CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 11/09/18

GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 12

NOTE PROCEDURE CAREFULLY

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, Dept. 12 prefers and encourages fax or email notification to the department of the request to argue and specification of issues to be argued – with a **STRONG PREFERENCE FOR EMAIL NOTIFICATION**. Dept. 12's Fax Number is: (925) 608-2693. Dept. 12's email address is: dept12@contracosta.courts.ca.gov. Warning: this email address is not be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 12 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

1. TIME: 8:30 CASE#: MSC13-02030
CASE NAME: LALANNE LLC VS. ROBERT LALANNE
HEARING ON MOTION TO/FOR DISTRIBUTION OF INTERPLEADED FUNDS
FILED BY CENTER STREET DEVELOPMENT COMPANY
**** TENTATIVE RULING: ****

After two prior rounds of briefing and hearing, this motion is finally ripe for decision. Center Street's motion for distribution is **granted**, and the Court orders that the entirety of the interpleaded funds should be paid out to Center Street.

The Court requested follow-up briefing on a single issue, which had previously been either misunderstood by the Court (on the first round) or insufficiently briefed (on the second): Was the LLC's September 2013 distribution represented a recovery in the the arbitration in which Andreas represented Mr. Lalanne, such that that distribution is covered by Andreas's attorney lien? After reviewing the parties' briefs, the documents submitted by both sides, and (especially) Judge James's arbitration Awards, the Court is convinced that the September distribution is not a recovery in the arbitration. Therefore, Andreas has no lien on that distribution, and Center Street may enforce its judgment lien to secure those funds in satisfaction of Mr. Lalanne's judgment debt to Center Street. The issue, however, is not as clear-cut as either sides' briefs make it look.

As the Court's prior tentatives have recognized (and as the parties at least tacitly agree), the key is to recognize that Andreas does not have an automatic lien on anything Mr. Lalanne gets from the LLC, but only on what is expressly covered by the lien's own terms. His attorney lien is created by his retention agreement with Mr. Lalanne. That agreement defines the scope of the lien as follows: "The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement, or otherwise." Unstated but clearly implied is that this means Mr. Lalanne's "recovery" in the arbitration case, in which Andreas is representing him. The Court and the parties have been using the convenient shorthand term "proceeds" to describe this, but the actual governing term in the retention agreement is "recovery". The term "recovery" signifies that the lien does not attach to everything that might be described as having been caused by the arbitration victory, in an expanded sense of causation. "Recovery" means only what Mr. Lalanne recovers ***in*** the arbitration (or in settlement thereof).

Center Street argues that this is cut-and-dried. The LLC was obligated by the 2008 Settlement Agreement to make quarterly distributions. Hence, even if the arbitration had never occurred at all, the LLC would have made this September 2013 distribution – not because it was ordered in the arbitration (it wasn't), but because the 2008 Settlement Agreement required it. Therefore, the September distribution is simply independent of the arbitration. This argument is too glib, and ignores the facts on the ground. Prior to the arbitration being filed and tried, the LLC was making quarterly distributions – but it was doing so on the basis of its own (incorrect) belief that the Genworth assets did not count as "reserves" for purposes of calculating distributable amounts. No doubt, had the arbitration not occurred, the LLC would have continued in that error. The Arbitrator's ruling rejecting the LLC's erroneous treatment of the Genworth assets that presumably influenced the amount, if not the fact, of the September 2013 distribution.

It does not automatically follow from that, however, that the September 2013 distribution represented Mr. Lalanne's "recovery" in the arbitration. The Arbitrator did not make any particular or specific order requiring the LLC to make the September 2013 distribution (or any later distribution) in any particular amounts. She said only: "It is the intention of the Arbitrator that upon the conclusion of this case, the resolution of the Colorado financial obligations and any current financial obligations of the LLC, the reserve shall revert back to $625,000 and quarterly distributions will continue." As the Court observed in the September 28 tentative, that is no more than an observation that the LLC's distributions will revert to ordinary course once things get back to normal – albeit, admittedly, an ordinary course with a course correction as to the proper method of calculation.

Suppose the LLC had decided to return to the error of its pre-arbitration ways, refusing in September 2013 to count the Genworth assets as "reserves". That would have amounted to flouting the precedential and moral authority of Judge James's decision, and it would surely have invited a slam-dunk follow-on arbitration or lawsuit. But it would not have constituted a *violation* of the arbitration Award, in the sense of directly disobeying an order from the Arbitrator – in the same way that it would have violated the Award if the LLC had refused to make the mandated April 2013 distribution in the amounts the Arbitrator ordered.

Indeed, one must wonder how far Andreas contends his lien would have continued to apply to future LLC distributions – another five years, or ten, or twenty, assuming the distributions were not large enough to exhaust Mr. Lalanne's attorney-fee debt to Andreas? That thought shows

how far Andreas is seeking to overextend the concept of "proceeds", or (more exactly) the contractual term "recovery".

And there is a final problem with Andreas's claim: his failure of proof as to the proper *amount* of the September 2013 distribution to which Andreas's lien would apply. No one has presented any evidence or calculations on point, so the Court has no idea how much (if any) of the September 2013 distribution could be causally traced to Judge James's ruling on the Genworth issue – in other words, what the delta might be between a "with Genworth" September 2013 distribution, versus a "without Genworth" September 2013 distribution. Unless the September 2013 distribution would have been zero under the LLC's pre-arbitration methods of calculation, then it cannot be true that *all* of the distribution was the "proceeds" of the arbitration victory. It may well be true that the distribution was larger than it would have been if the arbitration had not occurred. But *how much* larger, if any? The Court has no idea. As the party seeking to enforce his attorney lien, Andreas bears the burden of proof to show not only that his attorney lien applies to some of the interpleaded funds, but also to prove how much. He has not done so.

2. TIME: 9:00 CASE#: MSC13-02539
CASE NAME: MATTA VS. LEAL
HEARING ON MOTION TO/FOR BE RELIEVED AS COUNSEL FILED BY EDWARD J LEAL, RAYMOND J LEAL, ANGELINA M LEAL
**** TENTATIVE RULING: ****

Counsel to appear for an in camera hearing as to grounds for withdrawal. Defendants personally may appear and participate if they choose.

3. TIME: 9:00 CASE#: MSC15-01165
CASE NAME: ROBINSON VS. NIAKAN
HEARING ON MOTION TO/FOR ENFORCE SETTLEMENT AGREEMENT FILED BY NAVID NIAKAN
**** TENTATIVE RULING: ****

The parties are to appear to discuss the scheduling of a settlement conference, and if necessary, a hearing to determine the merits of the present dispute. (CourtCall acceptable.)

At the outset, the Court notes that Robinson has apparently not served her papers on Niakan. There is no proof of service in the file and Niakan has filed a statement that he has received nothing from her. **This is unacceptable.** Anything filed with the Court must be served on the other party, and proof of such service must be filed with the Court.

Although initially pleaded with a number of other causes of action (such as fraud), this is in substance an action to collect a debt. The parties reached a mediated settlement in 2016, under which defendant Niakan was to make payments totaling $46,000 to plaintiff Robinson on a specified schedule. Upon completion of those payments, Robinson was to file a dismissal of this action and to return two rings to Niakan. Upon default by Niakan, Robinson would be

entitled to file a stipulated judgment (signed by the parties at the time of the settlement, but held by a neutral in the meantime) for $66,500.

Both parties are now in pro per. Their respective requests to the Court are not presented in a technically correct manner on either side – and as noted, Robinson has not served her papers on Niakan so he has no notice of what she is requesting. Nevertheless, Robinson does not complain of any procedural irregularity, and the Court assumes that Niakan also wants the Court to proceed to decide the present dispute and bring the matter to a close. The technical flaws are not jurisdictional. Unless Niakan raises a procedural objection at the hearing, therefore, the Court is inclined to disregard the technicalities and get down to the substance of the matter.

The substance is not very complicated, because it appears that both sides agree on all the relevant facts. Niakan acknowledges that there were a number of tardy, short, or missed payments along the way. He asserts, however, that he paid the entire $46,000 by the due date for the final payment, with a final balloon payment of $18,190 in August of this year. Robinson acknowledges that that is true, and that she has received the entire $46,000.

Niakan now seeks enforcement of the settlement agreement, meaning a dismissal and an order to return the rings. Robinson requests entry of the stipulated judgment, arguing that because some of Niakan's payments were late, he defaulted on the settlement agreement. Thus, the disagreement between the parties comes down to a single point: Whether the tardiness of some of the payments constitutes a default entitling Robinson to the stipulated judgment, despite Niakan having eventually paid the full amount.

The Court is not deciding this issue yet, because it wants the parties to meet with one of the Court's Settlement Mentors to seek a compromise of the dispute. For the parties' guidance in settlement, however, the Court offers a pair of competing observations. On one hand, it can fairly be said that Robinson did not get the full performance she bargained for, which was not just eventual payment by the final due date, but timely payment over the course of the repayment period. On the other hand, Robinson accepted the full course of payments over a two-year period without attempt to seek the stipulated judgment. A fair reading of those facts could be that Robinson consciously sandbagged Niakan by continuing to accept his payments, up to the full $46,000, and asserted a default only after she had the full repayment in hand. That suggests that she might be estopped to demand the full $66,500, but might perhaps be entitled only to interest on the tardy payments.

4. TIME: 9:00 CASE#: MSC16-01989
CASE NAME: CAPPS VS. REYNOLDS
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

This minor's compromise was already approved. The amended petition seeks only to substitute a different and more suitable institution for the special needs trust. The amended petition is **approved**.

5. TIME: 9:00 CASE#: MSC17-01079
CASE NAME: HALE VS SAN RAMON VALLEY USD
HEARING ON MOTION TO/FOR: COMPEL ANSWERS TO DEPOSITION QUESTIONS, FILED BY DARLENE HALE
**** TENTATIVE RULING: ****

Lead counsel to appear in person.

6. TIME: 9:00 CASE#: MSC17-01432
CASE NAME: AMERICAN BUILDERS VS FEDERAL S
HEARING ON MOTION TO/FOR SET ASIDE DEFAULT AND DEFAULT JUDGMENT FILED BY RAIZA SINGH
**** TENTATIVE RULING: ****

This motion is **continued** to November 16, 2018, at 9:00 a.m. Plaintiff's opposition papers were timely filed, but were served by ordinary mail rather than by the next-business-day means required by Code of Civil Procedure § 1005(c). Movant's reply brief, if any, must be filed and served by no later than November 12.

7. TIME: 9:00 CASE#: MSC17-02529
CASE NAME: TIERNAN VS. DIABLO COMMUNITY S
HEARING ON MOTION FOR SUMMARY ADJUDICATION AS TO THEIR 1ST CAUSE OF ACTION FOR U FILED BY ROBERT TIERNAN, ROBERT TIERNAN, MARILYN
**** TENTATIVE RULING: ****

Plaintiff Robert Tiernan, et al. file this motion for summary adjudication as to their first cause of action. Intervenor defendant Bike East Bay filed an opposition. Defendants Diablo Community Services District and Diablo County Club were served with this motion and did not file oppositions. None of the other defendants was served with this motion; however, none of the other defendants has filed a first appearance in this case. This motion was filed based upon allegations in the original complaint. Since then plaintiffs have filed two amended complaints, but there appears to be no dispute that cause of action one remains the same in different versions of the complaint.

Plaintiffs' motion for summary adjudication as to the first cause of action for quiet title is **granted**.

The Court begins with the comment that much of the factual evidence proffered by both sides, arguing over whether there are or are not safety or nuisance issues, is simply irrelevant to this motion. Of course, generally speaking it is a matter of legitimate concern whether there are safety problems, whether on Calle Arroyo or on alternate routes such as Diablo Road. But those safety concerns simply do not bear legally on whether there does or does not exist any

easement for the general public to use Calle Arroyo. Plaintiffs are not required to prove that cyclists pose safety issues in order to establish that there is no such easement. Conversely, if they cannot prove the absence of such an easement as a matter of real estate law, they cannot make the easement go away by complaining that persons using it are doing so unsafely, or that they are creating noise or congestion. The same is true on the flip side: If no easement exists, the cyclist defendants cannot create one by showing that they use the street safely and politely. No one has a right to trespass on someone else's land dangerously and noisily; but neither does anyone have the right to trespass safely and quietly. Nor can the cyclist defendants create such an easement by arguing that Calle Arroyo is safer than the alternatives.

In their first cause of action, plaintiffs are seeking to quiet title over Calle Arroyo – and more specifically, to establish that Calle Arroyo is not subject to any general easement of public use. Plaintiffs contend that Calle Arroyo is a private road owned by the homeowners on that road and the Diablo Country Club. They also contend that there is no express or implied dedication on Calle Arroyo for public use and that the public has not used Calle Arroyo without objection for a period of at least five years. (Comp. ¶39.)

Plaintiffs' Burden

Plaintiffs have met their burden on this motion. The relevant subdivision map from 1916 includes Calle Arroyo and states that "the Mount Diablo Villa Homes Association, does hereby further certify that no parcels of ground within said subdivision are used for public purposes or dedicated for public uses." (Plaintiffs' Ex. 1.) In addition, Landon Blake, a licensed professional land surveyor, states that the entirety of Calle Arroyo road is private property based upon the language in the various grant deeds. (Blake Decl. ¶4; Plaintiffs' Ex. 4.) Blake also states that he reviewed the legal descriptions of all the properties along Calle Arroyo and found no language in any of the grant deeds which dedicated Calle Arroyo for use by the general public. (Blake Dec. ¶5.)

Plaintiffs also rely on the 1968 petition to create the Diablo Community Services District and some local ordinances enacted afterwards that purport to make the roads in Diablo private roads. (Plaintiffs' Exs. 2, 27 and 28.) These documents may show an intent by homeowners to keep the general public out of Diablo, but they could not remove a public right of way easement if one had been stated in the subdivision map or property deeds.

Thus, Plaintiffs have presented evidence that there is no express grant for public use on Calle Arroyo.

In addition to an express easement, it is possible that there is an implied public easement on Calle Arroyo. In order for there to be an implied public easement, there must be use by the public without objection or interference for at least five years prior to 1972. (*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240; *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 39; Civil Code §1009.) For this showing, persons "seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they

would have used public land. ... If a road is involved, the litigants must show that it was used as if it were a public road." (*Gion, supra,* 2 Cal.3d at 39; accord, *Scher v. Burke* (2017) 3 Cal.5th 136, 141.) In addition, "[l]itigants seeking to establish dedication to the public must also show that various groups of persons have used the land." (*Gion, supra,* 2 Cal.3d at 39; see also *Aptos Seascape Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 500-01.)

The requirement that the use be "substantial" is explained in *County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561. There the court held "that the use must be substantial rather than casual and even though the use need not be otherwise adverse to the interests of the owner, the scope and continuity of the use must be great enough to clearly indicate to the owner that his property is in danger of being dedicated." (*Id*. at 565.)

For example, in *Gion* the California Supreme Court considered two cases and in each found there was sufficient to support an implied-in-law public easement. The first instance involved a lot used by the public for parking for approximately 60 years. The city maintained the property for this period of time by the posting of danger signs, resurfacing the parking area, doing clean-up work and erosion control work. (*Gion, supra*, 2 Cal.3d at 35-36.) In the second instance, there was evidence of substantial use by the public of a breach, including 50 to 75 people camping on the beach for weeks at a time during the summer and people engaged in a number of recreational activities at the beach, including picnicking, hiking, swimming and fishing. (*Gion, supra*, 2 Cal.3d at 36-37.)

To say that the extraordinary showings in *Gion* were sufficient, is not necessarily to say that some lesser showing might not also be sufficient. Plaintiffs, however, have cited no authority suggesting that the very minimal non-resident use that has been shown prior to 1972 could possibly be sufficient to create an implied-in-law public easement.

Here, Plaintiffs have shifted the burden on this issue. They have presented declarations (and one affidavit) from several individuals with personal knowledge of the use of Calle Arroyo before 1972. (Wooten Decl.; Worden Decl.; Rei Decl.; Fariman Decl.; Clancy Decl.; La Cava Decl.; Kipp Decl.; Garner Decl.; B. Tiernan Decl.; Robert Tiernan Decl.; Robert P. Tiernan Decl.; Houston Affidavit (ex. 47).) (The Court notes that the Beratta declaration discusses facts in 1972 and later, and is therefore not helpful to show usage of Calle Arroyo prior to 1972.)

These individuals explain that prior to 1972 the Diablo area was located in the country and was essentially at the end of the road. These individuals state that Diablo was visited only by residents, their guests, and people going to the Country Club. Most of these individuals state that they saw little or no bicycle traffic using the streets in Diablo, except for local children riding their bicycles.

The subdivision was created in 1916 and none of the declarations offered by plaintiffs can describe the usage of Diablo or Calle Arroyo prior to 1950. However, most of the individuals

explained that the area was rural and secluded in the 1960s and 1970s. This creates an inference that the area had a similar character prior to the 1960s.

In addition, some of the individuals also explained that in the 1960s to at least 1972, there was no way to get from Alameda Diablo to Mt. Diablo Scenic Boulevard. (Wooten Decl. 2; Worden Decl. 3-4; Fairman Decl. 4.) This information is relevant, as currently bicyclists enter on Calle Arroyo, go down to Alameda Diablo and then cut over to Mt. Diablo Scenic Blvd. (Robert Tiernan Decl. 11 and Ex. 37.) Thus, until there was a way to get from Alameda Diablo to Mt. Diablo Scenic Boulevard it seems unlikely that the general public was using Calle Arroyo on a regular basis to get to Mt. Diablo Scenic Boulevard.

Based on plaintiffs' evidence, the Court finds that plaintiffs have shown that there was not an implied public easement prior to 1972.

Bike East Bay's Burden

Plaintiffs have shifted the burden. Bike East Bay must now present admissible evidence showing a triable issue of material fact in order to defeat this motion. They have failed to do.

At the outset, the Court notes that Bike East Bay's declarations were not signed under penalty of perjury. Plaintiffs' objections to this are well taken. However, if it would change the results of this motion the Court would continue the hearing to allow Bike East Bay to submit declarations signed under penalty of perjury. As explained below, even if this Court were to consider these declarations as admissible (subject to other evidentiary objections), Plaintiffs have not shown there is a triable issue of material fact.

Bike East Bay's main argument is that the petition to create the Diablo Community Services District in 1968 included language that "the roads within the proposed district are private in nature, but subject to a right of way reserved to the public." (Ex. 2 at (f)(2).) Bike East Bay argues that this language is enough to create a public easement over Calle Arroyo. The Court disagrees. This language shows a belief that most roads in Diablo have a public right of way easement. It does not include an intent to create such an easement where none existed. In addition, this language does not specifically apply to Calle Arroyo. There are two ways to take this – as itself creating an easement, or as evidencing that such an easement existed. The District, however, did not and does not own Calle Arroyo, and had no right to impose an easement on it if none existed already. And the comment of "subject to a right of way" is too vague to constitute substantial evidence that such an easement already existed.

Bike East Bay offers very little evidence to support a finding that an implied public easement exists based on the public's use Calle Arroyo prior to 1972. It relies on a map from 1920, which is both inadmissible and not really probative of what it is offered for. (Smith Ex. B.)

Robert P. Tiernan's deposition provides some evidence to support Bike East Bay's argument, but it falls short of creating a triable issue. Tiernan was involved in petitioning for the creation of

the Diablo Community Services District and was involved in drafting the language in the petition. Tiernan testified that he included the language that the roads were private but "subject to a right of way reserved to the public" to "reflect upon that's the part of the non-Diablo people who were to use our roads." (Tiernan Depo. 44:18-20.) As Tiernan explained, he chose those words so that the people who provided services to the residents, the County Club and the post office, such as delivery people, utility service workers and landscapers, were included. (Tiernan Depo. 44:12-17.) The chosen language may not perfectly capture what Tiernan says it was trying to describe. But neither on its face nor in light of Tiernan's explanation does it show that in 1968 the general public – such as persons passing through on their way to Mount Diablo – was using the roads in Diablo, including Calle Arroyo, to the great extent that would be needed to prove the existence of an easement: "substantial rather than casual and even though the use need not be otherwise adverse to the interests of the owner, the scope and continuity of the use must be great enough to clearly indicate to the owner that his property is in danger of being dedicated." (*Chandler-Sherman*, 54 Cal.App.3d at 565.)

Tiernan also testified that there were some individuals driving through Diablo that had no legitimate business there. (Tiernan Depo. 46:16-21.) Tiernan admitted that in the 1960s the traffic for Diablo included residents, their guests, people going to the County Club and the post office, and individuals providing services. (Tiernan Depo. 27:18-28:11.) Thus, there is some evidence that the general public was using the roads in Diablo to go to the post office and to drive through the area. The problem for Bike East Bay is that this evidence is insufficient to create a triable issue of material fact under the legal standards established by *Gion*, *Chandler-Sherman*, and similar cases.

In support of their argument, Bike East Bay points to a permit approval in 1979. (Smith Ex. C.) This document creates a public riding and hiking easement from Alameda Diablo to Mt. Diablo Scenic Boulevard. This document does not show that the public used the area prior to 1972. It also does not establish anything at all about an easement *on Calle Arroyo*.

Bike East Bay has presented evidence that there is a United States Post Office in Diablo, which can only be reached by using Calle Arroyo, Alameda Diablo, Avenida Nueva and El Nido. It then argues that the post office is not allowed to "make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user [when providing its services]." (39 U.S.C. § 403.) From this, Bike East Bay concludes that Calle Arroyo must have a public right of way so that the general public can get to the post office located in Diablo. Bike East Bay has not shown that an individual must use Calle Arroyo (as opposed to other roads) to access the post office. Further, if Bike East Bay's interpretation of § 403 were correct, then perhaps the post office is in violation of that statute; but Bike East Bay fails to explain why a post office's location could create a public easement where none otherwise existed.

Bike East Bay relies on the 2018-2019 draft budget for the Diablo Community Services District that includes a line for road maintenance. It argues that this means that public funds are being used to maintain Calle Arroyo and preventing the public from using the road in such a situation

would violate the gifts clause in the California Constitution. (California Constitution Article XVI.) Plaintiffs have properly objected to this document as inadmissible hearsay. Bike East Bay did not include enough facts for this Court to find that this document meets an exception to the hearsay rule. In addition, even if it were admissible, all it shows is that the Diablo Community Services District spends money on road maintenance in Diablo. There is no evidence that any of this money is spent on Calle Arroyo. And even if it did, so what? If the District is illegally spending money, it ought to stop doing so. But that doesn't mean the District can create an easement over its members' properties by spending money.

Evidentiary Matters

Plaintiffs have requested that the Court take judicial notice of a number of documents. These requests are unopposed. The requests for judicial notice of exhibits 1, 3, 5-28 and 36 are granted. The requests for judicial notice of exhibits 31-35 are denied.

Plaintiffs' objections to the declaration of Paul Ambrose:

1. Sustained. The declaration is not signed under penalty of perjury.
2. Overruled.
3. Sustained. Irrelevant.
4. Sustained. Irrelevant.

Plaintiffs' objections to the declaration of Kyle Smith:

5. Sustained. The declaration is not signed under penalty of perjury.
6. Sustained. Irrelevant.
7. Sustained. Hearsay.
8. Exhibit A – overruled. However, plaintiffs correctly point out that this deposition excerpt violations California Rules of Court, rule 3.1116(c).
9. Exhibit B – sustained.
10. Exhibit C – overruled. This appears to be a document that this Court can take judicial notice of and the Court will do so (despite defendant failing to make a proper request).
11. Exhibit D – sustained. There is insufficient information for this Court to find that this document is admissible based upon an exception to the hearsay rule.

8. TIME: 9:00 CASE#: MSC18-01399
CASE NAME: CSAA INS EXCH VS BSH HOMES
HEARING ON MOTION TO/FOR LEAVE TO FILE F.A.C. FOR DAMAGES IN SUBROGATION FILED BY CSAA INSURANCE EXCHANGE
**** TENTATIVE RULING: ****

The motion for leave to file a first amended complaint (FAC) is **granted**. Plaintiff may file and serve the FAC by November 16.

This is a subrogation action concerning water damage from an allegedly defective dishwasher. Defendant Tilley (dba ERS) was sued in the original complaint only on a breach-of-contract claim relating to alleged failure to preserve the dishwasher for inspection. ERS demurred, but it withdrew the demurrer because after meet-and-confer, plaintiff elected to amend its complaint in response to ERS's assertions of defects. Plaintiff now moves for leave to so amend.

So far, so good; that's exactly how the meet-and-confer process is supposed to work. (Or almost exactly; the meet-and-confer, and the election to amend, really should have occurred before the demurrer was filed at all.) But now ERS opposes the present motion because, it argues, the FAC remains demurrable.

That is rarely if ever an appropriate reason to oppose an otherwise timely and appropriate motion for leave to amend. Opposition to such a motion is not a suitable procedural substitute for demurrer. What ERS should have done was to stipulate to the filing of the FAC, and then (if it saw fit) demur to the FAC.

Indeed, ERS may not have thought through the procedural consequences of its opposition. Suppose the motion for leave to amend were denied. That would leave the original complaint in place. ERS has not answered it, and has withdrawn its demurrer. If ERS were then to seek to refile the demurrer to the original complaint, it would face the fact that it already withdrew its demurrer. And even if that were overlooked and ERS were allowed to refile, it would have to meet and confer first – and the meet-and-confer would consist of plaintiff proposing to amend, bringing us back to exactly where we are now.

9. TIME: 9:00 CASE#: MSC18-01439
CASE NAME: SIMANIAN VS. WILLIAMS
HEARING ON MOTION TO/FOR COMPEL ARBITRATION & STAY ACTION FILED BY STEPHEN MOLINELLA, NORTHERN CALIFORNIA PRACTICE SALES,
**** TENTATIVE RULING: ****

Defendant Molinelli's motion to compel arbitration is **granted in part**. Arbitration is ordered as to all parts of this action other than plaintiffs' claims against Patterson Dental Supply. Litigation of those claims is stayed, subject to any contrary agreements among the parties.

Code of Civil Procedure § 1281.2 creates a summary proceeding for resolving petitions to compel arbitration. "A petition to compel arbitration 'is in essence a suit in equity to compel specific performance of a contract.'" *Rosenthal v. Great Western Fin. Securities Corp*. (1996)

14 Cal.4th 394, 411 (internal citation omitted). In these summary proceedings the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972.

Under the proceedings, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. "'This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.'" *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1283 (internal citations omitted).

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see § 1281.2, subds. (a), (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.

A heavy presumption weighs in favor of arbitrability. *Gravillis v. Coldwell Banker Residential Brokerage Co*. (2006) 143 Cal.App.4th 761, 771. "California law favors arbitration as a dispute resolution method. Consequently, a trial court may deny a party's contractual right to arbitration only when all of section 1281.2(c)'s conditions are satisfied. California courts have no inherent authority to deny arbitration simply because it would be more efficient to litigate the claims in court." *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 980.

Plaintiffs (Dr. Simanian and his professional corporation) purchased a dental practice from defendant Williams. Molinelli acted as the broker on the deal. Simanian says Molinelli was a dual broker; defendants say he represented only the seller. (Northern California Practice Sales is, according to the complaint, not an independent defendant but a dba for Molinelli.) The last party is Patterson, the original supplier of at least some of the dental equipment in the practice. Simanian asserts a number of causes of action, but the basic gravamen of the case is that Williams and Molinelli made serious representations and nondisclosures about the fiscal and physical condition of the practice being sold. Patterson was not directly involved in the sale, but allegedly inspected the equipment the day before closing and negligently represented its condition to Simanian.

The arbitration provision in this case is found only in the sales contract between Simanian and Williams. Simanian does not dispute that the provision is valid, and that it directly calls for arbitration of the entire bilateral dispute between Simanian and Williams. (See Line 10.)

This motion, however, is brought by Molinelli, who was not a party to the sales agreement. Simanian therefore argues that there is no agreement to arbitrate between himself and Molinelli, and thus Molinelli cannot compel Simanian to arbitrate his dispute with Molinelli. Molinelli counters with several theories, but the Court need reach only his lead argument – that a nonsignatory defendant who is alleged to have acted as an agent for a signatory defendant may

invoke the arbitration provision found in the contract between the signatory plaintiff and the signatory defendant.

> There are, however, "exceptions to the general rule that a nonsignatory … cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement." (*Westra, supra*, 129 Cal.App.4th at p. 765.) One such exception provides that when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto. (E.g., *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418; *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1520; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1210. [¶] [A] plaintiff's allegations of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even though the agents are not parties to the agreement.

Thomas v. Westlake (2012) 204 Cal.App.4th 605, 614-14.

Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc. (2005) 129 Cal.App.4th 759, 765, cited by Molinelli, is similar to this case. In that case the purchaser of real estate sued the seller and a real estate broker/agent, Marcus & Millichap, who had acted for both principals, for fraud in connection with the sale. The purchase agreement contained an arbitration clause that expressly provided the buyer, seller and broker/agent all agreed any controversies arising from the agreement or the contemplated real estate transaction would be resolved by arbitration. Although the arbitration provision was followed by lines for the seller and buyer to initial to indicate their consent, there was no similar line for the broker/agent, who also did not sign the purchase agreement itself. When the seller and the broker/agent petitioned to compel arbitration of the fraud claims against them, the trial court granted the petition as to the seller but denied the petition as to the broker/agent. *Id*. at 762. The court of appeal reversed, holding the broker/agent, even though not a party to the purchase agreement, was entitled to arbitrate the claims against it: "The language of the purchase agreement, as well as the arbitration provision itself, clearly states that the Westras [(buyers)], MM [(Marcus & Millichap, the broker/agent)], and Skyline [(seller)] agreed to arbitrate disputes involving the subject matter of the purchase agreement…. This language was thus binding on MM as well as the Westras, and MM as an agent is entitled to enforce the arbitration agreement, to which the Westras and Skyline had agreed." *Id*. at 766.

Simanian points out that *Westra* included a fact not found here, namely that even though the broker was not a party to the arbitration agreement, the arbitration agreement expressly included disputes with the broker. Thus, it could be said that even if the broker did not agree to arbitrate disputes between the broker and the buyer, the buyer did so agree. That is true of *Westra*, but it does not explain such other cases as *Thomas* and the other cases it cites.

Here, the language of the purchase agreement contemplates arbitration of "any dispute that arises between [the parties] concerning this Agreement or its terms, interpretation or

enforcement." Purchase Agreement § 22.1. Although the parties disagree as to whether Molinelli was an agent for Simanian, they agree that Molinelli was an agent for Williams. Moreover, while Simanian's causes of action assert duties running directly from Molinelli to Simanian, Molinelli's alleged misdeeds were clearly committed in the course of Molinelli's performance as Williams's agent. In vernacular terms, the case against Molinelli is that he was in cahoots with Williams's alleged misrepresentations and nondisclosures. Under *Thomas*, *Westra*, and *Dryer*, that entitles Molinelli to rely on and enforce the arbitration provision in the sales agreement.

The Court is not as strongly persuaded by Molinelli's other theories (equitable estoppel and the LOI), but it need not reach them.

That leaves the question of how much of the case should be sent to arbitration – and more specifically, what to do with Patterson. All other parties, it appears, were hoping that Patterson would agree to join the arbitration. Patterson has declined to do so, however, and no one contends that it can be required to arbitrate.

Simanian argues that arbitration should be denied under Code of Civil Procedure § 1281.2(c), which allows the Court to deny a motion to compel arbitration whenever a party to the arbitration agreement is also a party to litigation with a third party that (1) arises out of the same transaction or series of related transactions, and (2) presents a possibility of conflicting rulings on a common issue of law or fact. That, however, strongly overstates the alleged involvement of Patterson, and the relation of the claims against Patterson to the claims against the other defendants.

The only cause of action pleaded against Patterson is the count for negligent misrepresentation. That count, however, relies on two separate sets of alleged representations. As against Williams and Molinelli, Simanian alleges that "Defendants represented to Plaintiffs that numerous facts were true, as described herein, including but not limited to the quality of the Practice, the financial condition of the Practice, and the condition of the Practice's equipment." Complaint at ¶ 119. That is the same set of alleged misrepresentations underlying Simanian's other causes of action, such as intentional fraud. The claim against Patterson is more limited. Simanian alleges that "Brokers and Sellers arranged for Elizabeth Dygert ('Dygert'), an employee of Patterson, to inspect the Practice's dental equipment on Plaintiffs' behalf prior to the close of escrow. … During the walkthrough, Dygert represented to Plaintiffs that all of the equipment in the Practice was operational and that Plaintiffs would not need to replace any equipment for at least one year. Dygert's representations were false." Complaint at ¶ 5.

The only common factual issue found in both the claims against Williams and Molinelli, and the claim against Patterson, is the actual condition of the equipment. The representations as to the condition of the equipment, however, are separate and not necessarily identical. Patterson is not accused of endorsing, repeating, or otherwise participating in the alleged representations of Williams and Molinelli as to the equipment. Not only were Patterson's alleged representations separately made, but without more detail we cannot know whether they were even identical in content as to the condition of the equipment. Thus, depending on how those facts develop, it is

conceivable that one set of representations may be found to be false while the other set is found to be true, or at least not negligently made.

The Court acknowledges the possibility of a conflicting ruling by an arbitrator with respect to Plaintiffs' negligent misrepresentation claim. Given the possibility of inconsistent rulings, "'[w]hat the trial court chooses to do in this situation is a matter of its discretion, guided largely by the extent to which the possibility of inconsistent rulings may be avoided.'" *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 981. "The trial court is not limited to merely denying arbitration." *Ibid*.

Under these circumstances, the Court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding. Code of Civil Procedure § 1281.2.

Here, in its discretion, the Court finds that staying the litigation against Patterson pending the outcome of the arbitration action to be the appropriate course. Therefore, it orders Simanian, Williams, and Molinelli to arbitration and stays the litigation against Patterson until the arbitration is complete. (Patterson, however, may consider changing its views as to arbitration, in light of such factors as that it faces being shut out of depositions and other discovery that might be of interest to it.)

The CMC now set for December 5 is vacated. The case is set for CMC on November 4, 2019, at8:30 a.m.

10. TIME: 9:00 CASE#: MSC18-01439
CASE NAME: SIMANIAN VS. WILLIAMS
HEARING ON MOTION TO/FOR COMPEL ARBITRATION FILED BY ROBIN WILLIAMS, ROBIN D. WILLIAMS, DMD, INC.,
**** TENTATIVE RULING: ****

See Line 9 for background information. This is the motion of defendant Williams to compel arbitration. It is **granted** to the same extent as is stated in Line 9.

Plaintiff Simanian acknowledges that he has a valid arbitration agreement with Williams. He raises only two arguments against this motion. The first is hypertechnical. Williams did not separately brief his motion, but simply incorporated by reference the arguments and supporting papers filed by Molinelli. SImanian characterizes this as a motion made with no evidence, citation, or argument, which should be denied for that reason. Uh-uh.

Beyond that, Simanian again argues for denial on the basis of Code of Civil Procedure § 1281.2(c). His lead argument is that because Molinelli can't compel arbitration, and the accusations against Molinelli are closely intertwined with the accusations against Williams, the Court should allow the entire case to proceed in litigation. There is an air in this of the tail wagging the dog, since Williams is clearly the lead villain in Simanian's narrative. But the whole issue is moot, as the Court is granting Molinelli's motion to compel arbitration in Line 9. That leaves only the issue of the non-arbitrable claim against Patterson, which is also addressed in Line 9.

Williams's request for judicial notice is denied as unnecessary. Further, the RJN and the Williams declaration do not comply with CRC 3.1110(f) and Local Rule 3.42 concerning tabbing of exhibits. Counsel is directed to review these rules and comply with them as to any future filings. Failure to do so may result in rejection or disregard of nonconforming papers.

11. TIME: 9:00 CASE#: MSC18-01439
CASE NAME: SIMANIAN VS. WILLIAMS
HEARING ON JOINDER IN MOTION TO COMPEL FILED BY DEF MOLINELLI (FILED 10-18-18 BY DEFENDANT WILLIAMS)
**** TENTATIVE RULING: ****

This is defendant Williams's "joinder" in Molinelli's motion to compel arbitration (Line 9). Given that Williams has filed his own motion to compel arbitration (Line 10), this "joinder" is meaningless.

12. TIME: 9:00 CASE#: MSC18-01969
CASE NAME: STARITA VS LEATHERS
HEARING ON MOTION TO/FOR EXPUNGE PENDENCY OF ACTION AND FOR ATTY FEES FILED BY KATRINA LEATHERS
**** TENTATIVE RULING: ****

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 11/09/18

Defendant's motion to expunge lis pendens is **granted**. Attorney fees are awarded in the amount of $3,000, payable by plaintiffs to counsel for defendant within 30 days.

Two housekeeping matters at the outset: First, plaintiffs filed a First Amended Complaint on October 25, as evidenced by a file-stamped copy provided with their opposition papers. No such pleading is found in the Court's physical file, however; it has apparently been delayed, mislaid, or misfiled by the clerk's office. Plaintiffs are requested to provide another physical copy. Second, plaintiffs' opposition papers do not comply with CRC 3.1110(f) and Local Rule 3.42 concerning tabbing of exhibits. Counsel is directed to review these rules and comply with them as to any future filings. Failure to do so may result in rejection or disregard of nonconforming papers.

Plaintiffs previously rented a unit within a house from defendant, in what everyone now agrees was an unlawful lease arrangement because of unpermitted conversion of a one-unit dwelling to three units. Defendant wishes to sell the house, and accordingly gave plaintiffs a 60-day move-out notice. After some initial resistance, plaintiffs did move out (a couple weeks earlier than required) and accepted a partial rent refund, albeit with perhaps a little grumbling.

About two months after their relocation, however, plaintiffs filed the present suit. Among other things, its prayer asks for specific performance of the rental agreement, under which (according to plaintiffs) they are entitled to continue occupying the premises through June of next year. They also filed and recorded a lis pendens.

Because that lis pendens poses a barrier to defendant's ability to sell the building, she moves to expunge it. Defendant argues that the "gravamen" of plaintiffs' complaint is simply for damages, not any right to possession of realty, and that in any event there is no authority for a lis pendens giving notice of a tenant's asserted right of occupation. Neither of those arguments is persuasive, at least not facially. Plaintiffs do pray for damages, but they also pray for specific performance, to wit, the right to resume occupancy of the premises through what plaintiffs argue is the lease term (through June 2019). And the Court sees no reason why a tenant, asserting a right to occupancy, should not give notice of that assertion of right to potential buyers. Consider the position of an innocent purchaser, who buys the unit only to find that there are ex-tenants out there asking a court to order that they can move back in. Conversely, consider the situation of the ex-tenants: Even if they have a perfectly valid claim for continued or resumed occupancy, they face the danger that the court will refuse to order it against an intervening innocent purchaser who had no notice of their claim.

The Court nevertheless finds that this lis pendens should be expunged. The Court finds that plaintiffs have not shown by a preponderance of the evidence that they are likely to prevail on the merits. Critically, the merits to be considered here are not the overall merits of plaintiffs' case, but specifically the merits of their claim to actual possession of the premises, for that is the only claim of which a lis pendens is designed to give notice. (Code of Civil Procedure § 405.32: "the probable validity of *the real property claim*".) Even if plaintiffs' claim for money damages turns out to be completely meritorious, there is no reason for a lis pendens (and no reason for the harm it causes to salability of the property) unless it is more likely than not that plaintiffs will succeed in obtaining actual possession of the property. They won't.

There are a number of sub-issues presented here, which the Court will discuss in due course. The factor directly dispositive of this motion, however, is easily identified. Everyone agrees that defendant's rental to plaintiffs of a part of this residence was illegal. Indeed, municipal authorities cited defendant for that violation, having been tipped off by a complaint from plaintiffs. How, then, could it be thought that the Court would issue a decree of specific performance allowing the plaintiffs, and requiring the defendant, to resume an unlawful tenancy? That's not going to happen; it could not lawfully happen.

(Defendant accuses plaintiffs of trying to solve that problem by asserting their right to occupy the entire premises. Plaintiffs' opposition expressly disclaims any such intent, calling this a straw-man argument. So if plaintiffs are asserting a right to occupy only one of three units on the premises, and the existence of three separate units is illegal, how could the specific performance remedy be anything but illegal?)

That leaves the subject of attorney fees. Code of Civil Procedure § 405.38 says:

> The court shall direct that the party prevailing on [an expungement] motion be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust.

The Court agrees with plaintiffs that the proper meaning of the lease term at issue here is something on which parties could reasonably disagree. Indeed, that's putting it kindly: The provision is not merely ambiguous or incomplete, it is flat-out internally contradictory. The provision in question reads:

> LEASE TERM: This agreement shall be a year-long arrangement (tenancy-at-will) beginning on:
> June 1st 2017, with the option to renew lease for a second year. If the Tenant(s) remains on the Premises longer than one (1) year, by law, the Landlord or Tenant(s) must provide at least sixty (60) days' notice to one another to cancel this Agreement.

Tenancy at will is inherently inconsistent with a stated duration such as one year. Moreover, the provision for an option for a second year is inconsistent not only with tenancy at will but with the last sentence, which seems to contemplate that either party can cancel the lease with 60 days' notice at any time during the second year. The only parol evidence offered on the intended meaning of this provision comes from plaintiffs, and it supports their argument that once they exercised their option by staying on past a year, they had a binding lease agreement through the following June. The Court is not now deciding the proper construction, but it does find that plaintiffs have at least a good-faith contention that they had a right to stay on for another year.

There are other factors, however, that cast serious doubt on the good faith of plaintiffs' prayer for specific performance.

- Plaintiffs were perfectly aware of the problem of the illegality of the lease to them; they themselves brought that illegality to the city's attention. They (and in particular their

counsel) cannot have reasonably expected to get a court order allowing resumption of that illegal lease.

- Although plaintiffs were not happy about the move-out notice, they did voluntarily move out in August. Moreover, they accepted the half-month rent refund, and to all appearances they treated the matter as closed.
- Plaintiffs complain at some length that the premises were not habitable. Why, then, would they be so eager to move back in? At best they could expect residency for a period of weeks – probably months – during which substantial repairs were being conducted. And then, as they concede, they would be entitled to occupy the repaired premises only until next June, when they would have to move once more. Given that plaintiffs have not sought any immediate move-back order, it could well be that the repairs would take up the entire period of the re-occupancy.
- To reoccupy the premises would mean that plaintiffs would have to uproot their family and move all their belongings three times in a single year – first last August, again upon the Court's order allowing them to move back in, and a third time at the expiration of the two-year lease.
- Plaintiffs' declarations are pointedly silent about where they are living now. They do not say that the new place they moved to in August is unacceptable on any ground – location, condition, size, rent, etc. – nor that it is less preferable in any respect than the place they moved out of. That is the absence of evidence, not evidence; but it is the proverbial dog in the nighttime. Further, they moved into the new place two weeks before they had to move out of the old place, rather than continue to look for a better option. It again suggests that plaintiffs are not in earnest or good faith in pretending that they want a court order allowing them to move back to the original premises.
- Why, then, do plaintiffs include that prayer in their complaint and FAC? Plaintiffs knew from the start that defendant wanted them to move out so she could sell the property. They also knew – either at the start, or (more likely) after consulting an attorney later – that they were in a position to throw a monkey wrench into that sale by praying for specific performance and recording a lis pendens. That in turn would magnify their leverage for a money settlement.

For these reasons, the Court finds that plaintiffs' recording of a lis pendens was not done in good faith and lacked substantial justification.

As to amount, however, the statute authorizes award of only "reasonable attorney's fees and costs *of making or opposing the motion*". That could be stretched in some circumstances to include pre-motion discussions, but the Court does not find it appropriate to do so here. Defendant's declaration does not segregate the fees incurred in making the motion, as opposed to trying to talk plaintiffs out of the need for one. The Court finds $3,000 to be a reasonable fee award in these circumstances.

13. TIME: 9:00 CASE#: MSL17-02418
CASE NAME: AMERICAN EXPRESS VS DIMINO
HEARING ON MOTION TO/FOR ORDER VACATING DISMISSAL & ENTERING JUDGMENT FILED BY AMERICAN EXPRESS BANK, FSB,
**** TENTATIVE RULING: ****

Plaintiff's unopposed motion for entry of judgment pursuant to Code of Civil Procedure § 664.6 is **granted**. Judgment will be entered in plaintiff's favor in the amount of $2,011.06, plus $310 in costs.

14. TIME: 9:00 CASE#: MSL17-04158
CASE NAME: DISCOVER BANK VS BETTY J DELOZ
HEARING ON MOTION FOR SUMMARY JUDGMENT FILED BY DISCOVER BANK
**** TENTATIVE RULING: ****

Plaintiff's unopposed motion for summary judgment is **granted**. Judgment will be entered in plaintiff's favor in the amount of $11,438.45, plus $938 in costs.

15. TIME: 9:00 CASE#: MSL18-01299
CASE NAME: VELOCITY VS ROGERS
HEARING ON MOTION TO/FOR: ORDER IN REQUEST FOR ADMISSIONS BE DEEMED ADMITTED, FILED BY VELOCITY INVESTMENTS, LLC
**** TENTATIVE RULING: ****

The motion to deem matters admitted is **denied**. The motion is untimely. While it is true that such a motion is not subject to a 45-day deadline after responses are due, it is still subject to a pretrial cutoff. All "motions concerning discovery" must be presented for hearing by no later than 15 days before the date of trial. Code of Civil Procedure § 2024.020(a). Trial in this matter is set for November 16.

16. TIME: 10:00 CASE#: MSC14-01460
CASE NAME: SHELL WESTERN VS WIGLEY
HEARING ON AMENDED APP FOR ORDER OF SALE OF DWELLING (FILED 5/11/18 BY PLAINTIFF)
**** TENTATIVE RULING: ****

NOTE that the hearing on this matter is at 10:00 a.m., not 9:00.

The present motion for an order for sale is **denied**, but without prejudice to other ways in which Shell Western may be able to proceed to realize collectible value from Larry's half-interest ownership of the Ulfinian property.

Because this motion centers on the distinction between Larry Wigley and his wife Brookann Wigley, the Court will use first names for clarity. It intends no disrespect.

Plaintiff Shell Western holds a judgment in this case against defendant Larry Wigley. Shell seeks an order for the sale of Larry's home at 732 Ulfinian Way, Martinez, for purposes of collecting the judgment. Larry has not opposed the motion. Larry's wife Brookann, however, has opposed the motion on the ground that she owns a separate-property interest in one-half of the equity in the residence.

This motion first came up for hearing on June 15. The Court's tentative ruling then expressed some doubts about whether Brookann had adequately documented her separate-property claim. But even assuming that she had such a claim, the tentative reasoned, there was still sufficient equity in the property to make Larry's half worth something in the order of $65,000 to $115,000, to which Shell Western would be entitled. At hearing, however, the Court allowed for further documentation and briefing. Brookann has made such further filings. Shell Western has not.

The Court is now satisfied with Brookann's proof that her half-interest in the Ulfinian property is her separate property. She establishes that she and Larry, before their marriage, together purchased a prior residence on Plaza Drive. There is no argument that that was community property then, as the owners were not married at the time. Nor is there any basis for suggesting that it was transmuted into community property at any point. There was one intervening grant deed, but the grant deed on its face states that it was "name change only", to reflect Brookann's married name.

On April 20, 1987, the Wigleys sold the Plaza Drive property and bought the Ulfinian property. They took title as joint tenants. The form in which they took title is not controlling, as the formal ownership of an asset as a matter of realty law may or may not conform to whether it is community property or separate property as a matter of family law. For example, it is not uncommon for an asset to be deemed community property in a family-law case even though it is held in only one spouse's name, depending on the timing of acquisition and the source of assets used to acquire it. Here, however, Shell Western does not contest Brookann's contention that her interest in the Ulfinian property is traceable to her separate-property interest in the Plaza Drive property. Brookann's showing on this point is far from complete. For one thing, her declaration does not actually say that the sale proceeds from Plaza were used to purchase Ulfinian. Given that the two transactions occurred on the same day, however, that is certainly a reasonable inference, and Shell Western does not suggest otherwise. Of greater substantive concern, she also does not give figures for the sale and purchase prices, nor account for what other sources might have been drawn upon to purchase the Ulfinian property (for example, if the Wigleys also used cash from some other community-property source). Nor does she address the extent, if any, to which community assets (such as income from their respective jobs) was used to pay the mortgage and other expenses between 1987 and now. Shell Western, however, has had plentiful opportunity to take discovery on these topics and to present contrary evidence and briefing. In the absence of any objection, contrary evidence, or counterargument from Shell Western, the Court accepts Brookann's contention.

All this, however, does not undo the arithmetic in the Court's prior tentative, to the effect that after allowing for the existing lien, the homestead exemption, and Brookann's half, the value of Larry's half remains substantial.

Brookann meets that point with the argument that because only half of the ownership of the house is available to Shell Western, and the market will severely discount the value of only a half-interest, it cannot be shown that there is sufficient saleable value in Larry's half-interest. The point about the market discount is asserted only cursorily and without evidence, but it is also only common sense – and it is uncontested. That means that there is no realistic prospect for Shell Western to be able to sell Larry's half-interest on the open market and make any reasonable recovery. That is sufficient to defeat the present motion, in that the motion seeks only an order for sale of the entire residence. Even if the present motion were amended to seek an order for sale of only Larry's half-ownership, the motion would have to be denied because there is no prospect that such a sale would yield any actual recovery for Shell Western.

That is not necessarily the end of this issue, because there may be other ways that Shell Western might decide to proceed – such as simply levying on Larry's half-ownership interest as such, and then suing to partition and sell the property once it is owned by Brookann and Shell Western as joint tenants. No such relief is sought now, however, so the Court decides nothing about whether that could or could not be done.

17. TIME: 9:00 CASE#: MSC17-00725
CASE NAME: INSALACO VS. CONTRA COSTA COUNTY
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
FILED BY HOPE LUTHERAN CHURCH OF WEST CONTRA COSTA
*** TENTATIVE RULING: ***

These motions are continued to November 16, 2018 at 9:00 a.m.

18. TIME: 9:00 CASE#: MSC17-00725
CASE NAME: INSALACO VS. CONTRA COSTA COUNTY
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
FILED BY HOPE LUTHERAN CHURCH OF WEST CONTRA COSTA
*** TENTATIVE RULING: ***

These motions are continued to November 16, 2018 at 9:00 a.m.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 11/09/18

19. TIME: 9:00 CASE#: MSC17-00725
CASE NAME: INSALACO VS. CONTRA COSTA COUNTY
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
FILED BY HOPE LUTHERAN CHURCH OF WEST CONTRA COSTA
*** TENTATIVE RULING: ***

These motions are continued to November 16, 2018 at 9:00 a.m.

20. TIME: 9:00 CASE#: MSC17-00725
CASE NAME: INSALACO VS. CONTRA COSTA COUNTY
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
FILED BY HOPE LUTHERAN CHURCH OF WEST CONTRA COSTA
*** TENTATIVE RULING: ***

These motions are continued to November 16, 2018 at 9:00 a.m.