CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 39
HEARING DATE: 11/06/17

1. TIME: 9:00 CASE#: MSC14-01619
CASE NAME: HAROLD NAGAN VS. PATRICK RILEY
HEARING ON MOTION FOR LEAVE TO FILE 1st Amended COMPLAINT
FILED BY HAROLD R. NAGAN, SUSAN A. NAGAN
**** TENTATIVE RULING: ****

Plaintiffs Harold Nagan and Susan Nagan's motion for leave to file an amended complaint is granted. Plaintiffs shall file and serve a first amended complaint by November 17, 2017. The first amended complaint may only include the amendments listed in Plaintiffs' moving papers, but must also remove cause of action 13 for conspiracy and remove Charles Riley as a defendant.

As an initial matter, the Court notes that Plaintiffs filed their reply papers on October 31, 2017, which was four court days before the hearing. Reply papers were due at least five court days before the hearing and consequently the reply papers were filed late. (Code of Civil Procedure §1005(b).) The Court has read and considered Plaintiffs' reply this time, however, any future late papers may be disregarded by this Court. (See California Rules of Court, rule 3.1300(d).) Plaintiffs also failed to include tabs with their exhibits as required by California Rules of Court, rule 3.1110(f) and Local Rule 3.42. All parties are expected to know and comply with all the California Rules of Court and Code of Civil Procedure and yet this is the third time the Court has had to remind parties in this case about violations of California Rules of Court.

Procedural History

Plaintiffs filed their complaint against defendants Patrick Riley, Natalie Riley and Charles Riley on September 12, 2014.

In April 2016, the Court granted summary judgment in favor of Charles Riley. (See Order Granting Charles Riley's Motion for Summary Judgment, Filed May 17, 2016.)

In June 2017, the Court granted Patrick Riley and Natalie Riley's motion for summary adjudication as to cause of action 13 for civil conspiracy. (See Order After Hearing June 26, 2017, Filed June 30, 2017.) The Court also granted judgment on the pleadings with leave to amend as to causes of action 6 (fraud), 9 (negligence) and 12 (negligent infliction of emotional distress). (See Order After Hearing June 26, 2017, Filed June 30, 2017.) As part of the Court's ruling, it stated that Plaintiffs could amend causes of action 7 (fraudulent concealment) and 8 (negligent misrepresentation) if they wanted to since the defendants' argument on the fraud claim may also apply to these claims. (Ibid.) This order required that an amended complaint be filed by July 24, 2017. (Ibid.) At the hearing on July 10, 2017, the deadline to file an amended complaint was extended to August 1, 2017. (July 10, 2017 Minute Order.)

Plaintiffs did not file an amended complaint by August 1, 2017. Instead Plaintiffs filed a motion for leave to file an amended complaint on September 21, 2017. The amended complaint will add allegations in causes of action 6, 7, 8, 9 and 12.

Discussion

Code of Civil Procedure §473(a) gives the Court discretion is deciding whether to allow an amended pleading. There is "a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial [citations]…" (*Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 487.) However, leave to amend can be denied where there is " 'inexcusable delay and probable prejudice to the opposing party'… [Citation.]" (*Ibid*; see also, *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 (even assuming there is unreasonable delay, "it is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment.").)

Here, Plaintiffs have not explained why they delayed in seeking leave to amend. Nor have they explained (until their reply) why the first amended complaint was not filed by August 1, 2017. However, Defendants have shown no prejudice to these amendments. If this was a normal motion for leave to amend, the Court's analysis would end here and the motion would be granted.

This is not, however, a normal motion for leave to amend. In this case the Court granted a motion for judgment on the pleadings with leave to amend and gave Plaintiffs a deadline to file an amended complaint, which was subsequently extended. Plaintiffs did not file an amended complaint by the deadline. It is this failure, that Defendants use to oppose Plaintiffs' motion. Defendants argue that since Plaintiffs missed the deadline to amend their complaint, the Court can strike the late filed amended pleading under Code of Civil Procedure §436 and §438. In addition to sections 436 and 438, Defendants rely on *Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603 to support their argument.

Code of Civil Procedure §438(h)(4) gives the Court discretion to strike an amended complaint under section 436 when that complaint is filed after the deadline to amend when a motion for judgment on the pleadings was granted with leave to amend. Under both sections 436 and 438(h)(4) the court has discretion on whether or not to strike pleadings as both sections use "may" instead of "shall". In addition, *Leader* makes clear that the trial court has discretion in deciding whether to grant a motion under section 473(a) [motion for leave to amend], section 436 [motion to strike] and section 581(f)(2) [dismissal of complaint after the failure to timely amend when a demurrer was sustained with leave to amend]. (*See Leader, supra,* 89 Cal.App.4th at 613-614.) Section 438(h)(4) and section 581(f)(2) both state that the court *may* act. Thus, it is clear from these statutes and *Leader* that this Court has discretion to decide whether to give Plaintiffs leave to file their amended complaint and whether to strike any such amended complaint filed by Plaintiffs.

In *Leader*, the plaintiff failed to timely file a fourth amended complaint after the trial court had sustained demurrers to the entire third amended complaint with leave to amend. (*Leader, supra,* 89 Cal.App.4th at 607.) Instead more than one month after the deadline had passed, the plaintiff brought the fourth amended complaint to a status conference and "just dropped it" on the court. (*Id*. at 608.) The court did not accept the late filed complaint and plaintiff then filed a

motion for leave to file the amended complaint under Code of Civil Procedure §473. (*Id*. at 607.) The defendants then filed a motion to strike the amended complaint and/or dismiss the action under Code of Civil Procedure §581(f)(2). (*Id*. at 607.) The trial court granted the motion to strike and then dismissed the case. (*Id*. at 611.) The Court of Appeal in *Leader* upheld the trial court's decision under an abuse of discretion standard. (*Id.* at 612.)

Defendants argue that this Court should follow *Leader* and refuse to allow the amended complaint or strike the amended complaint. The facts in *Leader* are distinguishable from the facts here and the Court exercises its discretion to allow Plaintiffs to file their first amended complaint. In addition, the Court will not strike Plaintiffs' amended complaint under Code of Civil Procedure § 436 and § 438(h). Therefore, Plaintiffs' motion for leave to file an amended complaint is granted. However, cause of action 13 and Charles Riley are no longer part of this case pursuant to the Court's rulings discussed above and yet the proposed amended complaint continues to include these items. Thus, the Court orders that Plaintiffs may file their amended complaint, but the amended complaint must remove cause of action 13 and remove Charles Riley as a defendant.

Defendants' requests for judicial notice are granted.

2. TIME: 9:00 CASE#: MSC14-01619
CASE NAME: HAROLD NAGAN VS. PATRICK RILEY
FURTHER CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

Tentative ruling procedure does not apply. Appearances required.

3. TIME: 9:00 CASE#: MSC15-00906
CASE NAME: SAFETY ENVIRONMENTAL CONTROL VS. JORDAN BRADSHAW
HEARING ON MOTION FOR LEAVE TO FILE 3rd Amended COMPLAINT
FILED BY SAFETY ENVIRONMENTAL CONTROL INC.
**** TENTATIVE RULING: ****

Granted. The moving papers establish proper grounds, and there is no opposition.

4. TIME: 9:00 CASE#: MSC16-01293
CASE NAME: SCHORNO VS. GANN-DESIMONE
HEARING ON MOTION TO SET ASIDE ORDER DENYING MOTION TO COMPEL
FILED BY NANCY S. GANN-DESIMONE
**** TENTATIVE RULING: ****

Defendant Nancy S. Gann-Desimone's motion to set aside order denying Defendant's motion to compel is denied. Defendant's motion was filed September 18, 2017 (although the moving papers are signed as of September 13, 2017). The order she seeks to set aside was the result of a hearing held July 31, 2017, and notice of entry of the order was mailed by plaintiff's counsel on August 10, 2017. While styled as a motion to "set aside" the order, it is in essence a motion to reconsider. Code of Civil Procedure section 1008 requires that the motion be based on new facts, circumstances, or law regarding the motion, and that the motion be filed within ten days after notice of the prior ruling (plus five for mailing). In this instance, the motion was not timely filed. Even if the motion were treated as a motion under Code of Civil Procedure section 473(b), it sets forth no mistake, inadvertence, surprise, or excusable neglect within the meaning of that statute. Simply stating that mail is not delivered to her post office box every day is not sufficient. Plaintiff's request for sanctions is denied. This is not a discovery motion, and the requirements of Code of Civil Procedure section 128.7 have not been followed.

5. TIME: 9:00 CASE#: MSC16-01293
CASE NAME: SCHORNO VS. GANN-DESIMONE
HEARING ON MOTION TO SANCTION PLAINTIFF FOR FAILING TO RESPOND
FILED BY NANCY S. GANN-DESIMONE
**** TENTATIVE RULING: ****

Defendant Nancy Gann-Desimone's motion to sanction plaintiffs for failing to respond to defendant's form interrogatories and request for admissions, set two, in a timely manner is denied. This motion essentially is a restatement of the prior motion to compel responses to form interrogatories and request for admissions, denied on August 8, 2017, with notice of the ruling sent on August 10, 2017. It is, in effect, an untimely motion to reconsider. Plaintiff's request for sanctions is denied.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 39
HEARING DATE: 11/06/17

6. TIME: 9:00 CASE#: MSC16-02093
CASE NAME: KINETICS MECHANICAL VS. ASSOCIATED FLOW CONTROLS
HEARING ON MOTION FOR JUDGMENT ON THE PLEADINGS
FILED BY ASSOCIATED FLOW CONTROLS INC.
**** TENTATIVE RULING: ****

Defendant Associated Flow Controls, Inc.'s ("AFC") motion for judgment on the pleadings is denied. The court notes initially that there are no procedural reasons this court cannot entertain Defendant's motion. Plaintiff Kinetics Mechanical Service, Inc. ("KMS") argues that Defendant's motion is barred by CCP Section 438(g)(1). CCP Section 438(g)(1) provides that a statutory motion for judgment on the pleadings may be made even though the moving party has already demurred to the complaint . . . on the same grounds as is the basis for the motion provided for in this section and the demurrer has been overruled, provided that there has been a material change in the applicable case law or statute since the ruling on the demurrer. KMS contends that AFC previously demurred to its FAC and that demurrer was overruled.

While Defendant has previously demurred to the FAC and that demurrer was overruled, AFC's demurrer was not made on the same grounds as this motion for judgment on the pleadings. The lack of licensure by AFC was not raised in the prior demurrer, and hence the limitation of CCP Section 438(g) would not bar this motion. Additionally, Defendant's notice is missing its contents, so it is unclear whether AFC is even making a statutory motion for judgment on the pleadings under CCP Section 438(g). If the motion is nonstatutory, there is no similar requirement as that in the statute. See Weil & Brown, *Civil Procedure Before Trial* (2017) pages 7(I)-82 through 7(I)-86.

Defendant AFC moves for judgment on the FAC on the ground that the FAC requires the performance of activities that require a contractor's license. AFC concedes that it did not have a contractor's license. Hence, it could not have entered into a contract with KMS pursuant to Bus. & Prof. Code Section 7031, and any contract between the parties would be void and illegal.

This is error. Bus. & Prof. Code Section 7031(a) is designed to prohibit unlicensed contractors (like AFC) from bringing or maintaining an action to recover compensation in any court in the state. Section 7031(b) provides for recovery of all compensation paid to the unlicensed contractor for performance of any act or contract by any person (KMS) utilizing an unlicensed contractor. The law is clear. KMS can sue AFC for any compensation it paid Defendant, if AFC was required to be a licensed contractor and performed the work of a licensed contractor without a license.

MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Company, Inc. (2005) 36 Cal.4th 412 is illustrative. In that case, the plaintiff was a contractor subject to the Contractors' State License Law. The plaintiff sought recovery on a contract under which the plaintiff had commenced work before obtaining the required license. The plaintiff obtained the license a few weeks after starting work and thereafter was fully licensed for the ensuing period in which the work was completed. The California Supreme Court held that when Bus. & Prof. Code Section 7031(a) applies, it bars a person from suing to recover compensation for any work done under an agreement for services requiring a contractor's license unless a proper license was in place *at all times* during that contractual performance. Moreover, the statute does not allow a

contractor to recover compensation for any individual acts performed while duly licensed if the contractor was unlicensed at any time during contractual performance. Id. at 425-431.

A party is even entitled to reimbursement for amounts paid to an unlicensed contractor if the party knew the contractor was unlicensed. See Alatriste v. Cesar's Exterior Designs, Inc. (2010) 183 Cal.App.4th 656, 668.

Defendant argues that Section 7031 applies to Plaintiff because "it bars a suit for breach of contract as well as for the collection of compensation of any act by an unlicensed contractor." See AFC's Memorandum of Points & Authorities, page 9, lines 8-11. Defendant cites to Holm v. Bramwell (1937) 20 Cal.App.2d 332.

In Holm, supra, 20 Cal.App.2d 332, the Court of Appeal disallowed amounts paid to a subcontractor because he was unlicensed. The Court reasoned that plaintiff's contract with the unlicensed subcontractor was illegal and void, and the mechanics lien the unlicensed subcontractor had obtained, was likewise void. A mechanics lien may not be founded on an illegal contract procured contrary to law. Id. at 336-337. AFC follows the logic of Holm in arguing that its contract with KMS was illegal and void because AFC was not qualified to make a valid contract because it was unlicensed. See Holm, supra, 20 Cal.App.2d at 338. However, Holm predates the passage of Bus. & Prof. Code Section 7031, which was added in 1939. The statute clearly sets out the unpaid, unlicensed party is without a remedy; that party may not bring or maintain an action to recover compensation in any court in the state. The statute also allows recovery by any person (and a corporation is a person under California law) who has utilized an unlicensed contractor. The person may recover all compensation paid to the unlicensed contractor for performance of *any act or contract*.

AFC also cites to Weeks v. Merrit Building & Construction Co. (1974) 39 Cal.App.3d 520. Weeks concerned a licensed subcontractor, who had his unlicensed surety complete the project because the subcontractor a heart attack. The subcontractor had mostly completed the project. The Court refused to allow payment to the subcontractor. The Court explained: Because the plaintiff relinquished all control over the performance of the contract after his heart attack, he violated Bus. & Prof. Code Section 7031 because it is the person who performs the contract who must have the required license, not just the person who happens to have a right to maintain a suit for money owed under the contract. One purpose of the Contractors' State License Law is to guard against the possibility that unlicensed persons will complete projects begun by a properly licensed person. Id. at 523-524.

Defendant also relies on Muth v. Leineke (1970) 9 Cal.App.3d 433. Muth was an action on a contract by Plaintiff and its undisclosed principal, who was also an unlicensed subcontractor. The Court noted that the fact that the plaintiff was duly licensed did not change the fact that the subcontractor was not. The public needs protection from admitted undisclosed principals whose unlicensed and undisclosed agents could recover the value of the work done leaving the customer open to suit and the possibility of double recovery by the principal if the undisclosed principal doctrine is not applied. Consequently, the court concluded that the

undisclosed agent's lack of license, under the undisclosed principal doctrine, was properly applied in this case to bar the plaintiff's recovery. Id. at 436-437.

With the exception of Holm, which was decided prior to Section 7031, neither Weeks or Muth assist Defendant. The cases do not hold that no contract was formed because the AFC was not a licensed contractor able to enter into a valid contract. Indeed, Bus. & Prof. Code Section 7031, and the cases interpreting it, conclude that the statute is broad. It does not concern only contracts with unlicensed contractors but "any acts performed by unlicensed contracts." The statute uses terms such as "utilized the services of an unlicensed contractor," to make sure that the statute applies to all unlicensed contractors and persons that use them, either pursuant to a contract or not.

Finally, AFC argues that the "a person" language in Bus. & Prof. Code Section 7031(b) applies only to the general public and owners. AFC points to an Assembly Committee analysis of the bill which apparently amended the statute in 2001, AB No. 678. AFC points to the following Committee comment: "That policy is furthered in AB No. 678 by specifically recognizing the capacity of an owner to recover money already paid an unlicensed contractor, even if the person knew the contractor was unlicensed." This 2001 Assembly Committee comment in the historical and statutory notes to Section 7031, and Defendant does not attach it to its request for judicial notice.

With that said, the statute does not use the term "owner" in discussing who my recoup all compensation paid to the unlicensed contractor for performance of any act or contract. See Bus. & Prof. Code Section 7031. The State Contractors License Board statute, Bus. & Prof. Code Section 7000, *et seq.*, states explicitly that protection of the public is the Board's highest priority. See Bus. & Prof. Code Section 7000.6. However, the statute specifically defines "person" in Section 7025(b). Section 7025(b) reads: "Person" as used in this chapter includes an individual, a firm, partnership, corporation, limited liability company, association or other organization, or any combination thereof." Hence, there is no question that KMS is a person for the purpose of the remedy provided for in Bus. & Prof. Code Section 7031 for breach of contract.

AFC's request for judicial notice of Exhibits A and B to the declaration of Douglas Poulin is granted. See Evid. Code Section 452(c).

7. TIME: 9:00 CASE#: MSC16-02093
CASE NAME: KINETICS MECHANICAL VS. ASSOCIATED FLOW CONTROLS
HEARING ON DEMURRER TO AMENDED ANSWER
FILED BY KINETICS MECHANICAL SERVICE, INC.
**** TENTATIVE RULING: ****

Plaintiff Kinetics Mechanical Service, Inc. ("KMS") demurrer to Defendant Associated Flow Controls, Inc. ("AFC") Verified Amended Answer to the Verified First Amended Complaint ("FAC") is sustained with leave to amend.

Two procedural problems have been raised. The first problem concerns the amount of time provided for Defendant to respond to the demurrer. AFC filed an answer to the FAC. KMS demurred to it. The hearing was set for October 23, 2017. The court continued that hearing to November 6, 2017. AFC then filed an Amended Answer on September 29, 2017. KMS demurred to the Amended Answer on October 10, 2017. Pursuant to CCP Section 1005(b), KMS needed to serve their demurrer, if by mail (which is how it was served), by October 6, 2017. Instead, KMS served AFC by mail with the demurrer to the Amended Answer on October 10, 2017. While the court could continue the motion, the court finds that AFC has not suffered any prejudice from the shortened time. Defendant filed a substantive reply to the demurrer, and the matter is fully briefed.

The second problem is that KMS has specified the wrong grounds for filing the demurrer against the Amended Answer. KMS says the motion is based on CCP Section 430.10 and 438. Section 430.10 sets out the grounds for objecting to a Complaint or Cross-Complaint. Section 438 concerns the grounds for a motion for judgment on the pleadings, which is an alternative motion being made by Plaintiff. However, the only three grounds for a demurrer to an answer are set out in CCP Section 430.20: (1) failure to state facts sufficient to constitute a defense; (2) uncertainty, and (3) failure to state whether the contract alleged in the answer is written or oral. Again, AFC has suffered no prejudice from this mistake. The court is willing to overlook the wrong, stated grounds for the demurrer to the Amended Answer because Plaintiff made the correct arguments (grounds 1 and 2) but did not cite the correct demurrer rule.

As to the substance of the demurrer to the Amended Answer, it is well-taken and the demurrer is sustained.

RESPONSE TO THE ALLEGATIONS IN THE VERIFIED FAC: UNCERTAINTY

AFC has actually "answered" only one allegation out of 149, that being paragraph 2 of the FAC, which alleges that AFC is a corporation. Defendant has otherwise responded to all 148 allegations in the FAC with the statement that "Defendant lacks sufficient information or belief to admit or deny the allegations of these paragraphs, and on that basis denies each of the 148 allegations."

Many of the allegations concern AFC's own actions and knowledge. Denials based on lack of information and belief are limited to situations where the defendant is not able to deny or admit positively. If the matter is within the defendant's actual knowledge or by its nature is presumed to be within Defendant's knowledge, of if the Defendant has the means of ascertaining whether or not it is true, a denial on information and belief will be deemed sham and evasive. See Dobbins v. Hardister (1966) 242 Cal.App.2d 787, 791-792. That is the case here.

AFC allegedly lacks information and belief as to virtually all of the allegations in the FAC, even though this information is within their actual or presumed knowledge: paragraph 1 (KMS is a corporation); paragraph 5 (where AFC's own offices are located); paragraph 6 (the amount in controversy); paragraph 7 (the cases arises from a UCSF medical center upgrade); paragraph 8 (KMS was awarded the prime contract); paragraph 9 (the terms of the prime contract, which AFS has a copy of); paragraphs 11-17 (the identification of the documents in AFC's possession); paragraph 18 (AFC's own quotation); paragraph 19 (KMS's purchase order from AFC, in AFC's possession); paragraph 23 (KMS communicated with Mr. Drue, AFC's CFO and

a Director); paragraphs 24-30 (documents in AFC's possession); paragraph 32 (AFC had access to the attendees at the pre-bid meeting); paragraphs 33-36 (Mr. Drue's own emails); paragraph 37 (Mr. Drue had the relevant documents); paragraph 38 (AFC obtained information from the relevant documents); paragraphs 39-41 (emails between Mr. Drue and KMS); paragraph 42-43 (specific acts by AFC); paragraphs 44-46 (another Mr. Drue email and AFC's quotation); paragraph 47 (AFC's knowledge); paragraphs 48-49 (KMS's bid for the prime contract); paragraphs 50, 51-53 (AFC's own communications); paragraphs 54-60 (KMS's submittals, which AFC has); paragraphs 61-63 (AFC provided information to KMS); paragraph 64 (Mr. Drue's own email); paragraph 65 (University approval of the prime contract); paragraphs 66-67 (AFC's familiarity with certain documents); paragraph 68 (KMS issued a purchase order to AFC); paragraph 69 (what the purchase order says); paragraph 70 (AFC's shipments); paragraph 71 (a change order); paragraph 72 (when start-up was to occur); paragraph 73 (the products provided by AFC failed to meet specifications); paragraph 74-102 (communications among KMS, AFC and RECO and each entity's actions); paragraphs 103-149 (legal or factual allegations based on the earlier allegations).

DO THE AFFIRMATIVE DEFENSES FAIL TO STATE ANY DEFENSE?

The Amended Answer to the FAC sets out 54 affirmative defenses. With the exception of Affirmative Defense Nos. 1, 22, 30, the remainder of the affirmative defenses are simply legal conclusions. Under California law, affirmative defenses *cannot* be "proffered in the form of terse legal conclusions; rather, they must aver facts "as carefully and with as much detail as the facts which constitute the cause of action and which are alleged in the complaint." See FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 384; South Shore Land Co. v. Petersen (1964) 226 Cal.App.2d 725, 732 ("Generally speaking, the determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action.").

AFC argues that the general demurrer to its Amended Answer should fail because the Amended Answer adequately states at least one affirmative defense. Defendants cites to Quelamine Co., Inc. v. Stewart Title Guarantee Co. (1998) 19 Cal.4th 26, 38-39 for the well-established proposition with respect to demurrers to Complaints that if the essential facts of some cause of action are alleged, the complaint is good against a general demurrer. See also Sheehan v. San Francisco 49ers, Ltd. (2009) 45 Cal.4th 992, 998 (general demurrer may be upheld "only if the complaint fails to state a cause of action under any possible legal theory")

Defendant's argument does not apply to its Amended Answer. These cases would be similar if Defendant had laid out essential facts to establish a defense but had not entitled the affirmative defense with the correct legal theory. Here, the Amended Answer does the opposite; it pleads 54 affirmative defenses, only three of which provide any factual basis at all for the defense.

SANCTIONS

Plaintiff seeks sanctions for the alleged bad faith answer and Amended Answer filed by AFC, pursuant to CCP Section 128.7. Plaintiff's counsel, Joan Presky, submits a declaration, stating that "in its first demurrer" to the original Answer, KMS set forth its request that AFC correct its pleading within 21 days or face a sanctions motion. While AFC did amend its answer, it is virtually indistinguishable from the original Answer. However, KMS did not follow the correct

two step procedure to obtain sanctions under CCP Section 128.7, which includes filing a separate motion with this demurrer to obtain sanctions under that statute.

EVIDENTIARY OBJECTIONS

AFC has objected to the declaration of Joan Presky. Presky filed a meet and confer declaration and also set out the amount of sanctions KMS seeks pursuant to CCP Section 128.7(c)(1). There is no need to rule on these evidentiary objections. AFC does not contest that the parties met and conferred. Sanctions pursuant to CCP Section 128.7 are not available since KMS did not file a separate motion. See CCP Section 128.7(c)(1); Martorana v. Marlin & Saltzman (2009) 175 Cal.App.4th 685, 699.

8. TIME: 9:00 CASE#: MSC16-02093
CASE NAME: KINETICS MECHANICAL VS. ASSOCIATED FLOW CONTROLS
SPECIALLY SET HEARING ON DISCOVERY / SET BY DEPT. 39
**** TENTATIVE RULING: ****

AFC's motion to compel further discovery:

Associated Flow Controls, Inc. ("AFC") has moved to compel further responses by Kinetics Mechanical Service ("KMS") to form interrogatories and requests for production of documents, and for sanctions. Their grounds, as set forth in a memorandum and a 144-page Separate Statement fall into five general categories: (1) KMS made impermissible general objections, prohibited by CCP § 2031.240(a); (2) KMS objected that certain requests were vague and ambiguous when they were not; (3) KMS did not comply with the requirements of CCP § 2031.230 concerning the extent of a statement concerning the existence of documents; (4) KMS produced some documents at the office of its counsel instead of the office of AFC's counsel; and (5) KMS improperly answered interrogatories through reliance on the "compilation" provision of CCP § without specifying the documents that would provide the information in question.

On September 7, 2017, this Court authorized each side to file discovery motions, without resort to the court's Discovery Facilitator Program, no later than September 22, 2017, with the following proviso: "The Court orders that no theoretical motions to compel be filed. This means that no motions may be filed in connection with objections that have had no impact on the substantive discovery responses themselves. Counsel will not seek relief as to any objections as to which opposing counsel has represented that the objection was to avoid waiver only and no information has been withheld." (Order of September 7, 2017, Par. 3(h).)

KMS's responses and subsequent communications have made clear that they did not in fact withhold any information pursuant to their objections. Accordingly, to the extent the motion attacks any objections (items 1 and 2, above), it was filed contrary to the Court's order.

With respect to the claims that KMS failed to comply with section 2031.230 concerning the existence of documents, by just stating "responsive documents will be produced," the

statement is somewhat cursory, but the section in question only applies where the responding party is making a "representation of inability to comply," i.e., that documents do not exist, were lost, etc. Because they were purporting to provide all responsive documents, they were not required to make the further statements required by that provision.

With respect to the form interrogatories, the issue of the responses to the form interrogatories was considered by the Facilitator, who found that the responses were sufficient. AFC did not advise the Court of this finding in its motion, nor was the motion filed within 30 days after the Facilitator's ruling, as required by local rule.

With respect to the production of documents at the wrong office, the Court notes that most documents were provided electronically through delivery of a flash-drive. Section 2031.010 permits a party to demand inspection of documents, but it does not provide that the documents must be produced at the location specified by the propounding party. (CCP § 2031.010.) (AFC cites two provisions in support of this claim, sections 2031.210(c) and 2031.280, but neither addresses the issue.) Section 2031.030(c)(3) provides that the demand must "specify a reasonable place for making the inspection[.]" Whether it is reasonable to produce the documents at the office of requesting counsel or responding counsel (or the place where the records ordinarily are kept), is usually a function of the volume of documents, with larger volumes being produced at the responding party's office. (Weil & Brown, Civil Procedure Before Trial, Discovery, Par. 8:1448.) AFC made no good faith effort to resolve the issue, has not shown that its request was reasonable, and offers no explanation for why a motion to compel on this issue was necessary.

AFC's motion is denied.

KMS requests attorney fees as a sanction, but seeks leave to file an appropriate declaration at a later date. AFC's motion was not substantially justified, nor would any special circumstance make an award of fees unjust. Accordingly, KMS should submit appropriate fee documentation to the Court no later than December 2, 2017. AFC may file a response, limited to the issue of the appropriateness of the amount of the fee, by December 15, 2017.

KMS's motion to compel further discovery:

Kinetics Mechanical Service ("KMS") has moved to compel further responses by Associated Flow Controls, Inc. ("AFC") to form interrogatories and requests for production of documents, and for sanctions. Their grounds are set forth in a memorandum and two Separate Statements of 31 and 91 pages. On the face of it, their claims as to why the responses are inadequate seem similar to the claims made by AFC in its motion to compel. There are several differences, however. First, while KMS often made objections, but then stated that it was providing documents anyway, AFC has made objections and apparently has declined to produce documents or answer interrogatories as a result. Thus, the motion to compel does not appear to be hypothetical and therefore be precluded by the Court's order. Second, AFC answered all form interrogatories with reference to unspecified documents that have already been produced. AFC produced only 226 pages of documents (which the court does not have). It seems implausible that it could contain all of the information. If AFC maintains that all of the

interrogatories can be answered through reference to these documents, it takes a substantial risk of evidence or issue sanctions at later date if in fact other documents exist. Third, AFC has made a wide variety of different types of objections, many of which are difficult to understand, e.g., "it is not reasonable to describe documents by categories which bear no relationship to the manner in which the documents are kept, and which require the Responding Party to determine which of its extensive records fit a demand that asks for everything in its possession relating to a specific topic;" or that it does not know the meaning of "project" because it is not a licensed contractor, or that documents are subject to the attorney-client privilege or the attorney work-product doctrine without providing a privilege log.

At the previous hearing, the Court declined to appoint a discovery referee, but Paragraph 3 (i) of the Court's order said "at or after the hearing [on these motions] the court will consider whether to appoint a Discovery Referee for future discovery motions." While the Court is willing to consider discovery matters, the depth and breadth of the issues concerning AFC's responses to discovery show that it is necessary to appoint a discovery referee, notwithstanding AFC's objections. The scope of the referee's authority will include KMS's pending motion against AFC. The parties are ordered to meet and confer about all necessary terms of such an order under Code of Civil Procedure sections 639 and 640. If the parties do not agree, each party shall submit a proposed order with any accompanying written argument no later than December 1, 2017 (served on the other party), and the matter will be heard on December 11, 2017, at 9:00 a.m.

KMS's request that Mr. Mikkel Drue be ordered present is denied.

9. TIME: 9:00 CASE#: MSC16-02093
CASE NAME: KINETICS MECHANICAL VS. ASSOCIATED FLOW CONTROLS
FURTHER CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

Appearances required.

10. TIME: 9:00 CASE#: MSC17-00766
CASE NAME: JOHNSON VS. EXECUTIVE INN
HEARING ON MOTION TO ENFORCE SETTLEMENT
FILED BY SUMMER DESAI
**** TENTATIVE RULING: ****

Granted. The action will be dismissed with prejudice. The moving papers establish that Plaintiff agreed to dismiss the action with prejudice and has failed to do so. There is no opposition.

11. TIME: 9:00 CASE#: MSC17-00806
CASE NAME: CLIF SCHOFIELD VS. AMY COMPAGLIA
HEARING ON MOTION FOR RECONSIDERATION RE: LEAVE OF COURT / ANTI-SLAP
FILED BY CLIF SCHOFIELD
**** TENTATIVE RULING: ****

Hearing dropped at the request of the moving party.

12. TIME: 9:05 CASE#: MSP14-00625
CASE NAME: CLARKE FAMILY TRUST
HEARING ON MOTION TO AMEND JUDGMENT TO ADD JUDGMENT DEBTOR
FILED BY NANCY TEXDAHL
**** TENTATIVE RULING: ****

Appearance required. The Court is inclined either to take the matter under submission after oral argument, or obtain supplemental briefing.

Petitioner Nancy Texdahl ("Nancy") moves to amend the judgment to include Thomas C. Clarke, Jr., ("Tom") in his individual capacity as a judgment debtor.

The previous decision in this case by Judge Fenstermacher, on February 5, 2016, ordered that Nancy recover the principal distributions from the family trust in the amount of $230,395.88, which had been placed in the survivor's trust, of which Tom was the sole trustee and beneficiary. The court specifically found that "the trustee did not act in bad faith," that "Tom was not acting as the de facto trustee, and that "the evidence does not support the conclusion that Mrs. Clarke delegated to Tom the discretionary decisions regarding the trust. Any action taken was done at the direction of Mrs. Clarke who was capable of performing the duties of trustee."

Nancy alleges, however, that after the decision, but before the judgment could be entered and enforced, Tom removed all funds from the trust account. Nancy argues that the Court has authority under Code of Civil Procedure section 187 and 473 to amend the judgment to include Tom in his individual capacity. She alleges that he may be added under numerous authorities, including *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 516.

In this instance, the findings of the trial court do not support the conclusion that an "alter ego" relationship existed at the time relevant to the underlying matter, i.e., when the funds from the family trust were moved into the survivor's trust. (Moreover, the issue here appears to be whether Tom the individual is the alter ego of Tom the Trustee, not his relationship with his mother, which was the issue in the previous trial.) In *Greenspan*, however, the court noted that the purpose of the underlying case is "not to resolve hypothetical problems the plaintiff might face in collecting on a judgment." (*Id.*, at 517.) It further noted that adding a party "as a judgment debtor under section 187 is unrelated to the liability determinations made in the arbitration, more specifically, liability for breach of contract. The remedy provided by section 187 is simply a means of satisfying a judgment against individuals and companies that have ignored

each other's separate existence in conducting business, thereby creating a single enterprise." (*Id*., at 516-517.) Thus, the fact that the issue had not been raised and litigated in the underlying matter was not conclusive. At the same time, however, it noted that "if before filing suit, the plaintiff reasonably believes that an alter ego relationship exists among various individuals and companies, the complaint should probably include alter ego allegations and name the alleged alter egos as defendants." (*Id*.) (As that court noted, the alter ego doctrine does not apply to a trust, but can apply to a trustee.)

Tom argues that this should have been done here. In this case, however, it appears that there was no reason to argue an alter ego theory in the underlying action. The problem arose only after the court's order was entered, and concerns only an alleged effort to render the judgment uncollectable. Thus, the fact that the issue was not raised in the underlying case would not appear to defeat Nancy's claim. (Tom also distinguishes *Greenspan* on the ground that it added a trustee as a judgment debtor in order to enforce a judgment against an individual who had placed funds into a trust. This is correct, but does not seem to justify a different result. If the criteria are met, it matters little whether the judgment was evaded by transferring money into a trust, or out of a trust.)

Nancy refers to other theories under which Tom might be liable in a separate action, if, acting as trustee, he removed funds from the survivor's trust despite an order that the funds be repaid to the survivor's trust. The court makes no ruling on the viability of those claims. Nancy's point, however, is that, even if meritorious, pursuant of separate action will be time-consuming and expensive, which would make a failure to amend the judgment inequitable.

Tom argues that a trustee has no duty to preserve the funds to satisfy a judgment, and that there is no evidence here as to why the funds were removed from the trust account, and therefore no basis to conclude that it was done merely to render the judgment uncollectable.

Accordingly, the Court invites further discussion of whether (1) whether the matter should be continued to allow the hearing of evidence concerning the circumstances under which the funds were removed from the survivor's trust, to determine whether they support the conclusion that it was done in order to avoid enforcement of the judgment; (2) whether the case law applies to a situation in which the theory is not that there was alter ego liability with respect to the underlying claim, but where an individual acted to preclude the enforcement of the judgment; (3) whether Nancy's other remedies through a separate suit are adequate, and how that affects her motion.

13. TIME: 9:05 CASE#: MSP16-00402
CASE NAME: MATTER OF KEADING FAMILY TRUST
SPECIAL SET HEARING ON MOTION FOR NEW TRIAL
FILED BY KENTON KEADING
**** TENTATIVE RULING: ****

Kenton Keading's motion for new trial is denied.

The motion is timely. The Amended Judgment was entered September 19, and the original judgment on September 12. The Court file shows no proof of service of notice of entry of judgment. The motion was filed on September 26, which is within 15 days of entry of either version of the judgment if served on the date it was entered, and is within 180 days of entry of judgment if notice was not provided.

Mr. Keading asserts that the Court abused its discretion in denying his request for a continuance. Assuming that this is potentially grounds for a new trial, it is not availing in this case. The matter was set for trial nearly six month after Mr. Keading's counsel substituted out of the case. Whatever understanding Mr. Keading may have had with his counsel about substituting back into the case, it was incumbent on Mr. Keading to resolve those issues in a timely manner. Once Mr. Keading appeared at the trial with counsel, the matter was ready to be tried, and there was no justification for further delay. At trial, Mr. Keading's counsel vigorously, thoroughly, and competently represented Mr. Keading.

Mr. Keading asserts that the damages were excessive, because the Court should have used one-half the value of the property, not its full value. He asserts that on Lucille's death, her one-half interest in the property was to be transferred into the bypass trust, with the other half going into the survivor's trust. Such a transfer had not been made, however. Moreover, Mr. Keading's actions still constituted a wrongful withholding of the entire property, whether it was withheld from Lewis Keading, or from either the survivor's trust or the bypass trust.

Mr. Keading asserts that his motion to compel further discovery should have been granted. This is not a ground for granting a motion for new trial.

As to the Chrysler, the Court concludes that its findings were consistent with the law and the evidence.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 39
HEARING DATE: 11/06/17

ADD-ON

14. TIME: 9:04 CASE#: MSP14-00625
CASE NAME: CLARKE FAMILY TRUST
HEARING ON MOTION FOR ORDER QUASHING SUBPOENA
FILED BY THOMAS H. CLARKE JR.
**** TENTATIVE RULING: ****

The motion is off-calendar as moot.

First it appears that the subpoena to Rockland Trust is not being pursued. To the extent that the motion sought to quash that subpoena, it is moot.

Second, it appears that an Amended Subpoena has been issued to Wells Fargo. Accordingly, the motion with respect to the earlier subpoena is moot.

The Court notes the following, however, for the guidance of the parties.

The Court's discovery facilitator program applies to motions to pursuant to C.C.P. section 1987.1. It does not apply to matters for which no response has been received. (Local Rule 3.300(a).) Although the general intent of the exemption is that a propounding party who has received no answer need not use the program, there is little that a discovery facilitator can do where there is a claim that no response at all need be provided.

As to the Rockland Trust subpoena, the program does not apply to a third party's refusal to comply with a subpoena. (Local Rule 3.300(c).)

As to the requirement of a Separate Statement, it also does not apply where there is no response, although, again, that generally is thought to apply to a propounding party's motion. The requirement also does not apply to a motion "to compel or to quash the production of documents or tangible things at a deposition. (CRC 1.345(a)(5).) While this was formally a "deposition subpoena," it provided the option of simply providing business records with a proper declaration. In this instance, the preparation of a separate statement would not have assisted the Court in resolving the issues.

The right of privacy in this instance must be balanced against the other party's interest in obtaining the information. In this instance, the information is directly relevant to the claim. Moreover, since the information requested is from the trust account, Mr. Clarke has less of a privacy interest than he might in a different type of account.