

TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, August 21, 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-270601, MAHRT v. Cornerstone et al.

This matter comes on calendar for defendant CHASE BANK'S demurrer to the two COAs alleged against defendant in plaintiff's Second Amended Complaint - the 10th COA (negligence) and the 11th COA (conversion). The grounds for the demurrer are that the two claims fail to state causes of action (CCP section 430.10(e)) and are uncertain (CCP section 430.10(f)).

Plaintiffs oppose the demurrer and defendant filed a Reply.

For the reasons set forth below, the demurrer is SUSTAINED as to both COAs WITHOUT leave to amend.

Facts and Procedure

Plaintiffs Garry and Gillian MAHRT allege that they were victims of a wire fraud scheme in connection with their attempt to purchase real property. In August 2021, plaintiffs had their bank (defendant

Exchange Bank) wire transfer \$2.6 million to an account at defendant Chase Bank (hereinafter referred to as “defendant”), which was meant to complete the property purchase. That account was in the name of defendant CASL INTERNATIONAL, LLC. According to plaintiffs, the principals of the CASL INTERNATIONAL LLC (defendants Yang Liu and/or Xinyue Chang) hacked into computers in California and misappropriated information pertaining to the plaintiff’s anticipated real estate transaction and then fraudulently induce plaintiffs to wire them the funds that were intended for the property purchase. Upon receiving the funds sent by plaintiffs, defendant Chase Bank credited the account identified in the wire instructions sent by Exchange Bank.

Plaintiffs were not Chase Bank customers; nor did they have an account with Chase Bank.

Plaintiffs filed their original complaint on April 14, 2022, alleging a single COA against defendant for common law negligence. On April 13, 2023, plaintiffs filed an “amendment” to the complaint which added language to the negligence COA and added four additional COAs against defendant. On May 16, 2023, defendant demurred to the complaint, arguing (among other things) that plaintiffs’ claims were preempted by the Commercial Code and that defendant had no duty to plaintiff because they were not defendant’s customers. On September 21, 2023, the Court sustained the demurrer as to all COAs against defendant, with leave to amend.

On October 11, 2023, plaintiffs filed a First Amended Complaint (FAC), which added language to the negligence COA, added a COA for conversion against defendant, and modified language regarding existing COAs alleged against defendant.

On November 11, 2023, defendant filed a demurrer as to all COAs against defendant in the FAC. Within that demurrer, defendant argued that the negligence COA failed to state sufficient facts because the claim is “displaced” by the California Commercial Code; and that the claim would still fail if not “displaced” because defendant owes no duty of care to plaintiffs. Defendant also argued that the conversion claim failed to state sufficient facts because that claim is also “displaced” by the Commercial Code; and that the claim would still fail if not “displaced” because defendant fails to allege any “wrongful act” on the part of defendant.

On April 5, 2024, the Court sustained the demurrer in its entirety, but granted plaintiffs leave to amend the negligence and conversion COAs.

Defendant now demurs to the negligence and conversion COAs in the SAC.

Plaintiffs filed an Opposition Brief, and defendant filed a Reply brief.

Standard on Demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. *Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747. Complaints are read as a whole, in context, and are liberally construed. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. In reviewing the sufficiency of a complaint, courts accept as

true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. *Rekestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43. Matters which may be judicially noticed are also considered. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.

The 10th COA for Negligence Fails to State Facts Constituting a COA

The elements of a negligence cause of action are: (1) duty, (2) breach of duty; (3) proximate cause; and (4) damages. *Predia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.

Defendant argues that the common law negligence COA fails to state a claim for two reasons: (1) the claim is “displaced” by Article 4, Division 11 of the California Commercial Code, which exclusively governs claims arising from “fund transfers,” including wire transfers such as the wire transfer that occurred in this case; and (2) even if the common law negligence claim is not “displaced,” defendant did not owe any duty of care to plaintiffs.

Plaintiffs oppose the demurrer, arguing that the UCC does not bar plaintiff’s negligence claim. Relying on *QDOS v. Signature Fin., LLC* (2017) 17 Cal.App.5th 990 and *Sun ‘N Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, plaintiffs further argue that defendant owed a duty to plaintiffs with respect to the wire transfer and with respect to activities occurring after the completion of the wire transfer. Plaintiffs further argue that defendant committed negligence per se by violating statutory standards of conduct.

Pursuant to *Zengen, Inc. v. Comerica Bank, Inc.* (2007) 41 Cal.4th 239, this Court finds that plaintiffs’ negligence claim is “displaced” by the California Commercial Code. Under *Zengen*, common law causes of action based on allegedly unauthorized “funds transfers” are preempted in two specific areas: (1) where the common law claims would create rights, duties, or liabilities inconsistent with Division 11; and (2) where the circumstances giving rise to the common law claims are specifically covered by the provisions of division 11. *Zengen* at 253.

The wire transfer at issue in this case are “fund transfers” to which Division 11 applies. Here, defendant complied with its obligations under Division 11 by accepting the fund transfer at issue per instructions provided from plaintiffs’ bank, who initiated the transfers and sent the wires. Under UCC section 4A-212, a receiving bank cannot be held liable under common law theories for merely accepting a wire transfer. *Chino Commercial Bank, N.A. v. Peters* (2010) 1163, 1174. Pursuant to California Commercial Code section 11404, if a beneficiary’s bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Comment 3 to section 11404 provides that after a wire transfer has been processed, “the beneficiary’s bank may safely ignore any instruction by the originator to withhold payment to the beneficiary.”

This Court finds that plaintiffs' common law negligence claim would be inconsistent with Division 11 of the California Commercial Code and therefore the negligence claim is displaced by the Commercial Code. This Court further finds that plaintiffs' attempt to redirect the negligence cause of action as a post-transfer claim of negligence is not persuasive, as this Court finds that the alleged post-transfer conduct is still covered and displaced by Division 11. The Court further notes that, with respect to the Commercial Code "displacement" issue, plaintiffs have not alleged any new facts that are materially different from the facts contained in the FAC which were found to be deficient.

Additionally, even if plaintiffs' common law negligence claim is not "displaced" by the Commercial Code, plaintiffs' allegations fail to demonstrate that defendant had any "duty" of care towards plaintiffs. A bank's duty of care – to act with reasonable care in its transactions with its customers, arises out of the bank's contract with its customer. *Rodriguez v. Bank of the West* (2008) 162 Cal.App.4th 454, 460. Although banks have a duty to act with reasonable care toward their depositors, including to ensure a person making a withdrawal has authority to do so, Financial Code section 1451 addresses the longstanding principle first codified in the 1925 Bank Act that banks have no duty to monitor withdrawals made by authorized parties in an authorized manner. *The Law Firm of Fox and Fox v. Chase Bank, N.A.* (2023) 95 Cal.App.5th 182, 201. The California Supreme Court in *Sun 'n Sand Inc. v. United California Bank* (1978) 21 Cal.3d 671, 695 carved out a *narrow duty* of inquiry for banks to make reasonable inquiries when "checks, not insignificant in amount, are drawn payable to the order of a bank and are presented to the payee bank by a third party seeking to negotiate the checks for his own benefit. *Id.* At 201-202. Aside from the narrow *Sun 'n Sand* exception, courts have refrained from imposing on banks a duty to third parties to monitor bank account transactions for suspicious activity. *Id.* At 202.

Here, plaintiffs fail to allege facts bringing them within the narrow exception set forth in the *Sun 'n Sand* decision; nor do plaintiffs allege facts that are sufficiently similar to the narrow exception set forth in *Sun 'n Sand*.

To the extent plaintiffs claim that defendant's internal policies and procedures and/or various statutes, regulations, banking practices establish that defendant owes plaintiff a duty of care, the Court is not persuaded that any of these provisions created any duty of care towards plaintiffs with respect to the wire transfer in this case. Nor is the Court persuaded that any of these provisions create a private right of action for plaintiffs. Nor have plaintiffs alleged facts demonstrating that defendants violated any of these provisions (including the alleged Penal Code section 496 violation now alleged in plaintiffs' opposition brief but not actually alleged in the SAC). Nor have plaintiffs alleged facts demonstrating that a violation of any of the provisions proximately caused plaintiffs' injury.

Finally, the Court notes that, with respect to the negligence COA, plaintiffs' allegations in SAC are not materially different from the allegations in the FAC. The only real difference in the two complaints

appears to be new allegations that defendant owed a duty of care to plaintiffs as a result of defendant's internal policies and procedures regarding detecting fraudulent wire transfers. These new allegations do not establish that defendant owed plaintiffs any duty of care and do not establish any private right of action for a violation.

The demurrer to the negligence COA is SUSTAINED WITHOUT LEAVE TO AMEND.

The 11th COA for Conversion Fails to State Facts Constituting a COA

The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.

Defendant argues that the conversion claim is also "displaced" by the Commercial Code, and that (even if not displaced) plaintiffs fail to allege facts demonstrating any "wrongful act" on the part of defendant.

Plaintiffs argue the conversion claim is not "displaced" by the Commercial Code, and that defendant "wrongfully disposed" of plaintiffs' property by distributing it to third parties after defendant knew the money belonged to plaintiffs, thereby denying plaintiffs their right to possession.

This Court agrees with defendant that the SAC does not contain any new *material* allegations of fact regarding the conversion cause of action. The only real difference between the allegations in the SAC and the FAC (for which this Court previously sustained defendant's demurrer with leave to amend) is that plaintiffs now list out specific transactions (relating to the wire transfer) that plaintiffs claim constitute conversion.

The Court finds that the conversion claim (which is based upon the wire transfer) is also "displaced" under the Commercial Code.

Additionally, even if the claim is not "displaced," plaintiffs' allegations (which are not materially different from the FAC) fail to allege that any funds/money were obtained by defendant through a wrongful act. Pursuant to Commercial Code 11404(a), once the wire transfer was received by defendant, it was required to pay the amount of the order to the beneficiary of the order.

The demurrer to the conversion COA is SUSTAINED WITHOUT LEAVE TO AMEND.

Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

2-3. SCV-267688, Oak Grove Construction Co., Inc. v. Kelly

This is a concurrent ruling on the Claim of Exemption filed by Law Offices of Thomas P. Kelly III, P.C. and the Order of Examination. All objections raised by both parties are OVERRULED.

1. Claim of Exemption

The claim of exemption filed by Law Offices of Thomas P. Kelly III, P.C. is DENIED. Judgment Creditor, John A. Kelly's request for attorney's fees is DENIED without prejudice. Such request is not appropriately raised in opposition to a claim of exemption filed by a third party and must rather be raised by noticed motion. Counsel for Judgment Creditor shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

On March 11, 2024, this Court issued an order granting Judgment Creditor, John A. Kelly, \$29,170 in attorney's fees and costs after partially prevailing on an Anti-SLAPP motion. The Court signed the Abstract of Judgment on March 19, 2024. On April 4, 2024, Judgment Creditor requested an Order of Examination of Judgment Debtor, Thomas P. Kelly, III. The Order of Examination was originally set for June 24, 2024, and ultimately continued to be heard in conjunction with the hearing on this claim of exemption. On April 12, 2024, the Court issued a Writ of Execution for satisfaction of the \$29,170 judgment. On April 13, 2024, Judgment Creditor submitted the writ to the Sheriff's Office along with a notice of levy on all accounts and other property held by Judgment Debtor at Exchange Bank, including those in the name of Law Office of Thomas P. Kelly III.

On April 15, 2024, Judgment Debtor filed Articles of Incorporation to transform his law practice, which had the former name of Law Offices of Thomas P. Kelly III, to a corporation under the new name of Law Offices of Thomas P. Kelly III, P.C (also referred to herein as "the corporation"). The corporation has the same physical address, mailing address, and phone number as Judgment Debtor's law practice. According to the April 29, 2024 Statement of Information, Thomas P. Kelly III is the CEO, CFO, Secretary, and only Director of the corporation.

On May 31, 2024, the Sheriff's Office issued a Notice of Levy of any and all accounts, including Safe Deposit Boxes, in the name of Judgment Debtor, including any personal property held as an attorney or in the name of his law firm, Law Offices of Thomas P. Kelly, III. The corporation (not Judgment Debtor) subsequently filed this claim of exemption claiming that the property is exempt because it is not the property of the Judgment Debtor and the corporation is not a party to the action or the judgment.

In support of the claim of exemption, Law Offices of Thomas P. Kelly III, P.C. submitted court filings to show that it is not a party to the action or the judgment. It is true that the corporation was not a party to the action or the judgment because it did not exist until after the judgment was entered. The corporation did not submit any evidence proving ownership of the property being levied.

Analysis:

Judgment Creditor first argues in opposition to the claim of exemption that Law Offices of Thomas P. Kelly III, P.C. may not assert this claim of exemption because it is brought under CCP § 703.520 and CCP § 703.020(a) provides that "The exemptions provided by this chapter apply only to property of a natural

person.” The corporation argues in reply that the claim of exemption was not necessarily brought under CCP § 703.520. Rather, this code section was merely imposed as a footnote on the judicial counsel form chosen to file this claim. Furthermore, the corporation argues that the following language in CCP § 703.520(b)(2) establishes that a claim of exemption may be brought by a party who is not the judgment debtor, “The name and last known address of the judgment debtor if the claimant is not the judgment debtor.”

Judgment Creditor is correct that Law Offices of Thomas P. Kelly III, P.C. may not claim an exemption under CCP § 703.010, et seq. CCP § 703.020 clearly outlines the persons who may make claims of exemptions under the chapter as being only:

- (1) In all cases, by the judgment debtor or a person acting on behalf of the judgment debtor.
- (2) In the case of community property, by the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment.
- (3) In the case of community property, by the domestic partner of the judgment debtor, as defined in Section 297 of the Family Code, whether or not the domestic partner is also a judgment debtor under the judgment.

Furthermore, while the corporation argues that it did not necessarily bring the claim of exemption under CCP § 703.520, it has provided no alternative authority that would allow a third party corporation to assert an exemption.

Rather, a third party corporation claiming ownership of the property would need to file a claim under CCP § 720.110, et seq. As provided in § 720.130, “The third-party claim shall be executed under oath and shall contain all of the following:

- (1) The name of the third person and an address in this state where service by mail may be made on the third person.
- (2) A description of the property in which an interest is claimed.
- (3) A description of the interest claimed, including a statement of the facts upon which the claim is based.
- (4) An estimate of the market value of the interest claimed.

The corporation did not make such a claim. The form filed by the corporation does not include the required information.

Even if the Court did consider the merits of the application, as the Court has noted above, the corporation has not submitted any evidence of ownership of the property. “At a hearing on a third-party claim, the third person has the burden of proof.” (CCP § 720.360.) “The third party claimant is required to introduce evidence that it owns the attached property...Once the third party accomplishes this, the burden shifts to the creditor to establish that the transfers represented by the deeds were fraudulent.” (*Whitehouse v. Six Corp.* (1995) 40 Cal. App. 4th 527, 535.)

Judgment Creditor also argues in opposition that any transfer of ownership of the property to the corporation would have been fraudulent, and thus reversible under the Uniform Voidable Transfer Act (UTVA). At this juncture, the Court is unable to assess whether the transfer of ownership was fraudulent because no transfer of ownership has been shown. The Court will direct the parties to the case of *Potter v. All. United Ins. Co.* (2019) 37 Cal.App.5th 894, 903-904, for a detailed description of the standards for assessing whether a fraudulent transfer occurred. While the Court cannot make a final determination regarding fraudulent intent, the Court will note that the timing of the creation of the law corporation being just days after the Court issued the Writ of Attachment is suspect. This is especially so given that The Law Offices of Thomas P. Kelly III, P.C. did not respond to these arguments in his reply.

2. Order of Examination

The Court continued the hearing on this order of examination for it to be heard concurrently with the claim of exemption and allowed the parties to submit briefing regarding the issues raised at the last hearing. The issues raised at the last hearing included 1) whether the Court should order Judgment Debtor to turn over all shares in his Law Corporation; 2) whether Judgment Debtor should be required to disclose the identities of all his legal clients; and 3) whether the Court should order Judgment Debtor to pay the judgment in monthly installments. Judgment Creditor submitted further briefing. Judgment Debtor did not.

After considering the briefing by Judgment Creditor and considering the concurrent denial of Judgment Debtor's Law Corporation's claim of exemption, the Court finds that Judgment Creditor has not shown sufficient necessity for requiring Judgment Debtor to identify his clients or to turn over his shares in the corporation. Since the claim of exemption is denied and since the law corporation has not shown ownership of the property in question, that property may be used to satisfy the judgment. The law corporation stock is apparently worth only \$100. Furthermore, Judgment Creditor has not shown a sufficient need for the identities of Judgment Debtor's clients. The Court was not persuaded by Judgment Creditor's cited authorities as this case is not a class action and Judgment Creditor is a third party to Judgment Debtor's clients.

However, the Court does find garnishment of Judgment Debtor's wages to be appropriate. Judgment Debtor has not submitted briefing in response to Judgment Creditor's representations regarding his income or the appropriate amount for monthly garnishments. Judgment Creditor argues that Judgment Debtor testified that his income has recently been found to be approximately \$100,000 per year by the Family Law Court. The Court finds this testimony sufficient to set the monthly garnishment at \$1,650, which is 20% of his monthly income (\$8,333.33). (CCP § 706.050.) Counsel for judgment creditor shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

4. 23CV01052, Looney v. Maretti

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, compliance with Rule 3.1312 is excused.

5. SCV-273925, Ellis v. Plant Prefab, Inc.

This matter comes on calendar for plaintiff Bob ELLIS's motion to compel responses to form interrogatories (set one) and responses to requests for production of documents (set one), and for monetary sanctions.

Plaintiff's counsel served both sets of discovery on defendant PLANT PREFAB, INC. on January 24, 2024. Thereafter, Plaintiff granted Defendant several extensions of time to file responses. The last extension was granted on April 25, 2024, and provided for a two-week extension to provide responses. No timely responses were provided for either discovery request.

Pursuant to CCP section 2030.290 and 2031.300, Plaintiff moves for an order compelling responses. Plaintiff also requests monetary sanctions in the amount of \$3,280.00.

No timely opposition has been filed. Plaintiff's counsel filed a notice that Defendant has not opposed the motion, along with a supplemental ("reply") declaration from counsel detailing the request for monetary sanctions.

Relevant Legal Principles

Where a party seeks to compel responses under CCP sections 2030.290 (interrogatories) and 2031.300 (demand for production of documents), the moving party need only demonstrate that the discovery was served, the time has expired, and the responding party failed to provide a timely response. See *Leach v. Sup.Ct.* (1980) 111 Cal.App.3d 902, 905-906; Weil&Brown, ¶8:1140. Failure to provide a timely response waives objections, "including one based on privilege or on the protection for work product..." CCP sections 2030.290, 2031.300. There is no meet-and-confer requirement or a deadline for a motion to compel response where none has been made. CCP §2030.290, 2031.300; Weil&Brown ¶8:909. Where a party has failed to respond on time to a request for production, the first step is not to compel production but, as with interrogatories, to compel a response. CCP § 2031.300.

The responding party must verify substantive responses. CCP §§ 2030.250, 2031.250, 2033.240. Where a response is unverified, the response is ineffective and is the equivalent of no response at all. See *Appleton v Sup.Ct.* (1988) 206 Cal.App.3d 632, 636. However, a party need not verify responses consisting solely of objections, which only the attorney must sign. CCP section 2030.250(a), (c), 2031.250; *Blue Ridge Ins. Co. v. Sup.Ct.* (1988) 202 Cal.App.3d 339, 344. A timely but unverified response containing both substantive responses and objections is invalid as to substantive responses but valid as to the objections. See *Food 4 Less Supermarkets, Inc. v. Sup.Ct.* (1995) 40 Cal.App.4th 651, 657; see also Weil & Brown, 8:1113.1.

Here, no timely verified responses of any kind were provided to the interrogatories. Therefore, moving party is entitled to an order compelling responses (without objection) pursuant to CCP section 2030.290(b). Similarly, no verified responses of any kind were provided to the request for production of documents.

For compelling responses to interrogatories and production requests, the court shall impose monetary sanctions on the losing party unless that party acted with substantial justification, or other circumstances make sanctions unjust. CCP §§ 2023.010, 2023.030, 2030.290, 2031.300. In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP § 2023.040. The sanctions are limited to the “reasonable expenses” related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

Analysis

The motion to compel responses is GRANTED. Defendant is ordered to provide, within 30 days of this order, code compliant responses (without objection) to Plaintiff’s form interrogatories and request for production of documents.

Defendant is further ordered, pursuant to CCP sections 2023.030, 2030.300(d), and 2031.300(c) to pay monetary sanctions to Plaintiff in the amount of \$2,430.00 for attorney’s fees (\$2,370.00) and the filing fee (\$60.00) incurred in bringing this motion. The Court finds \$425 per hour to be reasonable. The Court denies plaintiff’s request for an additional amount of \$850.00 for fees related to the Notice of Informal Conference and Sanctions, as those fees were not incurred for purposes of preparing or litigating the motion to compel.

Plaintiff’s counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

6. 23CV01090, Hardister v. Simpson

Defendants Escalante-Sonoma, LLC; Brian Simpson; and Tony Marshall’s demurrer to Plaintiff’s First Amended Complaint is DROPPED AS MOOT. Plaintiff dismissed these defendants from this action with prejudice on August 14, 2024.