

**Judge Mosbarger – Law & Motion – Wednesday, April 24, 2024 @ 9:00 AM
TENTATIVE RULINGS**

1-6. 18CV03508 BENIK, ERIK ET AL V. BRIGGOLD, RICHARD ET AL

EVENTS: (1) Order of Examination (Erik Benik, Manager/Managing Member Wishbone Ranch, LLC)

(2) Order of Examination (James Heath)

(3) Order of Examination (Third Party Greg Bauer)

(4) Order of Examination (Erick Benik)

(5) Motion for Charging Order Against Judgment Debtor James Heath (and Wife Shawneese C. Heath) Re Geo Van Designs, LLC & Truxx Industries, LLC and for Order Restraining Judgment Debtor James Heath and Wife Shawneese C. Heath

(6) Motion for Turnover Order Against Judgment Debtor Erik Benik (and Wife Shannon Benik) Re Nor Cal Laser, Inc. Stock, and for Order Restraining Judgment Debtor Erik Benik and Wife Shannon Benik

In regard to the Orders for Examination to Judgment Debtors Erik Benik, individually; Erik Benik, as Manager/Managing Member Wishbone Ranch, LLC; and/or James Heath, pursuant to *Code of Civil Procedure* §708.110(d), not less than 30 days prior to the date set for the examination, a copy of the order shall be personally served on the Judgment Debtor(s). Here, there are no proofs of service evidencing such service. If these individuals appear, the Court will swear them in for examination.

In regard to the Order of Examination to third party Greg Bauer, pursuant to *Code of Civil Procedure* §708.120(b)(1), not less than 10 days prior to the date set for the examination, a copy of the order shall be served personally on the third person, and pursuant to *Code of Civil Procedure* §708.120(b)(2), not less than 10 days prior to the date set for the examination, a copy of the order shall be served personally or by mail on the Judgment Debtor. Here, there is no proof of service evidencing such service. Additionally, the Court notes that the Judgment Creditor is required to tender mileage fees to the third person upon service of the Order or else the Order is not effective. *Code of Civil Procedure* §708.120(f). There is no proof of tender of mileage fees. The Court will hear from counsel.

The Motion for Charging Order Against Judgment Debtor James Heath (and Wife Shawneese C. Heath) Re Geo Van Designs, LLC & Truxx Industries, LLC and for Order Restraining Judgment Debtor James Heath and Wife Shawneese C. Heath is unopposed and is granted. The Court will sign the form of order submitted by counsel.

The Motion for Turnover Order Against Judgment Debtor Erik Benik (and Wife Shannon Benik) Re Nor Cal Laser, Inc. Stock, and for Order Restraining Judgment Debtor Erik Benik and Wife Shannon Benik is unopposed and is granted. The Court will sign the form of order submitted by counsel.

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7. 20CV01722 ARISTOTLE CUSTOM HOMES LLC V. SAVAGE, PATTI

EVENT: Plaintiff Aristotle Custom Homes, LLC's Motion to Enforce Settlement Agreement

The Court finds that the Defendant has not breached the Settlement Agreement as it relates to the status of the building permit, finding that the plain language of the Settlement Agreement – that the permit cost was to be deducted from the settlement amount – infers an obligation that Plaintiff make the determination as to active status prior to payment of the \$155,000. The payment by Plaintiff occurred on June 6, 2023, and therefore there was no breach by Defendant in that regard. Additionally, the Court finds that there is insufficient evidence of a breach of Paragraph 4 of the Settlement Agreement as it relates to the prohibition on disparaging conduct or resulting damages therefrom. The request for attorneys' fees and costs is denied. The Motion is denied in its entirety.

8. 21CV00994 TARMAN, THOMAS A V. PARKER, ROBERT F

EVENT: Demurrer by Robert F Parker to the Second and Third Causes of Action of the Second Amended Complaint

Defendant Parker's Request for Judicial Notice is GRANTED.

The Court Interprets CCP § 761.020 to Require a Legal Description of the Specific Area of the Easement

The Second Amended Complaint contains legal descriptions of both Plaintiff Tarman and Defendant Parker's properties. However, the SAC seeks, in the alternative, an easement referred to as the "Prescriptive Easement Area" as defined using a diagram.

The issue is whether CCP § 761.020 requires, in addition to the legal description of the neighboring properties, a legal description of the easement area. It is unclear from the plain language of the statute whether a legal description of the easement area is required. Parker has not cited any case law on the issue nor is the Court finding any case law on point.

From a practical perspective, if Tarman were to prevail on his easement cause of action, a sufficient description of the easement area would be necessary for any judgment. Without a sufficiently specific description, future disputes concerning the scope of the easement could be more likely.

In the Court's opinion, the legal description requirement was intended in part to guard against these potential complications. Thus, the Court finds § 761.020 requires Tarman to provide a legal description of the "Prescriptive Easement Area." The demurrer is sustained as to the second (prescriptive easement) and third (equitable easement) causes of action on these grounds.

The Addition of the Third Cause of Action Was Procedurally Improper

It is well settled that a plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so unless the new cause of action is within the scope of the order granting leave to amend. (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329). Here the Court's previous ruling did not include permission to plead a new cause of action. Consequently, the demurrer to the third cause of action is sustained on this additional ground.

The SAC Adequately Explains the Omission of the Exclusive Use Allegation Pertaining to the Prescriptive Easement Cause of Action

Dones v. Life Ins. Co. of North America (2020) 55 Cal.App.5th 665, 688:

Under the sham pleading doctrine, "if a verified complaint contains allegations fatal to a cause of action, a plaintiff cannot cure the defect by simply omitting those allegations in an amended pleading without explanation." (*JPMorgan Chase Bank, N.A. v. Ward* (2019) 33 Cal.App.5th 678, 690 [245 Cal. Rptr. 3d 303]; see *Smyth v. Berman* (2019) 31 Cal.App.5th 183, 195–196 [242 Cal. Rptr. 3d 336] (*Smyth*).) "But amendment in this manner is allowed where a plaintiff clearly shows that the earlier pleading is the result of mistake or inadvertence." (*JPMorgan*, at p. 690.) "[T]he sham pleading doctrine 'cannot be mechanically applied.' (*Avalon Painting Co. v. Alert [Lumber] Co.* (1965) 234 Cal.App.2d 178, 185 [44 Cal. Rptr. 90]) It 'is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts.' (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751 [54 Cal. Rptr. 3d 527].) Instead 'the rule must be taken together with its purpose, which is to prevent [an] amended pleading which is only a sham, when it is apparent that no cause of action can be stated truthfully.'

[Emphasis Added]

As the Court noted in its previous order, Plaintiff was granted leave to amend to explain why the "exclusive" allegation was omitted. The SAC has addressed the issue in paragraph 24. Paragraph 24 in essence states Plaintiff has pled in the alternative by pleading the "Disputed Area" (a strip of land approximately 125 feet long and four feet wide on the north side of the Tarman property) as it pertains to the quiet title cause of action, and a different "Prescriptive Easement Area" (defined by the diagram) as it pertains to the second cause of action for prescriptive easement. Plaintiff explains the difference in stating "Unlike the Disputed Area, the Prescriptive Easement Area is not fenced in and has not been put into exclusive uses that the Disputed Area was put to during the prescriptive period." The inadvertence with prior pleadings was the failure to "clearly explain the location of the Prescriptive Easement Area."

These facts demonstrate Plaintiff's allegations are not a sham and that prior discrepancies were the result of inadvertence. Keeping in mind the purpose of the sham pleading doctrine, the Court finds Plaintiff has adequately addressed the issue as it applies to the prescriptive easement cause of action.

Further, the Court finds Plaintiff has permissibly plead in the alternative.

Right to plead inconsistently or in the alternative: When a pleader is in doubt about what actually occurred or what can be established by the evidence, he or she may plead in the alternative and make inconsistent factual allegations. [Mendoza v. Rast Produce Co., Inc. (2006) 140 CA4th 1395, 402, 45 CR3d 525, 531; Adams v. Paul (1995) 11 C4th 583, 593, 46 CR2d 594, 601 – “a party may plead in the alternative and may make inconsistent allegations”; compare ¶6:247 – no affirmative pleading of inconsistent facts]

Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) [6:242]

Considering the SAC as a whole, as well as the previous pleadings, it is clear that Plaintiff's main objective is to obtain access to the pool pump and air conditioner. Likewise, it is clear that plaintiff has attempted to assert a variety of legal theories in order to achieve that objective. Although the facts may vary or even be inconsistent depending on the particular legal theory does not render the allegations void under the sham pleading rule. To the contrary, plaintiff is entitled to plead in the alternative which may include inconsistent facts when there is a doubt as to what can or will actually be proved.

As to Defendant's contention that plaintiff is required to provide evidence in support of his explanation of inconsistencies, supporting inadvertence, the court has found no authority suggesting evidence is required in support of an explanation regarding inconsistent allegations based on inadvertence. H. D. Arnaiz, Ltd. v. County of San Joaquin, (2002) 96 Cal. App. 4th 1357 cited by Defendant dealt with a CCP 473 motion seeking to vacate a voluntary dismissal that was filed by mistake or neglect. It did not involve the issue of sham pleading or pleading in the alternative.

Absent legal authority suggesting that the explanation required for inconsistent allegations requires evidence analogous to a CCP § 473 motion, the Court finds no such requirement exists in explaining inconsistent allegations.

The Second Amended Complaint Does Not Satisfactorily Address The Allegations of Equitable Easement with Respect to the Allegations in Paragraph 9

As Defendant notes, Plaintiff's status as a trespasser is a pre-requisite to an equitable easement cause of action. Paragraph 9 of the SAC indicates the fence was built with Ms. Chatfield's permission. Paragraph 9 is inconsistent with the allegation that Plaintiff was a trespasser. A trespasser is defined as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." (Rivera v. S. Pac. Transp. Co., (1990) 217 Cal. App. 3d 294, 298)

The demurrer to the third cause of action for equitable easement is sustained on the additional ground that the SAC does not adequately explain the discrepancy between the allegations in the cause of action and Paragraph 9.

Leave to Amend

Notwithstanding the procedural deficiencies concerning the third cause of action, Plaintiff is granted leave to amend. If Plaintiff intends on pursuing a cause of action for equitable easement he will need to obtain leave to amend.

In order to give Plaintiff sufficient time to seek leave to amend if he so desires concerning equitable easement, Plaintiff shall amend within 60 days.

9. 21CV02530 GILL, JANET DIANE, MD V. ENLOE MEDICAL CENTER ET AL

EVENT: Plaintiff Janet Diane Gill's Motion for Leave of Court to File Second Amended Complaint

Plaintiff Janet Diane Gill's Motion for Leave of Court to File Second Amended Complaint is DENIED, the Court finding that such amendment would severely prejudice the Defendants. Counsel for the Defendants shall submit a form of order consistent with this ruling within two weeks.

10. 23CV01783 HAISCH CONSTRUCTION CO, INC V. NATIONAL BUILDERS, INC ET AL

EVENT: Plaintiff's Request for Default Judgment

The Court will conduct a prove-up hearing. At the hearing, the Court will require evidence and/or testimony to support the claimed amounts due and owing to the Plaintiff.

11. 23CV03395 VAUGHAN, DONALD E, II ET AL V. FITCH, JAMES MICHAEL ET AL

EVENT: Plaintiff's Motion to Compel Further Responses to Form Interrogatories, Set One; and Request for Sanctions

The Court finds that Defendant California Vocation, Inc. has served Code-compliant verified further responses to Form Interrogatories – General, Set One. The Motion to Compel is therefore moot and is denied on that basis. The respective requests for sanctions by Plaintiffs and Defendant are denied. Counsel for the Defendant shall submit a form of order within two weeks.

12. 24CV01149 LOBO, CLINT V. STEVEN MADISON, TRUSTEE OF THE GENE N & HELEN C MADISON FAMILY TRUST, FIRST AMERICAN TITLE COMPANY ET AL

EVENT: Request for Preliminary Injunction

The Court finds that, the request being unopposed, the Plaintiff has established the likelihood of prevailing on his claims, and that the balance of harm weighs in his favor. Therefore, Plaintiff's request for preliminary injunction is granted. Bond is ordered in the amount of \$90,000. Counsel for the Plaintiff shall submit a form of order within two weeks.