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

Law and Motion Calendar
Judge: HONORABLE V. RAYMOND SWOPE
Department 23
400 County Center, Redwood City
Courtroom 8A

Monday, April 8, 2024

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

1. **EMAIL Dept23@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.

2. **YOU MUST CALL (650) 261-5123 BEFORE 4:00 P.M.** with the case name, number and the name of the party contesting.

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 both items 1 or 2 and 3 will result in no oral presentation.

Appearances by Zoom are highly encouraged.

Zoom Video/Computer Audio Information:

https://sanmateocourt.zoomgov.com/

Meeting ID: 160 045 1177
Password: 654598

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

14:00
LINE:1

22-CIV-02473 KEVIN RYAN VS. SPECIALIZED BICYCLE COMPONENTS HOLDING

KEVIN RYAN	RAND N. WHITE
SPECIALIZED BICYCLE COMPONENTS HOLDING COMPANY	PAUL B. SCHROEDER

DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT BY DEFENDANT MENLO VELO BICYCLES

TENTATIVE RULING:

Defendant Menlo Velo Bicycles' demurrer to Plaintiff's Third Cause of Action for violation of Civ. Code § 1790, et seq. in the Second Amended Complaint ("SAC"), is OVERRULED for the reasons set forth below.

Defendant demurs to Plaintiff's Third Cause of Action for Breach of Implied Warranties of Fitness and Merchantability under the Song-Beverly Consumer Warranty Act ("Act") based on failure to allege facts sufficient to support this claim.

Defendant argues that Plaintiff has not alleged facts sufficient to support that he gave Defendant pre-suit notice to allow Defendant an opportunity to repair or replace the bicycle, as required under the Act. However, Defendant fails to show that such an opportunity to repair or replace is required in order to state a claim for breach of the implied warranty of fitness and merchantability under the Act, as opposed to a claim for breach of an express warranty under the Act. (See Brand v. Hyundai Motor America (2014) 226 Cal.App.4th 1538, 1548-1549; see also Mocek v. Alfa Leisure, Inc. (2003) 114 Cal.App.4th 402, 406-408 (Mocek).) In Mocek, the Court of Appeal found when an express warranty is breached, the Act sets out an extensive scheme requiring manufacturers to repair, and the buyer has a duty to allow a reasonable number of opportunities for repair before the buyer can demand a replacement of the goods or reimbursement. (Id. at p. 407, citing Civil Code, § 1793.2, subd. (b).) Thus, the Court of Appeal found that if the Legislature had intended that if the seller breaches the implied warranty of merchantability it obtains a right to repair, it would have so stated. (Id. at p. 408.) "There is no reason to believe failure to set out the same process in case of a breach of the implied warranty of

merchantability was an oversight." (Ibid.) Therefore, Defendant has not established that Plaintiff is required to allege facts supporting an opportunity to repair or replace the bicycle in order to sufficiently allege this breach of implied warranty claim.

Defendant also argues that this claim fails because the measure of damages available under Civil Code section 1794 shows the intent of the statute is to allow a remedy to fix or replace the goods. Defendant contends that in order to obtain the remedies under the Act, Plaintiff must plead that he rejected or revoked acceptance of the goods or repaired the goods. Defendant's contention is not supported by the language of Civil Code section 1794 though. (See Civil Code, § 1794.)

Specifically, section 1794 states in relevant part:

> (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.
>
> (b) The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
>
> (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
>
> (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.
>
> …

(Civil Code, § 1794, subds. (a)-(b).)

The measure of damages under section 1794(b) includes the right of repair or replacement under Civil Code section 1793.2(d). However, section 1793.2(d)(1) applies to express warranties. "Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery

of the nonconformity." (Civil Code, § 1793.2(d)(1) (emphasis added).) Section 1793.2(d)(2) applies specifically to a motor vehicle, and thus appears to have no application here.

Section 1794(b) also provides that the measure of damages includes damages under the Commercial Code. (See Civil Code, § 1794, subd. (b).) Commercial Code sections 2711, 2712, and 2713 apply where the buyer has rightfully rejected or justifiably revoked acceptance of the good or has exercised any right to cancel the sale. (Civil Code, § 1794, subd. (b)(1).) Commercial Code sections 2714 and 2715 apply where the buyer has accepted the goods, and the measure of damages shall include the cost of repairs necessary to make the goods conform. (Civil Code, § 1794, subd. (b)(2).)

In this case, the SAC does not allege that Plaintiff rejected or revoked acceptance of the good, or canceled the sale, such that section 1794, subdivision (b)(1) applies. Instead, Plaintiff appears to be seeking damages pursuant to section 1794, subdivision (b)(2). (See Plaintiff's Opposition, p. 11:16-10, citing Civil Code § 1794, subd. (b)(2).) Thus, Commercial Code sections 2714 and 2715 are applicable here.

"Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable." (Comm. Code, § 2714(1).) Commercial Code section 2607(3) provides where a tender has been accepted, "[t]he buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy…" (Comm. Code, § 2607(3)(A).) The SAC alleges that on or around the date of the accident, Plaintiff gave notice to Defendant orally and/or in writing of the breach of the implied warrant pursuant to the requirement of Commercial Code section 2607. (SAC, ¶ 38.) Accordingly, Plaintiff alleges facts sufficient to support that Defendant was notified within a reasonable time after discovering the breach.

Defendant argues that such notice under section 2607(3)(A) requires an opportunity to repair. (See Cardinal Health 301, Inc. v. Tyco Electronics. Corp. (2008) 169 Cal.App.4th 116, 135 (Cardinal Health). In Cardinal Health though, the Court of Appeal reversed the judgment because there was insufficient evidence showing the plaintiff gave reasonable notice of the breach as required by Civil Code section 2607(3)(A). (Id. at p. 135.) The question whether notice was properly given must be "determined from the particular circumstances and, where but one inference can be drawn from undisputed facts, the issue may be determined as a matter of law." (Id. at pp.135-136.) Cardinal Health is therefore inapposite as the failure to comply with notice under section 2607(3)(A) was determined based on evidence. As discussed above, Plaintiff alleges facts to support that reasonable notice was given to

Defendant of the breach, and the Court accepts these allegations as true for purposes of this demurrer.

Defendant is to file and serve an Answer to the SAC by April 29, 2024.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for the County 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.

14:00
LINE:2

22-CIV-02473 KEVIN RYAN VS. SPECIALIZED BICYCLE COMPONENTS HOLDING

KEVIN RYAN	RAND N. WHITE
SPECIALIZED BICYCLE COMPONENTS HOLDING CO.	PAUL B. SCHROEDER

MOTION TO STRIKE PORTIONS OF PLAINTIFF'S SECOND AMENDED COMPLAINT BY DEFENDANT MENLO VELO BICYCLES

TENTATIVE RULING:

Defendant Menlo Velo Bicycles' motion to strike paragraph 5 of the prayer for attorney's fees in the Second Amended Complaint is DENIED. Defendant seeks to strike the attorney's fees if Defendant's demurrer to the third cause of action under the Song-Beverly Consumer Warranty Act ("Act"), which is brought concurrently with this motion, is sustained. For the reasons stated in the Court's order on the demurrer though, the Court finds that Plaintiff adequately alleges facts to support the third cause of action.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for the County 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.

2:00
LINE:3

22-CIV-03636 ROY MASON VS. TAQUERIA LA CUMBRE, INC., ET AL.

ROY MASON	BRIAN C. ANDREWS
TAQUERIA LA CUMBRE, INC.	ARA SAHELIAN

MOTION FOR ATTORNEY FEES BY DEFENDANT TAQUERIA LA CUMBRE, INC.
TENTATIVE RULING:

This matter is continued to September 9, 2024 at 2:00 PM so that it may be heard with plaintiff's motion to strike.

2:00
LINE:4

23-CIV-01884 ALEJANDRA GUADALUPE MARIN VAZQUEZ VS. KATHLEEN MARY O'MARIE, ET AL.

ALEJANDRA GUADALUPE MARIN VAZQUEZ	MARIO CAESAR VALLADARES
KATHLEEN MARY O'MARIE	ANTHONY F. PINELLI

MOTION TO BE RELIEVED AS COUNSEL OF MARIO CAESAR VALLADARES
TENTATIVE RULING:

The unopposed motion of Mario Caesar Valladares to be relieved as counsel of record for plaintiff Alejandra Guadalupe Marin Vazquez is DENIED WITHOUT PREJUDICE. To date, there is no proof that the motion was served on defendant O'Marie as required by California Rules of Court, rule 3.1362(d). With respect to plaintiff, the POS indicates the moving papers were served on the same day the motion was filed. At the time of filing, the hearing date and department number were changed. It is unclear whether plaintiff was served with a copy of the notice as amended.

2:00
LINE:5

23-CIV-04260 ERICA SWEENY VS. THE CHARLES ARMSTRONG SCHOOL, ET AL.

ERICA SWEENY	HARUT VOSKANYAN
THE CHARLES ARMSTRONG SCHOOL	KELLIE M. MURPHY

DEMURRER TO PLAINTIFF'S COMPLAINT BY DEFENDANT THE CHARLES ARMSTRONG SCHOOL

TENTATIVE RULING:

Defendant The Charles Armstrong School's Demurrer to Plaintiff Erica Sweeny's Complaint is SUSTAINED in part with leave to amend and OVER-RULED in part.

Plaintiff Erica Sweeny may file a First Amended Complaint no later than April 17, 2024.

As a preliminary matter, Defendant The Charles Armstrong School ("the School") fails to demonstrate it satisfied its meet-and-confer obligations. The Declaration of Kellie M. Murphy reveals that the parties' counsel only exchanged correspondence and did not "meet and confer in person, by telephone, or by video conference" as required. (Code of Civ. Proc., § 430.41, subd. (a).) "A determination by the court that the meet and confer process was insufficient shall not be grounds to" rule on the merits. (Id., subd. (a)(4).) Nevertheless, a future failure to satisfy all meet-and-confer obligations may result in a continuance, vacation of the hearing, or sanctions.

The School demurs here to each of the ten causes of action set forth in Sweeny's Complaint. Generally, the Complaint alleges that Sweeny suffered a concussion and head contusion at work, was placed on medical leave, and was subsequently fired by the School. (Sep. 11, 2023 Complaint, ¶¶ 12–18.)

A. 1st Cause of Action: Discrimination on the Bases of Disability

The first cause of action is for discrimination in violation of the Fair Employment and Housing Act (the "FEHA"). Though the heading of the count cites disability, the allegations allude to various other bases of discrimination:

> Plaintiff is informed and believes that her actual or perceived disability and/or medical condition, workplace

> injury, workers' compensation request, request and need for accommodation, being African-American, her ethnicity/national origin, and/or some combination of these protected characteristics under Government Code §12926(j) were substantial motivating reasons and/or factors in the decision to subject Plaintiff to the aforementioned adverse employment actions by defendants.

(Complaint, ¶ 30.) The School contends that there are no factual allegations showing Sweeny had a disability as defined by the FEHA, that the School knew she had a disability, or that any of the referenced protected characteristics were a "determinative factor" in the employment termination decision.

The FEHA prohibits an employer from discharging or discriminating against an employee on the basis of, inter alia, physical disability. (Gov. Code, § 12940, subd. (a).) "Physical disability" is defined to include any condition or that affects a body system and limits a major life activity such as working. (Id., at § 12926, subd. (m).) An employee whose employer regards them as having a disability is also protected. (Id., at subd. (m)(1).) Because the claim is based on the FEHA, "the general rule that statutory causes of action must be pleaded with particularity is applicable. Every fact essential to the existence of statutory liability must be pleaded." (Susman v. City of Los Angeles (1969) 269 Cal.App.2d 803, 809 [government claims act]; see Ficalora v. Lockheed Corp. (1987) 193 Cal.App.3d 489, 492 [retaliation is statutory cause of action pursuant to FEHA].)

The first cause of action does not identify any particular disability, though it incorporates the preceding allegations of the pleading. (See Complaint, ¶ 24.) In her opposition, Sweeny still does not clearly identify her alleged disability, only stating that it "stems from her workplace injury that resulted in her having a Concussion and a Head Contusion." (Mar. 25, 2024 Memorandum of Points & Authorities ("Opposition"), p. 5, ll. 22–23.) She also states that her disability left her "unable to work," but that fact is not alleged in the Complaint. (Id., at p. 5, ll. 24–25; cf., e.g., Complaint, ¶ 26 [conclusory allegation that disability "made performance of major life activities difficult"].) The Complaint only alleges that she "was placed off work," which a medical practitioner might prescribe whether or not the injury would make working more difficult. (Complaint, ¶ 16.)

There is also no allegation that the School was informed of her disability or regarded her as having one, other than what may be inferred from the paragraph excerpted above. While the Complaint alleges the School was aware that Sweeny was injured and a doctor placed her on leave, this is different than knowing Sweeny had a physical condition that limited her ability to work. (See Complaint, ¶¶ 13, 16.)

Even were the rule of liberal construction of the pleadings invoked to cure one or more of these defects and overlook the more conclusory than factual allegations, these taken together with the Complaint's "studied use of the ineffable 'and/or' leaves the complaint with no direct allegation" that discrimination based on a characteristic protected by the FEHA was a substantial motivating factor in the School's decision to terminate Sweeny's employment. (O'Hare v. Marine Elec. Co. (1964) 229 Cal.App.2d 33, 37.) That is, the intentionally ambiguously formulation states that only her "workers' compensation request … were [a] substantial motivating factor[] … in the decision … ." (Complaint, ¶ 30.)

Indirect allegations of crucial elements of a cause of action such as this are an exception to the general rules of liberal construction and permissible inference insufficient—otherwise plaintiffs and their counsel could avoid their duties to plead truthfully. (O'Hare, supra, at pp. 35, 37 [demurrer to cause of action for breach of directors' and shareholders' fiduciary duties where complaint only alleged defendants were "officers and/or directors and/or shareholders"].) This rule has particular application here, where the Complaint contains an egregious amount of irrelevant boilerplate—for example, age discrimination is strewn into the 'and/or' list despite the complete absence of any mention of Sweeny's age whatsoever. (See Complaint, ¶ 30.) While perhaps efficient for purposes of drafting, this practice does little to apprise defendants of the actual basis of the asserted claims.

Accordingly, the demurrer to this cause of action is SUSTAINED WITH LEAVE TO AMEND.

B. 2nd & 3rd Causes of Action: Retaliation & Failure to Prevent Discrimination

The same defect is present in the second and third causes of action for retaliation for engaging in a protected activity and failure to prevent discrimination and harassment. The Complaint simply does not adequately distinguish the actual facts of the case from the irrelevant boilerplate. Instead, it accuses the School of doing one of any of the possible acts or omissions made unlawful by the FEHA. For example, the second count alleges:

> [The school] retaliate[ed] against plaintiff for exercising her rights, raising complaints of illegality, refusing to engage in illegal behavior, complaining of discrimination and/or harassment on the basis of her actual, perceived, and/or history of disability, medical leave, protected leave, need for accommodations, filing of a Worker's Compensation claim, age, race and/or assisting and/or participating in an investigation, opposing defendants' failure to provide rights, and/or the

> right to be free of retaliation, in violation of Government Code section 12940(h).

(Complaint, ¶ 42; see also id., at ¶ 53.) For the same reasons as discussed above, this is insufficient.

It is true that "the distinction between ultimate facts and conclusions of law is not always clear or easy to state." (Dino, Inc. v. Boreta Enterprises, Inc. (1964) 226 Cal.App.2d 336, 340.) However, an important standard is "that the particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plain-tiff[.]" (Semole v. Sansoucie (1972) 28 Cal.App.3d 714, 719.) While an employee typically does not know the employer's true motivations and can only allege such generally on information and belief, the employee nonetheless suspects the motivation is something less than every unlawful animus under the FEHA (except in the most unusual cases), and the employee should be required to identify it with more particularity than the Complaint provides here. (See Jones v. Oxnard School Dist. (1969) 270 Cal.App.2d 587, 593 [fact–conclusion distinction turns on "whether the adversary has been fairly apprised of the factual basis of the claim against him"].)

Accordingly, the demurrer to these causes of action is SUSTAINED WITH LEAVE TO AMEND.

C. Fourth & Fifth Causes of Action: Failure to Accommodate & Engage

The fourth and fifth causes of action are for failure to provide reasonable accommodation and failure to engage in an interactive process. The employer's knowledge or perception of disability is an element of a cause of action for the former. (Featherstone v. Southern California Permanente Medical Group (2017) 10 Cal.App.5th 1150, 1167.) The same is an element of the latter, in addition to the employee having requested an accommodation. (Gelfo v. Lockheed Martin Corp. (2006) 140 Cal.App.4th 34, 54.)

As discussed above, there is no allegation that the School knew or believed Sweeny had a disability, only that she was on medical leave. There is also no allegation that Sweeny requested any accommodations. Accordingly, the demurrer to these causes of action is SUSTAINED WITH LEAVE TO AMEND.

D. Sixth & Seventh Causes of Action: Breaches of Oral & Implied Contracts

The sixth and seventh causes of action are for breaches of an oral contract and implied contract, respectively. Unlike the preceding

counts, they are common-law causes of action with less stringent pleading requirements. They allege that the parties had contracts not to terminate Sweeney's employment without good cause.

The elements of a cause of action for breach of contract are: "(1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (Richman v. Hartley (2014) 224 Cal.App.4th 1182, 1186.) The existence of an oral contract need only be pleaded in its legal effect. (Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 616.) Similarly, for an implied contract, "only the facts from which the promise is implied must be alleged." (Youngman v. Nevada Irr. Dist. (1969) 70 Cal.2d 240, 247.)

The School contends that the Complaint does not allege the manifestation of assent required to form a contract, sufficiently definite terms, or the consideration given. The School also raises arguments concerning its written at-will employment agreement with Sweeney, but the issue is beyond the scope of a demurrer.

The Complaint alleges that the School manifested assent to the contract by its agents' oral promises, by its employment Sweeny for less than three months, by industry standard, and its practice of terminating employees only for cause. (Complaint, ¶¶ 73, 77.) The oral promises, standards, and practices are sufficient mutual assent to plead the existence of a contract, even if the length of Sweeney's tenure cuts against it. (See, e.g., Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 680.)

Likewise, the terms and consideration are sufficiently definite in context of the employment relationship alleged throughout the Complaint: continued employment only terminable by good cause in exchange for Sweeny's performance of her job duties. (Complaint, ¶ 73.) More specific information is not required to apprise the School of the bases of these causes of action.

Accordingly, the demurrer to these causes of action is OVERRULED.

E. Eighth & Ninth Causes of Action: CFRA Leave Interference & Retaliation

The eighth and ninth causes of action are for interference with and retaliation for leave taken pursuant to the California Family Rights Act (the "CFRA"). These two causes of action appear to be based on Sweeney allegedly having taken leave granted by the CFRA.

As the School points out, the CFRA only grants leave to employees who, inter alia, have been employed for more than one year. (Gov. Code, § 12945.2, subd. (a).) The Complaint, on its face, admits Sweeny was

employed for less than a quarter of that time. (Complaint, ¶¶ 12, 18.) Though she refused to amend in response to the School's pre-filing request, Sweeny now concedes these two causes of action should be excised.

Accordingly, the demurrer to these causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

F. 10th Cause of Action: Wrongful Termination in Violation of Public Policy

The tenth and final cause of action is for wrongful termination in violation of public policy. Like the first three causes of action, the Complaint does not identify the manner in which Sweeney's discharge violated public policy. (See Complaint, ¶¶ 97–102.) Her opposition does not point to any basis that is separate from those underlying the preceding counts. (Opposition, p. 10, ll. 2–4 ["a nexus is established, Plaintiff was terminated on October 17, 2022, the same day she was scheduled to return to work from her leave of absence that was the result of her workplace injury" without specifying what the nexus is between].)

The only viable causes of action pleaded in the Complaint are those for breach of contract. Contract breaches are not a violation of public policy that support this tort. (See, e.g., Foley v. Interactive Data Corp., supra, 47 Cal.3d at p. 700.) Because the statutory causes of action fail, the tenth does as well.

Accordingly, the demurrer to the tenth cause of action is SUSTAINED WITH LEAVE TO AMEND.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant 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.

2:00
LINE:6

23-CIV-04260 ERICA SWEENY VS. THE CHARLES ARMSTRONG SCHOOL, ET AL.

ERICA SWEENY	HARUT VOSKANYAN
THE CHARLES ARMSTRONG SCHOOL	KELLIE M. MURPHY

MOTION TO STRIKE PORTIONS PLAINTIFF'S COMPLAINT BY DEFENDANT THE CHARLES ARMSTRONG SCHOOL

TENTATIVE RULING:

Defendant The Charles Armstrong School's Motion to Strike Portions of Plaintiff Erica Sweeny's Complaint is GRANTED.

As a preliminary matter, Defendant The Charles Armstrong School ("the School") fails to demonstrate it satisfied its meet-and-confer obligations. The Declaration of Kellie M. Murphy reveals that the parties' counsel only exchanged correspondence and did not "meet and confer in person, by telephone, or by video conference" as required. (Code of Civ. Proc., § 435.5, subd. (a).) "A determination by the court that the meet and confer process was insufficient shall not be grounds to" rule on the merits. (Id., subd. (a)(4).) Nevertheless, a future failure to satisfy all meet-and-confer obligations may result in a continuance, vacation of the hearing, or sanctions.

Defendant The Charles Armstrong School moves here to strike the prayer for punitive damages from the Complaint, as well as certain paragraphs containing conclusory allegations of malice, fraud, and oppression. (See Sep. 11, 2023 Complaint, ¶¶ 21, 38, 88, 96; id., at p. 21, l. 4.)

In ruling on the accompanying demurrer, the Court sustained the demurrer with respect to each cause of action but the sixth and seventh, leaving only contract claims in the Complaint. Contract claims cannot support punitive damages, and the allegations are irrelevant. (See Civ. Code, § 3294.) Therefore, the motion is granted.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant 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.

2:00
LINE:7

23-CIV-04583 MAHOGANY INVESTMENTS PACIFICA, LLC VS. SYLVAIN MONTASSIER, ET AL.

MAHOGANY INVESTMENTS PACIFICA, LLC EDWARD C. SINGER
SYLVAIN MONTASSIER

APPLICATION FOR RIGHT TO ATTACH ORDER BY PLAINTIFF MAHOGANY INVESTMENTS PACIFICA, LLC
TENTATIVE RULING:

The instant action for breach of a written lease agreement and breach of guaranty concerns commercial real property in Pacifica, which Plaintiff leased to Defendant PCHRG, Inc. ("PCHRG"). PCHRG operated a brewery at the premises. Under paragraph 3 of the lease, Defendant PCHRG agreed to pay initial base rent of $15,500.00 monthly for the first two years of the lease, with annual increases thereafter. (See Compl. Ex. 1.) Under paragraph 3, the base rent increased to $17,505.00 on Jan. 1, 2023 and again to $18,030.00 on Jan. 1, 2024. Under paragraph 5 of the lease, PCHRG agreed to pay Plaintiff 100% of all real estate taxes assessed against the Premises as additional rent. According to the Complaint, beginning November 1, 2022, PCHRG breached the lease by failing to pay.

Plaintiff moved for a temporary protective order, which the Court signed on March 8, 2024, on the grounds that Defendants had stated an intention to sell the brewery, kitchen, and other related equipment.
Plaintiff now applies after hearing for a right to attach order and a writ of attachment against Defendant PCHRG pursuant to Cal. Civ. Proc. § 483.010. The amount to be secured by the attachment is $220,024.56, which includes estimated allowable attorney fees of $30,000.00. Plaintiff has not filed an undertaking.

Attachment is a prejudgment remedy that allows a creditor to have a lien on the debtor's assets until final adjudication of the claim sued upon (see CCP § 481.010 et seq.). The creditor must follow statutory guidelines in applying for the attachment and establish a prima facie claim; and the court is required to make a preliminary determination of the merits of the dispute. (Lorber Indus. of Calif. v. Turbulence, Inc. (1985) 175 CA3d 532, 535, 221 CR 233, 235 (citing text); Kemp Bros. Const., Inc. v. Titan Elec. Corp. (2007) 146 CA4th 1474, 1476, 53 CR3d 673, 674.)

The court shall issue a right to attach order if it finds all of the following: (1) the claim is one upon which an attachment may be issued, (2) plaintiff has established the probable validity of the claim, (3) the attachment is not sought for any purpose other than to secure recovery on the claim, and (4) the amount to be secured is greater than zero. (CCP § 484.090.) Except as otherwise provided by statute, a claim is one upon which an attachment may be issued: (1) in an action on a claim or claims for money, (2) based upon a contract, express or implied, and (3) where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees. (CCP § 483.010(a).)

A claim has "probable validity" where "it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim." (CCP § 481.190; see Hamilton Beach Brands, Inc. v. Metric & Inch Tools, Inc., (2009) 614 F.Supp.2d 1056, 1062-1063 [plaintiff established probable validity of claim through declaration and accompanying documentary evidence that defendant breached agreement with plaintiff].) The plaintiff must at least establish a prima facie case. If defendant opposes the application, "the court must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of that litigation." (Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 CA3d 1110, 1120, 212 CR at 837 [quoting Comment to CCP § 481.190]; Kemp Bros. Const., Inc. v. Titan Elec. Corp. (2007) 146 CA4th 1474, 1484, 53 CR3d 673, 681)

Defendant opposes attachment, arguing that Plaintiff cannot meet its burden under the statute to show that damages are "readily ascertainable" because Plaintiff has failed to mitigate its damages by allowing Defendant to sublet the premises or assign the lease. Defendant's argument is very thin on citation to authority and relies on CIT Group/Equipment Financing, Inc. v. Super DVD, Inc. (2004) 115 Cal.App.4th 537, 540 for the proposition that the basis for computing the damages must appear to be reasonable and definite. (Opp. at 4.) While this is true, CIT is of no help to Defendant in arguing that Plaintiff must be able to show the exact amount of damages, calculated after applying the amount by which Plaintiff could have or should have mitigated, that will ultimately be proven at trial. To the contrary, CIT emphasizes the necessity of a clear and definite formula for the computation of damages at the writ of attachment stage, but specifically states that "uncertainty as to the specific amount of ultimate damages is not a basis to deny attachment." (Id. at 541.) Here, as in CIT, the damages are readily ascertainable because the lease agreement provides a clear standard "by which the amount due may be clearly ascertained and there [] exist[s] a basis upon which the damages can be determined by proof." (CIT, supra, at 540.) The fact that the damages have not yet been determined by proof with finality is not a bar to attachment, nor has Defendant provided any authority that such a situation would preclude attachment.

Thus, the Court finds the following: Plaintiff has met its burden in establishing that the claim is one upon which an attachment may be issued, because the action is a claim for money based upon an express contract where the total amount is readily ascertainable by the formula or standard set forth in the lease, and the amount exceeds $500 exclusive of costs. (CCP § 483.010(a).) Plaintiff has established the probable validity of the claim through evidence showing that Defendant breached the lease by failing to meet its payment obligations. (Szeto Decl. Ex. 7.) Nor does Defendant appear to contest this point. In addition, the amount to be secured is clearly greater than zero. (CCP § 484.090.)

As to the third element under CCP § 484.090, that "the attachment is not sought for any purpose other than to secure recovery on the claim," Defendant argues that Plaintiff is seeking attachment because he wants to take over the brewery himself. As evidence for this argument, Defendant declares that "On March 6, 2024, I [Defendant Elddin] arrived at the brewery to find that Mr. Szeto had dismantled the doors, entered the premises without consent, and changed the locks. Mr. Szeto had also placed a sign at the entrance of the brewery stating 'This premises is under new ownership.'" (Elddin Decl. ¶ 12.) The Court notes that the Elddin declaration appears to be unsigned, and therefore questions whether the declaration may even be properly considered. However, even assuming arguendo that the declaration is admissible, the Court does not find that this is necessarily evidence of Plaintiff's attempt to use the attachment procedure to take over the brewery itself. (Cf. Pimentel v. Houk (1951) 101 Cal.App.2d 884, 886 [even where a plaintiff has an ulterior motive in seeking attachment, attachment may be valid where defendant does not show that attachment was unavailable as a remedy or otherwise invalid].)

The Court finds that Plaintiff has met its burden under the statute and thus GRANTS the application for writ of attachment and right to attach order. Plaintiff is ordered to file a $10,000 undertaking as required by statute. (CCP § 489.220.)

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.

2:00
LINE:8

23-CIV-05106 WILLIAM H. HOLSINGER VS. JOSEPHINE ELFRIDA OMOLAYOLE

WILLIAM H. HOLSINGER	WILLIAM H. HOLSINGER
JOSEPHINE ELFRIDA OMOLAYOLE	VICTORIA A. SILCOX

MOTION TO SET ASIDE AND VACATE DEFAULT JUDGMENT AND ENTER ANOTHER AND DIFFERENT JUDGMENT BY DEFENDANT JOSEPHINE ELFRIDA OMOLAYOLE
TENTATIVE RULING:

Defendant Josephine Omolayole's "Motion to Set Aside and Vacate Default Judgment and Enter Another and Different Judgment," filed Jan. 8, 2024, is DENIED WITHOUT PREJUDICE. The motion seeks discretionary relief under Code Civ. Proc. Sect. 473(b), which states, in part:

(b) The court may, upon any terms as may be just, relieve a party … from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted …

The motion here does not include a proposed Answer/responsive pleading.

If Defendant appears at the April 8, 2024 hearing with a proposed Answer ready to be filed, the Court will consider granting the Motion (vacating the default).

POSTED: 3:00 PM