

TENTATIVE RULINGS

FOR: November 28, 2017

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 Greco 1991 Living Trust

17PR000218

PETITION TO APPROVE FIRST ACCOUNT AND REPORT OF TRUSTEE, FOR APPROVAL OF TRUSTEE FEES AND ATTORNEY'S FEES AND PARTIAL DISTRIBUTION

TENTATIVE RULING: GRANT Petition, including fees as prayed.

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Estate of Meredith Ann McGee

17PR000222

SPOUSAL PROPERTY PETITION

TENTATIVE RULING: GRANT Petition.

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

Direct Capital v. Peggy Bobbett Barnes, et al.

17CV000782

DEMURRER TO ANSWER TO COMPLAINT

TENTATIVE RULING: The unopposed Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

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MOTION FOR JUDGMENT ON THE PLEADINGS

TENTATIVE RULING: The unopposed Motion is GRANTED.

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

In the Matter of Elizabeth Graeber

17PR000219

PETITION FOR ORDER DETERMINING ASSETS WERE EFFECTIVELY TRANSFERRED TO THE ELIZABETH GRAEBER REVOCABLE TRUST

TENTATIVE RULING: The Petition is GRANTED, as prayed.

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

Steven Podesta, et al. v. Ocwen Loan Servicing, LLC, et al.

17CV000965

DEMURRER TO THE COMPLAINT

TENTATIVE RULING:

Defendants Ocwen Loan Servicing, LLC and U.S. Bank National Association's (as trustee for Lehman XA Trust, Series 2006-GP4) request for judicial notice of the deed of trust, the home equity line of credit deed of trust, the modification agreement, the assignment, and the substitution of trustee is GRANTED, but not necessarily for the truth of the matters asserted therein.

Defendants' demurrer on the ground of uncertainty is OVERRULED. (See Ntc. at p.2:7.) A demurrer based on uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (See *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty should only be sustained when the complaint is so bad that the defendant cannot reasonably respond. (*Id.*) Here, the causes of action are certain enough to allow defendants to understand the nature of the allegations and the theory of liability to fashion an appropriate response.

Defendants' demurrer to the first cause of action for violation of Civil Code section 2923.55 on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs allege they made contact with defendants and defendants told them there were no non-foreclosure options available to them. (Compl., ¶¶ 55-56.) Plaintiffs also allege

they had previously obtained a loan modification. (*Id.* at ¶¶ 21-22.) “Plaintiffs’ past applications for loan modifications demonstrate their awareness of their modification options, and are accordingly fatal to their § 2923.55 claim.” (*Millman v. Wilmington Sav. Fund Soc’y FSB* (N.D. Cal. Jan. 30, 2017, No. 16-cv-07402-EMC) 2017 U.S. Dist. LEXIS 12593, at *5.) Plaintiffs have not alleged a material violation of Civil Code section 2923.55.

Defendants’ demurrer to the second cause of action for violation of Civil Code section 2923.6 on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs do not allege defendants ever confirmed that plaintiffs’ loan modification application was complete as required under Civil Code section 2923.6, subdivision (h).

Defendants’ demurrer to the third cause of action for violation of Civil Code section 2923.7 on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. “Section 2923.7 does not impose a duty on the single point of contact to ‘describe the foreclosure process, answer questions in a timely and effective manner, and [provide] updates on the status of [a borrower’s] home.’” (*Cordero v. U.S. Bank, N.A.* (S.D. Cal. Sep. 17, 2014, No. 14CV1709-MMA (BLM)) 2014 U.S. Dist. LEXIS 131127, at *13.)

Defendants’ demurrer to the fourth cause of action for violation of Civil Code section 2924.9 on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Defendants argue the code section does not apply unless a borrower has previously exhausted the first lien loan modification process. Plaintiffs have not adequately responded to this argument.

Defendants’ demurrer to the fifth cause of action for violation of Civil Code section 2924.10 on the ground of failure to state sufficient facts is OVERRULED. Defendants maintain the purported violations are hyper-technical and therefore not material violations. Defendants cite no authority to support this proposition. Plaintiffs allege material violations. (Compl., ¶¶ 96, 99.)

Defendants’ demurrer to the sixth cause of action for violation of Civil Code section 2924.17 on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged a material violation.

Defendants’ demurrer to the seventh cause of action for unfair business practices on the ground of failure to state sufficient facts is OVERRULED. The fifth cause of action serves as the underlying claim. Plaintiffs allege standing based on late fees, penalties, and closing costs on their mortgage payments. (*Id.*, ¶ 114.)

Defendants’ demurrer to the eighth cause of action for breach of the implied covenant of good faith and fair dealing on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. The implied covenant does not apply where no express term exists on which to hinge an implied duty, and where there has been compliance with the contract’s express terms. (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1119.) Plaintiffs’ cases cited in opposition are distinguishable.

Defendants' demurrer to the ninth cause of action for declaratory relief pursuant to Civil Code section 2924.12 on the ground of failure to state sufficient facts is OVERRULED. As noted, the fifth cause of action alleges material violations.

Defendants' demurrer to the tenth cause of action for negligence per se on the ground of failure to state sufficient facts is OVERRULED. Although, generally, financial institutions owe no duty of care to borrowers, there are exceptions where the institution exceeded the conventional role as a mere lender of money, or where the *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 factors apply: "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 899, 906.) Plaintiffs have presented the *Biakanja* factors, and the Court believes the authority plaintiffs raise is controlling for purposes of this demurrer.

Defendants' demurrer to the eleventh cause of action for negligent misrepresentation on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiffs did not respond to defendants' arguments as to this claim and thus concede the claim lacks merit.

Defendants' demurrer to the twelfth cause of action for breach of contract on the ground of failure to state sufficient facts is OVERRULED. Defendants' contentions are based on Code of Civil Procedure section 430.10, subdivision (g). Defendants did not demurrer on this ground.

Any amended complaint shall be filed and served within 10 calendar days of service of notice of entry of order. (Code Civ. Proc., § 472b.)

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In the Matter of Rebecca Bell

17CV001113

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Pursuant to Code of Civil Procedure section 1277, the non-petitioning parent must be personally served with the petition for name change and given 30 day' notice of the hearing. The court file contains no proof of service on the minor's father. If a proper proof of service is filed before the hearing, the petition shall be granted. If no proof of service is filed, the matter will be continued to January 9, 2018 at 8:30 a.m. in Dept. I to allow time for proper service.

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In the Matter of Mark Anthony Ochoa

17PR001149

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.