

These are the tentative rulings for civil law and motion matters set for Tuesday, November 22, 2016, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, November 21, 2016. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0049051 Wheeler, Janis, et al vs. Thomas, Betty

Assignor George Sommers' motion for earnings withholding order is denied. Initially, there is no proof of service in the file establishing service of the motion on Dale Thomas. Furthermore, the assignor has failed to sufficiently establish a basis to issue a withholding order against Dale Thomas.

2. M-CV-0066279 KW Fund V Roseville Parkway LLC vs. Cummings, Holly et al

The appearances of the parties are required for the hearing on defendant's motion to set aside the judgment.

3. S-CV-0030314 Belisle, David, et al vs. Centex Homes, et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 43:

Cross-Defendant Fletcher Plumbing's Motion for Good Faith Settlement

The unopposed motion is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling cross-defendant's proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

4. S-CV-0031839 Ventura, Andrew, et al vs. Centex Homes, et al

Cross-Defendant Timberlake Cabinetry's Motion for Determination of Good Faith Settlement

The unopposed motion is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling cross-defendant's proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

Cross-Defendant Halabi, Inc.'s Motion for Determination of Good Faith Settlement

The unopposed motion is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling cross-defendant's proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

5. S-CV-0033411 Turchet, Luciano vs. Craig Brothers Const., et al

The motion to compel discovery is dropped from the calendar at the request of the moving party.

6. S-CV-0035241 Maclam, James R. vs. Fong, Richard C., et al

Defendant's demurrer to the third amended complaint (TAC) is overruled. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The TAC, when read as a whole, alleges sufficient facts to support the second and fifth causes of action.

Defendant shall file his answer or general denial on or before December 1, 2016.

7. S-CV-0035511 Stout, Vicki vs. RCO Services, LLC, et al

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 42:

Plaintiff's Motion for Attorney's Fees

Plaintiff's motion for an award of attorneys' fees is granted in part and denied in part.

Plaintiff Vicki Stout seeks \$42,360.00 in attorney's fees from defendants RCO Services LLC (RCO) and Ryan Olson, individually, as an item of costs pursuant to Civil Code section 1717 and Code of Civil Procedure section 1033.5. There is no dispute plaintiff Stout is the prevailing party in this proceeding, having recovered on both her first cause of action for breach of the promissory note and second cause of action for breach of contract; and having successfully defended against the cross-complaint brought by defendants/cross-complainants.

The dispute framed by the parties is whether plaintiff Stout may recover attorney's fees in light of the mediation provision in paragraph 17 of the Asset Purchase Agreement (APA). Specifically, defendants contend plaintiff Stout cannot recover attorney's fees since she reneged on her initial agreement to participate in mediation. Defendants, however, do not take into account the separate claims in plaintiff's complaint. Plaintiff's first cause of action sought recovery under the promissory note against RCO only, and not under the APA. The promissory note states in pertinent part:

“Each payment shall be credited on interest then due, and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and interest shall become due at the option of the holder of this Note. Principal and interest payable in lawful money of the United States. *If action be instituted on this Note I promise to pay such sum as the Court may fix as attorney's fees.* This Note is secured by a Security Agreement and a UCC-1 Financing Statement file with the California Secretary of State and the Placer County Recorder.” [Emphasis added.]

Since the promissory note expressly allows for the recoupment of attorney's fees, plaintiff Stout is entitled to such an award against RCO as the prevailing party under her first cause of action. The mediation provision in the APA does not preclude plaintiff Stout from bringing an action on the promissory note against RCO without first mediating. The APA was entered into between the buyer, Ryan Olson, and VS Property Inspection Service, Inc., the seller. By its express terms, the mediation provision in the APA applies to “any dispute or claim *between them.*” [Emphasis added.] As RCO was a party to the promissory note – but not a party to the APA – plaintiff Stout, as successor to VS Property Inspection Service, Inc., was not obligated to attempt mediation with Ryan Olson, individually, before seeking to enforce the payment due her from RCO under the promissory note. This is, in fact, what she did by alleging a breach of the promissory note in the first cause of action against RCO only.

The court also notes her entitlement to recover attorneys' fees against RCO by virtue of RCO's cross-complaint. RCO filed a cross-complaint which sought, among other things, to invalidate the promissory note. In the original cross-complaint of RCO, filed on January 29, 2015, RCO alleges Stout made false representations regarding her business. As a result, RCO alleges it was: “induced to and did enter into the Asset Purchase Agreement (the ‘APA’) by which cross-complainants purchased the business,

the Security Agreement, and the Promissory Note (all three of which are collectively referred to as ‘the contracts’)...” (Cross-complaint ¶15.) This allegation was incorporated by reference into each of the three causes of action alleged in the cross-complaint. Among the relief sought by RCO in its cross-complaint is “a determination from this court that the contract between plaintiff/cross-defendant [Stout] and defendant/cross-complainants [RCO and Olson] is rescinded and is null and void.” (See prayer to cross-complaint.) The cross-complaint sought restitution in the amount of \$675,000, representing the amount paid towards the purchase of the business (\$575,000) plus the amount owed under the promissory note (\$100,000). RCO was granted leave at trial to amend the cross-complaint, which included the same allegation referenced above and which allegation was incorporated into each cause of action of the first amended cross-complaint. Thus, regardless of the terms of the separate APA, RCO directly sought by way of the cross-complaint to have the promissory note declared null and void. In essence, RCO’s cross-complaint also was an action on the note and thus implicated plaintiff’s right to recover attorneys’ fees against RCO under the attorneys’ fees provision of the promissory note.

Olson stands in a different position than RCO. The mediation provision paragraph 17 of the APA is controlling as to Stout’s ability to recover attorney’s fees directly from Olson individually. To reiterate, the APA was entered into by Olson and Stout’s predecessor, VS Property Inspection Service, Inc. The terms of the APA are applicable to Stout since she is the successor to VS Property. Paragraph 17 of the APA states:

“MEDIATION OF DISPUTES. Buyer and Seller shall mediate any dispute or claim between them arising out of this Agreement or any resulting relationship or transaction between them. The mediation shall be held prior to any court action or arbitration. The mediation shall be confidential and in accordance with the applicable sections of the California Evidence Code. In the event the parties are not able to agree on a mediator within thirty (30) days of the first party seeking mediation, the presiding judge of the Superior Court of the county in which venue would lie for the filing of a complaint for relief in such dispute shall have jurisdiction to appoint a mediator. In the event the mediator determines that a second mediation is necessary, it shall be conducted in accordance with this paragraph. Should either party attempt an arbitration or court action before attempting to mediate, that party shall not be entitled to attorney fees that might be otherwise available to it in a court action or arbitration and the party who is determined by the arbitrator or judge to have resisted mediation may be sanctioned by the arbitrator or judge. Mediation fees, if any, shall be divided between the Buyer and Seller.”

While the entire provision is not a model of clarity, the use of the phrase “attempt an arbitration or court action” appears to contemplate that the filing of a complaint constitutes such an “attempt,” thus requiring an attempt to mediate as a prerequisite to the later recovery of fees. The phrase “before attempting to mediate” also is not more

particularly described or defined. Nonetheless, a fair reading of the provision is that a mediation session must at least be commenced, if not completed, in order to preserve the right to recover attorneys' fees later. Hence, the provision contemplates that each party engage in the mediation process prior to filing their respective complaint and/or cross-complaint. If the party fails to do so, then the party is prohibited from recovering attorney's fees on the claims asserted in its pleading. Here, the declarations presented to the court establish that Stout reneged and refused to engage in a mediation session prior to filing her complaint against Olson individually. This failure precludes her from recovering attorney's fees against Olson under the APA.

In support of her attempt to be awarded attorneys' fees from Olson, Stout points to the court's statement of decision regarding the failure of the parties to conduct a mediation before suit was filed. The court simply noted the parties waived the mediation provision *with respect to filing their claims in this lawsuit*. The court noted all parties proceeded to court without mediating and each made affirmative claims for damages. The court noted neither side sought to compel mediation and that the parties opted instead to fully engage the litigation process instead, including discovery and trial. This was not to say that the parties waived the limitation as to the subsequent recovery of attorneys' fees after litigating the case. Stout was still held to the pre-litigation requirements of engaging in the mediation process prior to bringing a court action against Olson in order to preserve her ability to recoup attorney's fees from him, which she failed to do.

Although there does not appear to be disagreement as to the number of hours or fees claimed by plaintiff's counsel, the court has independently reviewed whether the attorney's fees requested are reasonable. The \$42,360 requested by the motion is based on an hourly rate of \$300 and 141.2 hours. Determining the reasonable amount of attorneys' fees begins with the lodestar method, i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48-49.) The lodestar figure may then be adjusted, based upon factors specific to the case, to fix the fees at a fair market value. (*Ibid.*) The court has carefully reviewed the papers of the parties, the totality of the court file along with counsel's skill level and success in litigating the case. The court finds 141.2 hours is a reasonable total for the services rendered by counsel and also finds the \$300 hourly rate to be reasonable. Plaintiff is awarded \$42,360 in attorney's fees against defendant RCO. The request for attorney's fees as to defendant Olson is denied.

8. S-CV-0035599 Voyager Restaurant Group, Inc. vs Sonora Petroleum, Inc.

Defendants Roseville Petroleum, Inc. and Nirmal Singh's Demurrer to the Third Amended Complaint (TAC)

The demurrer to the TAC is overruled. In review of the current demurrer, the court takes judicial notice of the stipulation and order entered on September 8, 2016 as requested by plaintiff. In this stipulation, the moving defendants specifically stipulated to the filing of the TAC as the alternative to challenging plaintiff's operative pleading and

after agreeing to the language in the TAC. In light of this stipulation between the parties, which the court entered as the order of the court, the court declines to entertain the merits of the demurrer.

9. S-CV-0035829 Devlin, Mark, et al vs. Moore, James

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 42:

Plaintiffs' motion to file first amended complaint is granted. The court may permit a party to amend its operative pleading in the furtherance of justice and on such terms as may be just. (*Code of Civil Procedure section 473(a)(1); Code of Civil Procedure section 576.*) Courts have broad discretion in granting leave to amend a pleading and such discretion is usually exercised liberally to permit amendment to the pleading. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) The moving party must also show that the amendment will not prejudice any opposing party. (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158.) Upon review of the moving and opposing papers, plaintiffs have made a sufficient showing in support of granting the motion and have also sufficiently shown the absence of prejudice to defendant.

Plaintiffs' shall file and serve their first amended complaint on or before November 28, 2016.

10. S-CV-0036687 Ferlito, Gaspare vs. General Motors, LLC

Defendant's motion for protective order is granted. The court adopts the proposed protective order – confidential designation only, attached as Exhibit 2 to defendant's motion, with the following modification in language:

Paragraph 1.c. “ ‘Confidential’ means any information that is entitled to confidential treatment under all applicable state and federal laws.”

Plaintiff's request for sanctions is denied.

The motion for summary judgment is dropped from the calendar in light of defendant's withdrawal of the motion at the October 25, 2016 hearing.

11. S-CV-0036719 Godfrey, Kimberly J., et al vs. S. Placer Mun. Util. Dist., et al

Plaintiff's motion to deem the request for admissions admitted is denied in light of defendant's responses, which are in substantial compliance with CCP§2033.220. Nonetheless, the imposition of sanctions is still mandatory under CCP§2033.220(c). Monetary sanctions in the amount of \$3,460.00 are imposed upon both defendant South Placer Municipal Utilities District and its attorney of record, Kenneth Swenson.

12. S-CV-0037383 Doe, Jane vs. Bangerter, Riley, et al

The appearances of the parties are required for the continued hearing on defendant's motion to quash subpoena, or in the alternative, for a protective order.

13. S-CV-0037546 Hale, Richard, et al vs. General Motors LLC

Defendant's motion for protective order is granted. The court adopts the proposed protective order – confidential designation only, attached as Exhibit 2 to defendant's motion, with the following modification in language:

Paragraph 1.c. “ ‘Confidential’ means any information that is entitled to confidential treatment under all applicable state and federal laws.”

Plaintiff's request for sanctions is denied.

14. S-CV-0037781 Castillo, Alfredo et al. vs. Richardson, Thomas F. et al.

Defendants' unopposed motion to compel discovery responses is granted. Plaintiffs shall provide verified responses and responsive documents, without objections, to form interrogatories, set one; special interrogatories, set one; and requests for production of documents, set one, on or before December 1, 2016.

Sanctions are denied because the motion was not opposed. (CCP§2030.290(c); 2031.300(c).) However, repeated conduct of failing to comply with discovery obligations may lead the Court to find an abuse of the discovery process and award sanctions on that basis. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, overruled on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.)

15. S-CV-0037817 Schafhirt, Cynthia et al. vs. Colonial Village Roseville

Bryan A. Jackson's motion to be relieved as counsel for plaintiffs Cynthia Schafhirt and Susan Schafhirt is granted and he shall be relieved as counsel of record effective upon the filing of the proof of service of the signed order upon plaintiffs Cynthia Schafhirt and Susan Schafhirt.

16. S-CV-0037893 Rymel, Christopher et al. vs. Save Mart Suprmrks, Inc. et al

The motion to quash service of summons is continued to December 1, 2016 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones.

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The demurrer is dropped from the calendar as a first amended complaint was filed on November 16, 2016.

The motion for judgment on the pleadings is dropped from the calendar as no moving papers were filed with the court.

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