SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 2, Honorable Drew C. Takaichi, Presiding
Farris Bryant, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS
DATE: January 21, 2021 TIME: 9:00 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER OR AS OTHERWISE STATED BELOW
(SEE RULE OF COURT 3.1312 – PROPOSED ORDER MUST BE E-FILED BY COUNSEL AND SUBMITTED PER 3.1312(C))

EFFECTIVE JULY 24, 2017, THE COURT NO LONGER PROVIDES OFFICIAL COURT REPORTERS FOR CIVIL LAW AND MOTION HEARINGS. SEE COURT WEBSITE FOR POLICY AND FORMS.

TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or your web browser cache (temporary internet files) is accessing a prior week's rulings. "REFRESH" or "QUIT" your browser and reopen it, or adjust your internet settings to see only the current version of the web page. Your browser will otherwise access old information from old cookies even after the current week's rulings have been posted.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	18CV336806	*Gregory Belcher vs Paul Greenfield*	Click on Line 1 for tentative ruling. Court will prepare Order.
LINE 2	20CV367305	*Foresite Capital Management IV, L.P. vs Hesaam Esfandyarpour, Ph.D. et al*	Click on Line 2 for tentative ruling. Court will prepare Order.
LINE 3	20CV367305	*Foresite Capital Management IV, L.P. vs Hesaam Esfandyarpour, Ph.D. et al*	Click on Line 3 for tentative ruling. Court will prepare Order.
LINE 4	20CV369591	*Robert Stevens vs Michelle Kalish*	Demurrer is sustained; Plaintiff granted 10 days leave to file first amended complaint. No opposition filed.
LINE 5	19CV344620	*South Bay Piping Industry Labor Management Trust vs Pacific Plumbing & Sewer Service, Inc.*	Click on Line 5 for tentative ruling. Court will prepare Order.
LINE 6	20CV367725	*William Dresser vs Deanne Powers et al*	Plaintiff's motions to compel responses are denied. Defendant filed and served responses to subject discovery prior to hearing.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	20CV367725	*William Dresser vs Deanne Powers et al*	Motion for injunction of fee arbitration and to vacate partial stay is GRANTED. No opposition filed.
LINE 8	20CV364341	*Unifund Ccr, Llc, As Assignee Of Distressed Asset Portfolio Iii, Llc, as assignee of Capital One Bank (USA), NA vs Mario Gonzalez*	The motion to deem facts admitted is GRANTED. Defendant is ordered to pay to plaintiff attorney fees of $200 plus costs of $60 for a total of $260 as sanctions. No opposition filed.
LINE 9	20CV370351	*Sujith Polpaya et al vs Taylor Morrison of California, LLC*	The petition to compel arbitration is GRANTED and Hon. Catherine Gallagher is appointed as the arbitrator (subject to the arbitrator's acceptance). No opposition filed.
LINE 10	2015-1-CV-277009	*D. Wolff vs California Unemployment Insurance Appeal Board*	Motion to dismiss for failure to bring case to trial within five years is GRANTED. Proof of service in file.
LINE 11	20PR188576	*In the Matter of Matthew Lee*	Proof of deposit of minor's settlement funds not in file. Appearance required
LINE 12	20PR188734	*In the Matter of Jasmin Morales*	Proof of deposit of minor's settlement funds not in file. Appearance required
LINE 13			
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LAW AND MOTION TENTATIVE RULINGS

LINE 28			
LINE 29			
LINE 30			

Calendar Line 1

Case Name: *Belcher, et al. v. Dakota Note LLC, et al.*
Case No.: 18CV336806

According to the allegations of the third amended complaint ("TAC"), in May 2015, plaintiffs Gregory Belcher ("Belcher") and Vilasni Ganesh ("Ganesh") (collectively, "Plaintiffs"), met defendant Derald Kenoyer ("Kenoyer"), who introduced himself as a licensed home loan mortgage broker with defendant California Home Loans aka Capital Funding ("CHL") and came to the subject property to do a walk-through assessment in connection with arranging a loan. (See TAC, ¶ 21.) In February 2016, Plaintiffs entered into a loan agreement with CHL for the amount of $1,150,000, secured by a deed of trust on the subject property to be processed, serviced and managed by Kenoyer, and defendant K.C. Knapp ("Knapp") of CHL. (See TAC, ¶¶ 30-33, 36-37.) Unbeknownst to Plaintiffs, Knapp had his real estate broker's license revoked on January 9, 2016, prior to the loan transaction with Plaintiffs and CHL had its real estate corporate license revoked on September 16, 2015. (See TAC, ¶¶ 29, 32, 34-36.)

In February 2016, CHL continued to process the loan and switched title companies to defendant Old Republic Title ("ORT"). (See TAC, ¶ 28.) After Belcher inquired why he was required to pay $95,099.45 in closing costs, Kenoyer explained to Plaintiffs that the closing costs would cover Plaintiffs' loan payments for the first six months, which was not true. (See TAC, ¶¶ 39-40.) In reliance on Kenoyer's representation, Belcher paid the required closing fees into escrow. (See TAC, ¶ 41.) In 2017, Plaintiffs determined that they could no longer maintain the payments on the mortgage long term and would put the property on the market as they believed that they had equity in the property of about $1.7 million above the mortgages and liens. (See TAC, ¶ 46.) Belcher contacted the lender on the property's first mortgage, served by nonparty Ocwen, to discuss the hardship; Ocwen offered to modify the first loan and forbear from further collection efforts at that time to cooperate with Plaintiffs' efforts to sell the property; Belcher also contacted CHL to discuss the hardship and Plaintiffs' plans to sell the property. (See TAC, ¶ 30.) Kenoyer prepared a forbearance agreement in which Kenoyer offered Belcher a new loan in the amount of $300,000, and a fee of $20,000. (See TAC, ¶ 48.) The forebearance agreement provide that $176,000 would be used to pay off the delinquency of the loan; Plaintiffs were surprised and unable to understand how they owed Defendants $176,000 since the total amount of unpaid mortgage was $69,000. (See TAC, ¶ 49.) Kenoyer represented to Plaintiffs that they should not worry about the details and that they amount would cover all points, fees, property tax such that Plaintiffs would not have to make any payments until May 1, 2017. (See TAC, ¶¶ 49-51.) Knapp and Kenoyer as agents for CHL never reviewed the forebearance agreement with Plaintiffs or explained the fees and charges before the consummation of the new loan, and Plaintiffs signed the new loan unaware of the fraudulent and overinflated charges that could not be accounted for. (See TAC, ¶ 52.)

On September 9, 2020, Plaintiffs filed the TAC against Dakota Note, Greenfield, Amspacker, Karen Amspacker, Knapp, Kenoyer, Dale Allen Snow ("Snow"), Alan Summers, John Trowbridge, ORT, The Foreclosure Company, Inc., Andy Tse dba Tse Group Real Estate and Laurie Dasher, asserting causes of action for:

1) Violation of the California Constitution, Article XV and Civil Code §§ 1916-3 (usury);
2) Violation of 15 U.S.C. §§ 1601-1665 (1968), 12 CFR part 1024 § 1026;

3) Wrongful foreclosure;
4) Slander of title;
5) Intentional misrepresentation;
6) Negligence per se
7) Unfair business practices;
8) Breach of fiduciary duty;
9) Breach of contract; and,
10) Negligence.

Defendant Kenoyer asserts that he has never been served with the summons and has since moved to South Padre Island, Texas and thus moves to quash service of the summons on the grounds that Plaintiffs have not complied with the Rules of Court or Local Rules, Plaintiffs have not complied with five court orders to show cause for failure to serve numerous parties, and the Court has no personal jurisdiction over Kenoyer.

Kenoyer's motion to quash based on a lack of personal jurisdiction

Under California's long-arm statute, courts may exercise personal jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc. § 410.10.) California courts may assume jurisdiction over a nonresident defendant if the defendant has sufficient minimum contacts with the forum state to make the exercise of jurisdiction fair. (See Goehring, supra, 62 Cal.App.4th at p. 903; see also Code Civ. Proc., § 410.10 [California courts "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"].) Where general jurisdiction is not established, a court may nonetheless assume specific jurisdiction over a defendant in an action if the following criteria are met: (1) the defendant purposefully avails itself of the forum state, (2) the action arises out of the defendant's contacts with the forum state, and (3) the exercise of jurisdiction would be fair and reasonable. (See Goehring, supra, 62 Cal.App.4th at p. 904; see also Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal.4th 1054, 1062 (stating same); see also ViaView, Inc. v. Retzlaff (2016) 1 Cal.App.5th 198, 216 (stating same); see also Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd. (2019) 31 Cal.App.5th 543, 553 (stating same); see also Moncrief v. Clark (2015) 238 Cal.App.4th 1000, 1006 (stating same).)

Here, it is undisputed that Kenoyer conducted business as a real estate agent in California and had and continues to hold a California real estate license. The alleged conduct in the TAC emanates from Kenoyer's contacts with the forum state. Kenoyer asserts that it would be unfair to exercise jurisdiction over him because "[a]s of November 4, 2019, Kenoyer is no longer a resident of California, having retired and moved to South Padre Island, Texas." (See Def.'s memorandum of points and authorities in support of motion to quash ("Def.'s memo"), p.9:6-7.) Kenoyer asserts that Plaintiffs are required to litigate the action in Federal court. (Id. at p.9:22-23.) Kenoyer is mistaken. Kenoyer largely relies on law regarding general jurisdiction as opposed to specific jurisdiction. Here, the evidence demonstrates that Kenoyer directed activities toward the forum state such that he should expect to be subject to the court's jurisdiction, satisfying purposeful availment of forum benefits. (See Snowney, supra, 35 Cal.4th at pp.1062-1063; see also Jayone Foods, supra, 31 Cal.App.5th at pp.554-557 (transaction with California business for use in California demonstrates purposeful availment), citing Secrest Machine Corp. v. Super. Ct. (Ramos) (1983) 33 Cal.3d 664; see also Moncrief, supra, 238 Cal.App.4th at pp.1006-1007 (single transaction with California partnership

sufficient to establish purposeful availment).) This controversy is directly related to Kenoyer's contacts with California. (See Moncrief, supra, 238 Cal.App.4th at p.1007 (stating "[r]elatedness concerns 'whether the controversy is related to or arises out of defendants' contacts with California'"), quoting Snowney, supra, 35 Cal.4th at p.1067.) Here, Plaintiffs have demonstrated facts justifying the exercise of jurisdiction and Kenoyer has not demonstrated that exercise of jurisdiction would be unreasonable. (See Snowney, supra, 35 Cal.4th at p.1062 (stating that "[i]f the plaintiff meets this initial burden… [to] demonstrate[e] facts justifying the exercise of jurisdiction… then the defendant has the burden of demonstrating 'that the exercise of jurisdiction would be unreasonable'"); see also Jayone Foods, supra, 31 Cal.App.5th at p.553 (stating same).) Accordingly, the motion to quash based on a lack of jurisdiction is DENIED.

Kenoyer's motion to quash based on improper service

Kenoyer complains that Plaintiffs' purported attempts to serve him were invalid because: the May 15, 2019 attempt was purportedly served by mail at a post office box not registered to Kenoyer; the November 25, 2019 attempt was served at an address where the business had terminated its tenancy and he had already relocated to Texas. The Court agrees that these attempts are invalid. The motion to quash based on improper service is GRANTED as to the attempted service on May 15, 2019 and November 25, 2019.[1]

The Court will prepare the Order.

[1] Subsequently, Belcher also filed a proof of service indicating that Kenoyer had been served at the address listed in Kenoyer's declaration as his current address—a business. The proof of service was signed by a registered process server. This order does not address the December 18, 2020 proof of service as Kenoyer did not move to quash service of the summons as to this attempt.

Calendar Lines 2-3

Case Name: *Foresite Capital Management IV, LP v. Esfandyarpour, et al.*
Case No.: 20CV367305

According to the allegations of the cross- complaint ("XC"), cross-complainant and defendant GenapSys, Inc. ("Genapsys") developed industry disruptive DNA sequencing technology, investing over a hundred million dollars and over a decade in developing that technology. (See XC, ¶¶ 19-22.) In May 2017, cross-defendants Foresite Capital Management, LLC, Foresite Capital Fund IV, LP (collectively, "Foresite") approached Genapsys during its 2017 equity raise and explored investing, sending its senior technology experts to review all of Genapsys' technology. (See XC, ¶ 3.) The parties entered into a Non-Disclosure Agreement, and over the next several months, Foresite and its CEO and Managing Director, cross-defendant Jim Tananbaum ("Tananbaum") (collectively, "cross-defendants") were provided a detailed technical review of Genapsys products, intellectual property, workflow, know how, and trade secrets across several in-person and telephonic meetings and access to the dataroom. (See XC, ¶¶ 26-27.) Foresite's technical consultant at these meetings was Molly He, a venture partner at Foresite Capital. (See XC, ¶ 27.) Unbeknownst to Genapsys, at this time and upon receiving access to Genapsys' trade secret and confidential information, Foresite also created a competitor to Genapsys in the DNA sequencer market, Element Biosciences, with Molly He as its CEO and co-founder. (See XC, ¶¶ 32-33.) On June 17, 2019, Foresite purchased shares of Series C Preferred Stock from Genapsys. (See XC, ¶ 4.) Just days afterwards, Foresite invested millions of dollars in Element Biosciences. (See XC, ¶ 37.)

In 2018, Foresite also created Foresite Labs, an incubator, founded by Tananbaum and Vik Bajaj—one of the technical experts Tananbaum brought in to review Genapsys technology. (See XC, ¶¶ 32, 35.) Foresite Labs purports to focus on Genomics, one of the technologies that benefits from the disclosed Genapsys information. (See XC, ¶ 35.)

From their inception through the first half of 2019, both Foresite Labs and Genapsys were in "stealth mode." (See XC, ¶ 37.) Later in 2019, it was revealed that Foresite created and was the financier of Foresite Labs. (Id.) In January 2020, it was publicly announced that Foresite invested an additional $80 million in Element Biosciences. (Id.) Genapsys was stunned that Foresite had concealed its huge financial stake in direct competitors and had concealed the fact that the Foresite representatives who were provided access to Genapsys technology were founders and senior management of those competitors. (See XC, ¶ 38.) Moreover, Element Biosciences had obtained in excess of $100 million in funding just over 2 years from its inception, through purported development of technology wholly derived from Genapsys' confidential and proprietary information. (Id.)

However, despite its theft of Genapsys' intellectual property, concerned that Genapsys could nevertheless disrupt the entire market, cross-defendants embarked on a further scheme to harm Genapsys, interfering with its other investors, potential investors and existing contractual relationships, directly threatened the company, making numerous unwarranted and burdensome demands on the company, and knowingly made false allegations in its complaint.

On December 4, 2020, Plaintiff filed the public version of its XC against all cross-defendants, asserting causes of action for:

1) Tortious interference with prospective economic advantage;
2) Breach of contract—NDA;
3) Breach of contract—June 2019 letter agreement;
4) Breach of contract—IRA;
5) Breach of confidentiality agreements by disclosure of complaint; and,
6) Misappropriation of trade secrets.

Cross-defendants demur to the first and fifth causes of action of the XC, asserting that they fail to state facts sufficient to constitute a cause of action because they are barred by the litigation privilege and otherwise fail to state facts sufficient to constitute a cause of action. Tananbaum demurs to the second through fifth causes of action on the ground that he is not a party to any of the subject contracts.

Cross-defendants' demurrer to the first cause of action

Cross-defendants first argue that the first cause of action is barred by the litigation privilege because it is based on Foresite's filing of its complaint. Cross-defendants are correct that the first cause of action may not seek damages based on Foresite's filing of its complaint, or the allegations made therein as such conduct is protected by the litigation privilege. (See Rusheen v. Cohen (2006) 37 Cal.4th 1048, 1057-1058 (stating that "the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action… [t]he 'pleadings and process in a case are generally viewed as privileged communications'"), quoting Navellier v. Sletten (2003) 106 Cal.App.4th 763, 770.) However, the first cause of action's allegations regarding the filing of the complaint is but a small portion of that cause of action, and "a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy." (Kong v. City of Hawaiian Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1047; see also PH II, Inc. v. Super. Ct. (Ibershof) (1995) 33 Cal.App.4th 1680, 1681 (stating that "a party may not demur to a portion of a cause of action"); see also Grieves v. Super. Ct. (Fox) (1984) 157 Cal.App.3d 159, 163 (stating "a demurrer does not lie to a part of a cause of action").) Accordingly, the demurrer to the first cause of action may not be sustained on this basis.

Cross-defendants next argue that Genapsys otherwise fails to allege the elements of a tortious interference with prospective economic advantage because the first cause of action neither alleges a probability of future economic benefit, nor any independently wrongful act, nor any actions by the cross-defendants that caused harm. As to cross-defendants' first argument, as they argue, "a cause of action for tortious interference has been found lacking when either the economic relationship with a third party is too attenuated or the probability of economic benefit too speculative." (Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. (2017) 2 Cal.5th 505, 515.) Without divulging the allegations in the XC, the first cause of action adequately alleges a known third party with whom Genapsys had an economic relationship. As to cross-defendants' argument regarding a lack of an alleged wrongful act, the XC also adequately alleges an independently wrongful act. (See Marsh v. Anesthesia Services Medical Group, Inc. (2011) 200 Cal.App.4th 480, 505 (stating that "alleged acts of defamation or disparagement could legitimately be considered to meet, for pleadings purposes, the standards for establishing 'independent wrongfulness' of interference").) Lastly, cross-defendants' latter

argument that the XC fails to allege that they caused any harm to Genapsys ignores the allegations in paragraph 46 regarding Tananbaum.

Cross-defendants' demurrer to the first cause of action of the XC is OVERRULED.

Cross-defendants' demurrer to the fifth cause of action

Cross-defendants argue that the fifth cause of action for breach of the confidentiality agreement by disclosure of the complaint is barred by the litigation privilege, and otherwise fails to allege a breach and resulting damages. Here, the Court agrees that it does not allege damages resulting from the purported breach of the confidentiality agreement. Accordingly, cross-defendants' demurrer to the fifth cause of action is SUSTAINED with 10 days leave to amend.

Tananbaum's demurrer to the second through fifth causes of action

Tananbaum separately demurs to the second through fifth causes of action, arguing that he cannot be liable for breach of contract as he was not a party to any agreement with Genapsys. In opposition, Genapsys argues that Tananbaum has signed NDA without indicating his title; thus, according to California law, he is bound in personal capacity. (See Firestone v. Wahl (1955) 133 Cal.App.2d 501, 505 (stating that "an agent who signs his own name instead of that of the principal when he intends to bind the latter, becomes himself liable, the contract being considered his own").) However, there are no allegations that Tananbaum signed the NDA in his personal capacity, and the NDA is not attached. Accordingly, Tananbaum's demurrer to the second through fifth cause of action is SUSTAINED with 10 days leave to amend.

Cross-defendants' motion to seal the demurrer

Cross-defendants move to seal the demurrer. Consistent with the Court's prior orders regarding sealing, the Court finds good cause to seal the demurrer. As already established previously, the Court expressly finds facts that establish that there exists an overriding interest that overcomes the right of public access to the record, the overriding interest supports sealing the record, a substantial probability exists that the overriding interest will be prejudiced if the demurrer is not sealed, the proposed sealing is narrowly tailored and there are no less restrictive means to achieve the overriding interest. (See Cal. Rule of Court 2.550, subd. (d).) Other than the cross-defendants' demurrer and Genapsys' opposition to the demurrer, other court records relating to the motion to seal or demurrer are not to be sealed. Other than the parties, witnesses for the case, experts for the case, jurors on the case, and court personnel, no person is authorized to view the sealed record. (See Cal. Rule of Court 2.551, subd. (e).) Cross-defendants' motion to seal is GRANTED.

The Court will prepare the Order.

Calendar line 4

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Calendar Line 5

Case Name: *South Bay Piping Industry Labor Management Trust v. Pacific Plumbing & Sewer Service, Inc.*
Case No.: 19CV344620

According to the allegations of the complaint, plaintiff South Bay Piping Industry Labor Management Trust ("Plaintiff") is a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code). (See complaint, ¶ 4.) Plaintiff, through its agent Mauricio Velarde, investigated defendant Pacific Plumbing & Sewer Service, Inc.'s ("Defendant") work on the San Jose Convention Center, the County of Santa Clara Winter Shelter, the County of Santa Clara's County Building Bathroom removal, the County of Santa Clara's County Correctional Complex (Elmwood Jail) and the Sunnyvale Community Center, and found that: Defendant's employees are working on a project but are not paid prevailing wages as those workers do not appear in Certified Pay Records for the days in question; Certified Pay Records reviewed reported less hours than those reported by the employees; Defendant failed to properly increase the rates of pay to plumbers in accordance with the published rate of pay for the projects with a ** (double asterisk) rate; and, Defendant's employees arrived to jobs in company vans as a group with plumbing tools and materials, but did not compensate the employees for their travel time and the hours were not reflected in the Certified Pay Records. (See complaint, ¶¶ 10-11.)

On March 14, 2019, Plaintiff filed a complaint against Defendant asserting a single cause of action for violation of Labor Code section 1771.2.

Defendant moves for summary judgment, or, in the alternative, for summary adjudication of three issues: whether Defendant paid the correct prevailing wage for the Convention Center Project; whether Defendant paid its employees for travel time; and, whether Defendant paid its employees for all hours worked at the Convention Center project and Winter Shelter project.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

Defendant's burden on summary judgment or summary adjudication

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co. (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, citing Guz v. Bechtel National Inc. (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (Id. at § 10:241.20, p.10-91, citing Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (Id. at ¶ 10:242, p.10-92, citing Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854-855.)

Defendant seeks to summarily adjudicate three "issues" that do not completely dispose of an entire cause of action or issue of duty.

As previously stated, Defendant moves for summary judgment, or, in the alternative, for summary adjudication of three issues: whether Plaintiff paid the correct prevailing wage for the Convention Center Project; whether Plaintiff paid its employees for travel time; and, whether Plaintiff paid its employees for all hours worked at the Convention Center project and Winter Shelter project. "A party may move for summary adjudication as to… one or more issues of duty, if the party contends that… that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of... an issue of duty." (Code Civ. Proc. § 437c, subd. (f).) "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision" which requires the parties to submit a joint stipulation stating the issue or issues to be adjudicated and a declaration from each stipulating party that the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement. (See Code Civ. Proc. § 437c, subd. (t).)

In Oliver v. Konica Minolta Business Solutions U.S.A., Inc. (2020) 51 Cal.App.5th 1, the issues of whether employees were entitled to certain wages or for hours worked, and whether the employer was obligated to reimburse employees for miles driven in their personal vehicles between home and their first or last worksite of the day were determined not to be issues that could be summarily adjudicated without fulfilling the requirements of subdivision (t). (See Oliver, supra, 51 Cal.App.5th at pp.13, 15 (stating that it is "[a] motion… under Code of Civil Procedure section 437c, subdivision (t) for summary adjudication of a legal issue that does not completely dispose of a cause of action, an affirmative defense, or an issue of duty"); see also Decastro W. Chodorow & Burns v. Super. Ct. (Initial Amalgamation, Ltd.) (1996) 47 Cal.App.4th 410, 418-422 (discussing language of subdivision (h), determining that the subdivision does not allow for adjudication of one component of the damages element of a cause of action which does not dispose of an entire cause of action); see also Catalano v. Super. Ct. (Camenson) (2000) 82 Cal.App.4th 91, 97 (stating that "in keeping with the purposes of Code of Civil Procedure section 437c, subdivision (f), a grant of summary adjudication in this area must cover the entire claim… [t]he purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area").) Here, the issues sought to be adjudicated similarly do not completely dispose of a cause of action, affirmative defense or an issue of duty. Accordingly, the motion for summary adjudication is DENIED.

Defendant fails to meet its initial burden, or itself demonstrates the existence of a triable issue of material fact

Defendant moves for summary judgment on the ground that it did not violate section 1771.2 because: it paid all plumbers working on the Convention Center project the correct rate; it provides its employees with company vehicles for convenience only and pays all employees for travel time from its office to job sites although not legally obligated to do so; and, its employees were paid for all hours worked.

In support of its motion, Defendant presents the declarations of its employees Giovani Ortega Hernandez, Jaime Cardoza Solorzano, Jose Alfredo Rodriguez, Juan Valle, Matthew Gutierrez, Melvin Alas, and Omar Mejia, and former employees Jesus Hernandez, Jose Alberto Flores Amaya, and Arturo Mendoza Flores, who state that they: use the company vehicle to go from their home to Defendant's office or the job site and from the job site back to Defendant's office or to their home; they could also use their own vehicle and there was no requirement that they use the company vehicle; from time to time, they would give others a ride or would catch a ride from a co-worker based on convenience; they kept track of time, including lunch and submitted time cards to Defendant; they never underreported their time; they were not allowed to work off the clock; Defendant never required that they check in at its office before heading to the job site; sometimes, they would drive directly to the job site and other times to Defendant's office and carpooled with coworkers; they were instructed that if they chose to go to the office first and carpool to the job site that they still needed to log that time for compensation; they have reviewed the Certified Pay Records for the Convention Center Project and the Winter Shelter Project and have been paid for all hours worked on the projects; there was an issue with misclassification that was shortly remedied and they received restitution and the amended Certified Pay Records note the paychecks upon which they were paid restitution; and, they understand that Mr. Velarde has indicated that he saw more Defendant employees work than listed on the Certified Pay Records but that Velarde is incorrect.

Attached to the declaration of counsel Michael Hsueh, Defendant also presents Plaintiff's responses to interrogatories in which Defendant states that the workers were known to be Amancio Torres, Gustavo Martinez, Jose Alfredo Rodriguez, Jesus Hernandez, Matthew Gutierrez, Arturo Mendoza, Giovani Ortega, Jaime Cardoza, Juan Valle, Melvin Alas, and Jose Alberto Flores Amaya; the 2016-2 Plumber Determination for Santa Clara is a Double Asterisk "**" determination and the current rate in effect for a Journeyman Plumber is $104.89 minus $1.45 for fringe benefit contributions for a total of $103.44. (See Hsueh decl., exhs. B-C.)

Defendant also presents the declaration of its CFO, Marleine Bechwati, who states that: she reviewed the applicable 2017-1 General Prevailing Wage Determination, and determined that the prevailing wage was $96.39 after subtracting the $1.45 training rate and then there was a predetermined increase of $3.50 for work performed after June 30, 2017; its employees are not permitted to work off the clock and are paid based on the records that they fill out; its employees are in charge of accurately filling out their time cards; if its employees arrive at the office first, they are to log time spent at the office; Defendant provided a company vehicle for each of its employees except for Jose Rodriguez who did not want a company vehicle but employees were also allowed to use their own vehicles or another source of transportation of their choosing; the employees who worked for Defendant were Amancio Torres, Gustavo Martinez, Jose Alfredo Rodriguez, Jesus Hernandez, Matthew Gutierrez, Arturo Mendoza Flores, Giovani Ortega Hernandez, Jaime Cardoza Solorzano, Juan Valle, Melvin Alas, Omar Mejia, and Jose Alberto Flores Amaya; true and correct copies of the employees' timecards are attached to their declarations except for Amancio Torres and Gustavo Martinez; although

employee plumbers performing plumbing duties were paid $99.89 after subtracting training fees for the Convention Center project, some other plumbers were paid the higher rate of $103.44 after subtracting training fees in some amended Certified Pay Records and were thus overpaid; Amancio Torres and Gustavo Martinez are former employees of Defendant and despite diligent efforts, Defendant has been unable to contact them with respect to this motion; based on a review of the Certified Pay Records, both Amancio Torres and Gustavo Martinez were paid for all hours worked on the Convention Center Project, although their time cards and paystubs are not accurate on February 15, 20, 21 and 22, 2018 and March 2, 2018 when they mistakenly marked time for the Convention Center project instead of another project; and, although Mr. Velarde claims that he was told by Mr. Martinez on February 13, 2019 that he had arrived at Defendant's shop in the morning and later arrived at the Convention Center around 7:00 a.m. and could not work until 5:00 p.m., Mr. Martinez was not working on February 13, 2019 based on her review of his time cards and the Certified Pay Records.

Defendant also requests judicial notice of general prevailing wage determinations by the Director of the California Department of Industrial Relations, Travel and Subsistence Provisions for Plumber and Laborer for the County of Santa Clara, the City of San Jose Request for Bid advertising for the Convention Center Project, the Director's award memo for the Convention Center Project, and the County of Santa Clara Construction Document 91825 regarding the Winter Shelter Expansion project.[i]

Here, as stated by Ms. Bechwati, Defendant fails to submit declarations of Amancio Torres and Gustavo Martinez. (See Bechwati decl., ¶ 14.) Bechwati testifies that they were paid all hours worked on the Convention Center Project, but then states that their time cards and paystubs were not accurate because they made mistakes. (See Bechwati decl., ¶¶ 14, 19-20.) This is problematic, as Bechwati lacks the personal knowledge to make such statements on behalf of those employees, particularly when she is contradicting their own time cards—which Bechwati states that they themselves fill out and are in charge of accurately filling out—and Mr. Velarde's evidence that Martinez was working on the dates as stated on his time card according to Martinez. (See Bechwati decl., ¶¶ 9, 18-21.)

As Defendant fails to establish that it did not violate Labor Code section 1771.2 with respect to each of its employees, it fails to meet its initial burden to demonstrate that the complaint lacks merit against it. Accordingly, Defendant's motion for summary judgment is DENIED.

The Court will prepare the Order

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1. As Defendant fails to meet its initial burden, it is unnecessary to rule on the requests for judicial notice. Nevertheless, the City of San Jose Request for Bid, the Director's award memo for the Convention Center Project, and the County of Santa Clara Construction Document 91825 are not proper subjects for judicial notice; therefore, the request for judicial notice is DENIED as to those documents. The request for judicial notice is GRANTED as to the general prevailing wage determinations and the Travel and Subsistence Provisions. (Evid. Code § 452, subd.(h).)

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