# CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 06/23/17

## 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 notification to the department of the request to argue and specification of issues to be argued.

### 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: 9:00 CASE#: MSC15-00469**
**CASE NAME: THICKER THAN WATER VS. SABHLOK**
**HEARING ON MOTION TO STRIKE OR TAX COSTS**
**FILED BY TIKI TOM'S USA, INC.**
**** TENTATIVE RULING: ****

Defendant's memorandum of costs is premature because no judgment has been entered in this case. The memorandum of costs is stricken, without prejudice to filing at a proper time.

**2. TIME: 9:00 CASE#: MSC16-00459**
**CASE NAME: TRADEMARK HOMES VS. ALLARD**
**HEARING ON DEMURRER TO 1st Amended CROSS-COMPLAINT of ALLARD**
**FILED BY TRADEMARK HOMES LTD.**
**** TENTATIVE RULING: ****

Cross-Defendant Trademark Homes, Ltd. demurs to the First Amended Cross-Complaint (FACC) filed by Michael and Wendy Allard and their family trust. The demurrer is **sustained in part without leave to amend, and overruled in part.**

Factual Background

Cross Complainant Michael David Allard, as trustee of the Michael David Allard Trust, is the owner of the real property at 2692 Caballo Ranchero, Diablo. FACC ¶ 2. Michael David Allard and Wendy Allard entered into a contract with Trademark Homes to perform the construction and supervise all work for the construction of a single-family residence as well as several

accessory buildings. FACC ¶¶ 20, 21. The total November 2013 Trademark Contract price, inclusive of a $280,000 builder's fee, was $3,695,747.17. FACC ¶ 22. Development and construction of the Property began in or around November 2013 and continued into 2015, with a Certificate of Occupancy issuing on or around July 23, 2015. *Id.*

On March 9, 2016 Trademark Homes filed the initial complaint in this action alleging breach of contract, foreclosure of mechanic's lien, and quantum meruit causes of action. The initial complaint was amended on September 20, 2016 deleting the cause of action for foreclosure of mechanic's lien and replacing it with a cause of action for enforcement of the mechanic's lien release bond.

Cross-Complainants filed the First Amended Cross-Complaint on February 28, 2017. Cross-Complainants allege that Cross-Defendants failed to properly perform their work under the relevant contracts, which has led to "numerous and substantial defects and deficiencies at the Subject Property." FACC ¶ 36. They further allege that these defects "have caused consequential damage to the Subject Property, including but not limited to cracked wall finishes, failing structural elements, cracked and spalling hardscapes, and other unknown consequential damages." FACC ¶ 37.

The FACC asserts causes of action for (1) breach of contract; (2) negligence; (3) breach of express warranty; (4) slander of title to real estate for wrongful recording of mechanics lien; (5) injury to property for wrongful recording of mechanics lien; (6) recovery on Trademark's license bond; and (7) declaratory relief.

Right to Repair Act. Trademark first demurs to the entire FACC on the ground that Cross-Complainants failed to comply with the Right to Repair Act, Civ. Code §§ 895 *et seq.* Leaving aside whether demurrer is an appropriate procedural remedy for such a violation, however, the Court is today denying Trademark's Motion to Stay based on the same statutory ground (line 3 below). The Court holds that the Act does not apply to the FACC. That equally disposes of this contention as a ground for demurrer. The demurrer is **overruled** insofar as it relies on this contention.

Trademark also demurs to several of the specific causes of action pleaded against it in the FACC.

First Cause of Action (Breach of Contract). The demurrer to this cause of action is **overruled.**

Trademark's demurrer to this cause of action rests on asserted uncertainty. "[D]emurrers for uncertainty are disfavored. We strictly construe such demurrers because ambiguities can reasonably be clarified under modern rules of discovery." *Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.

The contract cause of action is pleaded collectively against all defendants in the case, without entirely breaking out which details of its allegations may apply to which defendant or defendants. Trademark's demurrer basically rests on the argument that Cross-Complainants are obligated to break down this generality and plead a separate contract claim against Trademark alone, including only those detailed allegations that apply specifically to Trademark. Trademark does not contend that anything is fatally *missing* from this cause of action. That is,

Trademark implicitly concedes that the cause of action contains allegations that, if stripped out and pleaded separately, would state a claim against it for breach of contract. But, Trademark argues, the cause of action is uncertain because Trademark cannot tell which particular allegations are directed at itself.

Trademark is alleged to have been the general contractor on this construction project. FACC ¶ 24 alleges: "In addition to undertaking the construction of the improvements on the Subject Property, Trademark was also responsible for hiring and overseeing other contractors or subcontractors. Trademark had the obligation to make sure that all construction and development was undertaken and completed pursuant to the plans and specifications, the November 2013 Trademark Contract, applicable building codes, reasonable industry standards, and to complete all construction and development in a timely and cost-efficient manner."

The demurrer focuses specifically on the apparent intermixing of construction defects and design defects; Trademark asserts that it had no contractual responsibility for the latter. Assuming that to be true, however, the pleading is not demurrable because only part of what is alleged is properly actionable against the demurring defendant. Indeed, though Trademark purports to be unable to tell which allegations are directed at itself, the demurrer has no difficulty picking out particular design-related details that (Trademark says) are not its responsibility.

The demurrer thus runs squarely into the principle that a defendant cannot demur to only bits and pieces of an otherwise actionable cause of action. If (as Trademark argues) there are actionable construction defects intermingled with nonactionable design defects, that might render the latter surplusage as to this cause of action – but it does not make the cause of action demurrably defective. The demurrer is overruled.

Second Cause of Action (Negligence). The demurrer to this cause of action is **overruled.**

In the seminal case of *Aas v. Superior Court* (2000) 24 Cal.4th 627, the Supreme Court dealt comprehensively with the intersection of contract and warranty law on one hand, and the tort of negligence on the other, in the setting of construction defect litigation. The rule established in *Aas* is that a construction-defect plaintiff cannot resort to a negligence tort to recover entirely economic damages, such as the cost of repairing defects or the diminution in the value of the home resulting from defects. A negligence theory is available, however, when a construction defect has resulted in property damage. In this context, "property damage" need not be damage to some property entirely separate from the construction project itself (such as a fire hazard in one house causing burning of an adjacent building on the same lot). It may consist of damage to other parts of the same building (as when leaking plumbing causes damage to other parts of the house). It does not include, however, damage to the defective part or work in itself (such as the premature rusting of a sink).

Here, Cross-Complainants directly allege damage to other parts of the house beyond the parts alleged to be defective in themselves. "[T]he Project Defects have caused consequential damage to the Subject property, including but not limited to cracked wall finishes, failing structural elements, cracked and spalling hardscapes, and other unknown consequential

damages." FACC ¶ 41. That is the kind of property damage that *Aas* holds may support a negligence claim.

Third Cause of Action (Breach of Express Warranty). The demurrer to this cause of action is **overruled.**

The demurrer to this cause of action, like that to the contract claim, rests only on asserted uncertainty. Trademark's opening brief asserted that there is no specific allegation as to what warranties it supposedly made and breached. After the opposition brief pointed out that the warranty allegations parroted warranty language directly from the parties' contract, Trademark retreated to asserting that the breaches are not sufficiently identified. The assertion is incorrect. For example, FACC ¶ 40 includes a long list of specific construction defects. If the FACC does not match up each asserted defect (*e.g.*, "improper interior plumbing issues", ¶ 40(h)) with a specific warranty on that precise subject (*e.g.*, a warranty concerning plumbing in particular), that is because the warranties themselves are broad and general, speaking to the entire construction project. It cannot be denied that at least some of the specifics alleged in ¶ 40 and elsewhere would, if true, violate the warranties alleged.

Fifth Cause of Action (Slander of Title). The demurrer to this cause of action is **sustained without leave to amend.**

This cause of action arises from Landmark's recording of a mechanic's lien. The FACC alleges that the lien was untimely and overstated in amount. The Court has previously held that the lien was timely. Whether it was overstated in amount depends on disputed facts.

Those facts will not be resolved in litigation on this tort cause of action, however, because the act of recording a mechanic's lien is completely privileged under Civ. Code § 47, and cannot form the basis for this tort claim. "[T]he filing of a claim of a mechanic's lien in conjunction with a judicial proceeding to enforce it is privileged within the meaning of Civil Code section 47, subdivision 2." *Frank Pisano & Assocs. v. Taggart* (1972) 29 Cal.App.3d 1, 25; and see *Swanson v. St. John's Regional Medical Center* (2002) 97 Cal.App.4th 245, 249 (hospital liens); *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830-32 (medical liens). Cross-Complainants attempt no argument to the contrary.

**3. TIME: 9:00 CASE#: MSC16-00459**
**CASE NAME: TRADEMARK HOMES VS. ALLARD**
**HEARING ON MOTION TO STAY PROCEEDINGS**
**FILED BY TRADEMARK HOMES LTD.**
**** TENTATIVE RULING: ****

Before the Court is a motion to stay proceedings filed by Cross-Defendant Trademark Homes Ltd. Cross-Defendant moves on the grounds that Cross-Complainants Michael and Wendy Allard failed to comply with the prelitigation procedures of the Right to Repair Act (Civ. Code §§ 895 *et seq.*; commonly and hereinafter referred to as "SB 800").

Factual Background

Cross Complainant Michael David Allard, as trustee of the Michael David Allard Trust, is the owner of the real property at 2692 Caballo Ranchero, Diablo. First Amended Cross Complaint ("FACC") at ¶ 2. Michael David Allard and Wendy Allard entered into a contract with Trademark Homes to perform the construction and supervise all work for the construction of a single-family residence as well as several accessory buildings. FACC at ¶¶ 20, 21. The total November 2013 Trademark Contract price, inclusive of a $280,000 builder's fee, was $3,695,747.17. FACC at ¶ 22. Development and construction of the Property began in or around November 2013 and continued into 2015, with a Certificate of Occupancy issuing on or around July 23, 2015. *Id.*

On March 9, 2016 Trademark Homes filed the initial complaint in this action alleging breach of contract, foreclosure of mechanic's lien, and quantum meruit causes of action. The initial complaint was amended on September 20, 2016 deleting the cause of action for foreclosure of mechanic's lien and replacing it with a cause of action for enforcement of the mechanic's lien release bond.

Cross-Complainants filed the First Amended Cross Complaint on February 28, 2017.

Cross-Complainants allege that Cross-Defendants failed to properly perform their work under the relevant contracts, which has led to "numerous and substantial defects and deficiencies at the Subject Property." FACC at ¶ 36. They further allege that these defects "have caused consequential damage to the Subject Property, including but not limited to cracked wall finishes, failing structural elements, cracked and spalling hardscapes, and other unknown consequential damages." FACC at ¶ 37.

The FACC states causes of action for (1) breach of contract; (2) negligence; (3) breach of express warranty; (4) slander of title to real estate for wrongful recording of mechanics lien; (5) injury to property for wrongful recording of mechanics lien; (6) recovery on Trademark's license bond; and (7) declaratory relief.

Analysis

Trademark Homes relies primarily on *Greystone Homes, Inc. v. Midtec, Inc*. for its argument that Cross-Complainants must pursue SB 800 pre-litigation procedures "before filing an action against any party alleged to have contributed to a violation of the standard." *Greystone,* 168 Cal.App.4th at 1211. The plaintiff in *Greystone* alleged that various homeowners had made claims against it for damage caused by plumbing fittings that the defendant had manufactured, and that the fittings were defective within the meaning of the Act.

Here, the Cross-Complainants have not pleaded a cause of action for violation of the standards for residential construction set forth in Civil Code Section 896. Instead, they allege that they have suffered actual damage to their home as a result of Trademark Homes' wrongful conduct. See e.g. FACC at ¶¶ 46, 47.

Both parties' briefs take for granted that the claims in the FACC are subject to SB 800. That, however, is not so. The prelitigation procedures required in Chapter 4 of SB 800, starting with Civ. Code § 910, apply more narrowly. Section 910 requires: "Prior to filing an action against any party *alleged to have contributed to a violation of the standards set forth in Chapter 2* (commencing with Section 896), the claimant shall initiate the following prelitigation procedures:…" (emphasis added). The unambiguous meaning of "alleged to have contributed

to a violation of the standards set forth in Chapter 2" is that to be within the ambit of § 910, an action must allege that a defendant or defendants violated the standards for residential construction set forth in Chapter 2 of SB 800 (*i.e.*, the standards enumerated in Civ. Code § 896). By its plain language, then, the statute applies only to actions alleging claims under SB 800 itself – and specifically under Chapter 2 of that act. No such cause of action is alleged in the FACC.

Neither party has cited any authority, and the Court is not aware of any, that would require a claimant to comply with SB 800's prelitigation procedures before asserting solely common law causes of action.

Here, Cross-Complainants do not plead a cause of action for violation(s) of the standards for residential construction set forth in Civ. Code § 896, and they do not allege that any defendant violated any of those standards. Rather, they allege that they have suffered actual damage to their homes as a result of Trademark Home's wrongful and negligent conduct. The various deficiencies alleged in the FACC may or may not also amount to violations of the standards in § 896 – but Cross-Complainants do not allege so, and they assert no such cause of action.

Cross-Complainants do not plead a cause of action for violations of the standards for residential construction found in SB 800. Under the plain and unambiguous language of SB 800, it follows that Cross-Complainants need not comply with the SB 800 prelitigation procedures. As a consequence, the Motion is denied.

**4. TIME: 9:00 CASE#: MSC16-00459**
**CASE NAME: TRADEMARK HOMES VS. ALLARD**
**FURTHER CASE MANAGEMENT CONFERENCE**
**** TENTATIVE RULING: ****

Counsel to appear. CourtCall is acceptable.

**5. TIME: 9:00 CASE#: MSC16-00821**
**CASE NAME: PRUITT VS. KAISER**
**HEARING ON MOTION FOR SUMMARY ADJUDICATION**
**FILED BY ALLEN WAYNE PRUITT**
**** TENTATIVE RULING: ****

Plaintiff Allen Wayne Pruitt's motion for summary adjudication is **granted in part and continued in part**.

Plaintiff's motion is continued with respect to the seventh affirmative defense concerning the negligence of others. Defendant Kaiser Foundation Hospitals-Antioch ("Kaiser") has submitted an offer of proof that additional discovery may reveal the negligence of another, specifically, Stonebrook Healthcare Center ("Stonebrook"). Plaintiff was transferred to Stonebrook, an

alleged rehabilitation center, after he was released from Kaiser. The discovery referee in this case only recently denied Plaintiff's motion to compel further responses concerning the seventh affirmative defense pending additional discovery by Kaiser. In this motion, Kaiser has set out with specificity what additional discovery it contends to conduct to prove the seventh affirmative defense, *that is*, obtaining Stonebrook's medical records concerning Plaintiff and deposing the initial assessment nurse and/or custodian of records. See Tang Decl., ¶¶ 9, 10, 11. Although Kaiser does not invoke the provision expressly, this is in the nature of a request for time to engage in further discovery pursuant to Code of Civil Procedure § 437c(h). Accordingly, this portion of the present motion is continued to December 15, 2017 pursuant to that statute. (Counsel should feel free to agree to a different date if that date is inconvenient.)

Plaintiff's motion for summary adjudication of the fifteenth and sixteenth affirmative defenses regarding ERISA and Medicare is granted. Unlike as to the seventh affirmative defense, Kaiser has neither adduced any facts, nor explained any legal theory, suggesting how the claims in this case might be preempted as these affirmative defenses suggest. While the discovery order permitted additional time for Kaiser to do discovery on these two affirmative defenses, Kaiser has not used the seven months since Plaintiff served his initial discovery to take any additional discovery on these defenses or even make an offer of proof to this Court that they can be substantiated or a triable issue of fact created. A continuance under § 437c(h) requires that there be "reasons stated". It is inappropriate when the non-moving party can suggest no way in which he will be better able to respond if given more time.

**6. TIME: 9:00 CASE#: MSC16-01070**
**CASE NAME: GREIF VS. HARLESS**
**HEARING ON MOTION TO BE RELIEVED AS COUNSEL**
**FILED BY COUNSEL FOR BECKY GREIF**
**** TENTATIVE RULING: ****

The motion of the Law Offices of Richard W. Meier to be relieved as counsel is **granted.**

**7. TIME: 9:00 CASE#: MSC16-01419**
**CASE NAME: RIVERA VS. GELUARDI**
**HEARING ON MOTION TO SET ASIDE DEFAULT**
**FILED BY JOHN GELUARDI**
**** TENTATIVE RULING: ****

The motion is granted. Defendant is to file his answer within 14 days.

**8. TIME: 9:00 CASE#: MSC16-01480**
**CASE NAME: NI VS. SEENO ENTERPRISES**
**HEARING ON MOTION FOR LEAVE TO FILE 2nd Amended COMPLAINT**
**FILED BY LIPING NI, SHARON LI, JASON LI**
**** TENTATIVE RULING: ****

The motion for leave to file a Second Amended Complaint is **granted**. Plaintiffs shall file the Second Amended Complaint on or before July 7, 2017.

Plaintiffs Liping Ni, Sharon Li, and Jason Li seek leave to file a second amended complaint. Defendant Northpoint Security Services, Inc. opposes the motion.

Code of Civil Procedure § 473(a)(1) gives the Court discretion to permit a party to amend its pleadings. Courts exercise this discretion liberally in favor of amendment to permit the resolution of all disputed matters in a single proceeding, up to and including trial. (*See, e.g., Lincoln Prop. Co., N.C., Inc. v. Travelers Indem. Co.* (2006) 137 Cal.App.4th 905, 916; *Mesler v. Bragg Mgmt. Co*. (1985) 39 Cal.3d 290, 296-297.)

The Court finds no delay or other prejudice warranting a denial of leave here. First, this matter has not been set for trial. (Contrast *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-87 [amendment proposed on eve of trial giving defendant insufficient time to conduct discovery to oppose the claim]; *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345 [amendment not sought until after trial readiness conference].)

Second, there is insubstantial prejudice to Northpoint. Though it was not named in the First Amended Complaint (which plaintiffs claim was in error), Northpoint was named in the original complaint under a Doe amendment and has actively participated in discovery. (See Declaration of Nicole Jones, Exh. H, I [written discovery propounded by Northpoint, and responses thereto].) Merely being named as a defendant is not sufficient prejudice in any event. (See *Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 557 ["…it seems unreasonable to deny a party the right to amend where the only apparent hardship to the defendants is that they will have to defend"].)

With regard to timeliness, Judge Spanos struck the punitive damages claims from the original form complaint, with leave to amend, on February 3, 2017. Plaintiffs filed the First Amended Complaint on February 14, 2017 (February 13, 2017, being a court holiday), but they claim to have inadvertently omitted certain allegations. Counsel met and conferred over further amendment on February 22, 2017. (Jones Decl., Exh. E.) On March 16, 2017, Judge Spanos granted an *ex parte* application allowing plaintiffs to file the Second Amended Complaint – the same one as here – which included the inadvertently-omitted items as well as new facts concerning crime statistics and a new claim for willful misconduct. Northpoint's counsel then wrote Judge Spanos, suggesting that plaintiffs' counsel may have misadvised him of defendants' position – they opposed granting the motion for leave to amend, though they would have agreed to an order shortening time to file a noticed motion for leave. (See Jones Decl., Exh. E and exhibits thereto [email chain among counsel].) But the record does not indicate that either defendant appeared at the *ex parte* hearing to advance its position. Judge Spanos thereafter struck the Second Amended Complaint, requiring plaintiffs to file this noticed motion.

In sum, plaintiffs filed an amended complaint on time, met and conferred over further amendment roughly eight days later, and approximately three weeks after that plaintiffs noticed the ex parte hearing when they could not obtain a stipulation. These facts do not show a delay so prejudicial as to justify denying the motion.

Finally, Northpoint argues that plaintiffs cannot and do not plead facts sufficient to state a punitive damages claim. But rather than deny amendment on that basis, the "better course of action" is "to allow [plaintiffs] to amend the complaint and then let the parties test its legal sufficiency in other appropriate proceedings." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760, citing *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048; see also Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 6:644 ["Ordinarily, the judge will *not* consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. Grounds for demurrer or motion to strike are premature. After leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading."].)

**9. TIME: 9:00 CASE#: MSC17-00459**
**CASE NAME: BUSENBARRICK VS. DEUTSCHE BANK**
**HEARING ON MOTION TO CONSOLIDATE WITH PS-16-1365 AND STAY UD ACTION FILED BY DIANA BUSENBARRICK**
**** TENTATIVE RULING: ****

This is case is on calendar for a motion by Busenbarrick to consolidate her suit against Deutsche Bank for wrongful foreclosure and related causes of action (No. C17-00459) with Deutsche Bank's unlawful detainer action against her (No. PS16-1365). No such motion, however, can be found in the files for either of those dockets.

There is a consolidation motion filed by the same attorney in two otherwise unrelated cases (Nos. PS17-0268 and MSC17-00717), where the title of the motion document incorrectly recites the present two cases as the ones to be consolidated, though the rest of the caption and the body of the motion correctly specify the actions at issue. That motion was denied by Judge Craddick on June 14.

In any event, the minutes of the unlawful detainer action against Ms. Busenbarrick reflect that the court (Commissioner Richards) has already denied her motion to consolidate, conducted trial, and entered judgment in favor of Deutsche Bank against Ms. Busenbarrick. Accordingly, if any motion was indeed filed in these cases, it is mooted by the completion of one of the two cases.

**10. TIME: 9:00 CASE#: MSL10-05908**
**CASE NAME: PORTOFINO VS. WALKER**
**HEARING ON MOTION FOR AMENDMENT OF JUDGMENT**
**FILED BY PORTOFINO**
**** TENTATIVE RULING: ****

The motion to amend judgment is **continued** to July 21, 2017. It does not appear from the file that the clerk has given notice to all affected parties (specifically the defendant), as required by Code of Civil Procedure § 116.310. The Court will give the required notice for the continued date.

**11. TIME: 9:00 CASE#: MSL15-01342**
**CASE NAME: BANK OF AMERICA VS. ITUA**
**HEARING ON MOTION FOR LEAVE TO FILE 1st Amended COMPLAINT**
**FILED BY BANK OF AMERICA, N.A.**
**** TENTATIVE RULING: ****

Plaintiff's unopposed motion for leave to file a first amended complaint is **granted.** The First Amended Complaint may be filed within 14 days.

Defendant may, if he wishes, file an answer to the First Amended Complaint within 30 days following service of it upon him, but he is not required to do so. If he does not, his answer filed June 18, 2015 will be deemed to be his answer to the First Amended Complaint.

**12. TIME: 9:00 CASE#: MSL15-01342**
**CASE NAME: BANK OF AMERICA VS. ITUA**
**FURTHER CASE MANAGEMENT CONFERENCE**
**** TENTATIVE RULING: ****

Counsel and defendant pro per to appear. CourtCall is acceptable.

**13. TIME: 9:00 CASE#: MSN15-0866**
**CASE NAME: RENTON VS. CONTRA COSTA COUNTY**
**HEARING ON MOTION FOR JUDGMENT ON THE PLEADINGS**
**FILED BY CONTRA COSTA COUNTY, STEVE VICTOR MONTOYA**
**** TENTATIVE RULING: ****

Before the Court is a motion for judgment on pleadings brought by respondents Contra Costa County and Montoya ("respondents"). Petitioner pleaded three causes of actions in her First Amended Petition ("FAP"), but dismissed two of them in March 2017. The only remaining cause of action is to compel the inspection of personnel records pursuant to California Labor Code

§ 1198.5. The motion avers that Labor Code § 1198.5 does not apply to petitioner because she is subject to a collective bargaining agreement as described in § 1198.5(q). In addition, Montoya is not a proper respondent. Petitioner filed an opposition late.

The motion is **denied** as to the County. It is **granted** as to Montoya.

To obtain a judgment on pleadings, respondent must show that the complaint does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 438(c)(1)(B)(ii). "All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered." (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

It is undisputed that Petitioner is an employee of Respondent County. Her FAP runs 73 pages not including attachments. Most of it consists of a lengthy and detailed recounting of all the disputes and complaints she has or has had with her employer and supervisors, ranging from being deprived of almost all work, to a flap about a missing lava lamp. Most of it is manifestly irrelevant to the cause of action she asserts, and to the relief she requests.

Wide-ranging though the FAP may be, however, the issued presented on this motion are very narrow and precise.

Labor Code § 1198.5 provides that every employee or former employee "has the right to inspect and receive a copy of the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee." It lays out some details about how such a right may be asserted and complied with, including a cause of action for noncompliance. However, subdivision (q) of the statute provides that the entire section does not apply to employees covered by certain collective bargaining agreements (CBAs):

> **(q)** This section does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for all of the following:
> **(1)** The wages, hours of work, and working conditions of employees.
> **(2)** A procedure for the inspection and copying of personnel records.
> **(3)** Premium wage rates for all overtime hours worked.
> **(4)** A regular rate of pay of not less than 30 percent more than the state minimum wage rate.

The County's motion rests on asserting that Petitioner is covered by just such a CBA, and hence the statute on which her entire FAP relies is one that by its own terms does not apply to her.

It is established that Petitioner was covered by a CBA during the time period in question (the Memorandum of Understanding, or MOU). She alleges so herself in the FAP, and that fact is also established by the documents presented by the County by way of requests for judicial notice (which is granted).

Not all CBAs, however, suffice to take an employee outside the coverage of § 1198.5. The CBA must comply with the four particular requirements stated in subdivision (q). Here, the MOU does not provide for "premium wage rates for all overtime hours worked" required by Labor Code § 1198.5(q)(3).

The County's motion seeks to satisfy this requirement by reference to § 41.9 of the MOU. That section, however, states that "Employees in, classifications are overtime exempt and are not eligible for overtime pay..". The same is provided in MOU § 6.6. There is an exception for

employees placed on the Overtime Exempt Exclusion List, as to whom overtime pay is authorized at time-and-a-half. But the Overtime Exempt Exclusion List is the exception, not the rule. It applies only to employees "assigned to a special or temporary project or task that requires persistent, excess work hours, without relief from their regular job duties. Overtime pay will not be authorized as a means to address normal staffing or operational issues." MOU § 41.9(A).

This is not a provision for "Premium wage rates for all overtime hours worked", as required by § 1198.5(q)(3). It is, at most, a provision for overtime wage rates to be paid to a few employees, on a temporary and ad hoc basis, for special and extraordinary circumstances. The rank and file unionized employees are expressly barred from overtime pay.

To be sure, a qualifying overtime provision in a CBA need not necessarily mimic the statutory overtime provisions that would apply in the absence of a CBA. In *Vranish v. Exxon Mobil* (2014) 223 Cal.App.4th 103, the court addressed an identically worded CBA exemption provision for the overtime statutes themselves, Labor Code § 514. The court held that a collective bargaining agreement could satisfy the requirement even if it defined overtime differently. However, different from *Vranish* where the agreement detailed overtime pay rate and displaced the statutory scheme, the MOU here *denies* overtime pay for almost all covered employees, almost all of the time.

The Court understands that some CBAs cover employees at a professional level who are paid by salary, not hourly wage, and that such employees are typically deemed exempt from overtime provisions. The Court intends no criticism of either employers or unions, nor of this CBA in particular, on that account. But the statutory language of § 1198.5(q)(3) remains applicable. CBAs not providing for overtime are not eligible for the exemption of § 1198.5(q), and employees covered by such CBAs have the rights and remedies provided for in § 1198.5.

However, Montoya is not a proper respondent. Petitioner was an employer to the County, not Montoya, evidenced by the MOU, as it is "between Contra Costa County and professional & technical engineers, Local 21." (RJN, Ex. A.) Section 1198.5 imposes a duty to allow access only on employers, not supervisors or managers personally. Petitioner is not entitled to seek relief from Montoya.

Therefore, Respondents' motion for judgment on pleadings is denied as to the County and granted as to Montoya. Petitioner is not granted leave to amend as to Montoya, as there is no possibility that he could be a proper respondent for Petitioner's claim.

**14. TIME: 9:00 CASE#: MSN15-0866**
**CASE NAME: RENTON VS. CONTRA COSTA COUNTY**
**FURTHER CASE MANAGEMENT CONFERENCE**
**** TENTATIVE RULING: ****

Counsel must appear. If Petitioner is not represented by an attorney, she must participate personally, not through her son or any other non-attorney purporting to speak on her behalf. CourtCall is acceptable for both counsel and Petitioner.

# CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 06/23/17

**15. TIME: 10:00 CASE#: MSN15-0862**
**CASE NAME: MATTER OF 429 SOUTH 24TH STREET**
**COURT TRIAL - SHORT CAUSE / 4.0 DAY(S)**
**** TENTATIVE RULING: ****

Counsel and parties to appear. A settlement mentor will be present.