 Cal App 4th 205, 218, citing *Walker v. Dorn* (1966) 240 Cal App. 2d 118, 120.

Defendant Robyn Swan did not file a timely opposition.

Plaintiff One Main Financial Group LLC filed notice of motion for judgment on the pleadings is granted. Judgment shall be entered into on behalf of One Main Financial Group LLC against Defendant Robyn Swan in the amount of in the amount of $4,893.33, plus costs and reasonable attorneys' fees. Plaintiff shall prepare and submit the form of judgment that confirms with this ruling.

17. 9:00 AM CASE NUMBER: L24-04840
CASE NAME: CITIBANK N.A. VS. ALLAN ALCANTARA
***HEARING ON MOTION FOR DISCOVERY FOR ORDER THAT MATTERS IN REQUEST FOR ADMISSION OF TRUTH OF FACTS BE DEEMED ADMITTED**
FILED BY: CITIBANK N.A.
****TENTATIVE RULING:****

On 11/7/2024, Plaintiff Citibank, N.A. filed a Notice of Motion and Motion for Order that Matters in a Request for Admission of Truty of Facts be Deemed Admitted, which was accompanied by a Memorandum of Points and Authorities and supporting declaration. An amended Notice was filed on 12/23/2024. Proof of service by mail to Defendant Allan Alcantara shows that Defendant was served by mail on 12/23/2024.

Defendant Allan Alcantara did not file a timely opposition to Plaintiff's motion. The Court grants Plaintiff's motion.

Analysis
This matter involves credit card debt. Plaintiff Citibank N.A. issued credit account no. xxxx9847 to Defendant Allan Alcantara. The plaintiff served the defendant with Requests for Admissions on 8/30/2024, and the defendant's response was due 35 days later, or by October 4, 2024. The defendant did not serve any response, had not served any response by the time this motion was filed on May 16, 2024, and has filed no opposition to the motion.

Since the defendant has been duly served with the Requests for Admission, has failed to serve any response, and has not taken any appropriate action to protect his rights, the Court grants the plaintiff's Request to Deem Admitted certain Admissions. The Court finds the following facts are admitted: 1) the defendant Allan Alcantara had an account with plaintiff Citibank NA no.xxxx9847; 2) Defendant Allan Alcantara received periodic statements for account no. xxxx9847; 3) as of June 11, 2024, the account balance for account no. xxxx9847 was $11,539.59; 4) Defendant Allan Alcantara has not paid the balance or any amount on the account since June 11, 2024; 5) the last payment made by Defendant Allan Alcantara for account no. xxx9847 was made within four years immediately prior to June 11, 2024.

The Court shall execute the proposed order submitted by Plaintiff Citibank N.A. lodged on 12/23/2024.

18. 9:00 AM CASE NUMBER: MSC21-00847
CASE NAME: MARIA P. GAMEZ VS. MARIE E. LOPEZ
***HEARING ON MOTION IN RE: FOR TRIAL PREFERENCE - CONTINUED FROM 1/15/25 DUE TO JUDGE'S UNAVAILABILITY**
FILED BY: GAMEZ, MARIA PAZ
****TENTATIVE RULING:****

Plaintiff Maria Paz Gamez's Motion for a Preference in Trial Setting is **denied without prejudice**.

The Court sets a non-preference trial date of **August 18, 2025 at 9:00 a.m**. The Court also sets a Case Management Conference on **April 10, 2025 at 8:30 a.m.** at which the parties should be prepared to address the possibility of stipulating to a schedule for discovery, a reduced notice period for any dispositive motions, and any other matters to allow all parties to complete their investigation of the case prior to trial. The parties are ordered to serve and file a joint case management statement and, if possible, a proposed stipulated case management order addressing these issues on or before **April 3, 2025**.

Background

This action was filed on April 28, 2021, arising from an April 28, 2020 sidewalk trip and fall accident at 551 Harvey Way in Baypoint, in which Plaintiff Maria Paz Gamez alleges she was injured. Defendants are Mical Yeira Ubillus, also known as Marie Elena Lopez, whose property abuts the sidewalk where plaintiff fell, and Contra Costa County (County), where the property is situated. Plaintiff, who was born on May 8, 1944 and is now 80 years old, now moves for preference in trial setting. Defendants Lopez and County filed oppositions to the motion on February 19 and February 20, 2025. As of the date of this ruling, plaintiff has not filed a reply.

Legal Standard

CCP section 36(a) states that a Court must grant trial preference when a party is over 70 years of age and the Court finds that "(1) The party has a substantial interest in the action as a whole [; and] (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." Because this code section is mandatory and considers only the health of the moving party, the court may not engage in a weighing of interests or comparison of potential prejudice to the opposing party once it finds that the moving party has made its showing. (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535.)

The court may also, in its discretion, set a matter for trial with preference when a motion "supported by a showing that satisfies the court that the interests of justice will be served" by granting preference. (CCP § 36(e); see *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 344 ["[T]he decision to grant or deny a preferential trial setting rests at all times in the sound discretion of the trial court in light of the totality of the circumstances"].) "With the age and terminal illness situations already provided for . . . , there are relatively few situations that justify preempting other cases waiting in line for a trial date." (Weil & Brown, Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Grp. 2019 ed.) Ch.

12(I)-C, ¶ 12:256.3.)

Plaintiff's Entitlement to Preference

Plaintiff offers the declaration of her orthopedic surgeon, P. Richard Emmanuel, M.D., and the declaration of her counsel, Eber Bonaya (Counsel).

Dr. Emmanuel states that plaintiff suffered from a traumatic intertrochanteric right proximal femur fracture in the accident requiring open reduction internal fixation surgery. Dr. Emmanuel further states that at present, plaintiff experiences constant pain her right knee which is exacerbated by daily activities. Plaintiff suffers from episodes of knee buckling, posing a substantial fall risk. Plaintiff has developed post traumatic right him trochanteric bursitis, causing chronic inflammation and further limiting her mobility and comfort. (See Declaration of P. Richard Emmanuel, M.D. [Emmanuel Decl.], ¶ 3.) As the result of these injuries, plaintiff has a leg length discrepancy that affects her gait and will require ongoing treatment to prevent further complications. These injuries have severely impacted plaintiff's quality of life, limiting her ability to perform basic daily activities and putting her at risk for future instability and falling. (*Id*., ¶ 4.) Dr. Emmanuel states "[g]iven [plaintiff's] age of 80 years old and the progressive nature of her symptoms, there is a significant risk that her condition will continue to deteriorate before a trial can be held under normal scheduling circumstances. (*Id*., ¶ 5.)

Counsel largely reiterates the statements in Dr. Emmanuel's declaration. Counsel adds that plaintiff is suffering from persistent hip pain radiating to her low back and both legs. Plaintiff uses a cane to walk, and experiences stiffness, tightness, tension and muscle spasms with limited motion when sitting, walking or standing for longer period of times. Counsel states that plaintiff has been suffering with hyperglycemia and hypertension causing her injuries to not completely heal. (See Declaration of Eber Bonaya, ¶ 10 and Exh. B [Plf.'s medical records].)

Defendants argue that while plaintiff's age and interest in this litigation is undisputed, she has not met her burden to show that her health makes trial preference necessary to avoid prejudice. Specifically, defendants argue that plaintiff's evidence relates to ambulatory issues only and does not address whether these issues will result in any reduction to her lifespan. In, particular, Dr. Emmanuel's declaration identifies that plaintiff's injuries have led to "ongoing pain and significantly impaired mobility" which limit "her ability to perform basic daily activities and putting her at risk for future injuries due to instability and fall risk." (Emmanuel Decl., ¶¶ 2, 4.) But defendants claim that these ailments do not carry the of incapacity prior to trial. Defendants add that accommodations can made for plaintiff's attendance at trial if ambulation becomes more difficult. Defendants repeat these arguments regarding the declaration of plaintiff's counsel, who for the most part reiterates the statements in Dr. Emmanuel's declaration.

In sum, defendants claim there is no indication that plaintiff is unable to participate in trial now, and no evidence that her health is such that there is a concern it might deteriorate prior to trial unless preference is granted. Based on this, defendants claim the motion should be denied.

Having considered these arguments, the Court finds that plaintiff has not demonstrated that her health is such that a preference is necessary to prevent prejudicing her interest in this litigation. While plaintiff is over 80 years old, she appears to be in stable health, albeit with significant mobility issues.

Plaintiff offers insufficient evidence of a current or imminent decline that will impact her ability to participate in trial such that she will be prejudiced if trial is not set within 120 days. The motion also does not presently satisfy the Court that the interests of justice will be served by granting preference.

Accordingly, the motion for trial preference is **denied without prejudice**.

The Court Sets a Non-Preference Trial Date

Nevertheless, having considered plaintiff's motion and the factors in California Rules of Court, rule 3.729, the Court finds good cause to set this case for trial.

The Court sets a non-preference trial date of **August 18, 2025 at 9:00 a.m**. The Court also sets a Case Management Conference on **April 10, 2025 at 8:30 a.m.** at which the parties should be prepared to address the possibility of stipulating to a schedule for discovery, a reduced notice period for any dispositive motions, and any other matters to allow all parties to complete their investigation of the case prior to trial. The parties are ordered to serve and file a joint case management statement and, if possible, a proposed stipulated case management order addressing these issues on or before **April 3, 2025**.

19. 9:00 AM CASE NUMBER: MSC21-02585
CASE NAME: PIERCE JR VS JERRY FAYE MOORE-PIERCE
***HEARING ON MOTION IN RE: TO DECLARE PLAINTIFF STEPHEN L. PIERCE JR. A VEXATIOUS LITIGANT**
FILED BY: MOORE-PIERCE, JERRY FAYE
****TENTATIVE RULING:****

On 11/14/2024, Defendant and Moving Party Jerry Faye Moore-Pierce filed a Motion to Declare Plaintiff Steven L. Pierce Jr. a vexatious litigant pursuant to Cal. Code of Civ. Procedure Section 391. Defendant did not file a no proof of service this motion as of 3/3/2025.

Counsel for Defendant and Moving party then filed a notice on 2/26/2025 seeking to continue this 3/5/2025 motion to a date at or after the trial, currently scheduled for 4/11/2025. This notice is accompanied by a proof of service by mail to Plaintiff. While the Court is curious about the strategy behind this continuance, the Court grants Defendant's motion to continue the 3/5/2025 to the date of the trial set for 4/11/2025. Counsel for Moving Party, Clinton Killian, Esq., shall serve notice continuing this 3/3/2025 motion to 4/11/2025 and shall file proof of service with the Court demonstrating service of the underlying motion to Plaintiff Steven L. Piece.

The Parties are not required to appear on 3/5/2025.

20. 9:00 AM CASE NUMBER: N24-1195
CASE NAME: MICHAEL HOFFMAN VS. CITY OF LAFAYETTE
HEARING ON DEMURRER TO: 2ND AMENDED PETITION - CONTINUED FROM 1/15/25 DUE TO JUDGE'S UNAVAILABILITY
FILED BY: CITY OF LAFAYETTE
TENTATIVE RULING:

Before the Court is a demurrer to the second amended petition for writ of mandate. For the reasons set forth, the Court requests supplemental briefing on issues set forth below and continues the hearing on the demurrer to **9:00 a.m. on April 16, 2025**. Parties to file simultaneous supplemental briefs on or before **March 28, 2025**.

Background

Petitioner Michael Hoffman ("Hoffman" or "Petitioner") as an individual and Trustee for the Michael A. Hoffman III and Deborah Suzanne Lindes Revocable Trust ("Hoffman Trust") filed a petition for writ of mandate and other relief on July 8, 2024. In his original petition, Hoffman seeks relief under Code of Civil Procedure sections 1094.5 (administrative mandamus) and 1085 (traditional mandamus) as well injunctive relief. Hoffman has amended the initial petition. Respondents named in the second amended petition ("2AP") are the City of Lafayette and Lafayette City Council ("Lafayette" for convenience, or "Respondent") and Comerica Bank and Trust, N.A. as Special Trustee ("Comerica") of the Robinson Family Trust (for convenience, the "Robinson Trust") is named as the real party in interest. (2AP ¶¶ 1, 2, 8-12.)

Grounds Asserted for Demurrer

The 2AP alleges four causes of action for a writ of mandate (1st C/A), for administrative mandamus (2nd C/A), for injunctive relief (3rd C/A), and for declaratory relief (4th C/A). Lafayette, Comerica, and Peter Docter and Amanda Docter (the "Docters") as co-trustees of the Robinson Family Trust, who are not named as real parties in interest in the 2AP, collectively demur to the 2AP. Demurring parties contend that all of the claims raised by the 2AP are barred on two principal grounds: the statute of limitations and failure to exhaust administrative remedies.

Demurring parties contend the decision being challenged was made by the Zoning Administrator on April 27, 2023, as reflected in Exhibit L to the 2AP. (Reply p. 2.) They argue Code of Civil Procedure section 1094.6 requires any petition for writ of mandate to "be filed not later than the 90th day following the date on which the decision becomes final." (Code Civ. Proc. § 1094.6.) (MPA ISO Dem. pp. 15-16; Reply p. 2.) Demurring parties contend that the deadlines for appeal have all passed long ago, presumably sometime in 2023, because Petitioner did not seek reconsideration of the Zoning Administrator's decision, which limits reconsideration to "new or different facts that could not have been presented previously" (Code § 6-237(a) [emphasis added]), and because Petitioner did not appeal the Zoning Administrator's decision to the Planning Commission and then to the City Council by the appeal deadlines from the date of the Zoning Administrator's decision (April 27, 2023 per 2AP Exh. L).

They also argue Petitioner failed to exhaust his administrative remedies available under various provisions of Title 6 of the Lafayette Municipal Code (the "Code"), by failing to seek reconsideration of

the Zoning Administrator's decision or appealing his decision to approve the plan changes the Planning Commission. (MPA ISO Dem. pp. 7-15.) The reconsideration and appeal provisions demurring parties cite have deadlines ranging from 14 to 30 days from the date of the decision or action appealed from. (*See, e.g.,* Code §§ 1-214 [30 days for general appeal of actions to City Council]; 6-226 [14 days to appeal "from . . . the action of the zoning administrator]; 6-234(a) [30 days from determination by city staff].)

Allegations in the 2AP and Certain Contentions by Petitioner in the Opposition

Petitioner challenges numerous actions taken by Lafayette involving the approval of variances and granting of permits for construction, grading, and other activities on residential properties located at 19 Springhill Lane and 20 Springhill Lane (the "Properties") owned by the Robinson Trust. Petitioner resides at the adjacent property located at 18 Springhill Lane owned by the Hoffman Trust, a property bordered by the Properties. (2AP ¶ 17.) The Properties and the Hoffman Property are located in the Hillside Overlay District which has specific procedures for approval of development of property in that district, including a requirement for notice and a public hearing. (2AP ¶ 19.) After notice and public hearings, Lafayette adopted Resolution 2022-19 ("Resolution") which approved development of the 19 Springhill Lane property, with extensive written findings, conditions and limitations. (2AP ¶ 23 and Exh. C.) Among other things, the Resolution approved grading on 19 Springhill Lane of 1,075 cubic yards.

The Resolution did not mention or approve grading or other development or construction on 20 Springhill Lane. (2AP ¶ 23 and Exh. C.) The related staff report does not mention construction, grading, or other work on 20 Springhill Lane. (2AP ¶ 22 and Exh. B.)

Petitioner alleges in March 2023, the drawings and plan were approved for permitting pursuant to the Resolution, but thereafter, the Planning Director/Zoning Administrator Wolff authorized changes to the approved plans without notice to Petitioner or other neighbors and without any opportunity for hearing. (2AP ¶ 25.) Demurring Parties contend the decision by the Zoning Administrator occurred on April 27, 2023, as reflected in an Agenda attached as Exhibit L to the 2AP. Exhibit L reflects the Zoning Administrator/Planning Director Gregg Wolff approved changes to the plans approved in the Resolution "OTC," apparently meaning "over the counter," consistent with other allegations in the 2AP. (2AP ¶¶ 25, 26, 29, 41, 46 and Exh. L.)

Issues for Supplemental Briefing

There seems to be no dispute that Lafayette through Wolff approved the changes to the plans and allowed additional grading in excess of 400 cubic yards and approved work on 20 Springhill Road "over the counter" without notice to the public or to Petitioner before the determination by the Zoning Administrator or notice of the decision after it was made. (2AP Exh. L.) The Court understands that the demurring parties contend the date of the decision being challenged in the 2AP was April 27, 2023 based on Exhibit L. Petitioner alleges that the "over the counter" approval of changes in the plans and additional grading violates law as alleged in detail in paragraph 41 of the 2AP.

1. The demurring parties contend the claims are barred by the statute of limitations because the initial petition was not filed within 90 days of the date of the decision (Code Civ. Proc. § 1094.6), and that the statute of limitations began to run despite the absence of notice of the

Zoning Administrator's action in advance of the OTC approval or notice of the decision after it was made. (Reply p. 2.) Demurring parties cite *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 629, in their initial papers for the proposition that Petitioner had to address Lafayette's failure to provide a required hearing through available appeals under the Code even though Lafayette failed to give notice and conduct the public hearing required before the decision. In that case, the party received notice of the revocation of its certificate of occupancy when it was revoked and could have appealed at that time within the applicable appeal deadlines. (*Id.* at 635.)

a. The parties should address authority relevant to when the statute of limitations for filing a petition for writ of mandate begins to run where no notice was given or hearing conducted before the decision and where no written notice of the decision was given to Petitioner after the decision was made, and where the only notice to Petitioner allegedly was observable changes made in the construction of the 19 and 20 Springhill properties in or about April 2024. (2AP Exh. I [April 30, 2024 Letter to Planning Commission, City Attorney].)

b. The parties should address the *Los Globos Corp.* decision and any authority that tolls or delays the commencement of the time for filing a petition under Code of Civil Procedure section 1094.6 and/or Government Code section 65009.

c. The parties should address whether, based on the violations of law alleged in paragraph 41 of the 2AP, the "over the counter" approval decision of the Zoning Administrator was in whole or in part void as to any aspect of the plan changes, permits or additional work approved.

d. If the violations alleged make any plan changes, permits, or additional work approved void, what is the effect, if any, on the statute of limitations and/or the failure to exhaust administrative remedies, including the time for filing any appeal under the Code or for filing a petition under Code of Civil Procedure section 1094.6 and Government Code section 65009, or any other relevant statute.

2. The April 30, 2024 letter attached as Exhibit I to the 2AP may be reasonably construed as a proposal to Lafayette for revocation of a permit or variance which was addressed to the Planning Commission in care of Wolff and the City Attorney (Code §§ 6-102(i), 6-251, 6-252). The 2AP alleges that the Planning Commission has not responded to the April 30, 2024 letter, and that an appeal can only be taken from an order of the Planning Commission revoking or failing to revoke the permits. (2AP ¶¶ 31-39; Code § 6-252(c).) The Code provides that the Planning Commission's powers include the power to "hear and decide each proposal for the revocation of a land use permit or permit of variance." (Code § 6-102(i).)

a. Demurring parties should address at what point they contend inaction, failure to set a hearing, or failure to issue a decision or "order" by the Planning Commission in response to the April 30, 2024 letter (1) constitutes an appealable "order" failing to revoke the permits or variances under Code section 6-252, or (2) demonstrates futility for purposes of exhaustion of administrative remedies.

b. The parties should address whether the 2AP is premature because Petitioner's proposal for revocation of the permits and/or variances in the April 30, 2024 letter is still pending before the Planning Commission, and Petitioner has additional administrative remedies available by appeal to the City Council.

c. The parties should address whether a rule of "substantial compliance" applies to appeals under the Code in terms of their form and content, and whether the April 30, 2024 letter can also be reasonably construed, at least for purposes of a demurrer, as an appeal of the Zoning Administrator's decision of April 27, 2023.

3. The parties should address the effect of the foregoing on the causes of action for injunctive and declaratory relief.

4. The parties should address the procedural issue of whether the Docters as co-trustees of the Robinson Family Trust are proper demurring parties. While the Robinson Trust is clearly named as a real party in interest, and the Docters as co-trustees have an interest in the action as real parties, the 2AP does not designate them as real parties in interest, nor do they appear to have been added as Roes according to the Court's review of Odyssey.