TENTATIVE RULINGS

FOR: November 9, 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. 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. Diane Price, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

Estate of Daniel J. DeSimoni **17PR000197**

FIRST AND FINAL ACCOUNT AND REPORT OF PERSONAL REPRESENTATIVE AND PETITION FOR STATUTORY PERSONAL REPRESENTATIVE FEES, STATUTORY ATTORNEY'S FEES, REIMBURSEMENT OF COSTS, AND FOR FINAL DISTRIBUTION

TENTATIVE RULING: GRANT petition, including fees as prayed.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

Aaric Trask v. TDL Wine, LLC, et al. **17CV000668**

AMENDED MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING: Defendants TDL Wine, LLC, and GLJR Wine, LLC's request for judicial notice of the complaint is GRANTED, but not for the truth of the matters asserted therein. (Evid. Code, § 452, subd. (d).)

Plaintiff Aaric Trask's request for judicial notice of Napa County Building Department Investigative Discovery Permit No. B11-00309 and Napa County Building Permit B11-01004 is DENIED. These documents are not the proper subject of judicial notice.

Defendants' evidentiary objections (incorrectly numbered as 1, 2, 3, and 8) submitted with their reply are OVERRULED as not code-compliant. (Cal. Rules of Court, rule 3.1354(b)-(c).)

Defendants' motion for summary judgment is DENIED. Trask was severely injured at defendants' winery when he fell through an unguarded opening between the upper storage and lower barrel storage rooms of the main winery building. (Plaintiff's Undisputed Material Facts ("PUMF"), No. 1.) He landed on the cement floor of the lower level storage room, five feet below. (*Id*.) Defendants argue summary judgment is appropriate on the theory that Trask's pleading is barred as a matter of law by *Privette v. Super. Ct.* (1993) 5 Cal.4th 689, and its progeny, a series of cases that have defined and limited the circumstances in which an independent contractor's employee (or third party) may recover in tort from the party hiring the contractor.

Defendants have met their initial burden that *Privette* applies. Trask was legally at defendants' premises when he fell from an unmarked, unbarricaded landing. (Defendants' Undisputed Material Facts ("DUMF"), No. 1.) On the date of the incident, Trask was working for Scott Miller, a licensed general contractor with a Class B license, as a journeyman carpenter. (*Id*., Nos. 4, 6.) Grant Long is the managing member of TDL Wine, LLC and an officer of GLJR Wine, LLC. (*Id*., Nos. 20-21.) Long hired Scott Miller Construction to perform "work." (*Id*., No. 2; see Irwin Decl., Ex. A at pp. 14:25-15:7 [providing Long hired Miller, not "defendants" as represented in DUMF, No. 2].) Since February 2015, TDL Wine, LLC has owned the property where the incident occurred.[1] (DUMF, No. 9.) Based on these undisputed facts, there is a presumption under *Privette* that defendants delegated to Miller the responsibility of performing the work safely. "The policy favoring 'delegation of responsibility and assignment of liability' is very 'strong in this context' [Citation], and a hirer generally 'has no duty to act to protect the [contractor's] employee when the contractor fails in that task[.]'" (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 601-02, *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671, 674.)

However, triable issues remain due to the application of the concealed dangerous condition exception. Under this exception, "a landowner that hires an independent contractor may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition. (*Kinsman, supra*, 37 Cal.4th at p. 664.)

Trask presents evidence satisfying the first element that Long knew or should have known about the concealed hazard. (PUMF, Nos. 30-34, 37-38, 40.) The concealed hazard was the unprotected floor edge/wall opening without safeguards such as guardrail or adequate lighting to react to the drop-off. (*Id*., Nos. 41-43.) The condition was concealed in part because of insufficient light and the use of a plastic refrigerator curtain in the opening and beneath appropriate code lighting conditions. (*Id*.. Nos. 41, 43.) While looking to find a light switch, Trask passed through the curtain believing it was a wall opening to access an adjoining room

[1] Trask represents GLJR Wine, LLC was the tenant. (See Response to DUMF, No. 19.)

with a floor at the same elevation that he was walking on. (*Id*., Nos. 12-15, 43.) Trask also presents evidence Miller did not know and could not have reasonably discovered the hazardous condition because it was dark, there was inadequate light or no light switches, and Trask had arrived at the upper storage room two to three minutes before falling. (*Id*., Nos. 3, 16, 43.) At the very least, Miller did not know there was no light switches in the upper level storage room. Nor did defendants warn Miller about the hazardous condition under the third element. (*Id*., No. 45; *Kinsman, supra*, 37 Cal.4th at p. 674 ["A landowner cannot effectively delegate to the contractor responsibility for the safety of its employees if it fails to disclose critical information needed to fulfill that responsibility, and therefore the landowner would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard."].) Based on this evidence, Trask has satisfied his burden to show there are triable issues of material fact as to whether the concealed dangerous condition exception applies. Since factual issues remain to be decided in this case, the Court finds defendants are not entitled to judgment as a matter of law. (See *Hernandez v. Dep't of Transp.* (2003) 114 Cal.App.4th 376, 382 [if the evidence is in conflict, the factual issues must be resolved by trial].)

Defendants' reply does not change the outcome. Defendants concede the unprotected floor edge/wall opening or, "loading dock" as they phrase it, was a dangerous condition. (Reply at p. 2:3.) Defendants, however, maintain the dangerous condition was not concealed since it was known to Miller after defendants hired him to abate the very condition of which Trask complains. Without any citations to the separate statement, defendants offer the following facts: defendants purchased a winery with existing red tag violations, in order to remedy those red tags defendants hired Miller, Miller previously had been hired several years before to perform substantially the same red tag remediation work, and one of the red tag violations was a loading dock with a five-foot drop. (*Id*. at p. 2:13-16.)

There is no support for the proffered facts as there is no evidence of "red tag violations," or the scope of any such violations, in the separate statement. Defendants introduce the following fact: "Scott Miller Construction was the contractor hired by TDL Wine, LLC, and GLJR Wine, LLC, ('defendants') in March 2015 to abate red tag violations at a winery purchased by Defendants." (DUMF, No. 1.) Defendants cite to Exhibit A [Scott Miller's deposition] at pages 14:25-15:7, attached to the Irwin declaration, as the applicable evidence. The evidence, however, does not support the fact that "defendants" hired Scott Miller Construction to "abate red tag violations." The cited record provides in full:

Q So Mr. Long agreed to hire you to perform the work, is that true?
A Yes.
Q And do you remember was there a contract entered into?
A Yes. Went through the bank.
Q And do you remember approximately when that was?
A Probably March of 2016 - - 15.

(Irwin Decl., Ex. A at pp. 14:25-15:7.) As revealed through the deposition transcript, Long hired Miller to perform some unspecified "work." Notably absent from the cited evidence is any fact to confirm that Miller was hired to abate red tag violations. DUMF number 10 also provides no support as it cites to Exhibit A at pages 10:25-11:14. Page 11 from the cited deposition is not

included in Irwin's declaration. Likewise, DUMF number 11 references "red tag violations," but the supporting evidence at pages 11:15-12:4 are not attached to Exhibit A. (See Irwin Decl., Ex. A [jumping from page 10 to page 14 and omitting pages 11-13.) DUMF number 13 mentions red tags and cites to Exhibit A at page 21:2-19 of the Irwin declaration, yet there is not sufficient context for the fact presented. No other DUMF references "red tag violations."

In short, the supporting evidence from defendants' separate statement falls flat of adequately representing the proffered reply facts; namely that defendants purchased a winery with existing red tag violations, defendants hired Miller to remedy the red tag violations, Miller was hired years earlier to perform substantially the same red tag remediation work, and one of the red tag violations was a loading dock with a five-foot drop. The extent of the purported "red tag violations," and therefore Miller's knowledge of them, remains unknown based on defendants' separate statement. These open questions as to the application of the *Privette* exception only highlight that there remain triable issues of material fact.

The Court need not reach Trask's second exception for an open and obvious hazard on the premises.

Ferguson Enterprises, Inc. Successor-in-Interest to Wolseley Company v. Bart Lee Drescher **18CV000505**

MOTION TO SET ASIDE DEFAULT JUDGMENT DUE TO THE FILING OF DEFENDANT'S BANKRUPTCY PRIOR TO THE ENTRY OF DEFAULT JUDGMENT

TENTATIVE RULING: Plaintiff's motion to set aside the default judgment entered against defendant on August 21, 2018, pursuant to Code of Civil Procedure section 473 is GRANTED. Unbeknownst to plaintiff, defendant filed a Chapter 13 bankruptcy on August 15, 2018.

In the Matter of Jack Eells **18PR000223**

PETITION FOR ORDER AUTHORIZING COMPROMISE OF MINOR'S CLAIM

APPEARANCE REQUIRED. The minor shall attend the hearing.