

# CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 34

HEARING DATE: 02/03/17

## **GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 34**

### **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** what issues are 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) revised effective 1/1/15*) Note: In order to minimize the risk of miscommunication, Dept. 34 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. 34's Fax Number is: (925) 608-2693. Dept. 34's email address is: [dept34@contracosta.courts.ca.gov](mailto:dept34@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.

### **Courtesy Copies at the Hearing and CourtCall Appearances**

If, in compliance with the Local Rules, argument is requested to contest a tentative ruling, parties are to appear personally in court and have ready to present to the court courtesy copies of any papers they intend to refer to during the hearing. Parties may appear via CourtCall on contested matters but on a "listen-only" basis unless otherwise specifically approved by the court in advance of the hearing.

### **Submission of Orders After Hearing in Department 34 Cases**

The prevailing party must prepare an order after hearing in accordance with the requirements of 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#: MSC12-00505**

**CASE NAME: DECLAN WOODS VS. MARY NOLAN**

**HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

**FILED BY CHRISTOPHER BUTLER**

**\* TENTATIVE RULING: \***

Personal appearance in court required. Hearing continued to 10:30 a.m. It is the court's intention to announce its decision on the record at tomorrow's hearing.

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**2. TIME: 9:00 CASE#: MSC12-00505**

**CASE NAME: DECLAN WOODS VS. MARY NOLAN**

**HEARING ON MOTION FOR CROSS-COMPLAINT AGAINST MARY NOLAN  
FILED BY LOUISE WOODS**

**\* TENTATIVE RULING: \***

Personal appearance in court required. Hearing continued to 10:30 a.m. It is the court's intention to announce its decision on the record at tomorrow's hearing.

**3. TIME: 9:00 CASE#: MSC12-00505**

**CASE NAME: DECLAN WOODS VS. MARY NOLAN**

**HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT  
FILED BY LOUISE WOODS**

**\* TENTATIVE RULING: \***

Personal appearance in court required. Hearing continued to 10:30 a.m. It is the court's intention to announce its decision on the record at tomorrow's hearing.

**4. TIME: 9:00 CASE#: MSC12-00505**

**CASE NAME: DECLAN WOODS VS. MARY NOLAN**

**HEARING ON MOTION FOR NEW TRIAL  
FILED BY LOUISE WOODS**

**\* TENTATIVE RULING: \***

Personal appearance in court required. Hearing continued to 10:30 a.m. It is the court's intention to announce its decision on the record at tomorrow's hearing.

**5. TIME: 9:00 CASE#: MSC14-01790**

**CASE NAME: PETER CONEY VS. KELLY DOSSA**

**HEARING ON MOTION FOR SUMMARY ADJUDICATION AS TO THE *FIRST AMENDED  
CROSS-COMPLAINT***

**FILED BY KELLY DOSSA, SCOTT DOSSA**

**\* TENTATIVE RULING: \***

Appearances in court required. Court will continue hearing date on motion, but will treat tomorrow's hearing as a case management conference.

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**6. TIME: 9:00 CASE#: MSC14-01790**  
**CASE NAME: PETER CONEY VS. KELLY DOSSA**  
**HEARING ON MOTION FOR SUMMARY ADJUDICATION AS TO THE *SECOND***  
***AMENDED COMPLAINT***  
**FILED BY KELLY DOSSA, SCOTT DOSSA**  
**\* TENTATIVE RULING: \***

Appearances in court required. Court will continue hearing date on motion, but will treat tomorrow's hearing as a case management conference.

**7. TIME: 9:00 CASE#: MSC14-02349**  
**CASE NAME: DUMAS VS. BANK OF AMERICA**  
**HEARING ON MOTION TO COMPEL RESPONSE TO REQUEST FOR PRODUCTION**  
**FILED BY BANK OF AMERICA, N.A.**  
**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

**8. TIME: 9:00 CASE#: MSC14-02349**  
**CASE NAME: DUMAS VS. BANK OF AMERICA**  
**HEARING ON MOTION FOR ORDER THAT MATTERS BE DEEMED ADMITTED**  
**FILED BY BANK OF AMERICA, N.A.**  
**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

**9. TIME: 9:00 CASE#: MSC14-02349**  
**CASE NAME: DUMAS VS BANK OF AMERICA**  
**HEARING ON MOTION TO COMPEL RESPONSES TO SPECIAL INTERROGATORIES**  
**FILED BY BANK OF AMERICA, N.A.**  
**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

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**10. TIME: 9:00 CASE#: MSC14-02349**  
**CASE NAME: DUMAS VS BANK OF AMERICA**  
**HEARING ON MOTION TO COMPEL RESPONSES TO FORM INTERROGATORIES**  
**FILED BY BANK OF AMERICA, N.A.**  
**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

**11. TIME: 9:00 CASE#: MSC14-02349**  
**CASE NAME: DUMAS VS. BANK OF AMERICA**  
**HEARING ON MOTION TO COMPEL RESPONSE TO REQUEST FOR PRODUCTION**  
**FILED BY BANK OF AMERICA, N.A.**  
**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

**12. TIME: 9:00 CASE#: MSC14-02349**  
**CASE NAME: DUMAS VS. BANK OF AMERICA**  
**HEARING ON MOTION COMPEL RESPONSE TO FORM INTERROGATORIES**  
**FILED BY BANK OF AMERICA, N.A.**  
**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

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**13. TIME: 9:00 CASE#: MSC14-02349**

**CASE NAME: DUMAS VS. BANK OF AMERICA**

**HEARING ON MOTION TO COMPEL RESPONSE TO SPECIAL INTERROGATORIES  
FILED BY BANK OF AMERICA, N.A.**

**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

**14. TIME: 9:00 CASE#: MSC14-02349**

**CASE NAME: DUMAS VS BANK OF AMERICA**

**HEARING ON MOTION FOR ORDER THAT MATTERS BE DEEMED ADMITTED  
FILED BY BANK OF AMERICA, N.A.**

**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

**15. TIME: 9:00 CASE#: MSC14-02349**

**CASE NAME: DUMAS VS BANK OF AMERICA**

**FURTHER CASE MANAGEMENT CONFERENCE**

**\* TENTATIVE RULING: \***

Appear. CourtCall OK for CMC only.

**16. TIME: 9:00 CASE#: MSC15-00709**

**CASE NAME: EXACT MARKET LLC VS. PATRIOTS**

**HEARING ON MOTION TO COMPEL FURTHER RESPONSES TO WRITTEN DISCOVERY  
FILED BY PATRIOTS JET TEAM**

**\* TENTATIVE RULING: \***

*Lead trial counsel* to appear in court. Counsel will be provided time and (if available) a jury room to attempt to resolve this dispute directly. If it cannot be resolved, the case will be called again at the end of the morning calendar, and counsel will be given a new date to return to argue the motion.

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**17. TIME: 9:00 CASE#: MSC15-00709**  
**CASE NAME: EXACT MARKET LLC VS. PATRIOTS**  
**FURTHER CASE MANAGEMENT CONFERENCE**  
**\* TENTATIVE RULING: \***

Appear. CourtCall OK for CMC only.

**18. TIME: 9:00 CASE#: MSC16-00099**  
**CASE NAME: KAO VS. CUI**  
**HEARING ON MOTION TO EXPUNGE LIS PENDENS AND FOR SANCTIONS**  
**FILED BY IRWIN KU, BETTY KU**  
**\* TENTATIVE RULING: \***

Defendants Irwin Ku and Betty Ku's Motion to Expunge Lis Pendens, recorded on February 2, 2016 as Document 2016-0018675-00 and another Lis Pendens recorded on March 28, 2016 as Document 2016-0053800-00 with the Contra Costa County Official Records, affecting real property commonly known as 2837 May Road, Richmond, CA **is granted.**

The motion is timely filed. A motion to expunge a lis pendens may be filed "at any time" after the lis pendens is recorded. (CCP § 405.30.) Defendants bring this motion on the ground these lis pendenses were not served before recordation in violation of Code of Civil Procedure § 405.22.

Although the statute does not expressly authorize expungement because of defects in service or filing of the lis pendens, case law has recognized these grounds. (*McKnight v. Sup.Ct. (Faber)* (1985) 170 Cal.App.3d 291, 303.) The court in *McKnight* recognized that the Legislature did not mention these technical violations as grounds for expungement, but it reached the conclusion that expungement was proper as a practical consequence. "If a notice of lis pendens is "void and invalid," and thus a nullity, it would be incongruous that the Legislature intended inappropriate or void lis pendens. Our conclusion here serves the purpose of clearing title, such notice to remain of record as a cloud upon the owner's title that effectively prevents the owner from freely conveying or otherwise dealing with his property. As mentioned, the purpose of the expungement statute is to prevent the unwarranted clouding of a party's title." (*McKnight v. Superior Court* (1985) 170 Cal.App.3d 291, 303.)

*McKnight* was decided under CCP § 409. Section 409 was repealed in 1993. The current statute, Code Civ. Proc., § 405.23 provides: "Any notice of pendency of action shall be void and invalid as to any adverse party or owner of record unless the requirements of Section 405.22 are met for that party or owner and a proof of service in the form and content specified in Section 1013a has been recorded with the notice of pendency of action."

CCP § 405.22 provides in part: "Except in actions subject to Section 405.6, the claimant shall, prior to recordation of the notice, cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties

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to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll.”

In other words, a lis pendens will be void and invalid as to any adverse party or owner of record unless the service and filing requirements of Code Civ. Proc. § 405.22 are met. Here, Plaintiff has not filed a Proof of Service of the first two lis pendens. Moving party declares there is no Proof of Service attached to the lis pendens. (Declaration of Steven J. Kahn, ¶¶3 and 4.) They further declare the lis pendens were not served. (Khan Decl., ¶5) Defects in statutory service and filing requirements are ground for expungement. *McKnight v. Sup.Ct. (Faber)* (1985) 170 CA3d 291, 303.

## **Sanctions**

Pursuant to Cal. Code of Civil Procedure § 405.38, the court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs. Defendants are hereby awarded attorney's fees and costs in the amount of \$2,065.00 (7 hours of attorney time at \$295 per hour).

Defendants' counsel declares attempts were made to avoid this motion, but Plaintiff refused to stipulate to the expungement.

## **Defendants' Request for Judicial Notice**

Pursuant to Evidence Code § 453(d), (c), (g) and (h), Defendants request the court to take judicial notice of the following:

1. Exhibit A—Plaintiff's Third Amended Complaint
2. Exhibit B—Notice of Pending Action, recorded on February 2, 2016
3. Exhibit C—Notice of Pending Action, recorded on March 28, 2016

**Defendants' unopposed request is granted**, except the court only takes judicial notice of the existence of the Third Amended Complaint, and not the truth of its contents.

Additionally, the Court notes that Defendant's Request for Judicial Notice and Declaration contains exhibits that were not properly tabbed in compliance with Cal. Rule of Court, Rule 3.1110(f)(3). It provides, "Each paper exhibit must be separated by a hard 8 1/2 x 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation."

Failure to comply with Rule 3.1110 is also a violation of Local Rule 3.42 for the Superior Court of California County of Contra Costa. Rule 3.42 provides in part, "All memoranda and other papers filed in support of, and in opposition to, motions shall comply with the requirements of the California Rules of Court."

Continued violation may result in the Court exercising its discretion to not consider the papers.

## **Plaintiff's Request for Judicial Notice**

Pursuant to Evidence Code § 452 and 453, Plaintiff requests the court to take judicial notice of the following:

1. Lis Pendens, recorded on July 6, 2016, Document No. 2016-0132272.

Plaintiff's unopposed **request is granted**.

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## Plaintiff's Request for Leave to Amend

Plaintiff's request for leave to amend the Third Amended Complaint to allege a constructive trust shall be addressed in a properly noticed motion.

**19. TIME: 9:00 CASE#: MSC16-00232**

**CASE NAME: SWAIN VS DOAN**

**HEARING ON MINOR'S COMPROMISE**

**\* TENTATIVE RULING: \***

Counsel and guardian ad litem to appear in court. Minor need not appear. Counsel to voir dire client as to all material aspects of the compromise.

**20. TIME: 9:00 CASE#: MSC16-00342**

**CASE NAME: FAUTT HOMES CORP VS. RAYMOND MARIOLLE**

**HEARING ON DEMURRER TO 1st Amended CROSS-COMPLAINT of MARIOLLE  
FILED BY FAUTT HOMES CORPORATION**

**\* TENTATIVE RULING: \***

Before the Court are two demurrers (the "Demurrers"), one filed by plaintiff Fautt Homes Corp. ("FHC"), and the other by Jefferey Fautt ("Fautt") (collectively, "Plaintiffs"). The Demurrers are directed at the First Amended Cross-Complaint ("1ACC") filed by defendants Raymond Mariolle and Regina Mariolle (collectively, "Mariolle"). The Demurrers raise substantially similar issues, so the Court addresses them together, noting and addressing any differences as necessary.

The FHC Demurrer attacks three causes of action contained in the 1ACC: the third, for disgorgement, the fourth, for intentional misrepresentation, and the fifth, for negligent misrepresentation. The Fautt Demurrer attacks three causes of action contained in the 1ACC: the fourth, for intentional misrepresentation, and the fifth, for negligent misrepresentation, and the sixth, for declaratory relief.

The Court addresses each of these challenged causes of action in turn.

### Disgorgement

Business and Professions Code § 7031(b) provides, in relevant part:

[A] person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.

The 1ACC's disgorgement claim appears to be based on Plaintiffs' purported hiring of an

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unlicensed subcontractor. (1ACC ¶ 47.) The FHC Demurrer argues that the 1ACC does not allege that any of the subcontractors were unlicensed at the time of their work, that FHC hired an unlicensed contractor, that FHC knew that subcontractor was unlicensed when hired, or that Mariolle paid for any unlicensed work. (FHC Demurrer at 4:14-18.)

Paragraph 19 of the 1ACC alleges that FHC "knowingly engag[ed] an unlicensed subcontractor to perform work," that the "Mariolles were charged by FHC, and paid to FHC," money related to work by a subcontractor which was not licensed at any relevant time to perform the work FHC engaged it to do.

It is true that Business & Professions Code § 7031(e) provides a potential exception to subdivision (b)'s disgorgement provision, but that exception is only to be applied if certain things are "shown at an evidentiary hearing." This matter is before the Court on a demurrer. There has been no evidentiary hearing, much less an evidentiary showing. The Court is required to accept the factual allegations of the 1ACC as true, and the allegations in ¶ 19, discussed above, are sufficient to allege a disgorgement cause of action under Business & Professions Code § 7031. As to the third cause of action for disgorgement, the FHC Demurrer is overruled.

## Fraud

The elements of a fraud claim are well-established. They are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud (*i.e.*, to induce reliance), (4) justifiable reliance, and (5) resulting damage. *E.g.*, *Conrad v. Bank of Am.* (1996) 45 Cal.App.4th 133, 156. And fraud must be pled specifically, which often is thought of as requiring the pleading of facts showing "how, when, where, to whom and by what means" the alleged misrepresentations were made. *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.

Mariolle posits that the misrepresentations at issue are alleged in ¶¶ 8-11 of the 1ACC. The Court has reviewed those paragraphs of the 1ACC. Together, they allege the following. FHC held itself out to be a "full service builder" that could provide all the services and professionals needed for a client's custom home concept to be fully constructed. Fautt himself promised Mariolle that Fautt personally would oversee the entire project as general contractor, that the home would be completed by early July 2014, high level finishes commensurate with homes Mariolle previously viewed on a tour with Fautt could be accomplished for approximately \$250 per square foot, and all of the work "from conception through design, architectural and structural planning, permitting, and decorating were all handled in-house at FHC using FHC's employees and personnel, who were represented to be capable regarding "design, development, accounting, documentary procedures and practices, and construction." Fautt is alleged to have made these representations both in his individual capacity and as President of FHC. (1ACC ¶ 51.)

The Court concludes that these allegations meet the *Stansfield* requirement of "how, when, where, to whom and by what means."

The Demurrers further argue that the Mariolles did not rely on these representations. The 1ACC plainly alleges that the Mariolles would not have entered into the relevant contract absent these representations. (1ACC ¶ 54.)

As for knowledge of falsity, the 1ACC alleges that the Fautt knew the representations were false when made. (¶ 53.) There is no more that can be expected at the pleading stage. *See, e.g. Woodring v. Basso* (1961) 195 Cal.App.2d 459, 465 (less specificity required when the allegations pertain to matters peculiarly within the knowledge of the defendants). Here, at

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the pleading stage, the Court considers that Mariolle may not know the specific facts that would demonstrate that Fautt knew his representations to be false when he made them, because those facts would be peculiarly within the knowledge of the defendants.

As to the fraud cause of action, the Demurrers are overruled.

## Negligent Misrepresentation

The argument the Demurrers make concerning the negligent misrepresentation cause of action mirrors the argument presented in relation to the fraud cause of action. They argue that the negligent misrepresentation cause of action lacks the required particularity. The Court disagrees, for the reasons described above. As a result, as to the negligent misrepresentation cause of action, the Demurrers are overruled.

## Declaratory Relief

Only Fautt demurs to the sixth cause of action for declaratory relief. Mariolle has not sued Fautt for breach of contract. The only basis Mariolle identifies for there being a dispute between Fautt and Mariolle that would require a judicial declaration is whether Fautt's representations to induce Mariolle into the relevant construction contract were false. But a cause of action for declaratory relief will not lie to determine an issue which can be determined in the underlying tort action. When another adequate form of relief is adequate, the Court is within its power to refuse to grant declaratory relief under Code of Civil Procedure § 1061. *See Cal. Ins. Guar. Ass'n v. Super. Ct.* (1991) 231 Cal.App.3d 1617, 1623-1624.

In addition, declaratory relief is a prospective form of relief, meant to guide the parties' conduct on a going-forward basis. Even interpreting the 1ACC liberally, there does not appear to be any need to define the parties' rights and obligations with respect to the alleged contract.

Finally, it was Mariolle's burden to demonstrate how the declaratory relief cause of action could be amended to cure this defect, and there is no suggestion as to how any declaration by the Court concerning the truth or falsity of Fautt's representations would not be entirely duplicative of the fraud cause of action, or how any declaration would guide the parties' conduct on a going-forward basis.

As to the sixth cause of action for declaratory relief, the Fautt Demurrer is sustained without leave to amend.

Fautt and FHC shall answer the remaining causes of action on or before March 6, 2017.

**21. TIME: 9:00 CASE#: MSC16-00342**

**CASE NAME: FAUTT HOMES CORP VS. RAYMOND MARIOLLE**

**HEARING ON DEMURRER TO 1st Amended CROSS-COMPLAINT of MARIOLLE**

**FILED BY JEFFREY FAUTT**

**\* TENTATIVE RULING: \***

See Line 20.

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**22. TIME: 9:00 CASE#: MSC16-00342**

**CASE NAME: FAUTT HOMES CORP VS. RAYMOND MARIOLLE**

**HEARING ON MOTION TO STRIKE EXTRANEOUS AND IMPROPER MATTER  
FILED BY JEFFREY FAUTT, FAUTT HOMES CORPORATION**

**\* TENTATIVE RULING: \***

The motion to strike is denied.

With respect to punitive damages, the Court has overruled the Demurrers to the fraud cause of action. Thus, punitive damages are not unavailable as a matter of law.

With respect the purported "merger clause" in the relevant contract, the Court agrees with the opposition that because fraud in the inducement has been pled here (*i.e.*, the Mariolles allege that absent Fautt's misrepresentations, they would not have entered into the contract), there is nothing irrelevant, false, or improper about those allegations. *See, e.g., Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 301.

With respect to the supposedly "hearsay" statements attached to the complaint, the Court has located no authority that suggests that a party cannot allege matters that might be hearsay under the Evidence Code. At or before trial, a valid motion to exclude hearsay matters may very well lie. But it is not a pleadings motion.

None of the remaining matters cross-defendants sought to have stricken is "irrelevant, false, or improper." It is not improper or irrelevant to allege matters related to the construction project at issue. And the allegations are not, from the face of the pleading, false.

**23. TIME: 9:00 CASE#: MSC16-00402**

**CASE NAME: JIANG VS. WU**

**HEARING ON MOTION TO BE RELIEVED AS COUNSEL  
FILED BY BIN WU**

**\* TENTATIVE RULING: \***

There being no opposition and for good cause, the motion is granted. Counsel to submit order after hearing using Judicial Council Form MC-053, which will include notice to client of next court hearing scheduled for April 19, 2017 at 9 a.m. for further case management conference. Order will not be effective until the proof of service upon the client of the signed order is filed with the court.

**24. TIME: 9:00 CASE#: MSC16-01162**

**CASE NAME: TYLER VS. WILLOW PASS HEALTHCARE**

**HEARING ON MOTION FOR STAY**

**FILED BY WILLOW PASS HEALTHCARE CENTER**

**\* TENTATIVE RULING: \***

See below.

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**25. TIME: 9:00 CASE#: MSC16-01162**

**CASE NAME: TYLER VS. WILLOW PASS HEALTHCARE**

**HEARING ON MOTION TO COMPEL ARBITRATION**

**FILED BY WILLOW PASS HEALTHCARE CENTER**

**\* TENTATIVE RULING: \***

Before the Court is Defendant Willow Pass Healthcare Center's ("Willow Pass") opposed Motion to Compel Arbitration ("Motion to Compel"). The Motion to Compel is denied for the reasons explained below. Accordingly, Willow Pass' separate Motion to Stay is also denied, though unopposed, because arbitration is not appropriate in this case and civil court is the proper venue for adjudicating all of the Complaint's claims.

Plaintiffs, Michael Tyler and Neall Tiplor, individually and as successors-in-interest to Melton Tiplor (collectively, "Plaintiffs;" individually, "Michael" and "Neall;" the Court refers to Plaintiffs by their first names to avoid confusion due to similar surnames and no disrespect is intended), argue that Michael had no authority to sign the Arbitration Agreement ("AA") because the prerequisite indicated in Melton's Power of Attorney ("POA") – that Neall and Ross be "unable or unwilling to serve"— was not satisfied, therefore rendering the AA invalid. In reply, Willow Pass argues that Michael, indeed, had authority to sign the AA. Alternatively, Willow Pass argues that the Court should grant the Motion to Compel under the doctrine of equitable estoppel.

## **Legal Standard**

State law applicable to contracts generally governs whether a valid agreement to arbitrate exists. (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701 ["federal policy in favor of arbitration does not come into play ... until a court has found the parties entered into a valid contract under state law"].) Under California law, a person who is authorized to act as the patient's agent can bind the patient to an arbitration agreement. (*Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 264-266.) Agency may be established either by agreement between the agent and the principal, that is, a true agency, or it can be created via ostensible authority, that is, some intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons. (*Flores v Evergreen at San Diego LLC* (2007) 148 Cal.App.4th 581, 588-589.) And "[t]he party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement." (*Young v. Horizon West Inc.* (2013) 220 Cal.App.4th 1122, 1128.) (citations omitted.)

## **Analysis**

Here, Willow Pass fails to meet its burden of proving the existence of a valid arbitration agreement under a theory of agency created under either true agency or ostensible authority as further explored below. Finally, relief under equitable estoppel is not available to Willow Pass.

## **True Agency**

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Willow Pass argues that Michael had authority to sign the AA while acting as Melton's agent pursuant to the POA between Melton and Michael.

In *Young*, the Court of Appeal determined that a signator had no authority to execute an arbitration agreement where a prerequisite condition of the Power of Attorney had not been met. (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1128-30.) There, a daughter signed an arbitration agreement on behalf of her elderly mother while the mother was being admitted into a healthcare facility. (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1126.) In *Young*, the patient included her daughter in her Power of Attorney, but the Power of Attorney indicated that the principal must first be determined incapacitated by a physician, and only then would her agent have authority to make decisions for the principal. (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1128.) Further, the daughter was not the principal's primary health care agent under the POA, but rather, the principal's husband was. (*Id.* at 1129.) The daughter was the "first alternate agent" only if the husband was "not willing, able, or reasonably available to make a health care decision for the principal." (*Id.*) There, the trial court rejected the argument that the husband was not "able or reasonably available" to make health care decisions for the principal because the husband was "in poor health and recovering from a stroke." (*Id.*) In *Young*, the Court of Appeal deferred to the trial court's factual determination that the POA's clear prerequisite had not been satisfied. (*Id.*)

Here, Melton's POA authorizes Michael to make decisions on the principal's behalf under only two possible circumstances: 1) Michael may *replace one* of the two co-agents, Neall or Ross Tiplor ("Ross"), if one of them is "unable or declines to serve;" or 2) Michael may make decisions for the principal after *both* of the co-agents Neall *and* Ross are "unable or decline[s] to serve."

Melton's POA instructs the co-agents to make "joint decisions" unless the co-agents are unable or decline to serve. There is no evidence offered that Ross, one of the co-agents, is involved in this matter. There is evidence, however, that Neall was "readily able to be contacted...quite simply by phone," and that he was not "unwilling or unable to act in a timely manner in response to any of decedent's health care needs or any other demands made under any of decedent's powers of attorney. [Neall] never expressed such inability or unwillingness to anyone."

Willow Pass argues that Neall's acts and omissions regarding Melton's admission to the Willow Pass facility indicates that Neall was unable, or declined to serve under the POA. Importantly, Willow Pass offers no evidence that it made any actual attempt to directly contact either Neall or Ross, to determine whether they were, "unable or decline to serve" in order to trigger Michael's unilateral authority under the POA. Furthermore, evidence before the Court indicates that Michael has no recollection of anyone from the facility even examining Melton's POA while Melton was being admitted.

Because a clear prerequisite for Michael's authority under Melton's POA was unmet, no true agency was established, and Michael did not have authority to enter a binding arbitration agreement on behalf of Melton under a theory of true agency.

## ***Ostensible Authority***

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Willow Pass argues that a valid arbitration agreement exists under a theory of agency via ostensible authority. Ostensible authority is created when the *principal's* conduct creates a belief in the minds of third persons that an agency exists, and such third persons reasonably rely on that belief. (*Flores v Evergreen at San Diego LLC* (2007) 148 Cal.App.4th 581, 588-589.) An agent has such authority as the *principal* –not the purported agent—causes a third person to believe the agent to possess. (*Young v. Horizon West, Inc., supra* 220 Cal.App.4th 1122, 1132.)

In *Young*, no ostensible authority was found even when the patient stated that the purported agent “had permission to take care of details” like “completing paperwork.” (*Young v. Horizon West Inc., supra*, 220 Cal.App.4th 1122, 1130.) Indeed, the *Young* court considered the principal’s statement to be a “far cry from expressly authorizing [the purported agent] to sign an agreement forgoing [the patient’s] right to a jury trial.” (*Id.*) Here, Willow Pass offers no evidence that Melton, the patient, made *any* statements regarding Michael’s authority, and Willow Pass offers no argument that *any* of Melton’s conduct constitutes ostensible authority. Rather, Willow Pass bases its argument for ostensible authority on the purported agent’s conduct, “Mr. Tyler exercised his powers by entering executing [sic] all of decedent’s admission papers... In doing so, Mr. Tyler voluntarily acknowledged his authority to execute the AA...”

Although Willow Pass offers no evidence that Melton’s conduct constituted ostensible authority, assuming, *arguendo*, that the act of Melton allowing his son to sign documents on his behalf may suggest ostensible authority, the Court of Appeal has determined that the principal “allowing,” or “letting” a third party believe that the signator had authority to act on his behalf is not sufficient to constitute ostensible authority. (*Young v. Horizon West Inc., supra*, 220 Cal.App.4th at p. 1133 citing *Flores v. Evergreen At San Diego, LLC, supra*, 148 Cal.App.4th 581, 586, and citing *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 376 [“It was not enough that the plaintiff ‘let’ her daughter act for her by making medical decisions and arranging treatment for her.”].) The principal must make an express authorization. (*Young v. Horizon West Inc., supra*, 220 Cal.App.4th 1122, 1130.) There is no evidence before the Court of Melton’s express authorization granting Michael ostensible authority to enter into the AA with Willow Pass on Melton’s behalf. Accordingly, there is no valid arbitration agreement under ostensible authority.

Furthermore, the *Young* court noted that a third party is not compelled to deal with an agent, but if it does so, it assumes the risk of ascertaining whether the person with whom he is dealing is the agent, “Those dealing with an assumed agent are bound at their peril to ascertain the extent of the agent’s authority.” (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1134.) (citations omitted.)

## **Equitable Estoppel**

Equitable estoppel requires: a) a representation or concealment of material facts; b) made with knowledge, actual or virtual, of the facts; c) to a party ignorant, actually and permissibly, of the truth; d) with the intention, actual or virtual, that the ignorant party act on it; e) that party was induced to act on it. (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1131-32.) (citations omitted.) Estoppel is unavailable if any one of these elements is missing. (*Id.*)

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In *Young*, relief under equitable estoppel was rejected. (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1131-32.) There, like here, the plaintiff's complaint arose out of noncontractual injury caused by the patient's stay at the healthcare facility. (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1131.) In *Young*, the court held that relief under equitable estoppel was not available because plaintiff did not "represent or conceal a material fact" even when the patient stated that her daughter had permission to "fill out paperwork." (*Young v. Horizon West, Inc., supra*, 220 Cal.App.4th 1122, 1131-32.) In *Young*, there was no agency and there was no equitable estoppel.

Here, Willow Pass offers no argument that *any* of these elements were satisfied. Rather, Willow Pass argues that Melton, the patient, received "care, treatment and benefits from the admission agreement and other agreements executed by Michael Tyler...." and receiving such benefits is inconsistent with Plaintiffs' argument now that the AA is not valid because it was signed by Michael. According to Willow Pass, "Plaintiffs cannot rely on these admissions papers to give them rights of actions and the same time argue that they are unenforceable because they were signed by Mr. Tyler." However, Willow Pass offers no authority establishing that equitable estoppel is available if a patient is admitted into a healthcare institution and then it is later determined that the admissions papers were not properly authorized.

Furthermore, Willow Pass offers evidence that admission into the facility is not contingent on signing the AA, "...the Arbitration Agreement is optional... the Arbitration Agreement does not have to be signed for the resident to receive care or treatment at Willow Pass." As such, receiving benefits from admission into the facility should be no preclusion to rendering the "optional" AA invalid.

For the reasons stated above, the Motion to Compel Arbitration is denied.

## **Request for Judicial Notice**

The unopposed request for judicial notice is granted.

## **Plaintiffs' Evidentiary Objections**

### Decl. of Sarvnaz Mackin, Esq

#1: ¶ 2: Overruled.

¶ 5: Sustained.

### "Exhibit AA" to the Decl. of Sarvnaz Mackin, Esq.

#1: Overruled.

#2: Overruled.

### Decl. of Binoy Ephrem

#1: Overruled.

#2: Overruled.

### Decl. of Rizabelen Gempeshaw

#1. Overruled.

#2. Overruled.

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Arbitration Agreement Attached to the Decl. of Rizabelen Gempeshaw as "Exhibit AA"

#1: Overruled.

#2: Overruled.

**26. TIME: 9:00 CASE#: MSC16-01162  
CASE NAME: TYLER VS. WILLOW PASS HEALTHCARE  
FURTHER CASE MANAGEMENT CONFERENCE**

**\* TENTATIVE RULING: \***

Appear. CourtCall OK for CMC only.

**27. TIME: 9:00 CASE#: MSC16-01430  
CASE NAME: ANDEREGGEN VS. CHRISTIAN  
HEARING ON PETITION FOR ORDER COMPELLING ARBITRATION  
FILED BY SUSAN C. CHRISTIAN, et al.**

**\* TENTATIVE RULING: \***

Continued by the Court to February 24, 2017 at 9:00 a.m. in Department 34.

**28. TIME: 9:00 CASE#: MSC16-01480  
CASE NAME: NI VS. SEENO ENTERPRISES  
HEARING ON MOTION TO STRIKE PLAINTIFF'S COMPLAINT  
FILED BY NORTHPOINT SECURITY SERVICES, INC.**

**\* TENTATIVE RULING: \***

Defendant Northpoint Security Services, Inc.'s motion to strike punitive damages is sustained with leave to amend. The Complaint fails to set forth any clear and convincing evidence that Defendant has been guilty of malice, oppression or fraud. See Civil Code Section 3294(a), (c). Specific facts showing malice, oppression or fraud must be pled. Legal conclusions are insufficient as is the pleading of only an intentional tort. See Greives v. Superior Court (1984 157 Cal.App.3d 159, 166; Smith v. Superior Court (1992) 10 Cal.App.4<sup>th</sup> 1033, 1042; G.D. Searle & Co. v. Superior Court (1975) 49 Cal.App.3d 22, 27. Plaintiffs have merely checked the box for punitive damages in the form Complaint. All of the causes of action are based on negligence or a failure to act; an intentional tort is not even alleged, let alone facts showing malice or oppression.

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**29. TIME: 9:00 CASE#: MSC16-01480**  
**CASE NAME: NI VS. SEENO ENTERPRISES**  
**FURTHER CASE MANAGEMENT CONFERENCE**  
**\* TENTATIVE RULING: \***

Appear. CourtCall OK for CMC only.

**30. TIME: 9:00 CASE#: MSC16-01910**  
**CASE NAME: RIVER OAKS VS. RIVER OAKS**  
**HEARING ON DEMURRER TO COMPLAINT of RIVER OAKS SELF-STORAGE TIC 4, LP**  
**FILED BY RIVER OAKS STORAGE, LLC**  
**\* TENTATIVE RULING: \***

Continued per stipulation and order to February 17, 2017 at 9:00 a.m.

**31. TIME: 9:00 CASE#: MSC16-02062**  
**CASE NAME: KELLER CANYON LANDFILL VS. COUNTY OF CONTRA COSTA**  
**HEARING ON MOTION TO INTERVENE IN PENDING ACTION**  
**FILED BY TEAMSTERS LOCAL 315**  
**\* TENTATIVE RULING: \***

Continued to February 17, 2017.

**32. TIME: 9:00 CASE#: MSC16-02109**  
**CASE NAME: McNEAL VS. TRANSFIELD SERVICES**  
**HEARING ON DEMURRER TO COMPLAINT of McNEAL**  
**FILED BY UNITED RENTALS**  
**\* TENTATIVE RULING: \***

Vacated.

# CONTRA COSTA SUPERIOR COURT

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DEPARTMENT: 34

HEARING DATE: 02/03/17

**33. TIME: 9:00 CASE#: MSC16-02109**

**CASE NAME: McNEAL VS. TRANSFIELD SERVICES**

**HEARING ON MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT  
FILED BY UNITED RENTALS**

**\* TENTATIVE RULING: \***

Vacated.

**34. TIME: 9:00 CASE#: MSL15-02020**

**CASE NAME: CAPITAL ONE VS. PHAM**

**HEARING ON MOTION TO SET ASIDE AND VACATE DEFAULT  
FILED BY CAPITAL ONE BANK (USA), N.A.**

**\* TENTATIVE RULING: \***

There being no opposition, the motion is granted.

**35. TIME: 9:00 CASE#: MSN16-2400**

**CASE NAME: ROMAN VS. VALDEZ**

**HEARING ON MINOR'S COMPROMISE**

**\* TENTATIVE RULING: \***

Counsel and guardian ad litem to appear in court. Minor need not appear. Counsel to voir dire client as to all material aspects of the compromise.

**36. TIME: 9:00 CASE#: MSN17-0002**

**CASE NAME: LETICIA GOODJOINT VS VINCENT SIMMONS**

**HEARING ON PETITION TO CONFIRM ARBITRATION AWARD  
FILED BY PETITIONER**

**\* TENTATIVE RULING: \***

There being no opposition, the motion is granted.

**37. TIME: 10:00 CASE#: MSC12-00505**

**CASE NAME: DECLAN WOODS VS. MARY NOLAN**

**SPECIAL SET HEARING ON: MOTION FOR JUDGMENT NOTWITHSTANDING THE  
VERDICT / SET BY MARY NOLAN**

**\* TENTATIVE RULING: \***

Personal appearance in court required. Hearing continued to 10:30 a.m. It is the court's intention to announce its decision on the record at the tomorrow's hearing.

# CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 34

HEARING DATE: 02/03/17

**38. TIME: 10:00 CASE#: MSC12-00505**  
**CASE NAME: DECLAN WOODS VS. MARY NOLAN**  
**SPECIAL SET HEARING ON MOTION FOR NEW TRIAL**  
**SET BY MARY NOLAN**

**\* TENTATIVE RULING: \***

Personal appearance in court required. Hearing continued to 10:30 a.m. It is the court's intention to announce its decision on the record at the tomorrow's hearing.

**39. TIME: 10:00 CASE#: MSC15-00360**  
**CASE NAME: BLACKMORE VS. GOLLADAY**  
**COURT TRIAL - LONG CAUSE/ 5 DAY(S)**

**\* TENTATIVE RULING: \***

Appear.

**40. TIME: 10:00 CASE#: MSC15-00569**  
**CASE NAME: ELLIOT-VIZCARRONDO VS. HUITRON**  
**COURT TRIAL - SHORT CAUSE/ 3 DAY(S)**

**\* TENTATIVE RULING: \***

Appear.