TENTATIVE RULINGS

FOR: June 13, 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. C (Historic Courthouse) at 2:00 p.m.

Robert Squires v. Eric Hellman **17CV000964**

AMENDED SPECIAL MOTION TO STRIKE (ANTI-SLAPP)

TENTATIVE RULING: Cross-defendants Jeffery J. Baier (individually and as trustee of the Jeffery J. Baier and Holly B. Baier Family Trust) and Holly B. Baier's (individually and as trustee of the Jeffery J. Baier and Holly B. Baier Family Trust) special motion to strike the fourth cause of action for slander of title from the cross-complaint is deemed MOOT in light of the dismissal of the claim on May 3, 2018.

The request for attorney's fees and costs pursuant to Code of Civil Procedure section 425.16, subdivision (c)(1), is GRANTED IN PART against cross-complainant Eric Hellman's attorney, Douglas Smith, in the amount of $5,065 payable to cross-defendants' counsel within 20 calendar days of service of notice of entry of order. Cross-defendants have shown that the recording of a notice of consent is a protected act in order to meet their initial burden. Cross-complainant cannot show a probability of success on the merits in light of the dismissal of the claim. The hours worked are reasonable, especially in light of the voluntary reduction of hours spent conducting preliminary research and strategy discussions. However, the proposed hourly rates of $590 for attorney Acrolina Panto and $690 for attorney Jonathan Reymann are unreasonable in Napa County. The rates are reduced to $300 and $350 per hour. No multiplier is warranted. Thus, the amount awarded represents Panto's 15.5 hours preparing the motion and drafting the reply at $300 per hour, Reymann's hour of work at $350 per hour, and the $60 filing fee. (Panto Decl., ¶¶ 7-9; Panto Reply Decl., ¶¶ 9, 10-12.)

David P. Abreu v. Michael Ru Bello, et al. **26-67606**

DEFENDANT CHRISTOPHER BELLO'S DEMURRER TO FIRST AMENDED COMPLAINT

TENTATIVE RULING: The matter is continued to June 19, 2018, at 2:00 p.m. in Dept. C.

PROBATE CALENDAR – Hon. Francisca Tisher, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

Estate of Bernard Alan Hammond **17PR000107**

SPOUSAL PROPERTY PETITION

TENTATIVE RULING: GRANT petition.

Estate of Robert Gerth **18PR000107**

PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

TENTATIVE RULING: GRANT petition.

CIVIL LAW & MOTION CALENDAR – Hon. Francisca Tisher, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

Seconi v. Balloons Above the Valley, et al. **18CV000087**

(1) DEFENDANT BALLOONS ABOVE THE VALLEY, LTD.'S DEMURRER TO FIRST AMENDED COMPLAINT

TENTATIVE RULING: The demurrer of Defendant Balloons Above the Valley, Ltd. (Balloons) to Plaintiffs Sylvia Seconi and Kimberly Kuhn's First Amended Complaint (FAC) is SUSTAINED without leave to amend.

Plaintiffs sue Balloons, Napa Valley Wine Train, Inc., Yountville Station (NVWT), Scott Carroll, and Houston Casualty Co. (Houston) arising out of injuries Plaintiff Seconi sustained when she was allegedly ejected from a hot air balloon and hit and dragged by the balloon's passenger basket on May 11, 2016. Plaintiff Kimberly Kuhn, Seconi's daughter, was also on the balloon ride and alleges she witnessed the harm to her mother. Relevant to the demurrer, Plaintiffs allege Balloons' operation of the balloon was negligent, and Houston is directly liable

for Plaintiffs' injuries as not only as Balloons' insurer, but as a party to the Release of Liability and Assumption of Risk Agreement (Agreement) signed by Plaintiffs' prior to the balloon ride.

Defendant Balloons demurs to the FAC on the ground that Plaintiffs have misjoined a party. (Code Civ. Proc., § 430.10, subd. (d).) Specifically, Houston Casualty, Co. Houston is Balloons' insurer, as set forth in the Agreement, filed on January 24, 2018, and incorporated into Plaintiffs' Complaint. Defendant argues Plaintiffs' allegations include theories implicating both first and third party coverage, which goes against California authority and public policy.

Preliminarily, addressing Plaintiffs' contention that Balloons is without standing to demur on grounds of misjoinder of Houston, Plaintiffs misinterpret and misapply the law. In support of their position, Plaintiffs cite to case authority regarding general and special appearances and jurisdiction as to Houston, failing to support their contention that Balloons' demurrer is improper. Contrary to Plaintiffs' position, "'It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendants are improperly joined with him in the suit.' [Citation omitted.]" (*Gardner v. Samuel*s (1897) 116 Cal. 84, 91; see also *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193 (*Royal Surplus*); and *Anaya v. Superior Court* (1984) 160 Cal.App.3d 228.) Stated more clearly, where two parties are improperly joined in the same action, *both* have standing to raise misjoinder as to each other or themselves. Accordingly, Balloons has standing to demur on grounds of misjoinder of Houston.

Here, Plaintiffs have joined both insured and insurer as defendants. Long-standing authority in California holds that a joint action against both insured for negligence and insurer for breach of the insurance policy is improper. (*Royal Surplus, supra*, 100 Cal.App.4th at 198.) Permitting otherwise could lead to the admission of prejudicial evidence of insured status in violation of Evidence Code section 1155, a joint trial would hamper the defense of Balloons on the liability question, and any alleged damages suffered by Plaintiffs at the hands of Balloons "may be best determined after the conclusion of the action by [Plaintiffs] against the insured." (*Id.*)

Possibly in an attempt to plead around the limitations set forth in cases such as *Royal Surplus*, Plaintiffs allege Houston is a party to the Agreement and thus subject to direct liability for Plaintiffs' alleged injuries. This allegation is unsupported and contradicted by the terms of the Agreement. Per the Agreement, Plaintiffs specifically agreed that, "I am aware that this is a contract between myself, [Balloons and NVWT], and a release of liability for the Corporation, its shareholders, its Officers, its Directors, its employees, its advertisers, its suppliers, its vendors, any and all landowners, its agents, its representatives, its consigns, its promotors, and its sponsors, and I sign if of my own free will." There is simply no support for Plaintiffs' contention that Defendant Houston Casualty is a party to the Agreement. "Liability insurance is not a contract for the benefit of the injured party so as to allow it to sue the insurer directly." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2001) ¶ 15.44, italics omitted.)" (*Id.* at p. 200.)

Based on the foregoing authority and analysis, the Court SUSTAINS the demurrer. Leave to amend is DENIED. The Court finds there is no reasonable amendment Plaintiff can make to cure the defects at issue, and Plaintiffs have failed to indicate how they could reasonably amend the complaint to satisfy pleading requirements. (*Silva v. Block* (1996) 49 Cal.App.4th 345, 349, citing, *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal. App. 4th 799, 808 [. . . the burden of proving a reasonable possibility that the defect can be cured by amendment is on the plaintiff].)

The Court GRANTS Balloon's request for judicial notice as to the filing of the FAC, but not of the truth of the matters asserted therein. (See *People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127.)

(2) DEFENDANT BALLOONS ABOVE THE VALLEY, LTD.'S MOTION TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT

TENTATIVE RULING: The Court GRANTS Balloons' motion to strike portions of the FAC without leave to amend.

Defendant Balloons seeks an order striking Plaintiffs allegation that Defendants constitute a common carrier, relying on the recent holding in *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283. The court in *Grotheer* found that, as a matter of law, hot air balloon companies and operators are not common carriers and thus do not owe their passengers a heightened duty of care. (*Id.* at pp. 1296-1297.)

A motion to strike lies either to strike any "irrelevant, false, or improper matter inserted into any pleading" or to strike any pleading or part thereof "not drawn or filed in conformity with the laws of this State, a court rule or order of court." (Code Civ. Proc., § 436.) Plaintiffs' attempt to differentiate this case from the holding of *Grotheer* is unavailing.

In light of *Grotheer's* holding, the Court strikes the portions of Plaintiffs' FAC in which Plaintiffs refer to Defendants as common carriers: (1) FAC, ¶ 51, page 11:20 ("…in their capacity as common carriers…."); and (2) FAC, ¶ 67, page 15:1-5 ("Operation of a balloon flight such as planned here puts the operators in the status of common carriers for hire; thus subject to the special rules and statutes that control such (See, e.g., Cal Civil Code 2100-04), which cannot be modified, overridden or precluded by an 'Agreement' such as is claimed here.").

Leave to amend is DENIED.

The Court GRANTS Balloons' request for judicial notice as to the filing of the FAC, but not of the truth of the matters asserted therein. (See *People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127.)