

**Judge Benson – Law & Motion – Wednesday, August 23, 2023 @ 9:00 AM
TENTATIVE RULINGS**

1-2. 20CV01510 Ortega, Ruben et al v. Puig-Palomar, Miquel MD et al.

EVENT: (1) Plaintiffs' Motion for Summary Adjudication

(2) Plaintiffs' Request For a Pre-Trial Conference

Defendant LivaNova's Request for Judicial Notice is Granted and is Unopposed.

Motion for Summary Adjudication

Plaintiffs' motion is continued to October 4, 2023 at 9:00am.

The opposition appears to suggest that affirmative defenses cannot be summarily adjudicated separately from the cause of action. That contention is simply erroneous. CCP § 437c clearly permits summary adjudication of affirmative defenses separate and apart from causes of action. However, allegations pled in an answer that refute the allegations of a complaint are not affirmative defenses, but rather are encompassed by the defendant's denial. (*Walsh v. W. Valley Mission Cmty. Coll. Dist.* (1998) 66 Cal. App. 4th 1532, 1547). Courts sometimes refer to these allegations as traverses. Importantly, CCP § 437c authorizes summary adjudication of affirmative defenses, not traverses.

On the issue of whether Plaintiffs have met their initial burden, the Court finds Plaintiffs have met their initial burden by referencing Defendant's responses to Form Interrogatory no. 15.1. To begin with, the responses do not separately identify each affirmative defense as required by the request. More importantly, the substantive response provided does not address affirmative defenses. For example, several paragraphs are dedicated to explaining why the product was not defective. Those arguments do not pertain to an affirmative defense – they are simply a traverse to the complaint.

Defendant's contention that the expert testimony it has presented provides further clarification/context to the discovery responses is unpersuasive. The evidence incorporated by Defendant in its opposition address issues of causation. Lack of causation is not an affirmative defense – it is a traverse. Similarly, Defendant's discussion of failure to warn does not address an affirmative defense. The failure to warn discussion is a traverse to the Complaint. Therefore, Defendant has not presented any evidence explaining discrepancies with its discovery responses.

Consequently, the Court is inclined to grant the motion. However, as discussed, CCP § 437c only disposes of affirmative defenses, not traverses. In briefly reviewing the (48) "affirmative defenses" in the answer, it appears to the Court that a significant portion of the "affirmative defenses" may in fact be traverses.

The fact that the answer labels allegations as an affirmative defense does not render it an affirmative defense. Rather, the substance of the allegations themselves determine whether the allegations are affirmative defenses or traverses. An affirmative defense

assumes that the allegations in the plaintiff's complaint are true, but that the plaintiff's claims are barred for an independent reason. (See CCP § 431.30(b))

Regarding LivaNova's contention that the fact its devices were approved by the FDA results in preemption of the products liability claims, the Court finds this is not necessarily the case. "... the federal requirements reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a *specific* device or field of device regulation that the statute or regulations were designed to protect from potentially contradictory state requirements." (*Medtronic, Inc. v. Lohr*, (1196) 518 U.S. 470, 500.) [Emphasis Added] To the extent issues in this case concern whether a specific device was defective, there is no preemption. However, to the extent the FDA compliance defense is based on issues that are directly regulated by the FDA, such issues would appear to be preempted. Because the FDA compliance defenses may constitute both a traverse (evidence that the product was not defective) as well as affirmative defense components (preemption), the motion is DENIED as to FDA affirmative defenses nos. 9 and 11.

The Court is ordering further briefing on the issue of whether the allegations labelled as affirmative defenses are in fact affirmative defenses, or whether they are traverses. The Court expects a separate analysis for each of the (48) labelled "affirmative defenses" (with the exception of affirmative defenses 9 and 11). The parties shall submit briefs on this issue no later than September 11, 2023.

As discussed, the granting of this motion will only dispose of allegations that are in fact affirmative defenses - the ruling on this motion will have no affect on allegations which are simply traverses.

Plaintiff will prepare the order.

Request for Pretrial Conference

The Court will hear from the parties.

3. 22CV02996 Western Surety Company v. Newnam, Fredrick et al.

EVENT: Motion to Deposit By Stakeholder; For Discharge of Stakeholder; Request for Attorney Fees Pursuant to CCP § 386.6

Plaintiff's motion is GRANTED. The Court will sign the Proposed Order.

4. **22CV02920 Absolute Resolutions Investments, LLC v. Ferguson, Jerry**

EVENT: Defense Counsel's Motion to Be Relieved

In light of the substitution of attorney filed on August 15, 2023 the motion is moot.

5. **23CV00918 Busby, Tracy Lynn v. McNeil, Robert et al.**

EVENT: Defendants Robert McNeil, Ed Taan, Kathy Hiatt, Cindy Seivert and Roni Turner's Demurrer to Plaintiff Tracy Busby's Complaint

Defendants Robert McNeil, Ed Taan, Kathy Hiatt, Cindy Seivert and Roni Turner's Demurrer to Plaintiff Tracy Busby's Complaint is SUSTAINED in PART and OVERRULED in PART. To the extent the demurrer is sustained, Plaintiff is granted 20 days leave to amend.

The Complaint adequately alleges that the individual defendants are officers and/or directors of Paradise Pines. The allegations that some of these defendants also hold positions with Trident Property Management does not necessarily negate the allegations concerning Paradise Pines.

Weil & Brown Civil Procedure Before Trial (Rutter Group) [7:44] No Matter How Unlikely: The sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action – not whether they are true. Thus now matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on demurrer. [Del E. Webb Corp. v. Structural Materials Co. (1981) 123 CA3d 593, 604

Defendants argue for the first time in the reply that Plaintiff has failed to allege facts supporting individual liability as to Defendants Robert McNeil and Cindy Seivert. The Court disagrees. Paragraphs 26-28 allege Robert McNeil's personal involvement in alleged labor code violations, and paragraph 49 alleges sufficient facts as to Cindy Seivert's personal involvement. Thus, as to Defendants Robert McNeil and Cindy Seivert the demurrer is OVERRULED.

Additionally, although not entirely clear to the Court, it appears Defendants contend that as to Ed Taan, Kathy Hiatt and Roni Turner, the complaint fails to allege sufficient facts establishing individual liability as to each. In this regard, the Court agrees. In reviewing the complaint, there are no facts supporting individual liability as to these Defendants. Accordingly, the demurrer is sustained as to Defendants Ed Taan, Kathy Hiatt and Roni Turner. Plaintiff is granted leave to amend to allege facts supporting individual liability as set forth in *Usher v. White* (2021) 64 Cal.App.5th 883, 896-897.

Defendant shall prepare and submit a form of order consistent with this ruling within 2 weeks.

6. 21CV00181 Jumper, Rochelle et al. Bullet Express Line Inc.

EVENT: Defendants Bullet Express Line, Inc., A & G Trans, Inc., Anil Gautam, and Nakul Kumar's Application for Good Faith Determination

Defendants Bullet Express Line, Inc., A & G Trans, Inc., Anil Gautam, and Nakul Kumar's Application for Good Faith Determination is GRANTED and is unopposed. The Court will sign the Proposed Order.

7. 23CV02034 Rose M. Wood, Administrator of the Estate of Donald Eugene Wood v. National Default Servicing Corporation et al.

EVENT: OSC re: Preliminary Injunction

The Court will hear from counsel regarding status of service.

8. 23CV01587 In re: Zasada, Alex P

EVENT: Change of Name (Adult) (Continued from 8/9/23)

There is no proof of publication on file. If there is no proof of publication on file at the time of the hearing and no appearances the petition will be dismissed without prejudice.

9. 23CV01480 In re: Gardner, Crystal

EVENT: Change of name (minor) (Continued from 8/9/23)

The Court is in receipt of Petitioner's declaration. After review, the Court finds good cause to permit service of the father through publication. The Court will sign the decree provided.

10. **21CV02155 Iecob's Industrial Equipment, a California Corporation v. Hansen, Christine**

EVENT: Motion to be Relieved as Counsel

The motion is continued to September 13, 2023 at 9:00am.