TENTATIVE RULINGS
LAW & MOTION CALENDAR
July 17, 2024 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

The 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, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6723**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 160-421-7577
Password: 410765
https://sonomacourt-org.zoomgov.com/j/1604217577

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
+1 669 254 5252 US (San Jose)

PLEASE NOTE: 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.

1. 23CV00585, Harris v. Wyatt

The Proof of Service reflecting service to Plaintiff, states that Plaintiff was served via mail at her last known address as confirmed through various sources. However, Counsel has filed a Declaration of Nonservice stating that a copy of the motion that contained the hearing date could not be served, and therefore there is no evidence Plaintiff has notice of the instant date. Therefore, Attorney Eric Young's motion to be relieved as counsel for Plaintiff Carla Harris, is **CONTINUED to September 11, 2024, at 3:00 pm in Department 19 for service of the hearing date on Plaintiff**.

2. 24CV02049, Cederborg v. Hanford

Plaintiff Mark Cederborg ("Plaintiff") filed the complaint in this action against Hanford Applied Restoration and Conservation ("HARC"), Douglas Hanford ("Hanford", together with HARC "Defendants") with causes of action for breach of contract and declaratory relief (the

"Complaint"). This matter is now on calendar for Plaintiffs' motion for writ of attachment pursuant to Cal. Code Civ. Proc. ("CCP") § 484.090 *et. seq*.

Attached only to his evidence with the motion, and not filed with the Court, Plaintiff has provided a proof of service reflecting service of the summons and complaint. There is no proof of service in the file reflecting that Defendants have been served with the motion. However, Defendants have filed a timely opposition and they do not assert that the motion was served untimely, nor do they assert any prejudice. Therefore, analysis proceeds to the merits.

I. Underlying Facts

Plaintiff is a former employee of HARC. Plaintiff worked for HARC for thirty years, culminating as serving as CEO of HARC from 2017-2023. During Plaintiff's time at HARC, he was offered stock incentives, which over time resulted in Plaintiff owning approximately 31.5% of HARC. Toward the end of 2022, Plaintiff and Hanford had substantial business disputes that resulted in their agreement that Plaintiff would leave HARC and have his stock repurchased. Hanford and Plaintiff executed two contracts to effectuate this transaction, a "Stock Redemption Agreement" governing the transfer of Plaintiff's shares and exit, and the Non-Negotiable Promissory Note (the "Promissory Note" together with the Stock Redemption Agreement, the "Contracts"). Both Contracts were executed February 28, 2023. The Contracts called for Plaintiff to receive $3,558,942.32 in the form of both cash payments over time and forgiveness of debt owed by Plaintiff to HARC. On February 27, 2024, HARC sent an email through counsel to Plaintiff stating that there were substantial misstatements in the valuation that led to the amounts in the Contracts. As a result, Defendants would not pay Plaintiff until such time that the extent of the misstatements were fully assessed. On March 1, 2024, Defendants failed to make the payment due under the Promissory note.

During the period where Plaintiff was readying the transition from his tenure as CEO to his exit, HARC began employing several individuals to assist with the company's transition due to Plaintiff's departure. This included multiple accounting professionals, who noticed several discrepancies with normal accounting practices in the construction business. See, generally, Declaration of Gina DeCarli ("DeCarli Declaration"); Declaration of Natascha Poteet ("Poteet Declaration"). The resulting inspection of the accounting documents revealed that there were significant miscalculations and misstatements of HARC's financial condition. DeCarli Declaration, ¶ 6-10. These accounting documents formed the basis of the valuation utilized in negotiating the Contracts. DeCarli Declaration, ¶ 10. The valuation used for the Contracts stated that HARC was worth $11.3 million dollars. Following correction of the accounting errors, Defendants resubmitted the accounting documents to the same evaluator, who concluded that the actual value of HARC was $3.5 million.

II. Governing Law

A. Right to Attach

"Attachment is an ancillary or provisional remedy to aid in the collection of a money demand by seizure of property in advance of trial and judgment." *Kemp Brothers Construction Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1476. "California's Attachment Law…is purely statutory and is strictly construed." *Id.* In order to obtain a right to attach order, the plaintiff must demonstrate that the claim is one upon which attachment is permitted and must demonstrate the probable validity of the underlying claim. *See* CCP §§483.010; 484.090(a)(2). A claim is one upon which an attachment may issue if it is: (1) a claim for money based upon a contract, express or implied; (2) of a fixed or readily ascertainable amount not less than $500; (3) that is either unsecured or secured by personal property, not real property (including fixtures); and (4) that is a commercial claim. CCP §483.010. "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." CCP §481.190. In determining probable validity, the court "must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation." *Loeb & Loeb v. Beverly Glen Music* (1985) 166 Cal.App.3d 1110, 1120.
Thus, "[a]t the hearing of an application for a right to attach order, the court shall consider the showing made by the parties appearing and shall issue such an order if it finds (1) the claim upon which the attachment is based is one upon which an attachment may be issued; (2) the plaintiff has established the probable validity of the claim upon which the attachment is based; (3) the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based; and (4) the amount to be secured by the attachment is greater than zero. CCP § 484.090(a). The court's determinations shall be made upon the basis of the pleadings and other papers in the record." *Goldstein v. Barak Construction* (2008) 164 Cal. App. 4th 845, 852-853, citing CCP §484.090(d); see also *Loeb & Loeb,* 166 Cal.App.3d at 1120 ("court must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation."). A claim has "probable validity" where "it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." CCP § 481.190; *see also Santa Clara Waste Water Co. v. Allied World Nat'l Assur. Co.* (2017) 18 Cal.App.5th 881, 885.

Second, claims must be for a "fixed or readily ascertainable amount not less than $500." CCP § 483.010. The damages sought need not be liquidated, but must be measurable by reference to the contract itself. *See Kemp Bros. Const., Inc. v. Titan Elec. Corp*. (2007) 146 Cal.App.4th 1474, 1481, n. 5. "It is not necessary that the amount for which the defendant may be liable should appear on the face of the contract by or from which liability is to be determined." *Bringas v. Sullivan* (1954) 126 Cal.App.2d 693, 699 (explaining that the CCP "does not require that the amount due on the contract shall appear from the contract itself[,] but that the amount of indebtedness shall be shown by affidavit."). To demonstrate that a claim is readily ascertainable, "the contract sued on must furnish a standard by which the amount due may be clearly ascertained and there must exist a basis upon which the damages can be determined by proof."

Id. (internal citation omitted). *See also CIT Group/Equipment Financing, Inc. v. Super DVD, Inc*. (2004) 115 Cal.App.4th 537, 540; *Hayward Lumber & Inv. Co. v. Construction Prods. Corp*. (1952) 110 Cal.App.2d 386, 387.

Unlike many other types of motions, motions for writ of attachment require the court to make substantive determinations on the merits of claims, which includes weighing the evidence. *Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 80. These determinations are made only for the purpose of the motion, and are not otherwise applicable to other matters in the case. CCP § 484.100. Evidence submitted in support of or in opposition to a writ of attachment must meet regular evidentiary standards. See, e.g., *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1390. "The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities." CCP, § 485.240(c).

B. Recission of Contract – Mistake of Fact

A defendant may show that a contract should be rescinded by displaying that their consent to the contract was based on mistake of fact. Civ. Code, § 1689. "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in . . . (a)n unconscious ignorance or forgetfulness of a fact past or present, material to the contract." Civ. Code § 1577. "It has been recognized numerous times that not all carelessness constitutes a 'neglect of a legal duty' within the meaning of (Civ. Code § 1577)." *M. F. Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 702.

Mistake of fact may either be unilateral or mutual. "When both parties understand the facts other than they are, the mistake necessarily is mutual and thus becomes a basis for rescission." *Crocker-Anglo Nat. Bank v. Kuchman* (1964) 224 Cal.App.2d 490, 496. In contrast, "rescission is available for a unilateral mistake, when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party." *Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772.

> A significant error in the price term of a contract constitutes a mistake regarding a basic assumption upon which the contract is made, and such a mistake ordinarily has a material effect adverse to the mistaken party. (Citation) In establishing a material mistake regarding a basic assumption of the contract, the defendant must show that the resulting imbalance in the agreed exchange is so severe that it would be unfair to require the defendant to perform. (Citation.) Ordinarily, a defendant can satisfy this requirement by showing that the exchange not only is less desirable for the defendant, but also is more

advantageous to the other party.

Donovan v. RRL Corp. (2001) 26 Cal.4th 261, 282.

"Ordinary negligence does not bar a claim for mutual mistake because [t]here is an element of carelessness in nearly every case of mistake. (Citation.) Only gross negligence or 'preposterous or irrational' conduct will [bar] mutual mistake." *Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1243 (internal quotations and citations omitted). Similarly, with unilateral mistake, negligence is common and typically must have occurred for mistake to apply. *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 282.

III. Analysis

Plaintiff moves for attachment of HARC. In the moving papers, Plaintiff argues that the claims at issue are derived from contract, and therefore may support attachment, that it seeks to recover an amount greater than zero, and that there is no alternative reason for attachment beyond recovery of the claim.

Defendants do not argue that they have complied with the terms of the Promissory Note. Therefore, as to the nature of the breach of contract claims, and the underlying factual allegations of the Complaint, no further analysis is required. Rather, Defendants aver that the breach of contract claims fail because recission of the Contracts is proper due to mistake of fact. Defendants marshal substantial evidence showing that the information underlying the valuation, all of which was prepared by Plaintiff and persons who reported to Plaintiff, overstated the value of HARC. The value of HARC is undeniably a material fact underlying the Stock Redemption Agreement, and therefore the Promissory Note.

As to the nature of the misstatement and whether it is substantial enough to merit recission, Defendants offer evidence that the valuation used in determining the Stock Redemption Agreement was $11.3 million based on the accounting documents prepared under Plaintiff's tenure. After Defendants underwent the effort to audit and correct accounting documents, the same evaluator came to the conclusion that HARC is actually worth $3.5 million. This is more than sufficient to represent a substantial and material mistake sufficient to support recission. *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 282. Courts have consistently found that errors substantially smaller than the mistaken valuation of almost 70% is sufficient to support recission. See, e.g., *Elsinore Union Elementary School Dist. of Riverside County v. Kastorff* (1960) 54 Cal.2d 380, 389 [7 percent error in contract price]; *Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 661–662 [6 percent error]; *M. F. Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 702 [28 percent error]; *Brunzell Const. Co. v. G.J. Weisbrod, Inc.* (1955)

134 Cal.App.2d 278, 286 [20 percent error]. As a result, Defendants have displayed that they were mistaken as to a basic material fact foundational to the Contracts.

Defendants argue that mistake of fact, either mutual or unilateral, provides adequate basis to rescind the Contracts. Here, there is no evidence before the Court that Plaintiff was aware of the nature of the erroneous nature of the valuation at the time the Contracts were entered sufficient to support the elements of unilateral mistake of fact. However, Defendants have adequately shown that Plaintiff was not adept at the accounting practices necessary to accurately value HARC. See Declaration of Natascha Poteet, ¶¶ 16-25. Plaintiff's efforts led to the valuation which was used by the parties in entering into the Contracts. Defendants have adequately displayed that Plaintiff and Defendants were more than likely mutually mistaken as to the HARC's value. See Declaration of Gina DeCarli, ¶¶ 6-10. The alternative is that Plaintiff was aware of the erroneous value, and Defendants would be able to show unilateral mistake.

Defendants have made adequate showing to rebut Plaintiff's attempt to evidence he is more likely than not to prevail on his breach of contract claims. Defendants being successful in this regard, a writ of attachment cannot issue.

Therefore, Plaintiff's request for issuance of a writ of attachment is **DENIED**.

Defendants shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

3. SCV-259837, London v. Citibank, N.A.

The parties are ORDERED TO APPEAR.

4. SCV-273747, E. v. Bright Starz Day Care

Plaintiff Anastasia E. ("Plaintiff") by and through her guardian ad litem Rachele Eschenburg ("Guardian Ad Litem") filed the complaint (the "Complaint") in this action against Bright Starz Day Care ("Bright Starz"), Jackielyn Bausley ("Bausely", together with Bright Starz, "Defendants"), and Does 1 through 25 for causes of action arising from alleged sexual abuse of Plaintiff while under the care of Defendants.

This matter is on calendar for the motion by Plaintiff through her Guardian Ad Litem pursuant to Cal. Code Civ. Proc. ("CCP") § 473 for leave to amend the Complaint. No opposition is on file. The Motion is **DENIED without prejudice**.

I. Governing Authorities

While motions to amend a pleading are generally within the discretion of the court, it does require that some showing be made which justifies the court's exercise of discretionary power. *Baxter v. Riverside Portland Cement Co.* (1913) 22 Cal.App. 199, 201. Though there is no statute requiring the filing of an affidavit, it is the burden of the moving party to place before the court such material to evidence that the ends of justice will be served through granting the motion. *Plummer v. Superior Court for Los Angeles County* (1963) 212 Cal.App.2d 841, 844. Any motion to amend must be accompanied by a supporting declaration stating the effect of the amendment, why the amendment is necessary and proper, when the changed facts were discovered, and the reasons why amendment was not made earlier. CROC, rule 3.1324 (b).

II. Analysis

First, Plaintiff has failed to produce any of the requirements under Rule 3.1324 beyond a copy of the proposed amended complaint and a motion which contains no authority cited. Additionally, there is no declaration submitted meeting the evidentiary burdens necessary for this type of motion. Plaintiff has submitted a proposed amended complaint, but it does not provide "additional facts" as argued in the motion. See Plaintiff's Proposed Amended Complaint ("PAC"). Rather, it adds a cause of action for breach of contract, while eliminating much of the factual allegations. *Contra*, Complaint (the alleged assault occurred on November 23, 2022). It is deleterious to Defendants' ability to respond for Plaintiff to have not included the required list of revisions as required under Rule 3.1324 (a), as it inhibits the ability of both Defendants and the Court to review the changes Plaintiff proposes.

As noted, the lack of declaration signed under penalty of perjury in support also makes the motion deficient. It fails to show the effect of the amendment, why the amendment is necessary and proper, when the facts giving rise to the allegations were discovered, and why the request for amendment was not made earlier. Plaintiff (through Guardian Ad Litem) must meet her evidentiary burden for the Court to have the power to allow amendment.

Second, there is no evidence before the Court showing that the motion was served on the Defendants. There is no proof of service in the file, and no opposition is on file from Defendants. See California Rule of Court, Rule 3.510 (Proofs of service are due 5 court days before the hearing). Defendants having not received notice of the motion, denial is proper. See, Code of Civil Procedure, §§ 1005 and 1010 (motions, and notice of the date on which they are to be heard, are to be served at least 16 court days before the hearing).

Therefore, Plaintiff's motion to amend is **DENIED without prejudice**.

****This is the end of the Tentative Rulings.*****