

TENTATIVE RULINGS

FOR: September 10, 2019

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. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. 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.

PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Conservatorship of Jeanette Docter

16PR000070

SECOND ACCOUNTING AND REPORT OF CONSERVATOR; PETITION FOR ALLOWANCE OF FEES TO CONSERVATOR OF PERSON AND ESTATE, FOR ATTORNEY’S FEES AND FOR WAIVER OF COURT INVESTIGATOR FEES

TENTATIVE RULING: GRANT petition, including fees as prayed. After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the matter is set for a biennial review hearing and an accounting in two years on September 10, 2021, at 8:30 a.m. in Dept. A. All accounting documents must be filed at least 30 days prior to the hearing. The court investigator shall prepare a biennial investigator report for the next hearing date. The court investigator shall make a finding as to the conservatee’s voting status. The clerk is directed to send notice to the parties.

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Conservatorship of Richard P. de Lone

26-68236

REVIEW HEARING

TENTATIVE RULING: On April 4, 2019, the Court set a review hearing to allow the co-conservators time to determine if a more appropriate placement could be found for the conservatee. The conservatee has found a new condo to live in and by all reports he is doing well and is happy with his placement. As the Court already found on April 4, 2019, that the co-conservators were acting in the best interest of the conservatee, and there be no further issues regarding placement, the case is set for a biennial review hearing in two years, on September 10,

2021, at 8:30 a.m. in Dept. A. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

In the Matter of the John Garrettson Belcher, Sr. Trust

19PR000129

PETITION FOR ORDER DETERMINING OWNERSHIP OF PROPERTY

TENTATIVE RULING: The Petition is GRANTED.

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In the Matter of the Chester E. Davison Jr. and Gwendolyn L. Davison Revocable Trust

19PR000159

PETITION FOR ORDER CONFIRMING TRUST ASSETS

TENTATIVE RULING: GRANT petition.

CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Thomas Pierce v. Royal Pacific Limousine, et al.

17CV000675

MOTION PERMITTING COUNSEL TO APPEAR PRO HAC VICE

TENTATIVE RULING: Plaintiff Thomas Pierce’s motion to permit attorney Robert M.N. Palmer to appear as counsel pro hac vice is GRANTED.

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Gary M. Hirth, et al. v. Robert D. Massaro, et al.

19CV000699

DEFENDANTS’ PETITION TO COMPEL ARBITRATION

TENTATIVE RULING: Defendants’ Request for Judicial Notice is GRANTED. The Court takes judicial notice of Plaintiffs’ Complaint filed in this action, but not for the truth of any matters asserted therein. Defendants’ Petition to Compel Arbitration is DENIED. Defendants shall, within 15 days of notice of entry of order, plead to the Complaint in this matter.

The notice of petition does not provide notice of the Court’s tentative ruling system as required by Local Rule 2.9. Defendants’ counsel is directed to contact Plaintiffs’ counsel forthwith and advise Plaintiffs’ counsel of Local Rule 2.9 and the Court’s tentative ruling

procedure. If Defendants' counsel is unable to contact Plaintiffs' counsel prior to the hearing, Defendants' counsel shall be available at the hearing, in person or by telephone, in the event Plaintiffs' counsel appears without following the procedures set forth in Local Rule 2.9.

Defendants petition the Court for an order staying the matter and compelling Plaintiffs to arbitrate the dispute. The petition is based on a "Dispute Resolution Mediation and Arbitration" provision contained in a General Contracting Services Agreement (referred to by Defendants as "Construction Contract") allegedly by and between the parties. (See Memo in Support at 2:2-5; Grealish Decl. at Exh. A, § 16.) Defendants argue that arbitration under the contract provision is appropriate because "[e]ach and every cause of action [in Plaintiffs' Complaint in this matter] arises directly out of Defendants' work on Plaintiffs' home as provided for in the Construction Contract..." (*Id.* at 2:26-28.)

As Plaintiffs correctly argue, the provision at issue does not comply with the requirements of Business & Professions Code section 7191. Specifically, the contract provision's title does not conform to the requirements of subdivision (a) of that section, and the provision does not contain the mandatory language set out in subdivision (b) of that section. "A provision for arbitration of a dispute between a principal in a contract for work on a residential property with four or fewer units that does not comply with this section may not be enforceable against any person other than the [licensed contractor]." (Bus. & Prof. Code § 7191, subd. (c).) As Defendants acknowledge, the contract at issue is a "Construction Contract to design and rebuild [Plaintiffs'] home in Middletown, California." (Memo in Support at 2:9-10; see also *id.* at 3:3-24.) For the foregoing reasons, the Court finds that the arbitration provision is unenforceable against Plaintiffs.

Through their Reply, Defendants inexplicably argue that a February, 2016 contract between Plaintiffs and Healthy Buildings Management Group, Inc. is not subject to section 7191. The question is immaterial, however, since Defendants' Petition to Compel Arbitration is based exclusively on the September 2016 General Contracting Services Agreement. There is not a single mention of any February, 2016 contract, that the Court finds, in any of Defendants' Notice, Amended Notice, Memorandum In Support of Petition, or Proposed Order. Further, as explained above, Defendants' Memorandum in Support of the Petition very clearly and repeatedly argues that the Complaint arises *exclusively* out of the "Construction Contract" and that Defendants are entitled to the prayed-for-relief based on the arbitration provision in that "Construction Contract." (See e.g. Memo in Support at 2:2-5, 21-28, 3:3-28, 5:15-7:11, 10:13-15.)

Because Defendants' Petition fails based on the requirements of Business & Professions Code section 7191, the Court need not address the remaining grounds asserted by Plaintiffs through their opposition. However, the Court is compelled to address one such matter based on Defendants' reply thereto.

Plaintiffs argue that the arbitration provision at issue here should not be enforced for the additional reason that Defendants waived any rights they may have had thereunder. (See Opposition at p. 22.) Specifically, Plaintiffs provide evidence that they contacted Defendants, by letter from counsel, to inform Defendants of, and provide details regarding, the nature of their

claims. (See Riggs Decl. at ¶ 3, Exh. A.) Defendants failed to respond. (*Id.* at p. 2:11-12.) Plaintiffs’ counsel followed up with a second letter that read, in part, “[p]lease consider this letter to be a request for immediate mediation under the provisions of any applicable contract which may provide for mediation as a prerequisite to other claims.” (*Id.* at ¶ 4, Exh. B.) Plaintiffs present evidence that, while they received a single telephone voicemail from an attorney claiming to represent Defendants, and informing that Defendants were in receipt of the second letter (*Id.* at p. 2:19-21), Defendants never responded in any substantive way to either letter. (*Id.* at 2:21-3:5.) Plaintiffs argue that Defendants’ failure to respond to Plaintiffs’ request to mediate the dispute serves as a waiver of any rights Defendants may otherwise have had under the arbitration provision at issue.

Again, the Court need not address Plaintiffs’ claim of waiver. However, in Reply, Defendants argue that Plaintiffs should be estopped from asserting that the arbitration provision is unenforceable, because “Plaintiffs admit that only four and a half months ago they attempted to enforce these clauses.” (Reply at 3:23-24.) Somewhat incredibly, Defendants *admit* that they did not respond to Plaintiffs’ request for mediation. (*Id.* at 4:4.) It is axiomatic that one who comes before equity must come with clean hands. (See *Camp v. Jeffer, Mangels, Butler & Marmaro*, (1995) 35 Cal. App. 4th 620, 638.) The Court is certainly not inclined to reward Defendants’ admitted failure to engage in substantive discussions by granting them equitable relief; in this case, estopping Plaintiffs from asserting waiver. The Court is not, however, required to rule on these grounds, for pursuant to the Business & Professions Code, an arbitration provision that is defective under section 7191 remains enforceable against the licensed contractor. (See *Bus. & Prof. Code* § 7191, subd. (c).)

For the foregoing reasons, the Petition is DENIED. Defendants shall have 15 days from Notice of entry of order to plead to the Complaint in this matter.

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John P. McGill, et al. v. Gene Webb

19CV000903

(1) PLAINTIFFS’ MOTION FOR JUDGMENT ON THE PLEADINGS

TENTATIVE RULING: Plaintiffs John P. and Wanda McGill’s (individually and as trustees for the McGill Family Trust 2018) motion for judgment on the pleadings as to “Defendants Answer” on the ground of failure to state sufficient facts to constitute a defense [Code Civ. Proc., § 438, subd. (c)(1)(A)] is DENIED. (Ntc. at p. 1:23.) Despite the language in the notice, the Court has construed the motion as being made against the amended answer filed on August 6, 2019, not the original answer. Because the notice of motion states judgment on the pleadings is sought as to the entire amended answer, the motion may be denied if *any* defense is alleged. (See *Fire Ins. Exch. v. Super. Ct.* (2004) 116 Cal.App.4th 446, 452.) Defendant Gene Webb denied each allegation in the complaint. A general denial is effective to controvert all *material* allegations of an *unverified* complaint. (Code Civ. Proc., § 431.30, subd. (d).) Plaintiffs’ complaint is unverified. Thus, Webb’s general denial “puts in issue the material allegations of the complaint,” and constitutes a defense to the action. (*Id.*) Although plaintiffs may believe there is something in the amended answer that is true, there remains a denial as to

all allegations, even ownership. Plaintiffs are free to use contention interrogatories or requests for admission to put such matters to rest.

Plaintiffs' request for judicial notice is GRANTED IN PART AND DENIED IN PART. The request is granted as the amended answer (exhibit E). (Evid. Code, § 452, subd. (d).) The request is denied as to the assessor's parcel map (exhibit A), the photographs of the slide area (exhibit B), and the answer (exhibit C). The assessor's parcel map is the subject of dispute due to the general denial, and thus, the Court cannot take judicial notice of the truth of the matters asserted therein. The photographs are not the proper subject of judicial notice. The answer is not relevant to a motion seeking judgment on the pleadings as to the amended answer. Moreover, the Court notes plaintiffs cited Evidence Code section 451 when the citation should have been to section 452.

Plaintiffs' counsel also did not comply with the meet-and-confer requirements before filing the motion. (Code Civ. Proc., § 439; see Reply at p. 5 ["Plaintiffs believed they complied with the Code to meet and confer and when they received the Amended Answer following that meet and confer. They understood they were entitled to move for Judgment on the Pleadings, as opposed to another round of amendments by Defendants."].) Plaintiffs' counsel is admonished and shall meaningfully meet-and-confer with opposing counsel by telephone or in person before filing *any* future motion with the Court. Failing to properly meet-and-confer may constitute ground for denial of the motion.

(2) PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE RE: INJUNCTION

TENTATIVE RULING: The parties did not comply with Local Rule 3.3 requiring courtesy copies of all documents in excess of 15 pages. The courtesy copies are needed, especially the color copies of the submitted photographs of the purported slide moving downhill onto the driveway. The parties shall submit courtesy copies on or before September 13, 2019. The matter is continued to September 20, 2019, at 8:30 a.m. in Dept. B.

In the meantime, as time is of the essence before the rainy season begins, the parties shall file a joint meet-and-confer declaration by 5:00 p.m. on September 16, 2019, detailing their efforts to reach an agreement as to: (1) the request to direct repair and remediation of the slide condition on defendant Gene Webb's property that threatens the only access into or out of plaintiffs' property; and (2) a plan or options to carry out that request.

To guide the parties, the Court's initial inclination is to grant plaintiffs the relief they seek. The plan about how to carry out the requested relief may best be resolved cooperatively by the parties, rather than have the Court craft one, especially due to the fact that there has been a past remediation of a slide condition that appears to have worked to stabilize the area. If the Court ends up granting the relief requested, there should be a plan or options in place on how to proceed to stay ahead of the rainy season and to prevent the situation from worsening. Indeed, if the slide blocks plaintiffs' access to their property, remediating or restoring the area may be even more expensive than if corrective measures are taken now. This is by no means a finding on any issues in the motion, but the Court has offered its initial inclination as it appears the parties may

be able to work together to find a solution to this problem without the further delay and expense of litigation.

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In the Matter of Jose Juan Solis

19CV001063

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Notice has been properly published and no written objections have been filed. The petition is GRANTED without need for appearance.