1. FREUD v. BALIBRERA, 23CV1519

Motion to Compel

Before the court is plaintiff's motion to compel the deposition of defendant and the production of documents designated in the deposition notice. Plaintiff also seeks a monetary sanction against defendant in the amount of $2,906.25. (Grego Decl., ¶ 10.)

Plaintiff's counsel declares he met and conferred with defendant prior to filing the instant motion pursuant to Code of Civil Procedure sections 2016.040 and 2025.450, subdivision (b)(2). (Grego Decl., ¶ 9.)

Defendant, who is representing himself in pro per, did not file an opposition.

When a party is served with a deposition notice but fails either to appear for examination or to proceed with it, or to serve a written objection to the notice at least three calendar days before the scheduled date on which the deposition is scheduled (Code Civ. Proc., § 2025.410, subds. (a) & (b)), the party that gave the notice may move for an order compelling the deponent's attendance, the deponent's testimony, and the production for inspection of any document, electronically stored information, or tangible thing described in the notice. (Code Civ. Proc., § 2025.450, subd. (a).)

In this case, plaintiff noticed defendant's deposition for November 8, 2024 (the original notice was issued for October 15, 2024). (Grego Decl., Exs. A & B.) On October 29, 2024, defendant emailed plaintiff's counsel stating he would not attend the deposition because he had "[t]oo much going on" and had "not secured a lawyer." (Grego Decl., Ex. C.) Defendant emailed plaintiff's counsel again on November 4, 2024, stating he would not attend any deposition without a lawyer. (Grego Decl., Ex. D.) Ultimately, defendant failed to appear at the deposition.

Because defendant did not serve any valid written objection to the notice of deposition, the court grants plaintiff's motion to compel. Defendant is ordered to attend and testify at deposition, and produce the documents designated in the previously-served

notice of deposition, within 30 days after the date of service of the notice of entry of order.

Further, Code of Civil Procedure section 2025.450, subdivision (g)(1) provides: "If a motion under subdivision (a) is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2025.450, subd. (g)(1).) Having reviewed plaintiff's counsel's declaration, the court finds that $1,875.00 (five billable hours at an hourly rate of $375.00) is a reasonable sanction under the Civil Discovery Act.

TENTATIVE RULING # 1: THE MOTION TO COMPEL IS GRANTED. DEFENDANT IS ORDERED TO ATTEND AND TESTIFY AT DEPOSITION, AND PRODUCE THE DOCUMENTS DESIGNATED IN THE PREVIOUSLY-SERVED NOTICE OF DEPOSITION, WITHIN 30 DAYS AFTER THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. THE COURT IMPOSES A MONETARY SANCTION OF $1,875.00 AGAINST DEFENDANT AND IN FAVOR OF PLAINTIFF, TO BE PAID NO LATER THAN 30 DAYS AFTER THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. 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.

2. COPPLE v. BOOTH CREEK SKI HOLDINGS, INC., ET AL., 24CV1971

Demurrer

Before the court is defendant Sierra-at-Tahoe, LLC's ("defendant") general demurrer to plaintiffs' complaint under Code of Civil Procedure section 430.10, subdivision (e), on the ground that it fails to state a claim against defendant. Defense counsel declares he met and conferred with plaintiffs prior to filing the demurrer pursuant to Code of Civil Procedure section 430.41, subdivision (a)(2). (Smith Decl., ¶¶ 2–4.)

1. Background

This is a personal injury action arising out of a ski accident that occurred at defendant's ski resort on February 13, 2023. Plaintiff Mark Copple ("Mark") alleges he was seriously injured when he hit an unmarked tree stump covered by snow. (Compl., ¶ 10.) Plaintiff Deborah Copple ("Deborah") claims loss of consortium. (Compl., ¶¶ 25, 36.)

The complaint alleges defendant negligently designed and maintained the ski trail due to their improper removal of trees and tree stumps.[1] (Compl., ¶¶ 16, 18.) Further, the complaint alleges defendant did not properly mark or warn skiers of the tree stumps. (Compl., ¶¶ 16, 19.)

Plaintiffs assert causes of action for negligence and premises liability.

2. Legal Principles

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of

[1] Plaintiffs' opposition brief explains that certain trees on defendant's property were damaged by the Caldor Fire in 2021. However, the court does not consider these allegations because they are not contained within the complaint. (Code Civ. Proc., § 430.30, subd. (a).)

fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

3. Discussion

To establish a cause of action for negligence, a plaintiff must prove the defendant owed him a duty of care. (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 751.) Generally, each person has a duty to use due care to avoid injuring others by their careless conduct. (Civ. Code, § 1714.) Any exception to the general rule must be based on statute or clear public policy. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.) The doctrine of primary assumption of risk is one such exception. (*Hamilton v. Martinelli & Assocs.* (2003) 110 Cal.App.4th 1012, 1021.)

In *Knight v. Jewett*, *supra*, 3 Cal.4th 296, the California Supreme Court examined the principles of assumption of risk. To determine if a plaintiff assumed the risk of a particular activity, a court must decide if the defendant owed a duty to the plaintiff. (*Id.* at p. 313.) The existence and scope of a defendant's duty of care is a question of law. (*Ibid.*) In the sport or recreational context, determining the existence and scope of a defendant's duty of acre is a "legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity" (*ibid.*), rather than "the particular plaintiff's subjective knowledge and awareness[.]" (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.)

Some dangers are inherent and integral to participation in a sport or recreational activity, and a court is to consider these dangers when determining whether there is a duty of acre: "As a general rule, persons have a duty to use due care to avoid injury to others, and mya be held liable if their careless conduct injures another person. [Citation.] Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citations.] In the sports setting, however,

conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were those configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. [Citation.] In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant." (*Knight*, *supra*, 3 Cal.4th at pp. 315–316.)

"In any case in which the primary assumption of risk doctrine applies, operators, instructors, and participants in the activity owe other participants a duty 'not to act so as to increase the risk of injury over that inherent in the activity.' [Citation.] But owners and operators of sports venues and other recreational activities have an *additional duty* to undertake reasonable steps or measures to protect their customers' or spectators' safety–if they can do so without altering the nature of the sport or the activity." (*Mayes v. La Sierra University* (2022) 73 Cal.App.5th 686, 698 [italics in original].)

In *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, the plaintiff was skiing at defendant's resort when, without warning, he entered an area of the resort that had recently been altered to accommodate a ski race. (*Id.* at p. 358.) "This area now consisted of hazardous man-made jumps, which increased the risk of harm to skiers and caused the plaintiff to fall down." (*Ibid.*) At the motion for summary judgment level, the "plaintiff produced evidence from which a jury could find that defendant failed to mark off the race start area (with the jumps) before the accident, and that an ordinary skier would not expect to encounter such jumps in that location." (*Id.* at p. 365.) The court found that "when a resort turns part of a previously ordinary run into a significantly more dangerous racing area, it has a duty to warn its patrons." (*Id.* at p. 366.)

In this case, the complaint alleges that defendant improperly removed trees and tree stumps. Trees are a natural feature of the terrain. (See *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1202.) However, in this case, defendants allegedly altered the trees (i.e., cutting them down to tree stumps), which – assuming the truth of the allegations –

arguably would have increased the risk of injury; as the complaint alleges, Mark was unable to see the tree stump because it was covered by snow.

Moreover, at the pleading stage of the proceedings, plaintiff is not required to actually establish a duty with defendants. (*Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 758 [a demurrer tests adequacy of complaint's allegations, "not whether plaintiffs can produce evidence to support those allegations"].) Therefore, the court finds that the complaint sufficiently alleges a duty of care. The demurrer is overruled.

TENTATIVE RULING # 2: THE DEMURRER IS OVERRULED. 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 TLEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

3. KUSHNER v. RIGHTPATH SERVICING, LLC, ET AL., 23CV1329

Motion to Enforce Settlement Agreement

Pursuant to Code of Civil Procedure section 664.6, plaintiff moves to enforce the settlement agreement that was put on the record August 22, 2024, at the settlement conference, wherein the court retained jurisdiction under section 664.6.

Under the August 22, 2024, settlement agreement, plaintiff agreed to a "cash-for-keys" deal requiring that he dismiss the lawsuit with prejudice and surrender possession of the premises on or before October 12, 2024, in exchange for a one-time cash payment of $6,500.00.

Plaintiff claims that defendants have not paid plaintiff $6,500.00.

Defendants argue that the August 22, 2024, settlement agreement was replaced by a subsequent cash-for-keys agreement. In opposition to the instant motion, defendants submitted a declaration stating that, following the August 22, 2024, settlement agreement, plaintiff and his wife signed a new cash-for-keys agreement requiring that they vacate and surrender possession of the premises on or before September 24, 2024, in exchange for a one-time cash payment of $30,000.00. (Lauvray Decl., ¶ 5 & Ex. 1.) Defendants claim that, despite surrendering possession of the premises and receiving the $30,000.00 cash payment, plaintiff has failed and refused to dismiss his remaining claim for declaratory relief unless the defendants pay him the additional sum of $6,500.00. (Lauvray Decl., ¶ 6.)

In his reply, plaintiff argues that the subsequent agreement is a separate and additional agreement. The court disagrees and finds that the subsequent agreement constitutes a novation under Civil Code section 1530 ("[n]ovation is the substitution of a new obligation for an existing one"). Therefore, defendants are not obligated to pay plaintiff the additional sum of $6,500.00 and plaintiff's motion is denied.

Lastly, defendants ask the court to enforce plaintiff's promise in the August 22, 2024, agreement to dismiss the sole remaining claim with prejudice. The court notes, however,

that the subsequent agreement does not include any obligation for plaintiff to dismiss the action. Therefore, defendants' request is denied.

TENTATIVE RULING # 3: PLAINTIFF'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT 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 TLEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

4. URBAN SUNRISE, LLC, ET AL. v. VOGT, ET AL., 22CV0024

Motion for Reconsideration

Before the court is cross-defendant David Vogt's ("Vogt") motion for reconsideration, pursuant to Code of Civil Procedure section 1008, subdivision (a)[2] of the court's denial of his motion for summary judgment.

Section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) For the reasons discussed below, Vogt's motion does not raise any new or different facts, circumstances, or law.

The court's October 14, 2024, denial of Vogt's motion for summary judgment was based on a finding that Vogt did not meet his initial burden of persuasion that each element of the causes of action in question had been proved.[3] The court reasoned that Vogt had not established plaintiff breached the contract where the following phrase in the parties' agreement is ambiguous: "provided Seller completes the transaction *or is prevented from doing so by Buyer*" (emphasis added).

In the instant motion for reconsideration, Vogt argues that plaintiff never raised ambiguity as an issue in its answer to cross-complaint, response to Vogt's Form Interrogatory Number 50.6, or opposition to Vogt's motion for summary judgment. However, as plaintiff correctly points out, the burden was on Vogt to establish that each element of the causes of action in question had been proved. As already stated, the court determined that Vogt did not meet his initial burden where, under the court's interpretation of the parties' agreement, the critical phrase is ambiguous. The court's finding that the contract is ambiguous is not a new fact, law, or circumstance justifying reconsideration under Section 1008, subdivision (a).

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[2] Further undesignated statutory references are to the Code of Civil Procedure.

[3] Vogt's cross-complaint contains three causes of action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) quantum meruit.

When the court has denied a motion for summary judgment, the moving party cannot circumvent the requirements § 437c by subsequently moving for reconsideration under § 1008. Thus, even if Vogt had raised a new or different fact, circumstance, or law, a motion for reconsideration is procedurally improper following the denial of summary judgment. (*Torres v. Design Group Facility Solutions, Inc.* (2020) 45 Cal.App.5th 239, 241 [judge erred in granting defendant's motion for reconsideration under § 1008, subd. (a), which was essentially a renewed summary judgment motion subject to requirements of § 437c; court refused to endorse procedural bypass to due process protections afforded under § 437c to party opposing summary judgment].)

The instant motion is essentially a renewed motion for summary judgment. Section 437c, subdivision (f)(2) provides in relevant part: "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (§ 437c, subd. (f)(2).) The rationale is that if Vogt's renewed motion for summary judgment is based on newly discovered facts or circumstances or a change of law, plaintiff is entitled to the procedural protections afforded to parties opposing summary judgment, including 75 days' notice and a separate statement of material facts. (§ 437c, subds. (a)(2) & (b)(1); see *UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 367; *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 737–738.)

Based on the above, Vogt's motion for reconsideration is denied.

TENTATIVE RULING # 4: THE MOTION FOR RECONSIDERATION 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.