

TENTATIVE RULINGS

FOR: May 2, 2019

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. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. 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. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

In the Matter of the Harry Edwin Fosdick Trust

19PR000046

AMENDED PETITION FOR ORDER INSTRUCTING SUCCESSOR TRUSTEE

TENTATIVE RULING: A trust is created by a settlor or by married settlors who manifest the intent to create a trust. It must have assets and a beneficiary. (Prob. Code §§ 15200-15205.) A trust may be express or implied. (Prob. Code §15200.) In order to become trust *res*, assets must be transferred to the trustee. (*Reagh v. Kelley* (1970) 10 Cal.App.3d 1082, 1094.) When there is no effective transfer to the trustee, the trust fails as to that asset. (2 Baer, California Trust and Probate Litigation (March 2019 ed.) § 20.3.) “It is not necessary that the transfer be effected by the incorporation of the conveyancing instrument into the instrument declaring the trust . . .” (*Reagh v. Kelley, supra*, at 1094.)

The Court finds that the “Revocable Living Trust Document” attached as Exhibit A to the Amended Petition (Trust Instrument), together with the attestations in the verified Amended Petition, evidence an intent by Harry Edwin Fosdick and Hedy Fosdick to create a trust. The Trust Instrument identifies beneficiaries and names Petitioner as successor trustee.

As to assets, Petitioner alleges under penalty of perjury that, “The [Wells Fargo] account was held under the name of the Harry Fosdick Trust” and, “He had his bank account held in his name as Trustee of the trust.” (Petition at 2:4-8.) Petitioner identifies three Wells Fargo accounts. (Petition at 3:28-4:4.) It appears from the petition that the accounts ending in 0060 and 9639 are held in the name of the “Fosdick Living Trust,” while the account ending in 9639 is held in the name of Harry E. Fosdick. The Court finds that all funds held in any account that is in the name of the Fosdick Living Trust have been effectively transferred to the trustee.

Petitioner fails to introduce evidence that the proceeds of the life insurance policy, and/or funds held in any Wells Fargo account in the name of Harry E. Fosdick have been transferred to the trustee. As such, these assets are not trust *res* and therefore remain within decedent's probate estate.

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Estate of Audrey Bowers

26-14288

PETITION FOR PENDENTE LITE AND FINAL ORDERS FOR SUSPENSION OF POWERS AND REMOVAL OF PERSONAL REPRESENTATIVE AND FOR APPOINTMENT OF SPECIAL ADMINISTRATOR

TENTATIVE RULING: The petition is GRANTED IN PART. The Court declines the request to find that the tenancies are terminated as of the expiration of the sixty-day notice given on March 12, 2019. However, petitioner may take any action he deems necessary, subject to the applicable landlord tenant law, to gain possession of the rental units.

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Conservatorship of Eric Andersen

26-36271

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on May 6, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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Conservatorship of Kim Vincent Rapada Carino

26-67683

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on May 6, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

**CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B
(Historic Courthouse) at 8:30 a.m.**

Shahla Davoudi v. Kevin Fitzgerald

18CV000637

MOTION FOR SUMMARY ADJUDICATION OF ISSUES

TENTATIVE RULING: Plaintiff’s request for judicial notice is GRANTED. The motion for summary adjudication of issues is GRANTED. The Court orders a hearing for OSC Re: Dismissal be set for June 13, 2019, at 8:30 a.m. in Dept. B.

The party moving for summary adjudication bears the burden of persuasion that there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party also bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Id.* at p. 850-51.) If the party carries this burden, there is a shift and the opposing party is then subjected to a burden of production to make a prima facie showing. (*Ibid.*) “In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the opposing party.” (*Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 588.)

Through discovery, Defendant admitted the following (Marshall Decl. at Exhs. C, and D): Defendant made and executed an Amended Promissory Note (Note) in favor of Plaintiff. That as of December 31, 2015 he owed Plaintiff \$865,150. Defendant agreed to pay Plaintiff the principal sum of \$865,150 on December 31, 2015, plus interest at the rate of 10%. Defendant failed to do so. On April 7, 2016, Defendant executed a Forebearance Agreement by which Defendant acknowledged that as of February 29, 2016, he owed Plaintiff \$967,526 on the Note. Pursuant to the Forebearance Agreement, Fitzgerald reaffirmed the validity of the Note, agreed he had no defenses to payment of all amounts due under the note, and further affirmatively waived and released any defenses he “might otherwise have or ever had against payment in full of the [Note]” Defendant further admitted through discovery that he has no defenses to payment of the amounts due Plaintiff on the Note, and that he was in default under the Note.

The Note provides that in the event of default, “[i]f this Note is placed in the hands of an attorney for collection, [Defendant] agrees to pay the reasonable attorneys’ fees, court costs and costs of collection of the holder hereof.” (Davoudi Decl. at Exh. A, p.2.)

Plaintiff has therefore presented evidence that there is no triable issue of material fact as to either her claim for breach of contract, or any of the affirmative defenses asserted by Defendant. Defendant failed to present any evidence to the contrary. For the foregoing reasons, Plaintiff’s motion for summary adjudication is GRANTED. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at 850.)

The notice of motion does not provide notice of the Court’s tentative ruling system as required by Local Rule 2.9. Plaintiff’s counsel is directed to contact Defendant’s counsel forthwith and advise Defendant’s counsel of Local Rule 2.9 and the Court’s tentative ruling procedure. If Plaintiff’s counsel is unable to contact defendant’s counsel prior to the hearing,

Plaintiff's counsel shall be available at the hearing, in person or by telephone, in the event Defendant's counsel appears without following the procedures set forth in Local Rule 2.9.

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**Langrebe Lath & Plastering, Inc. v.
Davis/Reed Construction, Inc., et al.**

18CV001207

**L&W Supply Corporation v.
Langrebe, Lath & Plastering, Inc., et al.**

18CV001219

MOTION TO CONSOLIDATE ACTIONS

TENTATIVE RULING: The motion to Consolidate is GRANTED. Case No. 18CV001219 is consolidated with Case No. 18CV001207. Case No. 18CV001207 is designated as the lead case.

The cases involve claims arising out of, and relating to, respectively, a certain construction project on Bordeaux Way in Napa, California. Four parties are involved in both: Langrebe Lath & Plastering, Inc. (LLP), a subcontractor; Davis/Reed Construction, Inc. (Davis/Reed), general contractor; L&W Supply Corporation (L&W), a materials supplier; and, Liberty Mutual Insurance Company (Liberty).

Davis/Reed and Liberty bring the current motion to consolidate the two actions. LLP filed a Notice of Non-Opposition. Only L&W opposes.

“When actions involving a common question of law or fact are pending before the court . . . it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” (Code Civ. Proc. § 1048, subs. (a).) The purpose of consolidation is to promote convenience and economy by avoiding duplication of procedure, especially regarding proof of issues common to both actions. (*Wouldridge v. Burnes* (1968) 265 Cal.App.2d 82, 86.)

Through its complaint in the later-filed action, L&W asserts claims against LLP, Davis/Reed, and Liberty Mutual for the value of materials furnished by L&W for use on the project. The issue of which, if any, of the parties is/are responsible to L&W for such amounts is at the heart of the earlier-filed Langrebe case. Common questions of fact include whether LLP used such materials at the project, and if so, how much. The Court is sympathetic to L&W's argument that there are issues involved in the Langrebe Case that are not presented in the L&W case. However, consolidation does not require strict identity of issues between the cases.

Based on the foregoing, the Court orders the actions consolidated.

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendant's counsel is directed to contact counsel for all parties forthwith and advise counsel of Local Rule 2.9 and the Court's tentative ruling procedure. If Defendant's counsel is unable to contact all other counsel prior to the hearing, defendant's

counsel shall be available at the hearing, in person or by telephone, in the event counsel appears without following the procedures set forth in Local Rule 2.9.