

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

COMPLEX Law and Motion Calendar

Judge: HONORABLE SUSAN GREENBERG
Department 3
400 County Center, Redwood City
Courtroom 2B

Thursday, April 18, 2024- AM

IF YOU **INTEND TO APPEAR** ON ANY CASE ON THIS CALENDAR YOU MUST DO THE FOLLOWING:

1. EMAIL Dept3@Sanmateocourt.org BEFORE 4:00 P.M. CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING, OR
2. YOU MUST CALL (650) 261-5103 BEFORE 4:00 P.M. AND FOLLOW THE INSTRUCTIONS ON THE MESSAGE.

AND

3. You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308(a)(1).

Failure to do item 1, or both 2 and 3 will result in no oral presentation.

At this time, personal appearances are allowed but not required. Parties may appear by Zoom, advance authorization is not required for remote appearances

Zoom Video/Computer Audio Information COURTROOM 2B:

<https://sanmateocourt.zoomgov.com/>

Meeting ID: 161 828 3335

Password: 711017

Zoom Phone-Only Information Please note: You must join by dialing in from a telephone; credentials will not work from a tablet or PC

Dial in: +1 (669)-254-5252

(Meeting ID and passwords are the same as above)

TO ASSIST THE COURT REPORTER, the parties are ORDERED to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

Case	Title / Nature of Case
9:00 23-CIV-04746	RENATO G. VIRAY VS. CARE INDEED, INC.
RENATO G. VIRAY CARE INDEED, INC.	DAVID KELEDJIAN JOHN VAN LOBEN SELS

DEMURRER TO FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT BY DEFENDANTS CARE INDEED, INC. AND CARE INDEED HOME HEALTH CARE, INC.

TENTATIVE RULING:

Defendants Care Indeed, Inc. and Care Indeed Home Health Care, Inc. (collectively “Defendants”) Demurrer to First Amended Complaint (“FAC”) is **OVERRULED**. (Code Civ. Proc. § 430.10, subd. (e).)

Plaintiff’s objections are OVERRULED. The material objected to – Defendants’ Notice and portions of their memorandum of points and authorities (“MPA”) – is not evidence, and therefore not subject to evidentiary objections.

As a threshold matter, Defendants did not comply with the procedural requirements where they neither appended to their Notice nor filed a separate demurrer. (Cal. Rules of Court, rule 3.1320(a). See Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2023 Update) ¶ 7:109.)

Further, Defendants did not identify the first and second causes of action in their Notice. “A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded.” (Code Civ. Proc. § 430.60. Compare Notice, filed Feb. 13, 2024, p. 1:11 (demurrer “to the Third, Fourth, Fifth, Eighth, and Ninth Causes of Action, and as to Plaintiff’s class claims as alleged in the Fifth and Eighth Causes of Action for failure to state fact sufficient to constitute a cause of action pursuant to Code Civ. Proc. § 430.10(e)”); with MPA, filed Feb. 13, 2024, p. 5:4 – 6:16 (arguing “The FAC fails to sufficiently plead under either the First or Second Causes of Action any violation of Labor Code section 226.7”))

Notwithstanding Defendants’ omissions, the Court finds Plaintiff was not prejudiced as he substantively opposed this demurrer, including to the first and second causes of action, and the Court will rule on the demurrer.

“A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are *judicially noticeable*. No other extrinsic evidence can be considered (i.e., no ‘speaking demurrers’).” (Weil & Brown, *supra*, at ¶ 7:8 (original emphasis, cleaned up).) Further, “[a] general demurrer does not lie to only part of a cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by general demurrer.” (*Id.* at ¶ 7:42.2.) “: For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all *material facts properly pleaded* (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law).” (*Id.* at ¶ 7:43.)

In ruling on this demurrer, the Court does not consider the extrinsic facts to the First Amended Complaint posited by Defendants in the Section II of their opening brief. (See MPA, *supra*, p. 2:3 – 3:11.) Further, Defendants do not request judicial notice.

For the first and second causes of action, the Court finds Plaintiff has pled sufficient facts to allege Defendants' failure to provide meal and rest periods. (See FAC, *supra*, at ¶¶ 38 – 64. Contra MPA, *supra*, at p. 6:10-15.) Further, Defendants' contention "personal attendants such as Viray are not exempt from the rest and meal break requirements of Wage Order 15-2001" is based on extrinsic facts to the First Amended Complaint. (MPA, *supra*, at p. 5:17-9. See also *id.* at p. 5:11 – 6:10.)

For the third cause of action, the Court finds Defendants impermissibly demur to only part of the cause of action for failure to pay hourly and overtime wages, where they only address the allegation pertaining to shift differential pay and performance-based non-discretionary bonuses pled at Paragraph 83 and do not address the other alleged violations in this cause of action. (MPA, *supra*, at p. 4:9-11. See also *id.* at p. 4:14 – 5:3.)

For the fourth cause of action, the Court finds Plaintiff has pled sufficient facts to allege failure to pay proper sick pay. (Lab. Code § 246. See FAC, *supra*, at ¶ 90. Contra MPA, *supra*, at p 7:15 – 8:9.) Whether Plaintiff was "paid incorrect amounts when [he] took sick leave" may be properly addressed in discovery. (MPA, *supra*, at p. 7:27-28.) Further, whether Defendants' policies comply with any of the three calculations set forth in Labor Code section 246, subdivision (l), involve questions of fact, not suitable for resolution on demurrer. (*Id.* at p. 6:25 – 7:14.)

For the fifth cause of action, the Court finds Plaintiff has pled sufficient facts to allege unlawful receipt and collection of wages. (Lab. Code § 221. See FAC, *supra*, at ¶ 94. Contra MPA, *supra*, at p. 8:22 – 9:4.) Whether an exception applies involves a question of fact, not suitable for resolution on demurrer. (MPA, *supra*, at p. 8:14-21 (arguing "while this is the general rule, it is not absolute [as] California Labor Code § 224 allows an employer to deduct fees.").)

For the eighth cause of action, the Court finds Plaintiff has pled sufficient facts to allege failure to indemnify. (Lab. Code § 2802. See FAC, *supra*, at ¶ 116.) Whether "the expense at issue is for a purchase of an item for the employee's general use and had only incidental use for the purposes of business" involves a question of fact, not suitable for resolution on demurrer. (MPA, *supra*, at p. 9:10-12.)

For the ninth cause of action, the Court finds Defendants impermissibly demur to only part of the cause of action where Defendants' demurrer is predicated on the "Third, Fourth, Fifth, and Eighth Causes of Action fail to allege material facts sufficient to state a claim" (MPA, *supra*, p. 11:1-2) and does not contemplate the other statutory violations pled in this cause of action (see FAC, *supra*, at ¶¶ 122, 126).

For the class claims pled in the fifth and eighth causes of action, the Court finds Plaintiff has pled sufficient facts for wage and hour violations affecting both Plaintiff and the unnamed class members by showing "(1) an ascertainable class of plaintiffs, and (2) questions of law and fact which are common to the class." (*Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1326 (cleaned up) (quoting *Beckstead v. Sup. Ct.* (1971) 21 Cal.App.3d. 780, 783 – 784.) "[W]age and hour disputes (and others in the same general class) routinely proceed as class action." (*Id.* at p. 1328.) "Under California law, an employee may maintain a class action to recover either overtime pay or underpayments of minimum wage on behalf of himself or herself and others similarly situated." (Chin, *Cal. Prac. Guide: Empl. Lit.* (Rutter, Mar. 2024 Update). ¶ 19:795. See FAC, *supra*, at ¶¶ 94, 116.) Defendants' contentions may be addressed in discovery and at class certification.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Plaintiff shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

