

1. MAISEL v. BUSSELL, ET AL., 23CV1464

Demurrer

On the court's own motion, matter is continued to January 19, 2024. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 1: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, JANUARY 19, 2024, IN DEPARTMENT FOUR.

2. CONCEPT SERVICES, INC. v. RUIZ, SC20210078**Default Judgment Prove-Up Hearing**

Plaintiff Concept Services, Inc., commenced this action in April 2021 against defendant Maria A. Ruiz. The Complaint asserts causes of action for (1) breach of fiduciary duty, (2) conversion, (3) fraudulent concealment, (4) intentional misrepresentation, (5) constructive fraud, and (6) unjust enrichment. Defendant was personally served with a copy of the Summons and Complaint on April 28, 2021. (Pl. Brief in Support of Request for Court Judgment, Declaration of James R. Cummins, ¶ 4 & Ex. B.) Default was entered against defendant on June 28, 2022. (Id., ¶ 5 & Ex. C.)

In addition to this civil action, a criminal action was filed in El Dorado County against defendant based upon the same conduct underlying this action. When the criminal action was filed in April 2022, defendant fled California. To date, her whereabouts remain unknown. There is currently an outstanding warrant for defendant's arrest.

On June 13, 2023, the court granted plaintiff's ex parte application to serve the Statement of Damages on defendant via publication given that she fled the state and her whereabouts are unknown. (Id., ¶ 7 & Ex. E.) Publication was completed in Placer County, California on June 29, 2023, July 6, 2023, July 13, 2023, and July 20, 2023. (Ibid.) Publication was completed in Washoe County, Nevada on June 26, 2023, July 3, 2023, July 10, 2023, and July 17, 2023. (Ibid.) Proof of Publication was filed with the court on August 16, 2023. (Ibid.)

Pending is plaintiff's request for Default Judgment against defendant.

1. Legal Principles

The plaintiff has the burden of presenting evidence at a prove-up hearing that establishes the plaintiff's entitlement to the specific judgment requested. (Holloway v Quetel (2015) 242 Cal.App.4th 1425, 1432; Carlsen v Koivumaki (2014) 227 Cal.App.4th 879, 884 fn. 4, 899–890.) “[E]ven when the allegations of a complaint ... support the judgment a plaintiff seeks, he is not automatically entitled to entry of that judgment by

the court, simply because the defendant defaulted. Instead, it is incumbent upon the plaintiff to prove up his damages, with actual evidence.” (Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267, 272.)

The court must consider the evidence the plaintiff has offered and render judgment in the plaintiff’s favor for the amount justified by that evidence, but not exceeding the amount stated in the complaint or statement of damages. (Code Civ. Proc., § 585, subds. (b), (c); Holloway, supra, 242 Cal.App.4th at p. 1432; Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, 386.) “It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs’ interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through. That role requires the court to analyze the complaint for itself—with guidance from counsel if necessary—ascertaining what relief is sought as against each defaulting party, and to what extent the relief sought in one cause of action is inconsistent with or duplicative of the relief sought in another. The court must then compare the properly pled damages for each defaulting party with the evidence offered in the prove-up.” (Heidary v. Yadollahi (2002) 99 Cal.App.4th 857, 868.)

2. Statement of the Case

Plaintiff summarizes the allegations of the Complaint as follows:

“From March 2016 through January 2021, Defendant was employed as the office manager, compliance officer, and controller/benefits account manager for the Company. (See Declaration of Matelina F. Hernandez in support of Request for Court Judgment (“**Hernandez Decl.**”), ¶ 3). Defendant’s responsibilities included processing payroll, issuing checks for payment of accounts payable and other disbursements, and submitting the Federal and State payroll tax reports and ensuring that the correct amount of Federal and State payroll taxes were paid. (Hernandez Decl., ¶ 3–6).

“While employed with Plaintiff, Defendant maintained exclusive control over the Company’s Assure payroll processing service (“**Assure**”) and the Company’s QuickBooks. (Hernandez Decl., ¶ 4–5). Assure maintained an electronic signature which was automatically affixed to all checks upon issuance, and QuickBooks was directly linked to the Company’s bank accounts to facilitate processing payroll and direct deposit of payroll for the Company’s employees. (Hernandez Decl., ¶ 4–5). QuickBooks also has a bill payment and check processing feature, which allowed Defendant to process payroll and reimbursements on her own. (Hernandez Decl., ¶ 4–5). Defendant was not an authorized signatory on the Company accounts. (Hernandez Decl., ¶ 7). Any check processed by Defendant would require an authorized signer to sign the check prior to issuance; the authorized signers were Matelina Hernandez and Michael Curley. (Hernandez Decl., ¶ 7). However, a signature stamp was kept in the Company’s safe, for which Defendant had the combination and could access. (Hernandez Decl., ¶ 7).

“Between March 2016 and August 2020, Defendant was the *only* person processing payroll and issuing checks or other disbursements through the Company’s QuickBooks. (Hernandez Decl., ¶ 10). In July 2020, Plaintiff announced that Tanya Levi would take over the Company’s accounting department. (Hernandez Decl., ¶ 9). Defendant trained Ms. Levi on the Company’s QuickBooks in August 2020. (See Declaration of Tanya Levi in support of Request for Court Judgment (“**Levi Decl.**”), ¶ 3). During training, Ms. Levi noticed inconsistencies and a general lack of organization in Defendant’s management of the Company’s QuickBooks system. (Levi Decl., ¶ 3).

“Following her training, Ms. Levi discovered additional inconsistencies within the Company’s QuickBooks. (Levi Decl., ¶ 4). Specifically, Ms. Levi noticed that while checks had been created, the tangible copies of said checks were *nowhere* to be found. (Levi Decl., ¶ 4). This prompted Ms. Levi to investigate further using QuickBooks’ “audit trail” feature, which allows users to trace the entries within the system to the creation of the entry. (Levi Decl., ¶ 4). It was then that Ms. Levi discovered that Defendant was creating

checks on behalf of the Company to herself and deleting the entries in QuickBooks. (Levi Decl., ¶ 4). Specifically, it was determined that Defendant would create multiple checks for the same fictitious transaction, which she would cash as reimbursements to herself. (Levi Decl., ¶ 4). In addition, Ms. Levi discovered that Defendant was receiving direct deposits of her salary at points inconsistent with the Company's pay periods. (Levi Decl., ¶ 4).

"When Ms. Levi discovered the missing reimbursement checks, she requested receipts from the Defendant. (Levi Decl., ¶ 5). In response, Defendant only provided a fraction of the total receipts. (Levi Decl., ¶ 5). Upon review, Ms. Levi noticed that the memo field for all of the check receipts Defendant provided were overly vague such that Ms. Levi could not ascertain the true purpose of the checks Defendant created for herself. (Levi Decl., ¶ 5).

"In January 2021, Ms. Levi approached Plaintiff's Certified Public Accountant ("**CPA**") with her findings from investigating the Company's QuickBooks. (Levi Decl., ¶ 7). The CPA confirmed that Defendant had been embezzling money from the Company since at least 2017. (Levi Decl., ¶ 7). In total, it has been determined that Defendant embezzled \$635,560.00 from the Company. (See Declaration of Timothy Gillihan in support of Request for Court Judgment ("**Gillihan Decl.**"), ¶ 14). This amount includes unauthorized credit card charges by the Defendant totaling \$32,122.00; the Company credit card was issued to Defendant to pay the Company's shipping and postage expenses. (Gillihan Decl., ¶ 12; Hernandez Decl., ¶ 8). However, a review of Defendant's credit card charges revealed that between 2017 and 2020 Defendant was using the business credit card for unauthorized personal purchases. (Gillihan Decl., ¶ 12).

"It was also determined that, in addition to the embezzlement, Defendant also failed to make timely payments to the Internal Revenue Service ("**IRS**") and Franchise Tax Board ("**FTB**") and entered the wrong information in the memo field, causing said agencies to incorrectly apply payment elsewhere. (Hernandez Decl., ¶ 6). For this, Plaintiff was

required to pay the IRS \$139,000 in penalties. (Hernandez Decl., ¶ 6).” (Pl. Brief in Support of Request for Judgment, 2:10–4:12 [bolding and italics in original].)

3. Plaintiff’s Requested Judgment

The 1st C/A to the Complaint, breach of fiduciary duty, states that plaintiff was damaged in excess of \$500,000.00. Other than that stated amount, the Complaint requests damages according to proof, in addition to punitive damages, attorney fees and costs, and interest on damages. The Statement of Damages, served by publication on defendant after entry of default, notified defendant that plaintiff was requesting entry of Default Judgment as follows: (1) special damages in the amount of \$635,560.00; (2) prejudgment interest in the amount of \$145,743.49 pursuant to Civil Code section 3288; (3) attorney fees in the amount of \$51,212.00; (4) costs in the amount of \$3,734.20; and (5) punitive damages in the amount of \$2,000,000.

Plaintiff’s proposed Default Judgment requests \$639,000.00 in damages, costs in the amount of \$3,734.20, and \$1,278,000 in punitive damages.

4. Discussion

Except in a personal injury or wrongful death case, a statement of damages cannot be relied on to establish a plaintiff’s monetary damages on the defendant’s default. (Rodriguez v. Cho (2015) 236 Cal.App.4th 742, 755; Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267, 286.) The requirement of a statement of damages is designed to give defendants “one last clear chance” to respond to the allegations of the complaint by providing the defendant with actual notice of their exact potential liability. (Connelly v. Castillo (1987) 190 Cal.App.3d 1583, 1588.) Further, a default judgment is void if the defendant was not served with the required statement of damages before the default was entered. (Yu v. Liberty Surplus Ins. Corp. (2018) 30 Cal.App.5th 1024, 1034.)

When the plaintiff’s complaint does not set forth the amount of damages sought, the plaintiff does not satisfy due process by serving the defendant with a statement of damages before seeking entry of default in an action that is not an action for personal

injury or wrongful death, instead of amending the complaint. (Dhawan v. Biring (2015) 241 Cal.App.4th 963, 969–970.)

Here, the court could enter default judgment in favor of plaintiff in the amount of \$500,000.00 since that amount is expressly stated in the Complaint. However, plaintiff would need to amend its complaint to obtain damages in the requested amount of \$639,000.00, which is in excess of the damages stated in the Complaint. Further, to preserve plaintiff's right to seek punitive damages on a default judgment, plaintiff needed to serve on defendant—prior to entry of default—a statement that plaintiff is reserving that right and specifying the amount sought. (Code Civ. Proc., § 425.115, subd. (f); Heidary v. Yadollahi (2002) 99 Cal.App.4th 857, 867.) Plaintiff served the punitive damages statement after entry of judgment.

Accordingly, the court cannot enter default judgment in favor of plaintiff at this time unless plaintiff is willing to accept judgment in the amount of \$500,000.00, the amount stated in the Complaint. Otherwise, plaintiff needs to set aside entry of default, file an amended complaint with its request damages, and serve defendant with a punitive damages statement prior to entry of default (assuming defendant does not respond to the allegations of the amended complaint).

TENTATIVE RULING # 2: PLAINTIFF'S REQUEST FOR DEFAULT JUDGMENT IS DENIED WITHOUT PREJUDICE. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN

PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

3. SOWERS v. CAL. TAHOE CONSERVANCY, 23CV1008

Demurrer

On the court's own motion, this matter is continued to January 26, 2024. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 3: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, JANUARY 26, 2024, IN DEPARTMENT FOUR.

4. SEDANO v. MAND, 23CV0691**Motion for Leave to File Second Amended Complaint**

This is a wage and hour putative class action. The action was commenced in May 2023. A First Amended Complaint was filed in June 2023. Pending is plaintiffs' motion for leave to file a Second Amended Complaint ("SAC"). The motion is opposed.

Leave of court is required to amend any pleading except as provided by Code of Civil Procedure section 472. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading" (Code Civ. Proc., § 473, subd. (a)(1).) A trial court may allow the amendment of a pleading at any time up to and including trial. (Id. § 576.)

"It is well established that 'California courts "have a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others." [Citation.] Indeed, "it is a rare case in which 'a court will be justified in refusing a party leave to amend his [or her] pleading so that he [or she] may properly present his [or her] case.' " [Citation.]' [Citation.] Thus, absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. [Citation.]" (Bd. of Trustees v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

"[T]he trial court has wide discretion in determining whether to allow the amendment, but the appropriate exercise of that discretion requires the trial court to consider a number of factors: 'including the conduct of the moving party and the belated presentation of the amendment. [Citation.] ... The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment. [Citation.]' [Citation.] 'The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.'

[Citation.]” (Leader v. Health Indus. of America, Inc. (2001) 89 Cal.App.4th 603, 613 [italics omitted].)

Defendant opposes the motion on the grounds that “neither the original plaintiff nor the new plaintiff [Tatiana Ramirez] have standing to bring the Private Attorneys General Act (‘PAGA’) cause of action asserted in the proposed” SAC. (Opp., 2:5–7.)

In its reply, plaintiffs explain that “[t]he proposed SAC does not seek to add Ramirez as an aggrieved employee representative under the [PAGA], ... but rather as a *class* representative. As stated in the proposed SAC, Ramirez has initiated the statutory notice procedure to become a PAGA representative and, once the procedure is complete, intends to seek amendment to assert a PAGA claim as a representative plaintiff on behalf of the state and other aggrieved employees.... But this will be in a forthcoming Third Amended Complaint, not the SAC.” (Reply, 2:4–10 [italics in original].)

Given California’s policy of great liberality in permitting amendments, that defendant’s opposition is based on a misunderstanding of the proposed amendment, and there being no showing of prejudice, plaintiffs’ motion is granted.

TENTATIVE RULING # 4: PLAINTIFFS’ MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT IS GRANTED. THE SECOND AMENDED COMPLAINT MUST BE FILED AND SERVED BY JANUARY 5, 2024. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT’S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

5. JOHNSON v. MCCALL, 21CV0173

Motion for Leave to Amend Defendant's Verified Answer to Plaintiff's First Amended Complaint

There is no proof of service on file establishing that a copy of defendant's motion and the notice of hearing were served on plaintiff.

TENTATIVE RULING # 5: DEFENDANT'S MOTION FOR LEAVE TO AMEND DEFENDANT'S VERIFIED ANSWER IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

6. MATTER OF ZOVICH & SONS, INC., 23CV1304

Petition for Writ of Mandate

On the court's own motion, this matter is continued to January 26, 2024. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 6: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, JANUARY 26, 2024, IN DEPARTMENT FOUR.

7. JACOBS v. PAPEZ, ET AL., 22CV0891**Motion to Set Aside/Vacate Default**

This action was commenced in June 2022 by plaintiff Jeffrey Jacobs against defendants Thomas Papez and Brian Friedland. Mr. Friedland appeared at numerous court appearances in this action, starting in or about December 2022. At every appearance, Mr. Friedland indicated he was trying to find an attorney to take his case but was not successful. At a Case Management Conference on May 23, 2023, this court, much to plaintiff's chagrin, admonished Mr. Friedland that he had not yet filed a response to the complaint and was at risk of having default entered against him. On June 8, 2023, default was entered against Mr. Friedland. On November 16, 2023, Mr. Friedland filed a motion to set aside entry of default on the grounds of mistake, inadvertence, oversight, or was prevented from responding due to an unexpected condition/situation. The motion is opposed by plaintiff and defendant Papez.

Code of Civil Procedure section 473 provides, in part: "The court may, upon any terms as may be just, relieve a party ... from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief ... shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (Id., subd. (b).)

For the following reasons, the motion is denied. Although Mr. Friedland filed for relief within six months from entry of default, he did not apply for relief within a reasonable period. Mr. Friedland was warned by the court on May 23, 2023, that he was in danger of having default entered against him. Sure enough, default was entered about two weeks later. Further, Mr. Friedland appeared at a Case Management Conference on July 11, 2023. Mr. Friedland wanted to participate at the hearing and the court informed him that he could not do so because default had been entered against him. Mr. Friedland then waited another four months before applying for relief.

Additionally, entry of default did not occur due to Mr. Friedland's mistake, inadvertence, or oversight. As an initial matter, Mr. Friedland does not even explain what the mistake, inadvertence, or oversight was that resulted in the default. Moreover, Mr. Friedland well knew he needed to take action in this case given that he repeatedly informed the court that he was trying to find an attorney to take his case. The court also warned Mr. Friedland that he needed to respond as soon as possible to the complaint or else default would be entered against him.

Lastly, Mr. Friedland states he was prevented from responding due to an unexpected condition or situation, but he did not provide any explanation about this. To the extent it involves health problems, Mr. Friedland does not explain how those problems prevented him from filing a response, which could have been accomplished using a simple form answer (Judicial Council form PLD-C-010, Answer—Contract).

The motion to set aside entry of default is denied.

TENTATIVE RULING # 7: BRIAN FRIEDLAND'S MOTION TO SET ASIDE ENTRY OF DEFAULT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

8. JOHNSON, ET AL. v. JOHNSON, SC20180141

(A) OSC Re: Contempt for Failure to Comply With Court Orders

(B) Referee's Petition for Instructions

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 15, 2023, IN DEPARTMENT FOUR. KENT JOHNSON'S PERSONAL APPEARANCE IS REQUIRED AT 1:30 P.M., FRIDAY, DECEMBER 15, 2023, IN DEPARTMENT FOUR.