TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, May 22, 2024 at 3:00 p.m.
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. SCV-273657, County of Sonoma v. Beaver

On its own motion, the Court GRANTS leave to file BOWIE's amended answer. Accordingly, Plaintiff's motion to strike portions of BOWIE's answer is DENIED as moot. However, Plaintiff's request in that motion for payment for service on BOWIE is GRANTED**.** Defendants are ordered to remit $478.02 to Plaintiff no more than 10 calendar days from the date upon which this order is filed and served.

I. Background

County of Sonoma (Plaintiff) brings this code-enforcement action to compel JOHN Beaver and his son BOWIE Beaver (collectively Defendants) to abate nuisance conditions at a property (the

Property) in Cazadero owned by BOWIE. The complaint alleges that JOHN lives on the Property and that BOWIE lives in Australia. (Individual defendants are referred to by their first names for clarity, as they have the same surname. No disrespect is intended.)

Plaintiff filed the instant lawsuit on July 7, 2023. On September 27, Defendants' counsel sent a pleading captioned "Answer to Complaint of the County of Sonoma," which purported to answer for both Defendants, to counsel for Plaintiff. However, that pleading was never filed because it was not accompanied by a valid fee waiver. Pursuant to a time extension granted by Plaintiff, counsel filed an answer on November 6, 2023 on behalf of JOHN only.

Plaintiff filed a demurrer to JOHN's answer on November 17, 2023. On March 22, 2024, the Court sustained the demurrer with leave to amend and ordered JOHN to file an amended answer within 30 calendar days. The amended answer was filed on April 26, 2024.

Defendant's counsel filed BOWIE's answer on February 14, 2024. This matter comes on calendar for hearing on Plaintiff's motion to strike portions of BOWIE's answer.

II. The May 20 filing

BOWIE's opposition was due on May 9, 2024. (CCP § 1005(b) [nine court days before hearing].) At 5:04 PM on May 20, two days before the hearing on the instant motion, Defendant's counsel filed an amended answer on BOWIE's behalf, together with a pleading captioned "Declaration and Memorandum re: Costs of Service."

A. The Declaration and Memorandum

Counsel's rationale for filing this memorandum eleven days after the deadline for opposition is "When I realized there was a section to order fees [in the motion to strike], I decided to file this document albeit late." The Proof of Service of Plaintiff's moving papers in the instant motion reflects that the papers were served on counsel by postal mail on March 4, 2024, at the mailing address that appears on counsel's profile on the California State Bar website. The Notice of Motion contains the following text:

> "Plaintiff also requests reimbursement of the costs of personal service on Bowie Beaver pursuant to Code of Civil Procedure §415.30, at his correct mail and e-mail address in Australia. Total expenses (not including attorneys' fees): $478.02."

Counsel does not explain why he failed to "realize there was a section to order fees" in this motion until two and a half months after papers explicitly stating that there was such a section were served on him.

Counsel has consistently filed late opposition papers during this litigation, and the Court has frequently warned him that late-filed papers will not be considered. The Court will now do so again in the strongest possible terms. **In the future, the Court will completely ignore any opposition papers filed later than midnight on their due date.**

B. The amended answer

"A party may amend its pleading once without leave of the court . . . after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike." (CCP § 472.) As noted above, the "date for filing an opposition" to the instant motion was May 9. Thus, the amended answer submitted for filing on May 20 may not be filed without the Court's leave.

The Court grants leave to file the amended answer on its own motion. However, the Court stresses once again its insistence the counsel scrupulously comply with all applicable deadlines in the future.

III. The motion to strike is denied as moot.

Because BOWIE has filed an amended answer, the motion to strike portions of his previous answer is moot.

IV. Costs of service on BOWIE

CCP § 413.10 provides that service of process outside the United States may be accomplished in several ways, one of which is "as provided in this chapter." "This chapter" refers to Chapter 4 of Title 5 of the Code of Civil Procedure. CCP § 415.30 is in Article 3 of that chapter. Thus, service on a party outside the United States may be carried out in accordance with CCP § 415.30.

On July 28, 2023, Plaintiff attempted to serve BOWIE with the process in this matter as provided by CCP § 415.30 by three methods: postal mail, air mail, and email. (Declaration of Michael King in Opposition to Motion to Quash filed Feb. 9, 2024 ("King MTQ dec"), ¶2 and Exh. 1.) CCP § 415.30(c) provides that "Service of a summons pursuant to this section is deemed complete on the date a written acknowledgement of receipt of a summons is executed, if such acknowledgement thereafter is returned to the sender." The cover letter accompanying the attempted service noted that "It is imperative that you sign and return the Notice of Acknowledgment of Receipt as soon as possible to avoid being personally served through the Australian Attorney General via a police officer." (King MTQ dec, Exh. 1.) When BOWIE failed to return the acknowledgment, Plaintiff had him served by the Queensland, Australia Attorney General's Department, as provided by the Hague Convention, on September 28, 2023. The associated Proof of Service was filed on October 26, 2023.

Plaintiff notes that when a party upon whom service is attempted by mail fails to return the acknowledgment form, that party "shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method." (CCP § 415.30(d).) Plaintiff's counsel declares under penalty of perjury that the cost of Hague Convention service on Bowie was $478.02, broken down as follows:

Judicial Council Notice and Acknowledgment; Complaint, etc.	$ 30.64
Mailing of Hague Convention Packet	$ 60.20
Charges for service by Australian AG	$ 387.18 USD
Total:	$ 478.02

(King MTQ dec ¶ 8; see also Plaintiff's Declaration in Support of Motion to Strike and Request for Costs, Exh. D.)

Plaintiff asks the Court to order reimbursement of those expenses pursuant to CCP § 415.30(d). The Court agrees that Defendants are liable for the expenses incurred in serving BOWIE, and will order them to pay Plaintiff $478.02.

V. Conclusion

The motion to strike is denied. Defendants are ordered to pay $478.02 to Plaintiff within ten calendar days.

2. MCV-262631, Looney v. Dash and a Handful, Inc.

Plaintiff's unopposed motion to compel answers to post judgment discovery is GRANTED. Plaintiff's request for monetary sanctions is granted in the amount of $60.00. Defendant is ordered to pay Plaintiff $60.00 within 30 days of service of the Court's order on this motion. Defendant is also ordered to respond to Plaintiff's discovery requests within 30 days of service of the order on this motion. Because Defendant failed to timely respond to Plaintiff's discovery requests, objections to such discovery are waived. (CCP § 2031.300.) Plaintiff shall submit a written order to the Court consistent with this tentative ruling. Due to the lack of opposition, in compliance with Rule 3.1312 is excused.

3. MCV-229272, Discover Bank v. McCabe

Plaintiff's unopposed motion for entry of judgment under terms of stipulated settlement is GRANTED. Plaintiff's request for judicial notice is granted. The Court will sign the proposed order lodged with the moving papers.

4. MCV-261809, Looney v. Monnus, Inc.

Plaintiff's unopposed motion to compel answers to post judgment discovery is GRANTED. Plaintiff's request for monetary sanctions is granted in the amount of $60.00. Defendant is ordered to pay Plaintiff $60.00 within 30 days of service of the Court's order on this motion. Defendant is also ordered to respond to Plaintiff's discovery requests within 30 days of service of the order on this motion. Because Defendant failed to timely respond to Plaintiff's discovery requests, objections to such discovery are waived. (CCP § 2031.300.) Plaintiff shall submit a written order to the Court consistent with this tentative ruling. Due to the lack of opposition, in compliance with Rule 3.1312 is excused.

5. SCV-268808, Holsapple v. National Hot Rod Association

Defendants' motion for summary judgment, or in the alternative, summary adjudication is DENIED. Defendants' request for judicial notice is GRANTED. Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Defendants' objections to the following evidence are SUSTAINED. All other objections are OVERRULED.

1. Stoll Decl., Exhibit 1, Holsapple Depo. Tr., 112:22-113:11.
2. Stoll Decl., Exhibit 1, Holsapple Depo. Tr., 113:25-114:5.
3. Stoll Decl., Exhibit 2, Declaration of William Holsapple ("Holsapple Decl."), ¶ 4.
4. Stoll Decl., Exhibit 2, Holsapple Decl., ¶ 5.
5. Stoll Decl., Exhibit 2, Holsapple Decl., ¶ 6.
6. Stoll Decl., Exhibit 2, Holsapple Decl., ¶ 7.
7. Stoll Decl., Exhibit 2, Holsapple Decl., ¶ 8.
8. Stoll Decl., Exhibit 2, Holsapple Decl., ¶ 9.
9. Stoll Decl., Exhibit 7, Transcript of Mark Adams Deposition ("Adams Depo. Tr".), p. 16:16-19.
10. Stoll Decl., Exhibit 7, Adams Depo. Tr., p. 26:25-27:6.

Standards on Summary Judgment:

A party moving for summary judgment must show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (CCP § 437c(c).) A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action.

(CCP § 437c(f)(1).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (CCP § 437c(p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.)

Background:

Defendant National Hot Rod Association ("NHRA") organized the 2019 NHRA Sonoma Nationals, a drag racing event, which was held at Sonoma Raceway from July 26, 2019 through July 28, 2019. (Undisputed Material Fact "UMF", 1.) Plaintiff is employed by Gladden Equipment Erectors, Inc. racing team as a crew chief and as such worked at many NHRA racing events, including numerous events at Sonoma Raceway. (UMF, 3-4.) Sonoma Raceway is owned by Defendant Speedway Sonoma. (UMF, 2.) NHRA requires all event participants, including crew members, to sign a "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement" (the "Release") as a condition of participating in or working at any NHRA racing event. (UMF, 8.) Plaintiff signed this release on July 25, 2019 before he started working at the 2019 NHRA Sonoma Nationals. (UMF, 9-10.)

On July 27, 2019, Plaintiff operated a moped owned by his employer to travel to and from the Sonoma Raceway's racetrack timeslip booth to where his employer's equipment was located. (UMF, 19.) Plaintiff used the same route on the Sonoma Raceway's sportsman pit road (the "return road") to travel back and forth during the Event. (UMF, 20.) Plaintiff alleges that when he was travelling from the timeslip booth to the pit area, his moped slid on an oil slick on the return road, causing him to crash. (UMF, 22.)

Plaintiff contends that the oil slick on the return road "was in no way related to the risks inherent in working at [the NHRA racing event at Sonoma Raceway] or around racing vehicles, but due to a NHRA/Sonoma Raceway vehicle dumping oil for the racetrack on an area open to the public." (UMF, 26.) Plaintiff claims that Defendants' alleged misconduct amounts to gross negligence because Defendants were put on notice of the oil slick when a vehicle operated by Dave Armstrong, one of the 2019 NHRA Sonoma Nationals participants, leaked oil onto the Sonoma Raceway track prior to the Incident. (UMF, 39.)

Analysis:

I. The Release of Liability Contract is Enforceable.

"To be effective, a release need not achieve perfection…It suffices that a release be clear,

unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence." (*Nat'l & Internat. Bhd. of St. Racers, Inc. v. Superior Ct.* (1989) 215 Cal.App.3d 934, 938.)

Here, the release clearly expresses the parties' intent to release Defendants from negligence liability. (UMF 11-17.) Plaintiff argues in opposition that the release is unenforceable because the language is so broad that it clearly releases all liability for fraud and intentional acts, thus violating Civil Code § 1668. Plaintiff further argues that the release is against public policy because his continued employment with Gladden Equipment Erectors, Inc. was conditioned upon his signing. Plaintiff cites *Baker Pacific Corp. Suttles* (1990) 220 Cal.App.3d 1148 ("*Baker*") in support of these arguments. However, *Baker* is distinguished from the present case because the employees in *Baker* never signed the release. As the *Baker* Court explains,

> Our research has not produced a reported case where, as here, the validity of the release language under section 1668 is tested in a declaratory relief action *prior* to the parties' acceptance of the release language and their entry into the underlying transaction. In that significant respect the cases relied on by our dissenting colleague are materially distinguished by the case we are called upon to decide.

(*Baker*, *supra*, at 1155–56. Italics in original.) The cases referred to by the *Baker* Court are, *Werner v. Knoll* (1948) 89 Cal.App.2d 474 ("*Werner*"), *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333 ("*Hulsey*"), and *Madison v. Superior Court* (1988) 203 Cal.App.3d 589 ("*Madison*"). They "each involve a situation where the exculpatory language is subjected to judicial review in litigation arising *after* the complaining party has signed and accepted the release, entered into the underlying transaction or service contemplated in the contract, injury is suffered and a suit for damages is brought against the releasee." As explained in *Baker*, these three cases, "stand for" the following proposition,

> [W]here a plaintiff/releasor has knowingly and willingly contracted to exculpate the defendant releasee from liability, accepts the benefits of the agreement, and then sues the releasee on causes of action not statutorily proscribed by Civil Code section 1668 (i.e., negligence, warranty, strict liability), the releasor will not be permitted to avoid his agreement on public policy grounds by urging that statutorily proscribed actions, irrelevant to the actions pursued by the releasor, can be inferred as included within the broad exculpatory language of the agreement.

(*Baker*, *supra*, 220 Cal.App.3d at 1156.)

That is precisely the case here. Though the language of the release is broad enough to be

interpreted as releasing Defendants from liability for acts proscribed by Civil Code § 1668, Plaintiff is not suing Defendants for any such acts. The language of the release in this case similar to the language of the releases in the *Werner*, *Hulsey*, and *Madison* cases. Plaintiff knowingly and willingly contracted to exculpate Defendants from liability, Plaintiff accepted the benefits of the agreement, and Plaintiff now sues Defendants for negligence and premises liability, which are causes of action not statutorily proscribed by Civil Code § 1668. Thus, Plaintiff cannot avoid the agreement by urging that the release is void because the language is broad enough to include causes of action that are not those pursued here.

Furthermore, "'Despite its broad language, section 1668 does not apply to every contract.' [Citation.] 'It will be applied only to contracts that involve 'the public interest.' [Citations.]'" (*Madison*, *supra*, (1988) 203 Cal.App.3d 589, 598.) Plaintiff argues that this contract involves the public interests because he was required to sign the release as a condition of his continued employment with his employer. The authority cited in support of this argument is *Baker*, *supra*. The *Baker* decision "rests on the existence of a public interest in the employer-employee relationship." (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 619.)

However, the *Baker* holding was narrowly applied only "in the context of this declaratory relief action…" (*Baker*, *supra*, 220 Cal.App.3d at 1157. Italics added.) Also, the present matter does not involve the employer, unlike *Baker*. Furthermore, the evidence provided to show that this release was a condition of his continued employment with his employer is Plaintiff's own statements that "If I had not signed the Release, I would more likely than not have been terminated from Gladden Racing." (Plaintiff's Decl. ¶ 11.) This is not sufficient to show that his continued employment was in fact conditioned on signing the release presented by Defendants.

Rather, the public interest is not implicated by this contract. "When the public interest is not implicated, private parties are free among themselves to shift a risk elsewhere than where the law would otherwise place it." (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 619.) "Such agreements, in the context of sporting or recreational activities, have consistently been enforced." (*Ibid.*, citing *Buchan v. U.S. Cycling Federation, Inc.* (1991) 227 Cal.App.3d 134 ("*Buchan*").) The *Buchan* Court stated, "This court has not been apprised of any case in which the California Supreme Court or the Courts of Appeal have voided a release on the ground of "public interest"…in the sports and recreation field." (*Buchan*, *supra*, at 149.) In fact, "The *Madison* court was specific in stating that the concept of 'public interest' has no applicability to sports activities." (*Ibid.*, referencing *Madison*, *supra*, 203 Cal.App.3d 589. See also *McAtee v. Newhall Land & Farming Co.* (1985) 169 Cal.App.3d 1031, 1034 and *Brown v. El Dorado Union High Sch. Dist.* (2022) 76 Cal.App.5th 1003, 1023-1024.)

Plaintiff has not responded to any of the authority cited to this point in Defendants' memorandum. The authority cited by Defendants makes it clear that the release in question does not involve a matter of public interest. As such, it is enforceable.

II. <u>Triable Issues of Material Fact Exists Regarding Gross Negligence</u>

"…[A]n agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy." (*Brown v. El Dorado Union High Sch. Dist.* (2022) 76 Cal.App.5th 1003, 1024.) "Thus, in the recreational context, while a waiver of liability and assumption of risk can serve as a bar to liability based on negligence, it cannot serve as a bar to liability based on gross negligence." (*Ibid.*) "In contrast to ordinary negligence—which involves a breach of the duty of exercising reasonable care to protect others from harm [citation]—'[g]ross negligence' long has been defined ... as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" (*Joshi v. Fitness Int'l, LLC* (2022) 80 Cal.App.5th 814, 827 ("*Joshi*").)

"In the context of a motion for summary judgment, where "a complaint alleges facts demonstrating gross negligence in anticipation of a release, the initial burden remains on the moving defendant asserting the release as a defense to produce evidence refuting the allegations constituting gross negligence. [Citations.]'" (*Joshi*, *supra*, at 828.) "But when the plaintiff fails to allege in his or her pleading facts sufficient to support a theory of gross negligence, the defendant satisfies its burden by asserting a release as a complete defense, and the burden then shifts to the plaintiff to produce evidence that there is a triable issue of fact supporting gross negligence to defeat summary judgment." (*Ibid.*)

Defendants argue that the burden on this motion is on Plaintiff to prove a triable issue of material fact regarding gross negligence because Plaintiff failed to plead facts sufficient to support a gross negligence theory in his complaint. The Court agrees. The burden is on Plaintiff to raise a triable issue of material fact because there are not facts alleged in the accusatory pleading to support a gross negligence theory.

" …[S]ummary judgment on the issue of gross negligence may be warranted where the facts fail to establish an extreme departure from the ordinary standard of care as a matter of law. However, "[g]enerally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence.'" (*Hass v. RhodyCo Prods.* (2018) 26 Cal.App.5th 11, 33.) The Court views the evidence in the light most favorable to the plaintiff. (*Ibid.*)

Plaintiff has provided evidence that employees of NHRA would not want there to be oil on the return road, and if any was detected they would clean it up because it is slippery and dangerous.

(Plaintiff's Additional Material Facts "PAMF," 33-36.) However, the employees of NHRA do not check the return road for oil spills because their main concern is the racetrack. (PAMF, 38, 41-42.) Plaintiff also produced evidence that NHRA's policy is to fine drivers whose car causes an oil spill because the oil spill must be cleaned up since it is dangerous to the drivers. (PAMF, 33.) They would not let a vehicle travel on the return road if they knew that the vehicle had an oil leak. (PAMF, 37.) This evidence is sufficient to raise a triable issue of material fact whether the failure to check the return road for oil spills constituted a want of scant care or an extreme departure from the ordinary standard of care.

The Court also notes that Plaintiff has provided evidence that NHRA provides diapers to be installed on vehicles with oil leaks to prevent oil from getting on the road. (PAMF, 30.) NHRA has no way to track any diapers that are given to drivers with leaks, so there here is no record of a diaper being provided to, or being installed on, David Armstrong's vehicle—which is the vehicle from which the oil spill in question was believed to have originated. (PAMF, 30.) Plaintiff succeeded in raising a triable issue of material fact regarding gross negligence. The motion is denied.

6-9. SCV-268721, Russell v. Russell

Plaintiff's Motion to Correct Clerical Mistake

Plaintiff's motion to correct clerical mistake is CONTINUED pending the appeal of the judgments. The matter is continued to September 25, 2024 at 5:00 pm in Department 18. Defendant has appealed from both judgments entered. Accordingly, the question of whether the second judgment was issued as a clerical error is one appropriately decided by the Appellate Court.

The continuance of this motion pending the outcome of the appeal would not prejudice the Plaintiff. If for any reason the appeal is resolved, dismissed, or dropped prior to the September 25, 2024 hearing date, Plaintiff may file an ex parte motion for advancement of the hearing on this motion.

Defendant's Motion to Set Aside Default

Defendant's motion to set aside default is CONTINUED pending the appeal of the judgments. The matter is continued to September 25, 2024 at 5:00 pm in Department 18. The Court previously continued the hearing on this motion, explaining that the Court does not have jurisdiction to decide it while the appeal is pending. The appeal is still pending. If for any reason the appeal is resolved, dismissed, or dropped prior to the September 25, 2024 hearing date, Defendant may file an ex parte motion for advancement of the hearing on this motion.

Defendant's Motion to Vacate Judgments

Defendant's motion to Vacate Judgments is DENIED. Defendant's request for judicial notice is GRANTED. Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

I. Defendant Has Not Shown That the Judgment is Void on its Face.

> "'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll.'" (*Dill v. Berquist Constr. Co.* (1994) 24 Cal.App.4th 1426, 1441.) "In a situation such as the instant case in which an attack upon a judgment must be determined by a consideration of the judgment roll alone 'every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it.'"

(*Johnson v. Hayes Cal Builders, Inc.* (1963) 60 Cal.2d 572, 578.)

Here, the First Amended Complaint (FAC) alleges,

> The Property is held as a tenancy-in-common by Cliff R. Russell ("Plaintiff"), the title owner of an undivided one-tenth (1/10) interest in the Property, and defendant Robert J. Russell, Trustee, The Robert John Russell Trust, A/u dated March 16, 2001, ("Defendant"), the title owner of an undivided nine-tenths (9/10) interest in the fee simple title to the Property.

(FAC, ¶ 1.) No other party is claimed in the FAC to have an interest in the property. The interlocutory judgments of partition are entered against the named defendant, Robert J. Russell, as Trustee of the Robert John Russell Trust. Defendant fails to carry his burden in attacking the judgment as Trustee, because he has not shown that the Court lacks jurisdiction over him as Trustee. His ownership interest as Trustee is clearly pleaded, he was served, and his default has been taken in this capacity. Defendant has not shown that he, as Trustee, has no interest in the property.

Regarding Defendant's argument that the judgments are void on their face for failing to include Robert Russell, the individual, due to CCP § 872.510, it is not so clear from the judgment roll that Robert Russell the individual has an interest in the property such to render the judgments void. The exhibits attached to the FAC are ambiguous, but do not show that Robert Russell the individual had an interest in the property at the time the complaint was filed or the time the judgments were entered.

Defendant further argues that the judgment is void because Plaintiff failed to join the alleged oral partnership between Plaintiff and Defendant. Defendant has cited no authority in support of this argument. The partnership is not alleged to have its own interest in the property and there is nothing in the judgment roll to suggest that it does. This argument is not persuasive.

Finally, Defendant argues that failure to name the lienholder renders the judgment void. This Court explained in a previous tentative ruling that this argument is unpersuasive given that the case cited by Defendant, *Wernse v. Dorsey* (1935) 2 Cal.2d 513, 514, states, "The lien claimant was neither made a party to the action *nor was a referee appointed* to inquire into the amount or the bona fides of the lien…" Furthermore, Plaintiff cited *Balkins v. Los Angeles Cnty.* (1947) 81 Cal.App.2d 42, 47, which stated, "In an action for partition where encumbrances are of record at the commencement of the action and the lien holder is not a party to the action, the court must order such person to be made a party *or it must appoint a referee to ascertain what amount if any remains unpaid*…" (Emphasis added.)

In his supplemental briefing, Defendant argues that it would be error to rely on the case cited by Plaintiff because it predates the partition statutes by twenty years. The Court notes that the *Wernse* case cited by Defendant predates the case cited by Plaintiff by 12 years. Nevertheless, neither of the cases above have been invalidated after the enactment of the partition statutes and there is nothing to suggest that they are inconsistent with CCP § 872.510. They each contemplate a requirement to join a mortgage holder as a party to a partition action and they both reach the same conclusion—that the Court need not order their joinder if a referee is appointed. A referee was appointed in this matter.

Accordingly, based solely on an inspection of the judgment roll and not on any extrinsic evidence provided by either party, Defendant has failed to show that the judgments in this matter are void on their face.

<u>Plaintiff's Motion for Undertaking Pending Appeal</u>

Plaintiff's motion for an undertaking pending the appeal in this matter is GRANTED pursuant to CCP § 917.4. In order to stay enforcement of the judgment, Defendant shall post an undertaking of $15,000, in compliance with CCP § 995.010 et seq., not later than 30 days of service of an order on this motion. Defendant's request for judicial notice is GRANTED. Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

As an initial matter, the Court notes that this matter previously came on for hearing in Department 19 and the Court issued a tentative ruling prior to the hearing which required the parties to submit further briefing on the applicability of CCP § 917.4. However, prior to the hearing, the Honorable Oscar A. Pardo recused from the matter and the matter was transferred to this department. As such, the Court's tentative ruling was vacated and, consequently, the supplemental briefing was no

longer required. Nonetheless, both parties submitted supplemental briefing addressing CCP § 917.4. The Court has reviewed both parties' supplemental briefing and has taken it into consideration in issuing the following ruling.

Analysis:

I. An Undertaking is Mandatory to Stay Enforcement When the Court's Order Directs the Sale of the Property.

CCP § 917.4 provides,

> The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court *if the judgment or order appealed from directs the sale*, conveyance or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property, *unless an undertaking in a sum fixed by the trial court is given* that the appellant or party ordered to sell, convey or deliver possession of the property will not commit or suffer to be committed any waste thereon and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered by the waste and the value of the use and occupancy of the property, or the part of it as to which the judgment or order is affirmed, from the time of the taking of the appeal until the delivery of the possession of the property. If the judgment or order directs the sale of mortgaged real property and the payment of any deficiency, the undertaking shall also provide for the payment of any deficiency.

(Emphasis added.) The plain language of the statute is clear that whenever the Court orders the sale of a property, as the Court did in this matter, an undertaking is required in order to stay enforcement of the order. The perfecting of an appeal alone is insufficient. It is not in the discretion of the Court.

Defendant has cited several cases for the proposition that an appeal from an interlocutory judgment of partition automatically stays further proceedings on the judgment and no undertaking is necessary. These cases include *Williams v. Wells Fargo Bank* (1941) 17 Cal.2d 104, *Neusted v. Skernswell* (1945) 69 Cal.App.2d 361 and *Born v. Horstmann* (1889) 80 Cal. 452. Defendant argues that these cases, though they discuss repealed former versions of CCP §§ 917.4 and 917.9, are still good law and should be applied. The cases are still good law and they are not inapposite. Neither *Williams* nor *Neusted* make any mention of CCP § 945, which was the predecessor of present day CCP § 917.4. Rather, each of them discussed only the discretionary statute CCP § 949, the predecessor to present day CCP § 917.9. In fact, the *Williams* Court specifically stated, "In the absence of specific provision concerning an interlocutory judgment of partition *under section 949 of the Code of Civil Procedure*, the perfecting of an appeal stays proceedings in the lower court upon such a decree." (*Williams v. Wells Fargo Bank*, *supra*, 17 Cal.2d at 107.) It makes no mention of CCP § 945.

Regarding the *Born* case, the holding does not support Defendant's position because the Court did not find that the perfecting of an appeal automatically stays enforcement of a judgment for sale of a property. Rather, the Court found that the mere *giving* of the undertaking was sufficient to stay the enforcement. The appellant need not have done anything further to effectuate the stay, other than give the undertaking. In other words, the appellant need not have obtained an order of the Court stating that enforcement was stayed. "The three-hundred-dollar undertaking on appeal herein stays all proceedings on the judgment, independently of the restraining order made by the court…" (*Born v. Horstmann* (1889) 80 Cal. 452, 453.) "'[S]ections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the judgment or order appealed from.' In the case before us the appellants are not required by the judgment to do anything. Therefore, the perfecting of the appeal **by giving the undertaking** mentioned in section 941 *ipso facto* operates as a *supersedeas*, and the order heretofore made herein on motion of appellants was not essential to preserve their rights on appeal.' (*Ibid*. Bold added, italics in original.)

Defendant has not cited any authority interpreting CCP § 917.4 nor its processor CCP § 945 to say that no undertaking is necessary in these circumstances. Rather, the plain language of the statute is clear that an undertaking is required in this instance. The Court's interlocutory judgment of partition, though there are currently two versions in place, both order the sale of the property that is in the possession or control of Defendant. An undertaking is required.

The Court will note the distinction between a stay of the trial court proceedings and a stay of the enforcement proceedings. A bond is not necessary to stay the trial court proceedings pending the appeal.

II. The Amount of Undertaking Requested by Plaintiff is Unreasonably Excessive.

Plaintiff requests the undertaking be set at $392,387.01 which purportedly represents the damages ordered to be paid by Defendant to Plaintiff in the interlocutory judgment plus damages Plaintiff will sustain over the next 24 months while the appeal is pending. This request is entirely unreasonable. CCP § 917.4 is clear that the purpose of the undertaking is to ensure that the party ordered to sell the property will not commit waste during the pendency of the appeal and will compensate the other party for lost use or occupancy during the appeal if the appeal is unsuccessful. As such, the undertaking need only be an amount sufficient to ensure this, not an amount sufficient to compensate the plaintiff for all perceived past and future damages related to the property.

Plaintiff has represented in the First Amended Complaint that Plaintiff is entitled to rental income for the ADU located on the property. Plaintiff alleges the parties had an agreement to rent out the ADU and split the rental proceeds equally. However, Defendant moved in to the ADU; therefore, it

cannot be rented out. The expected rental income is believed to be $2,500 per month. Even though Plaintiff only has a 10% interest in the property, Plaintiff alleges that the parties agreed to share the rental proceeds equally. The Court's interlocutory judgment has ordered Defendant to pay $1,250 per month (half of the expected rental value) until the property is sold. Plaintiff requests that the undertaking encompass 24 months' worth of rent because, according to Plaintiff, the appeal will take 24 months. However, the language of CCP § 917.4 does not require that *all* of the expected damages for lost use be paid into the undertaking to stay the enforcement of the judgment. Rather, it need only be enough to show that Defendant will pay the damages for lost use if the appeal is unsuccessful.

If we assume that the appeal will take 24 months to resolve, the total loss in rent to Plaintiff during the pendency of the appeal would be $30,000. The Court finds that an undertaking of 30% of that amount ($10,000) is sufficient. The Court also finds that an undertaking of $5,000 to ensure no waste will occur is reasonable. Accordingly, Defendant shall post an undertaking of $15,000 in order to stay the enforcement of the judgment. Defendant must pay the undertaking not later than 30 days from service of notice of an order on this motion. If the undertaking is not paid by that time, Plaintiff may proceed with the sale of the property.

10. 23CV00803, Kovich v. Zamora

Appearances are required.

11. SCV-271736, Biosphere Watch Group, SPC v. Veritas Farms, Inc.

This public-interest representative action under Proposition 65 was filed by Biosphere Watch Group in 2022. Defendants manufacture and distribute a number of personal-care products, including lip balms, tinctures, lotions, and salves, that contain cannabis-derived substances. The products are marketed as containing one such substance, CBD, but also contain THC and Mycrene, which are listed by the State of California as causing, respectively, developmental toxicity and cancer.

The parties and the Attorney General reached a settlement on September 25, 2023. Terms of the settlement include the placement of Proposition 65 warnings on the packaging of all products sold in California that contain THC or Mycrene; the payment of a $2,000 civil penalty, 75% of which will go to the state Office of Environmental Health Hazard Assessment and 25% of which will go to Plaintiff; and $8,500 in attorney's fees.

This matter comes on calendar for Plaintiff's motion to approve and confirm the settlement pursuant to CCP § 664.6. The motion is unopposed, and Defendant's counsel has filed a letter of non-opposition.

The motion is GRANTED. The Court will sign the proposed order submitted by the parties.

12. MCV-261974, Looney v. Wesco Group, Inc

Plaintiff's unopposed motion to compel answers to post judgment discovery is GRANTED. Plaintiff's request for monetary sanctions is granted in the amount of $60.00. Defendant is ordered to pay Plaintiff $60.00 within 30 days of service of the Court's order on this motion. Defendant is also ordered to respond to Plaintiff's discovery requests within 30 days of service of the order on this motion. Because Defendant failed to timely respond to Plaintiff's discovery requests, objections to such discovery are waived. (CCP § 2031.300.) Plaintiff shall submit a written order to the Court consistent with this tentative ruling. Due to the lack of opposition, in compliance with Rule 3.1312 is excused.