

## **TENTATIVE RULINGS**

### **LAW & MOTION CALENDAR**

**Wednesday, March 8, 2023, 3:00 p.m.**

**Courtroom 16 – Hon. Patrick M. Broderick**

**3035 Cleveland Avenue, Suite 200, Santa Rosa**

**PLEASE NOTE: Per order of the Court, any party or representative of a party must appear remotely through Zoom for this calendar, unless you request in person appearance by 4:00 p.m. the day before the hearing.**

#### **TO JOIN “ZOOM” ONLINE,**

**Courtroom 16**

**Meeting ID: 824-7526-7360**

**Passcode: 840359**

**<https://us02web.zoom.us/j/82475267360?pwd=M0o4WVRSaysdIU5VWhBZEK1MEhpdz09>**

#### **TO JOIN “ZOOM” BY PHONE,**

**By Phone (same meeting ID and password as listed above):**

**(669) 900-6833 US (San Jose)**

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, YOU MUST notify the Court by telephone at **(707) 521-6729**, and all other opposing parties of your intent to appear by 4:00 p.m. the court day immediately before the day of the hearing. Parties in motions for claims of exemption are exempt from this requirement.

**PLEASE NOTE: The Court WILL NOT provide a court reporter for this calendar. If there are any concerns, please contact the Court at the number provided above.**

### **1. SCV-269708, Callahan v Thomas**

This matter is on calendar for the motion of Plaintiffs Amanda Callahan, Gail Callahan, and DeWinton (“Plaintiffs”) Callahan for judgment on the pleadings pursuant to Code of Civil Procedure section 438 as against Defendant Richard Thomas (“Defendant”). **The motion is GRANTED.**

Plaintiffs’ complaint against Defendant alleges causes of action for (1) breach of contract, (2) conversion, (3) trespass, (4) common counts, and (5) fraud. Plaintiffs’ cause of action for breach of contract alleges that Defendant agreed to rent 701 Bailey Avenue in Petaluma for \$2,000 a month. On or about January 8, 2021, he vacated the property leaving extensive damage, unpaid rent, and debris. Plaintiffs allege that Defendant owes \$4,000 in unpaid rent, property damage repairs in excess of \$25,000, and debris removal in excess of \$5,000.

Plaintiff’s cause of action for conversion alleges that Defendant took a \$30,000 cashier’s check from real estate agent Keleigh Ento without permission. The \$30,000 cashier’s check was going to be offered for an immediate vacate of the rental property in exchange for no damage at the

property, it would be left in a clean condition, and Defendant would sign a release. Plaintiffs allege that the property was not left clean or damage-free, and that Defendant did not sign the release.

Plaintiffs' cause of action for trespass alleges that commencing February 28, 2021, and several times thereafter, Defendant trespassed onto Plaintiffs' property in Oakland, California where he vandalized property, including slashing tires on Plaintiffs' vehicles.

Plaintiffs' cause of action for common counts alleges that Defendant owes \$75,000 for damages to the subject property.

Plaintiffs' cause of action for fraud alleges that Defendant defrauded Plaintiffs by indicating that he would vacate the subject property and leave it in good condition, with no damage, and stay current on his rent, in exchange for "cash for keys and signing/dating a written release."

CCP section 438 allows a party to move for judgment on the pleadings. While Plaintiffs cite CCP section 438(c)(3)(B)(ii), allowing the court on its own motion to grant judgment on the pleadings in a defendant's favor. It appears that Plaintiffs intend to cite subsection (c)(1)(A), allowing a plaintiff to move for judgment on the pleadings if the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint. (Code Civ. Proc., § 438.)

This motion is based upon this court's October 5, 2022 order deeming Plaintiffs' requests for admissions served on Defendant admitted. Plaintiffs' request for judicial notice is granted. As the Defendant did not file responses to Plaintiffs' request for admissions, the following statements were deemed admitted: that Defendant breached a contract as alleged within the first cause of action of the November 19, 2021 Complaint ("Complaint") in this action; that Defendant engaged in an intentional tort as alleged within the second cause of action alleged in the Complaint; that Defendant engaged in an intentional tort as alleged in the third cause of action in the Complaint; that Defendant engaged in conduct warranting the common counts cause of action as alleged within the [fourth] cause of action in the Complaint; and that Defendant engaged in fraud as alleged within the fifth cause of action in the Complaint. Accordingly, pursuant to these admissions, Defendant has admitted the allegations in the Complaint are true.

Plaintiffs have not addressed each cause of action to show that each is sufficient to state a cause of action as is required by CCP section 438. However, the Complaint consists of form pleadings which, when properly filled out, are sufficient to state a cause of action. In addition, the requests for admissions, which were deemed admitted, essentially admit that the complaint alleges causes of action for breach of contract, conversion, trespass, common counts, and fraud. However, while the complaint alleges the amount of damages sought by the Plaintiffs, none of the admissions address the amount of damages owed. Therefore, the motion is GRANTED; however, the court will set a prove-up hearing for Plaintiffs to establish the amount of damages to be awarded. The court will set the hearing and will thereafter give Plaintiffs notice of the hearing.

Plaintiffs' counsel is directed to submit a written order to the court consistent with this ruling.

## **2. SCV-267872, Norguard Insurance Co v Shepherd**

This matter is on calendar for the demurrer of Cross-Defendant Craft Contracting dba Craft General Construction (“Craft”) to the first through fourth causes of action in the First Amended Cross-Complaint (“FACC”) brought by Cross-Complainant Shep Concrete Pumping and Kyle Shepherd (together “Shep”) on the grounds that each cause of action is barred pursuant to Labor Code section 3864. **The hearing is CONTINUED to May 3, 2023, at 3:00 p.m., in Department 16, to allow Shep to address the merits of the demurrer.**

The FACC contains causes of action against Craft for (1) Total Equitable Indemnity; (2) Partial Equitable Indemnity; (3) Express Indemnity; (4) Contribution and Repayment; and, (5) Declaratory Relief. The court notes that Craft’s demurrer does not include the third cause of action for express indemnity first raised in the FACC; and, the original cross-complaint is referenced as an exhibit to the declaration of Gregory Prongos.

The FACC alleges that on February 19, 2021, Plaintiff Norguard Insurance Company (“Norguard”) filed a complaint; the FACC incorporates those allegations. (FACC ¶13.) Shep denies the allegations in that complaint but alleges that if they should be found liable, they are entitled to indemnity from Craft and/or entitled to some compensation from Craft.

Norguard’s complaint seeks recovery of payments made pursuant to a workers compensation insurance contract with Craft. Norguard alleges that Craft’s employee, Dorian Guerrero (“Employee”), was operating a concrete hose and that Shep caused the hose and/or concrete exiting from the hose to strike the Employee’s body, causing injuries. Norguard alleged one cause of action against Shep for negligence.

Craft argues that Norguard’s complaint clearly identifies Craft as the employer of the injured worker and states that Norguard paid workers compensation to Craft’s employee because of its insurance contract with Norguard. It argues that Labor Code section 3864 clearly prohibits Shep’s causes of action. It argues that case law under Labor Code 3864 clearly reflects that equitable crossclaims against an employer are improper and bars recovery by California’s workers compensation immunity scheme.

In opposition, Shep argues that the demurrer is directed to the original cross-complaint and is therefore moot due to the filing of the FACC. While it appears correct that the demurrer was drafted considering the original cross-complaint, it was filed after the FACC and the allegations supporting the causes of action in the original cross-complaint appear to be the same as in the FACC. Shep has provided no substantive argument in response to Craft’s arguments.

Shep also argues in opposition that they were not served with notice of this hearing. (Tadlock decl., ¶6.) Shep only learned of the hearing date during a routine review of the court’s registrar of actions. (*Id.*, ¶7.)

In reply, Craft appears to concede that notice was not provided to Shep as it has not provided proof of service. The court does not see proof of service of the notice of demurrer in the file. Rather, Craft focuses on an irrelevant argument regarding Shep’s counsel’s agreement to obtain leave to file a second amended cross-complaint. Craft also argues that because Shep ultimately did find out about this hearing, they are not prejudiced.

In light of the above circumstances, **this hearing is CONTINUED to May 3, 2023, at 3:00 p.m., in Department 16**, to allow Shep to address the merits of the demurrer. Craft may also file an

amended demurrer and memorandum addressing Shep's third cause of action for express indemnity. Any such amended papers must be filed and served by April 10, 2023, or they will not be considered. Shep's supplemental opposition and Craft's supplemental reply are otherwise due by the statutory deadlines.

### **3. SCV-270295, Wolvek v Callahan**

The motion of Spaulding McCullough & Tansil LLP to be relieved as counsel for defendant Rebecca Callahan is **GRANTED**. The court will sign the proposed order.

### **4. SCV-267539, Adiego v Paillet**

This matter is on calendar for the motion of Defendant K LW Investments, LLC ("Defendant") for an order granting it leave to file a cross-complaint against defendant Guy Francois Paillet ("Paillet"). **The motion is GRANTED.**

The proposed cross-complaint contains causes of action against Paillet for total indemnity, declaratory relief-implied partial indemnity, declaratory relief-equitable apportionment, and express indemnity.

Trial is set for June 23, 2023. Leave of court is required to file a cross-complaint against a third party after trial has been set. (CCP section 428.50(b).)

A defendant can cross-complain against a codefendant to the action only if the cause of action asserted "(1) arises out of the same transaction, occurrence, or series of transactions or occurrences [set forth in the complaint] ... or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause [of action] brought against him." (CCP § 428.10(b).) A defendant is generally authorized to file a cross-complaint against a concurrent tortfeasor for indemnity. (See *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 607.)

Defendant's counsel states that after the answer was served, "upon further investigation" it was discovered that Paillet "shares in whole or in part a portion of Plaintiff's claimed damages." (Handloff decl., ¶5.)

This action was filed on December 11, 2020. Paillet's cross-complaint against Defendant was filed on February 11, 2021. Defendant's answer was filed on May 4, 2021. While counsel's declaration does not explain why the cross-complaint is only now being proposed, the claims arise out of the allegations in the complaint and do not unreasonably burden or complicate plaintiff's lawsuit. Accordingly, the motion is **GRANTED**. The court will sign the proposed order.