

TENTATIVE RULINGS

FOR: April 6, 2018

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. G (Criminal Courts Bldg.-1111 Third St.)

BVK Gaming, Inc. v. Timothy J. Long

17CV001155

MOTION FOR JUDGMENT ON THE PLEADINGS

TENTATIVE RULING: Defendant's motion for judgment on the pleadings is GRANTED without leave to amend as to the fourth cause of action and DENIED as to the remaining four causes of action.

Defendant Timothy J. Long moves for judgment on the pleadings as to all five causes of action in the complaint, each of which the court addresses as follows:

The first cause of action for breach of contract.

Defendant seeks judgment on the pleadings as to the first cause of action on two grounds--claim preclusion and issue preclusion. With regard to the argument that the breach of contract cause of action is barred by claim preclusion, it is clear the current claim involves, at least in part, conduct occurring and allegedly constituting a breach *after* the prior lawsuit was resolved. Claim preclusion simply does not apply under such circumstances. Even if it did apply, the court previously overruled the demurrer brought by defendant on this ground. A statutory motion for judgment on the pleadings may not be granted if a demurrer on the same ground was previously overruled unless there is an intervening change in the law. (Code Civ. Proc., § 438, subd. (g)(1).) No such change of law has been shown in this case.

Defendant further contends that the breach of contract claim in this case is barred by the doctrine of issue preclusion based on special verdicts rendered by the jury in the previous case between these parties. The court disagrees. The issue preclusion doctrine only applies to identical issues

that were actually litigated and necessarily decided in the first suit. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825.) Since Plaintiff BVK Gaming Inc. (BVK) prevailed in the previous lawsuit, it is clear that any findings made against BVK were not necessary to that judgment. And “[t]hose findings which might have been made but were not necessary to the judgment are not conclusive.” (*In re Lisa R.* (1975) 13 Cal.3d 636, 646.) Moreover, defendant has failed to explain how any of the special verdict findings would bar the current breach of contract claim, even if they were given issue preclusive effect.

The second cause of action for breach of the covenant of good faith and fair dealing and the fifth cause of action for injunctive relief.

Defendant seeks judgment on the pleadings with respect to the second and fifth causes of action on the ground that they are barred by issue preclusion based on the special verdict findings and through application of the doctrine of unclean hands. For the reasons discussed above, the special verdict findings cannot be given issue preclusive effect, for unclean hands or otherwise.

The third cause of action for declaratory relief.

Defendant seeks judgment on the pleadings with respect to the third cause of action on three grounds, two of which are addressed above in connection with the second cause of action and will not be addressed further. The third argument is that the claim is barred on account of a failure to allege an uncertainty in the contract. The court disagrees. As asserted in plaintiff’s opposition, the necessary uncertainty of the contract to support a declaratory relief cause of action is pled in paragraphs 30 and 31 of the complaint.

The fourth cause of action for unfair business practices.

Defendant also seeks judgment on the pleadings as to the fourth cause of action on the ground the claim will not lie for a private person selling a gaming license. With this argument, the court does agree. While Business and Professions Code section 17200 is defined broadly, it is not limitless. To apply its reach to include a private party’s contractual activities would have significant ramifications into contract law that this court is not willing to extend, at least not without plaintiff providing persuasive legal authority to do so.

Under the asserted facts of this case, it does not appear that an unfair business practices claim can be properly asserted and, therefore, there is no basis for granting leave to amend.

Evidentiary issues.

In analyzing the motion with respect to each cause of action as addressed above, the court also resolved the evidentiary issues raised by the parties as follows:

The court grants defendant’s request for judicial notice of the complaint (exhibit A) in this case, the cross-complaint (exhibit B) in *Long v. BVK Gaming, Inc.*, Case No. 26-56249, the September 17, 2012 Order striking the cross-complaint (exhibit C) in Case No. 26-56249, the notice of entry of judgment on verdict (exhibit D) in Case No. 26-56249, the complaint (exhibit E) in *BVK*

Gaming, Inc. v. Long, Case No. 26-62431, and the May 6, 2014 Order striking the complaint (exhibit F) in Case No. 26-62431.¹ (Evid. Code, § 452, subd. (d).) With regard to the pleadings, the Court has not taken judicial notice of the truth of the matters asserted therein. BVK's evidentiary objections to the request for judicial notice are otherwise overruled.

The court grants BVK's request for judicial notice of the previous demurrer materials (exhibits A-C), the January 17, 2018 order overruling the demurrer (exhibit D), the complaint (exhibit E) in this case, the cross-complaint in Case No. 26-56249 (exhibit F), the request for dismissal (exhibit G) in *Long v. Long*, Case No. 26-45293, and the notice of entry of judgment on verdict (exhibit H) in Case No. 26-56249.

Moreover, BVK attached to its request for judicial notice the cross-complaint in Case No. 26-56249 and the September 17, 2012 order striking the cross-complaint in Case No. 26-56249. To the extent BVK seeks judicial notice of these materials, the request is denied as the items were not identified. (See Cal. Rules of Court, rule 3.1113(l) [“(a)ny request for judicial notice must be made in a separate document listing the specific items for which notice is requested”].)

Although seemingly superfluous, Long's evidentiary objection to the documents attached as exhibits A-B to the Millstein declaration – the same documents Long asked the Court to take judicial of – is sustained. Exhibit A is the complaint in this case. BVK already requested judicial notice of the complaint, so attaching it to the declaration is redundant. Exhibit B is the cross-complaint in Case No. 26-56249. As noted, BVK did not request judicial notice of this court document.

Long's evidentiary objection to any arguments citing to the Millstein declaration is overruled. Long did not identify the specific arguments or portions of the opposition he seeks to exclude.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Arsenio L. Palle, et al. v. Mr. Cooper, et al.

18CV000339

OSC: RE PRLIMINARY INJUNCTION

TENTATIVE RULING: Pursuant to stipulation of the parties, the matter is continued to May 8, 2018, at 8:30 a.m. in Dept. I.

¹ Code of Civil Procedure section 438, subdivision (d), requires that the matter as to which judicial notice is sought “shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit.” Long did not comply with this subdivision. The Court, however, permits Long's request despite the procedural failure because it is clear what documents are the subject of judicial notice.