

**Judge Mosbarger – Law & Motion – Wednesday, May 17, 2023 @ 9:00 AM
TENTATIVE RULINGS**

1. 16CV01960 BROWN, GARY LLOYD V. SYCAMORE RANCH ET AL

EVENT: Motion of Defendant Sycamore Ranch for Attorneys' Fees

Generally, under the "American Rule", a prevailing party cannot recover attorney fees unless specifically permitted by contract or statute. CCP §§1021, 1033.5(a)(1); *Cziraki v. Thunder Cats, Inc.* (2003) 111 Cal.App.4th 552, 557. In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. *Civil Code* §1717(a). The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. *Civil Code* §1717(b).

The basis for an attorneys' fee award is found in the Buy-Sell Agreement, which states:

"Should any litigation be commenced between the parties hereto or their personal representatives concerning any provision of this Agreement or the rights and duties of any person in relation thereto, the party or parties prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for their, his, or her attorney's fees in such litigation, which shall be determined by the court in such litigation or in a separate action brought for that purpose."

[See, Complaint filed September 8, 2016 at Pg. 10.]

The contract fee provision above entitles *Plaintiff* to an award of attorneys' fees as the prevailing party under *Civil Code* §1717(a), and *Defendant*, under the fee reciprocity of that Section. That is, if one party would be entitled to attorneys' fees under a contract, the opposing party has the same entitlement whether the contract has such language or not. *Ibid*. California law provides that a non-signatory to a contract who successfully defends an action may, under certain circumstances, recover his or her attorneys' fees when sued on a contract as if he or she were a party to it. One of those circumstances is in the context of a third-party beneficiary. The Court finds that Sycamore Ranch is a third-party beneficiary to the Buy-Sell Agreement and is permitted to pursue the recovery of attorneys' fees under the attorney fee provision therein. See, e.g., *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124; *Hom v. Petrou* (2021) 67 Cal.App.5th 459.

The Complaint, filed in this action on September 8, 2016 includes the following allegations:

"...8. Plaintiff refers to and herein incorporates the preceding paragraphs of this complaint.

9. As set forth above, Article III of the Agreement relates to Sale of the Partnership Interest upon the death of a Partner. "The value of the Partnership shall be determined on an annual basis by mutual agreement of all the Partners within (90) ninety days following the close of each partnership year and shall be endorsed upon Schedule "B" (Purchase Price of Partnership Interest) on each copy of the Agreement." The sole remaining partners to the Sycamore Ranch are Plaintiff and Defendant. Plaintiff and Defendant have been neglectful in determining the value of the partnership on an annual basis within (90) ninety days following the close of each partnership year. The Plaintiff, by and through his legal counsel, notified the Defendant of such failure, and requested the parties either agree to a value pursuant to Article III of the Agreement, or in the alternative, establish an alternative means for valuing the partnership upon the death of a Partner. Defendant Willadsen has breached her obligations under the Agreement, and her fiduciary duty to Plaintiff by refusing to agree on a value of the Partnership pursuant to Article III of the Agreement.

10. An actual controversy has arisen, and now exists, between the Defendants and the Plaintiff concerning their respective rights and duties in that Plaintiff contends Defendant Willadsen is obligated to agree to a value of the Partnership pursuant to Article III of the Agreement, and as a result of the Defendants' refusal to agree to a value, the parties are without a reliable means for valuing the Partnership.

11. Plaintiff desires a judicial determination of his rights and duties, and a declaration as to the proper means for valuing a partnership interest on the death of a partner.

12. A judicial declaration is necessary and appropriate at this time under the circumstances in order for Plaintiff to ascertain his rights with respect to the partnership business and assets.

On the SECOND CAUSE OF ACTION:

5. For a declaration of the rights and interests of Plaintiff and Defendants in and to the partnership business and assets;

6. For a means of valuing the partnership to be established..."

In looking to the Court's Ruling After Court Trial dated September 16, 2022, the conclusion portion states:

"The Court finds in favor of Defendants Willadsen and Sycamore Ranch on the equitable causes of action for Accounting, Breach of Fiduciary Duty and Dissolution and orders that Plaintiff Brown shall take nothing on these claims against said Defendants. Defendants Willadsen and Sycamore Ranch are entitled to costs as prevailing parties as to these equitable causes of action."

Additionally, the Judgment dated February 9, 2023 states in pertinent part that:

“...8. Judgment is entered in Defendants' favor on all causes of action alleged in Butte County Superior Court Case Nos. 16CV01960 and 19CV02314.

9. Defendants are the prevailing parties in this action and shall recover their attorneys' fees and costs, in an amount to be determined by the Court.”

Based on the above the Court finds that Sycamore Ranch was named in the declaratory relief cause of action, a determination on that the cause of action was found in favor of Sycamore Ranch, and thus Sycamore Ranch is a prevailing party permitted to seek recovery of attorneys' fees pursuant to the provisions of the Buy-Sell Agreement.

The Court makes the following order regarding the award of fees:

- (1) The fees requested for work performed by Robert Persons totals \$23,651.85, which the Court reduces by \$5,785 (the amount expended to defend against the Cross-Complaint of Phyllis Brown as Administrator of the Estate of Fletcher Brown).
- (2) The fees requested for work performed by Downey Brand totals \$72,556, which the Court reduces by \$17,752 (the amount expended to defend against the Cross-Complaint of Phyllis Brown as Administrator of the Estate of Fletcher Brown) and \$7,889.98 (work performed after May 19, 2022).
- (3) Taking into consideration the above reductions, the total attorney fees remaining is \$64,780.87, which the Court finds to be excessive. As such, the Court has reduced the billed amount by 1/3, which the Court finds to be a reasonable amount.
- (4) The Court awards Sycamore Ranch's request for fees totaling \$6,600 for the time spent on the instant motion. The Court finds that the amount billed during this period was \$9,899.67, which the Court finds to be excessive. As such, the Court has reduced the billed amount by 1/3, which the Court finds to be a reasonable amount.

The total sum awarded is \$71,380.87.

2. 18CV00766 PRIVETTE, ALLISON ET AL V. PLEASANT GROVE MOBILEHOME PARK ET AL

EVENT: Motion for Amended Order to Deposit Funds in Blocked Account for Minors

The Motion is granted and the matter is set for a status hearing on June 28, 2023 at 10:30 a.m. for status of deposit into blocked account. The Court will sign the Amended Orders to Deposit Funds in Blocked Account submitted by counsel.

3. 21CV01235 ZABEL, JULIE V. JENKINS, CONSTANCE ET AL

EVENT: Defendant's Motion to Compel Settlement Conference Before Trial

Plaintiff's Motion to Compel Settlement Conference Before Trial was served on April 21, 2023 by U.S. mail, which is only 16 Court days plus 4 additional days before the hearing on the Motion. CCP §1005(b) requires 1 additional day notice. Notice is therefore insufficient. However, given the Court's broad authority under Butte County Local Rule 3.10 and California Rules of Court Rule 3.1380, to set the matters pending before it for a settlement conference, the Court sets this matter for a Mandatory Settlement Conference before Judge Stephen Benson on May 24, 2023 at 1:30 p.m. to be conducted via zoom. The Court advises the parties and counsel that they must comply with the Mandatory Settlement Conference procedures as set forth in Butte County Local Rule 3.10, including the filing of Mandatory Settlement Conference Statements, which are to be filed and served no later than 5:00 p.m. on May 22, 2023, and complying with meet and confer obligations. The Court will prepare the form of order.

4. 21CV02257 NORLUND, SANDRA ET AL V. NORLUND, RICHARD ET AL

EVENT: Defendant John C. Schaller's Special Motion to Strike

DEFENDANT'S MOTION TO STRIKE

Defendant John C. Schaller's Special Motion to Strike [CCP § 425.16] is GRANTED.

Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. (*Jarrow Formulas, Inc. v. LaMarche*, (2003) 31 Cal. 4th 728, 733) First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Id.*)

First Prong

CCP §425.16(e)

As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made *in connection with an issue under consideration or review by a legislative, executive, or judicial body*, or any other official proceeding authorized by law,

...

[Emphasis Added]

Defendant contends the allegations as to Mr. Schaller in the FAC are protected because they were made in connection with issues under review by a judicial body, i.e. they were in furtherance of his client's obligations under the settlement agreement. Preliminarily, there appears to be some dispute as to whether the probate case was pending at the time of Mr. Schaller's alleged wrongful acts.

In reviewing the FAC, the alleged wrongful acts by Mr. Schaller occurred from roughly May 2019 through November 2019. Included in the FAC is an order signed by Judge Robert Glusman on December 24, 2019 to enter judgment pursuant to the stipulated settlement agreement. It is clear that the probate case was pending, or at a minimum was under review (i.e. review of the settlement) during Mr. Schaller's alleged wrongful actions. Additionally, it should be noted that per the terms of the order the Probate Court retained jurisdiction of the case. In sum, the Court finds the acts complained of in the complaint occurred while the probate case was "under consideration or review" for purposes of CCP § 425.16(e).

Plaintiff contends the allegations in the FAC are not protected because they establish the violation of a crime, specifically Penal Code § 115. Our Supreme Court has emphasized that the exception for illegal activity is very narrow and applies only in undisputed cases of illegality. (*Zucchet v. Galardi*, (2014) 229 Cal. App. 4th 1466, 1478) "If ... a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (citing *Flatley v. Mauro* (2016) 39 Cal.4th 299, 316.) "[T]he showing required to establish conduct illegal as a matter of law—*either through defendant's concession or by uncontroverted and conclusive evidence*—is not the same showing as the plaintiff's second prong showing of probability of prevailing. Subsequent courts have reiterated that it is only in "rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law. (*Id.*) [Emphasis Added]

Defendant has made it clear in his reply brief and reference to evidence that he vigorously disputes the suggestion he engage in illegal conduct. Thus, it is Plaintiff's heavy burden of demonstrating with uncontroverted and conclusive evidence that a violation of PC § 115 occurred.

PC § 115 Offering false or forged instruments for filing

(a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony

Defendant has pointed to evidence that the original Deed of Trust (DOT) with the correct date was lost. This evidence alone precludes a conclusive finding of a

violation of CCP § 115. This evidence suggest a possibility Defendant did not knowingly procure a forged or false instrument.

Additionally, there is no evidence that the DOT was false or forged. Section 115 can be violated in two ways: (1) by procuring or offering a false instrument for filing; or (2) by procuring or offering a forged instrument for filing. *People v. Schmidt*, (2019) 41 Cal. App. 5th 1042, 1056) For purposes of section 115, “false” means that the instrument was something other than what it purports to be. (*Id* at p. 1058) Schmidt makes clear that fraud in the inducement does not render the instrument “false” for purposes of section 115.

Here, all indications are that Richard Norlund had ownership interest in the subject property, thus the DOT could not have been “false” for purposes of PC § 115. Further, there is no evidence of a forged document. As a result, Plaintiff has failed to meet her burden demonstrating a violation of Penal Code § 115 as a matter of law. Therefore, because the Court has found the allegations in the FAC encompass protected activity under CCP § 426.16(e), the burden shifts to Plaintiff to demonstrate a probability of success on each of her claims.

Second Prong

The plaintiff must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to support a favorable judgment if the evidence submitted by the plaintiff is accepted. (*Lunada Biomedical v. Nunez*, (2014) 230 Cal. App. 4th 459) The trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. Although the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. (*Id.*)

Breach of Contract

There is no evidence supporting a breach of contract claim against Mr. Schaller. He was not a party to the settlement agreement.

Actual Fraud

Plaintiff's cause of action for actual fraud appears to rely on a theory of conspiracy as it pertains to Mr. Schaller. It is well settled that bare allegations and rank conjecture do not suffice for a civil conspiracy. (*AREI II Cases*, (2013) 216 Cal. App. 4th 1004, 1022) A party seeking to establish a civil conspiracy must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the [conspirators] knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. (*Id*)

Plaintiff's argument that Richard Norlund changed the deed at Mr. Schaller's direction is pure conjecture. There is no evidence that Mr. Schaller instructed

Richard to change the date on the deed, nor is there evidence of a mutual understanding to purposefully execute a deed that deprived Plaintiff of her security interest.

Constructive Fraud

This cause of action necessarily fails as it cannot be reasonably argued that Mr. Schaller owed a fiduciary duty to Plaintiff, nor has Plaintiff presented any evidence demonstrating a fiduciary or confidential relationship.

Aiding and Abetting

As Defendant correctly notes, the caption in the FAC for this cause of action does not name Doe Defendants. Consequently, because Mr. Schaller was simply substituted in as a Doe Defendant, the FAC does not allege a cause of action against Mr. Schaller. Regarding Plaintiff's suggestion that she might amend, there is no express or implied right in section 425.16 to amend a pleading to avoid a SLAPP motion. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*, (2004) 122 Cal. App. 4th 1049, 1055) In enacting the anti-SLAPP statute, the Legislature set up a mechanism through which complaints that arise from the exercise of free speech rights can be evaluated at an early stage of the litigation process' and resolved expeditiously. (*Id*)

In sum, Plaintiff has failed to demonstrate a "probability of success" as to any of the causes of action against Mr. Schaller. As a result, Defendant's motion is granted in its entirety. Pursuant to CCP § 425.16(c)(1), Defendant is awarded attorney fees against Plaintiff in the amount of \$4,830.00.

VENUE TRANSFER

Pursuant to Code of Civil Procedure section 397(c) and on the Court's own motion this case is hereby transferred to the Los Angeles County Superior Court. The Court finds that the circumstances involving this case as well as the case pending in Los Angeles county, case number 20STCV27665, necessitate transfer.

Specifically, the interests of justice require this case to be transferred. Prior to the filing of this case, the LA case was filed. Up until the Second District Court of Appeal's decision, it was this Court's understanding that the LA case was strictly limited to judicial foreclosure. The Second District's opinion makes clear that the LA case encompasses issues beyond judicial foreclosure. Importantly, those issues include whether the deed of trust was fraudulently altered, which is a primary issue in this case. Consequently, if this case were to proceed in Butte County, the issue of whether the deed of trust was fraudulently altered would be potentially litigated simultaneously in two separate counties. This would lead to potentially inconsistent rulings not to mention requiring Defendants to defend themselves in two separate venues regarding the same issues.

Additionally, the Court finds a significant majority of potential witnesses are located in Southern California. As a result, the ends of justice and the convenience of

witnesses necessitate transfer. The Case Management Conference scheduled for June 14, 2023 is hereby vacated. Plaintiff Sandra Norlund and Defendant Richard Norlund shall share in the transfer fees required by Government Code section 70618.

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

5-6. 22CV00267 DONKOV, GEORGI ET AL V. CALIFORNIA FAIR PLAN ASSOCIATION

EVENTS: (1) Motion for Protective Order and Request for Monetary Sanctions Against Plaintiffs/Cross-Defendants' Attorney of Record

(2) Motion for Appointment of Discovery Referee

The Defendant/Cross-Complainant's Motion for Protective Order and Request for Monetary Sanctions Against Plaintiffs/Cross-Defendants' Attorney of Record and Motion for Appointment of Discovery Referee are denied. The Court acknowledges that the comments and behavior of Mr. Lenzi were inappropriate and unprofessional and admonishes Mr. Albert Lenzi, and all other counsel in this matter, to follow the statutory requirements of the Evidence Code, Code of Civil Procedure, Rules of Law, and appropriate standards of decorum during the remainder of the pendency of this litigation; however, the Court finds that there has not been a showing of good cause for the appointment of a discovery referee to monitor future depositions. Additionally, Defendant/Cross-Complainant's request for sanctions is denied. Mr. Lenzi shall prepare and submit a form of order consistent with this ruling within two weeks.

7. 22PR00603 IN RE THE FLOYD J. NEAL AND SHAREN L. NEAL TRUST, DATED MAY 10, 1992

EVENT: Petition to Dismiss/Set Aside the Notice of Entry of Judgment or Order Terminating Irrevocable Trust

This matter has been reassigned to Judge Stephen Benson and is continued to May 31, 2023 at 9:00 a.m. in Department 6.

8. 23CV00279 IN RE: JACKSON, DIANA MARIA

EVENT: Petition for Change of Name

The Court still has not yet received proof of publication nor proof of service on the father as required by *Code of Civil Procedure* §1277(a). The Court will hear from the Petitioner.