

TENTATIVE RULINGS

FOR: February 14, 2018

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

In the Matter of In re the Addie Dupuis Living Trust

18PR000004

PETITION FOR ORDER ACCEPTING RESIGNATION OF TRUSTEE AND FOR APPOINTMENT OF SUCCESSOR TRUSTEE

TENTATIVE RULING: The matter is continued to February 21, 2018, at 8:30 a.m. in Dept. F. The copy of the trust and the other documents attached to the petition are not legible. Petitioner shall file appropriate copies.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Kelly Dillingham v. John P. Zimmerman, et al.

16CV000328

DEFENDANT JOHN P. ZIMMERMAN, M.D.'S MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING: As an initial matter, the Court finds that the Motion was timely filed and served as there was an agreement between counsel to accept service via email in lieu of personal service. The Declaration of Theodore H. Chase makes clear that on November 30, 2017, Mr. Chase asked Ms. Foley if she would accept service via email so he would not need to make the trip to hand-serve the documents, and that she agreed, and that agreement was memorialized via email that same day. Given these facts, the Court finds that Ms. Foley waived the two calendar day addition of time that normally accompanies electronic service, pursuant to Code of Civil Procedure section 437c, subdivision (a)(2).

As for the Court's setting of the hearing on February 14, 2018 instead of February 13, 2018, as requested by Defendants, the Court finds good cause to hear this Motion less than 30 days before trial as the one day delay was necessary due to limitations in the Court's schedule, and not due to the fault of Defendants.

Defendants' Motion for Summary Judgment is GRANTED. "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." (Code Civ. Proc., § 437c(p)(2).)

The Court does find Plaintiff's claim to be timely. The statute of limitations for a professional negligence claim is "one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury[.]" (Code Civ. Proc., §340.5.) In Defendants' Undisputed Material Fact No. 7, Defendants point to Plaintiff's visit to Dr. Bunkis in April 2015 regarding "corrective surgery" as the moment when Plaintiff discovered or should have discovered her injury. However, Plaintiff testified that when she wrote "corrective surgery" she was referring to the corrective surgery of May 2014, and was seeking a second opinion regarding it. (Plaintiff's Deposition, 138:1 - 139:25.) She did not believe that she needed corrective surgery at that point. (*Id.*) None of the evidence cited by Defendants show that Plaintiff discovered or should have discovered her injury before May 9, 2015, one year before she filed her Complaint on May 9, 2016.

However, Defendants have shown that Plaintiff cannot prove her First Cause of Action for Medical Malpractice or her Second Cause of Action for Negligent Infliction of Emotional Distress. Defendants support their Motion with the Declaration of Laurence E. Wolf, M.D., who opines, based on his review of Plaintiff's medical records, claim, and deposition testimony, along with the deposition testimony of Dr. Bunkis, that Dr. Zimmerman complied with the applicable standard of care in his treatment of Plaintiff. Dr. Wolf further opines that Plaintiff's complaints of injuries were the result of the inherent risks of the procedure performed and that those risks were detailed and consented to by Plaintiff.

"Once the defendant or cross-defendant has met [its] 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. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c(p)(2).) Plaintiff has failed to show that a triable issue of material fact exists. "When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310, citing *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.) Plaintiff supplies no expert evidence in opposition.

Instead, Plaintiff claims she has an expert, Dr. Charles Lee, who has agreed to testify, but does not provide any declaration from Dr. Lee in opposition. Plaintiff requests a continuance to “allow for the additional capture and presentation of evidence” but fails to explain exactly what evidence is to be obtained and why it was not obtained earlier. Code of Civil Procedure section 437c, subdivision (h), provides for a continuance only if it appears “that facts essential to justify opposition may exist **but cannot, for reasons stated, be presented**[.]” Plaintiff fails to state any such reasons, and trial is scheduled to begin in this case on March 15, 2018. The unsupported request for a continuance is therefore denied.

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**Dennis H. Bethke and Fonda V. Bethke as Trustees of the
Bethke Family Trust v. Specialized Loan Servicing, LLC, et al.**

16CV001190

DEMURRER TO THE THIRD AMENDED COMPLAINT

TENTATIVE RULING:

Defendants Specialized Loan Servicing, LLC, the Law Offices of Les Zieve, and the Bank of New York Mellon FKA the Bank of New York’s (as trustee for certificate holders of the CWALT, Inc., Alternative Loan Trust 2006-OA10 Mortgage Pass-Through Certificates, Series 2006-OA10) request for judicial notice of the recorded documents and court filings from the various bankruptcy cases is GRANTED.

Defendants’ demurrer to the first cause of action for violation of Civil Code section 2923.55, second cause of action for violation of Civil Code section 2923.6, third cause of action for violation of Civil Code section 2923.7, and fourth cause of action for unfair business practices on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiffs did not cure the deficiencies detailed in the November 9, 2017 Order [filed November 13, 2017]. Moreover, plaintiffs disregarded the Court’s admonishment and specific instruction to include citations to the pleading in their opposition, which the Court also raised in its June 14, 2017 Minute Order. As warned, plaintiffs’ failure to follow the Court’s order is deemed a waiver of the contentions in the opposition generally referencing the third amended complaint and is an acknowledgment that the demurrer arguments are meritorious.

The case management conference is continued to March 14, 2018, at 8:30 a.m. in Dept. F.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

In the Matter of Roy Welton 2003 Revocable Living Trust

17PR000277

SUCCESSOR CO-TRUSTEE’S FIRST ACCOUNT AND REPORT, JULY 18, 2011 TO JANUARY 31, 2017 AND PETITION FOR APPROVAL; AND FOR APPROVAL OF SUCCESSOR CO-TRUSTEE’S AND ATTORNEY COMPENSATION; AND PETITION FOR REMOVAL OF SUCCESSOR CO-TRUSTEE LARRY WELTON AND SHANNON WELTON AS ARBITRATOR AND APPOINTMENT OF STEVEN WELSTON AS SOLE SUCCESSOR CO-TRUSTEE AND FOR INSTRUCTIONS TO SUCCESSOR SOLE TRUSTEE

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

In the Matter of Dennis Walter Daroza

17CV001434

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Notice has been properly published and no written objections have been filed. The petition for name change is GRANTED without need for appearance.

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In the Matter of Christian Herrera

18PR000031

PETITION FOR ORDER AUTHORIZING COMPROMISE OF DISPUTED CLAIM

APPEARANCE REQUIRED. Petitioner and the minor shall appear.