TENTATIVE RULINGS FOR December 20, 2024
Department S-36
BEFORE THE HONORABLE TONY RAPHAEL
(909) 708-8851

ATTENTION: Commencing December 10, 2022, the Court will no longer regularly provide an official Court Reporter to transcribe proceedings in this Department. Parties who wish to have an official record of the proceedings in addition to a minute order must retain a private Certified Shorthand Reporter for the hearing and must submit a "Stipulation and Order For Appointment of Official Reporter Pro Tempore" to the court in the form found on the Court's website. If counsel are appearing for the hearing remotely, the Stipulation can be emailed to the Judicial Assistant for Department S-36 at acassel@sb-court.org. The Court may sign the Order appointing the Certified Shorthand Reporter as the official Court Reporter Pro Tempore. Parties who do not retain a Certified Shorthand Reporter to be designated as an official Court Reporter Pro Tempore are deemed to have waived an official Court Reporter for the proceeding.

PLEASE REFER TO THE GENERAL ORDERS AND FORMS POSTED ON THE COURT'S WEBSITE.

PLEASE NOTE: There may be multiple tentative rulings so view the entire document.

This Court follows California Rules of Court, rule 3.1308(b) for tentative rulings. (See San Bernardino Superior Court Local Emergency Rule 8.) Tentative rulings are posted on the court's website after 3:00 p.m. the day before the hearing at https://www.sb-court.org/divisions/civil/civil-tentative-rulings.

You may appear in person or by remote appearance at the hearing. (See www.sb-court.org/general-information/remote-access) If you do not have Internet access you may obtain the tentative ruling by calling (909) 708-8853 or telephoning the department at 909-708-8851)] If you (or both parties) wish to submit on the Tentative, notify the other party and call the department by 4:00 p.m. the day before and your appearance may be excused unless the Court orders you to appear.

You must appear at the hearing if you are so directed by the court in the tentative ruling and be prepared to address those issues set forth by the court in its ruling.

UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF RULING

ALIREZA HAYAT SHAHI; MANYA RADFAR

v.

VOLKSWAGEN GROUP OF AMERICA, INC.

CIVSB2304355

PROCEDURAL/FACTUAL BACKGROUND

This is a lemon law litigation. On February 7, 2023, Plaintiffs Alireza Hayat Shahi and Manya Radfar filed their Complaint against Defendant Volkswagen Group of America, Inc. The Complaint pleads 3 causes of action: (1) breach of express warranties, (2) breach of implied warranties, and (3) violation of Civil Code section 1793.2, subdivision (b). Defendant answered.

The Complaint alleges that Plaintiffs Shahi and Radfar purchased a 2022 Volkswagen Taos ("Subject Vehicle") on May 7, 2022. It was covered by express warranties. It was also delivered with defects in its engine and electronic system (¶¶8-9).

Discovery dispute. On April 11, 2024, Plaintiffs Shahi and Radfar propounded Requests for Production of Documents (RFPs), set 2, on Defendant Volkswagen. No responses were served within 30 days. (Martinez Decl. at ¶¶10, 13, Exh. C.) Volkswagen served its verified responses on October 30, 2024. (Koopersmith Decl. at ¶9, Exh. B.)

Plaintiffs Shahi and Radfar move to compel responses. Defendant Volkswagen opposes.[1] Plaintiffs Shahi and Radfar reply.

[1] Plaintiffs argue in their Reply that the Opposition was filed and served late. It was filed and served on December 13, 2024, but it was due on or before December 9, 2024. Attorney Koopersmith explains the opposition is late because she was sick with bronchitis on November 30, 2024, and still has not yet

DISCUSSIONS

Statement of the Law

A party has 30 days, plus any additional time if service is not personal, from the date of service to respond to propounded discovery. (Code Civ. Proc., §§2031.260, subd. (a), 2016.050, 1013.) If a party fails to timely respond to propounded discovery, he waives any objection, including those based on privilege and work product.[2] (Code Civ. Proc., §2031.300, subd. (a).)

If a party to whom document demands were propounded fails to serve timely responses, then the propounding party may move for an order compelling responses. (Code Civ. Proc., §2031.300, subd. (b).) Unlike with compelling further motions, no time limit exists on when a motion to compel responses must be filed. (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 395, fn. 4, disapproved on other grounds in *Wilcox v. Birthwhistle* (1999) 21 Cal.4th 973, 983, fn. 12; *Leach v. Superior Court (Markum)* (1980) 111 Cal.App.3d 902, 905-06.) Additionally, no meet-and-confer requirement is imposed.

Analysis

The Motion is **MOOT**. Albeit after the time to respond had expired and after the motion was filed, Defendant Volkswagen served substantive responses to the propounded RFPs.

In the Reply, Plaintiffs argue that the motion is not moot because the responses include the promise to produce documents, which have not been produced. However, a response to propounded RFPs includes either a statement that will comply and produce documents, a

fully recovered. While ill, she attempted to keep up with her tasks and delegate assignments, but this matter was missed. (Koopersmith Decl. at ¶3.) Counsel sufficiently explains the delay. Furthermore, Plaintiffs were able to fully respond to the Opposition. Plaintiffs are not prejudiced by the late service.

[2] A party may be relieved of this waiver if he brings a motion for relief and has subsequently served a response that is in substantial compliance with section 2031.010, et seq. and the failure to serve timely responses was the result of a mistake, inadvertence, or excusable neglect. (Code Civ. Proc., §2031.300, subd. (a).)

statement of inability to comply and produce documents, or objections. (Code Civ. Proc., §2031.210, subd., (a).) The actual production at the time of the response is not necessary to render the served responses as complying with the Defendant's obligation. Furthermore, if Volkswagen fails to comply with its statement of compliance, a remedy exists, i.e., a Motion to Compel Compliance under Code of Civil Procedure section 2031.320.

Plaintiffs also raise the issue that the served responses contain objections. This is true. All objections were waived by failing to timely respond. Defendant has not moved for relief from that waiver. The Court strikes the objections.

CONCLUSION

Based on the foregoing, the Court deems as MOOT Plaintiffs Shahi and Radfar's Motion to Compel Responses to RFPs. The Court strikes the waived objections within the served responses.

Plaintiffs' counsel is ordered to provide notice.

JIE ZOU, etc.

v.

CITY OF CHINO HILLS

CIVSB2316320

PROCEDURAL/FACTUAL BACKGROUND

This litigation concerns the injury to and death of Mingxiang Zou (Decedent). On July 14, 2023, Plaintiff Jie Zou, as the administrator of the Estate of Mingxiang Zou ("Estate") filed its Complaint against Defendant City of Chino Hills ("City"). The operative First Amended Complaint (FAC) added Plaintiff Jie Zou (individually) ["Jie"], Yuan Zou ("Yuan"), and Shuixiu Liu ("Liu") [collectively "Heir Plaintiffs"]. The FAC pleads essentially 1 cause of action for dangerous condition of public property (wrongful death).[3]

The FAC alleges that on January 10, 2023, at around 11:30 a.m., Decedent was walking on the south sidewalk of Grand Ave in the 1701 block and Willow Wood Lane when an Aleppo pine tree within a City park fell injuring and killing him (¶4).

Defendant City demurred to the wrongful death cause of action because it was time-barred. Heir Plaintiffs opposed. Defendant City replied. On October 1, 2024, after oral argument, the Court continued the Demurrer to allow supplemental pleadings. In conjunction with that order, Defendant City filed its supplemental brief on December 6, 2024, and Heir Plaintiffs filed their supplemental opposition on December 13, 2024.

[3] The 1st cause of action for dangerous condition of public property (survival) was adjudicated in the City's favor on June 14, 2014. On that date, the Court granted the City's Motion for Summary Adjudication of the survival (1st) cause of action.

DISCUSSIONS

Statement of the Law

A demurrer challenges defects that appear on the face of the pleading, which includes incorporated exhibits, or matters that are judicially noticeable, but nothing else. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 ["*Blank*"]; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) When evaluating a demurrer, the Court reasonably interprets the pleading by reading it as a whole and its parts in their context. (*Blank, supra,* 39 Cal.3d at p. 318.) The material facts that are properly pled are assumed true for purposes of a demurrer, but contentions, deductions, or conclusions of fact or law are not assumed true. (*Ibid.*) Whether a plaintiff can prove the allegations or the difficulty in proving the allegations is of no concern. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936.) The complaint is to be liberally construed. (Code Civ. Proc., §452.)

A demurrer predicated on insufficient facts to constitute a cause of action (Code Civ. Proc., §430.10, subd. (e)) should be granted only when the facts alleged on the face of the complaint fail to state any valid claim entitled to the plaintiff. (*New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank, supra,* 39 Cal.3d at p. 318.) On the other hand, "if it appears from the complaint … there is no reasonable possibility that an amendment could cure the complaint's defect," sustaining without leave to amend is permissible. (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486.)

Before filing a demurrer, the moving party shall meet and confer with the opposing party at least 5 days before a responsive pleading is due, in person, by telephone, or by video

conference, to see if a resolution can be reached on the objections to the pleading. (Code Civ. Proc., §430.41, subd. (a).) With the demurrer, the moving party shall submit a declaration stating (a) how the parties met and conferred and no resolution was reached, or (b) the opposing party failed to respond to the demurring party's meet and confer requests or failed to meet and confer in good faith. (Code Civ. Proc., §430.41, subd. (a)(3).)

Analysis

A claim related to death or injury to a person or property must be made within six months of the accrual of the cause of action; any other type of claim must be made within one year of the accrual of the cause of action. (Gov. Code, §911.2.) Upon receipt of the tort claim, the public entity has 45 days to act upon it unless a written agreement between the parties extends it. (Gov. Code, §§911.6, subd. (a), 912.4, subds. (a)-(b).) If the written rejection notice complies with Government Code section 913, then the claimant has 6 months to file his litigation; if the written rejection notice does not comply with Government Code section 913, then the claimant has 2 years from the accrual of the cause of action to file his litigation. (Gov. Code, §945.6, subd. (a); *Andrews v. Metropolitan Transit System* (2022) 74 Cal.App.5th 597, 605 ["A public entity's compliance with section 913 determines the statute of limitations applicable to a claimant's subsequent lawsuit."] ["*Andrews*"].) Compliance with the limitations for filing one's lawsuit after a claim presentation is mandatory. (*Cole v. Los Angeles Unified School Dist.* (1986) 177 Cal.App.3d 1, 5; *Julian v. City of San Diego* (1986) 183 Cal.App.3d 169, 176.)

As detailed in the original memo, the filing of the FAC on June 21, 2024, is the date that governs whether Heir Plaintiffs' wrongful death cause of action is timely. Here, the FAC alleges Heir Plaintiffs served a written claim on March 27, 2023, and the City rejected that claim on April 3, 2023 (¶9). The FAC's filing is 1 year, 2 months, and 18 days after the rejection notice,

and 1 year, 5 months, and 11 days after Decedent's death. Thus, if the 6-month filing period governs, the FAC is untimely and subject to dismissal. (*Cole v. Los Angeles Unified School Dist., supra,* 177 Cal.App.3d at p. 5.) But if the 2-year period governs, then the FAC is timely because filed less than 2 years after Decedent's death.

The applicable period turns on whether the rejection notice complied with Government Code section 913. The rejection notices were not attached to the FAC or sought judicially noticed. Thus, the Court could not determine from the face of the pleading whether the wrongful death cause of action was time-barred. Accordingly, the Court requested supplemental briefing.

With its supplemental brief, Defendant City attaches its three rejection notices served to each Plaintiff on April 3, 2023 (Exh. A to Supplemental Brief). Both parties refer to the City's claim rejection notice and the Court takes judicial notice of them as a matter not reasonably subject to dispute.

Upon the submission of a claim, "whether the public entity acts or chooses not to act on a claim, the Government Claims Act requires written notice to the claimant or the claimant's representative.' [Citation.] 'Written notice shall be given in a precise manner.' [Citation.] Section 913, subdivision (a) describes the mandatory requirements for delivery of the notice [citation] and provides language that 'may' be used for the text of the notice. Section 913, subdivision (b) sets forth a warning that 'shall' be included if a claim is wholly or partially rejected." (*Andrews, supra,* 74 Cal.App.5th at p. 604.)

The mandatory language provision within Government Code section 913, subdivision (b), concerns warning that the claimant has 6 months from the date of the notice to file his action, and he may seek the advice of counsel. The City's rejection notices contain this warning. Heir Plaintiffs do not contend otherwise.

The notice also may substantially contain the following:

> Notice is hereby given that the claim that you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $___ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law).

(Gov. Code, §913, subd. (a).) Now, although subdivision (a) mandates written notice, the operative language for the written notice is permissive. (*Andrews, supra,* 74 Cal.App.5th at p. 605 ["It is a well-settled principle of statutory construction that the word 'may' is ordinarily construed as permissive…."].) The statute does not mandate any particular language associated with the action taken within the written notice. (*Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 465 ["The language of section 913, subdivision (a), cannot be read to require those elements…."].)

Here, the rejection notices state:

> Carl Warren & Company is the claims management company for the City of Chino Hills. Notice is hereby given that the above-captioned claim, which was received by the City of Chino Hills on March 27, 2023, was rejected on April 3, 2023.

Heir Plaintiffs argue the above language does not comply with Government Code section 913, subdivision (a), because they fail to identify the board or officer or that any board or officer reviewed the claims and rejected them. Rather, the rejection notices indicate the claims were rejected by Carl Warren & Company, but the Tort Claims Act provides for a board to act on a claim, not a claims management company.

Under Government Code section 912.6, the board of a local public entity acts upon a claim made against the local public entity. This would indicate the City's board was the one obligated to accept, reject, accept in part and reject in part, etc., Heir Plaintiffs' claim. Yet the rejection notices do not state that. However, it was not required to state that. Government Code

section 913, subdivision (a), only provides an example of language that can be included in the written notice on a claim. It does not provide any mandatory format or language.

In *Chalmers v. County of Los Angeles, supra,* 175 Cal.App.3d at p. 465, the Court of Appeal rejected that a notice was deficient because it failed to include the dates of filing and the rejection of the claim within the notice letter. The reason, the statute did not require such to be included. (*Ibid.*)

The same applies here. Government Code section 913, subdivision (a), does not mandate the identifying of the public agency or the person acting on the agency's behalf who rendered the decision on the submitted claim. Furthermore, the rejection notices identified who the claim was presented to (City of Chino Hills), the date of the claim (March 27, 2023), the action taken (rejected), and the date of the action (April 3, 2023). The information identified in Government Code section 913, subdivision (a), is contained in the rejection notices. Thus, it cannot be found that the rejection notices failed to comply with Government Code section 913. The Court also notes, that the rejection notices contained the mandatory language required under Government Code section 913, subdivision (b).

Since Government Code section 913's provisions were met, the six-month limitation period under Government Code section 945.6, subdivision (a), governs, and the FAC is untimely. Therefore, the Court **SUSTAINS** without leave to amend the City's Demurrer to the 2nd cause of action.

CONCLUSION

Based on the foregoing, the Court SUSTAINS without leave to amend Defendant City's Demurrer to the 2nd cause of action as time-barred.

City's counsel is ordered to provide notice.

MT. DIABLO INVESTMENT GROUP, LLC, a California limited liability corporation;

v.

LOANVEST XV, L.P., a California limited partnership; GEORGE CRESSON, an individual; and DOES 1-10

CIVSB2403812

NOTE: The Court will inquire from the parties whether Loanvest XV, LP is still in default.

PROCEDURAL/FACTUAL BACKGROUND

Currently before this Court is a demurrer to the complaint filed by Defendants Loanvest XV, LP and George Cresson.

This action was commenced by Plaintiff MT. Diablo Investment Group, LLC ("Plaintiff") on January 26, 2024, asserting causes of action for: (1) fraudulent transfer under voidable transaction act (Cal. Code Civ. Proc., §3439, et seq.); (2) civil conspiracy and (3) common law fraudulent transfer. The Complaint alleged there was a judgment against Defendant George Cresson ("Cresson") and in violation of the judgment, Defendant Loanvest XV, L.P ("LV15", collectively "Defendants") conveyed title to certain real property in Lake Arrowhead to Cresson.

Plaintiff filed an opposition to the demurrer on October 15, 2024, and Defendants filed a reply on October 21, 2024.

DISCUSSION

Statement of the Law

The function of a demurrer is to test the legal sufficiency of the challenged pleading. (*Kendrick v. City of Eureka* (2000) 82 Cal.App.4th 364, 367; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As a general rule, in testing a pleading against a demurrer, the facts alleged in the pleading are deemed to be true, however improbable they may be. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 125.)

A demurrer can only be used to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicial noticeable. (*Blank v. Koran* (1985) 39 Cal.3d 311, 318.) The face of the complaint includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) No other extrinsic evidence can be considered. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.)

The court assumes the truth of all material facts which have been properly pleaded, of facts which may be inferred from those expressly pleaded, and of any material facts of which judicial notice has been requested and may be taken. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.) However, a demurrer does not admit contentions, deductions or conclusions of fact or law. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.) Because the factual allegations are assumed to be true, the possibility that they may be difficult to prove is irrelevant. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Agricultural Assn.* (1986) 42 Cal.3d 929, 936.)

When ruling on a general demurrer, "[t]he court must, at every stage of an action, disregard any defect in the pleadings that does not affect the substantial rights of the parties. Pleadings must be reasonably interpreted; they must be read as a whole and each part must be

given the meaning that it derives from the context wherein it appears. All that is necessary as against a general demurrer is to plead facts showing that the plaintiff may be entitled to some relief. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955; *Michaelian v. State Compensation Ins. Fund* (1996) 50 Cal.App.4th 1093, 1104-1105.)

A demurrer for failure to state a cause of action should be sustained only where the facts alleged on the face of the complaint fail to state any valid claim entitling the plaintiff to relief. The plaintiff may be mistaken as to the nature of the case or the legal theory on which he or she can prevail, but if the essential facts of some valid cause of action are alleged, the complaint is good against a general demurrer. (WEIL & BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL [The Rutter Group] ¶ 7: 41, citing *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On the other hand, "a trial court does not abuse its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint that under applicable substantive law there is no reasonable possibility that an amendment could cure the complaint's defect." (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486.) Where a complaint is successfully challenged by general demurrer, the burden is on the plaintiff to demonstrate how the complaint can be amended to cure the defect. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

Allegations of the Complaint.

On October 30, 2015, Plaintiff filed suit against South Bay Real Estate Commerce Group, LLC ("SBRECG") and Defendant Cresson (collectively, "Judgment Debtors"), in the Superior Court of California, County of San Mateo. (Case No. Civ.536047.) On November 7, 2016, Plaintiff and Judgment Debtors entered into a settlement agreement pursuant to which Plaintiff agreed to dismiss the suit and Judgment Debtors agreed to pay Plaintiff the sum of $450,000 on terms and conditions set forth in the settlement agreement. Between November 7, 2016 and present the Judgment Debtors have only paid $138,500 of the $450,000 owed. They have not made payment in more than five years. (Comp., ¶¶ 1-9.)

On June 26, 2017, the Settlement Agreement was reduced to a judgment ("Judgment") which has since been amended multiple times. As relevant to this matter, on February 19, 2020, the Superior Court of California County of San Mateo entered Third Amendment Judgment of Dismissal Pursuant to the Settlement ("3rd Judgment"). On September 24, 2020, in an obvious attempt to avoid paying Plaintiff pursuant to the 3rd Judgment, Judgement Debtors filed a motion to enforce the Settlement Agreement seeking to nullify their obligations to pay Plaintiff on the pretext of Plaintiff's alleged failure to comply with the Settlement Agreement. On February 3, 2021, the Court found the dismissal moot, denying the Judgment Debtor's motion and affirming the obligation to pay Plaintiff under the 3rd Judgment. (Comp., ¶¶ 10-12.)

On April 6, 2021, the Judgment Debtors filed an appeal (Case No. A162380) of the February 3, 2021 Order. On May 5, 2021, the Judgment Debtors and Loanvest VII, L.P.; Loanvest XV, L.P. (Defendant LV15) and Post Construction Services (collectively, the "Sureties") filed an undertaking on appeal (the "undertaking"), where the Sureties obligated themselves to Plaintiff in the amount of $1,000,000.00. Upon information and belief, Cresson

holds an ownership interest and/or managerial authority over each of the Surieties, including LV15.

On November 19, 2021, while the Undertaking remained in full force and effect, LV15, as Grantor, executed a Grant Deed ("Deed") granting to Defendant Cresson as the Grantee, a fee simple interest in the real property located at 323 Sunset Drive, Lake Arrowhead, CA (the "Real Property"). At the time of the filing of the Undertaking on Appeal, Defendants were aware that the Real Property was a significant asset for Defendant LV 15 as a Surety, but deliberately omitted the Real Property from its description of assets. On the same date of the Deed, November 19, 2021, Defendant Cresson recorded a homestead declaration claiming himself as the homestead owner of the real property and declaring the real property as his principal dwelling. Upon information and belief, Cresson shares a household with his wife Vera Cresson and the couple resides at 2026 Geri Lane, Hillsborough CA94010. (Comp., ¶¶ 12-17.)

On the same date the Deed was executed, November 19, 2021, Defendant Cresson acting as the Trustor, executed a Deed of Trust, entrusting the Real Property to Trustee David Cresson Jr. in trust accompanied by authority for sale. The disposition of those loan funds were never directed toward payoff of any portion of Defendants' debt obligation. On February 10, 2022, Defendant Cresson, acting as Trustor, executed another Deed of Trust, entrusting the Real Property to Trustee Heather Lovier, in trust, accompanied by the authority for sale. The disposition of those loan funds were never directed toward payoff of any potion of Defendants' debt obligation. (Comp., ¶¶ 18-19.)

On October 19, 2022, the California Court of Appeal, denied the Judgment Debtors' appeal, affirming the February 3, 2021 Order awarding Plaintiffs its costs of appeal. On May 1, 2023, Plaintiff filed a motion filed to Enforce Undertaking against the Surieties. The Motion

was granted on August 1, 2023, and on November 6, 2023, a Fourth Amended Judgment of Dismissal Pursuant to Settlement was entered, which included the Surieties as additional judgment debtors. On July 12, 2023, Plaintiff field a "Motion to Add Interest to Judgment" which was sought to add to the Judgment all accrued statutory interest. On November 6, 2023, the Superior Court of California County of Merced entered Fourth Amended Judgment of Dismissal Pursuant to Settlement (the "4th Judgment") pursuant to which Judgment Debtors and Surieties owe $548,712.21 (calculated as of September 14, 2023). As of the date of this Complaint, Plaintiff has received nothing except the previously paid $138,500 from either of the Judgment Debtors or Surieties. (Comp., ¶¶ -23.)

Causes of action were asserted for (1) fraudulent transfer (Comp., ¶¶ 24-38); (2) conspiracy (Comp., ¶¶ 37-45); and (3) common law fraudulent transfer (Comp., ¶¶ 46-53).

Analysis

The Uniform Fraudulent Transfer Act ("UFTA") is codified in Civ. Code section 3439, et. seq. A transfer made by a debtor is voidable as to a creditor if the debtor made the transfer with the intent to hinder, delay, or defraud any creditor of the debtor, without receiving a reasonable value in exchange for the transfer, and the debtor either (i) was engaged or about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or (ii) intended to incur or believe or reasonably should have believed that he would incur debt beyond his ability to pay as they become due. (Civ. Code, § 3439.04, subd. (a); see also CACI 4200.) Alternatively, a transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer if the debtor made the transfer without receiving reasonable value in exchange for the transfer and the debtor

was insolvent at the time or became insolvent because of the transfer. (Civ. Code, § 3439.05, subd. (a).)

"Under the UFTA, a transfer can be invalid either because of actual fraud (Civ. Code, § 3439.04, subd. (a)) or constructive fraud (*id*., §§ 3439.04, subd. (b), 3439.05); one form of constructive fraud is a transfer by a debtor, without receiving equivalent value in return, if the debtor is insolvent at the time of transfer or rendered insolvent by the transfer (§ 3439.05)." (*Meija v. Reed* (2003) 31 Cal.4th 657, 661.) *Meija* also states:

> Under the UFTA, a transfer is fraudulent, both as to present and future creditors, if it is made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." (Civ. Code, § 3439.04, subd. (a).) Even without actual fraudulent intent, a transfer may be fraudulent as to present creditors if the debtor did not receive "a reasonably equivalent value in exchange for the transfer" and "the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." (Civ. Code, § 3439.05.) On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines "[t]ransfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset …."
>
> (*Id.*, at 664.)

"[T]o state a cause of action for fraudulent transfer under section 3439.04, subdivision (a)(1), they are not required to allege that [defendant] failed to receive a reasonably equivalent value for the properties he transferred; it is sufficient to allege that the defendant made the transfer 'with "actual intent to hinder, delay, or defraud any creditor of the debtor."' [Citation.]" (*Aghaian v. Minassian* (2020) 59 Cal.App.5th 447, 456-457.) Plaintiff does that in Comp., ¶¶ 28, 32-33. Therefore, since this is a demurrer and the Plaintiff has alleged the causes of action for a fraudulent transfer, whether the homestead exemption applies is a question of fact not resolvable on a demurrer. **The Court OVERRULE the demurrer to the first and third causes of action**.

<u>*Conspiracy.*</u> The complaint lists the cause of action at ¶¶ 37-45. As to the conspiracy cause of action, "The elements of an action for civil conspiracy are: (1) formation and operation

of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062.) "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454.) "Though conspiracy may render additional parties liable for the wrong, *the conspiracy itself is not actionable without a wrong*." (*Ibid* (*Emphasis Added*).)

"General allegations of agreement have been held sufficient [*citation*], and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged." (*Id*.) "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

"As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they actually commit the tort themselves." (*Short v. Nev. Joint Union High Sch. Dist.* (1985) 163 Cal.App.3d 1087, 1100-1101.) In alleging the conspiracy, the plaintiff need only allege the ultimate fact of the conspiracy. "Plaintiffs could not more clearly allege the ultimate fact of conspiracy than by pleading that defendants 'did agree together.'" (*Farr v. Bramblett* (1955) 132 Cal.App.2d 36, 47, disapproved on other grounds in *Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 114 n4; see also *Greenwood v. Mooradian* (1955) 137 Cal.App.2d 532, 535, (allegation that "the defendants herein have conspired together" held sufficient to plead the conspiracy.)

IIG Wireless, Inc. v. Yi (2018) 22 Cal.App.5th 630, 652 states:

> Conspiracy is not a separate tort, but a form of vicarious liability by which one defendant can be held liable for the acts of another. (*De Vries v. Brumback* (1960) 53 Cal.2d 643,

650 [2 Cal.Rptr. 764, 349 P.2d 532]; *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581 [47 Cal. Rptr. 2d 752].) To establish conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47 [77 Cal. Rptr. 2d 709, 960 P.2d 513].) A conspiracy requires evidence "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." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal. Rptr. 2d 339].) Thus, conspiracy provides a remedial measure for affixing liability to all who have "agreed to a common design to commit a wrong" when damage to the plaintiff results. (*Agnew v. Parks* (1959) 172 Cal.App.2d 756, 762 [343 P.2d 118].) The defendant in a conspiracy claim must be capable of committing the target tort. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145, fn. 2 [26 Cal. Rptr. 3d 401].)

Defendants argue there is no civil wrong, therefore this cause of action must be dismissed. However, the allegations of a fraudulent transfer are properly pleaded. **Therefore, the Court OVERRULES the demurrer based on conspiracy.**

CONCLUSION

Based on the foregoing, the Court OVERRULES the demurrer and directs Defendants to file an answer within twenty days from the date of this order.

Plaintiff's counsel is ordered to provide notice.

ECOLOGY AUTO PARTS

v.

JOSE CRUZ GOMEZ

CIVSB2205643

PROCEDURAL AND FACTUAL BACKGROUND

The Pleadings and Allegations

Plaintiff Efrain Perez ("Perez") was injured during a traffic collision allegedly caused by Defendants Jose Cruz Gomez and Gomez Trucking (collectively, "Gomez"). As a result, Perez commenced suit (case no. CIVSB2250461) against Gomez in March 2022, for (1) negligence/negligence *per se*; (2) negligent entrustment; and (3) negligent hiring, supervision, or retention. The complaint indicates Perez was standing next to his vehicle waiting for emergency services when a semi-truck driven by Gomez collided with the rear of his vehicle, resulting in injury. Gomez's employer, Ecology Auto Parts (EAP), also filed a complaint (case no. CIVSB2250643) against Gomez in March 2022, seeking reimbursement for workers' compensation benefits paid to Perez. The actions were consolidated.

The Motion for Leave to Take Mental Examination

Now, through the pending motion, Gomez seeks permission to take a mental examination of Perez. The motion indicates Perez is asserting mental and emotional injuries so an examination is necessary to evaluate the claimed damages. Although Gomez met and conferred in advance of the motion, Perez would not agree to the examination. The motion is supported by a declaration

from attorney John C. Deagon III; Perez's response to form interrogatories; portions of the transcript from Perez's deposition; and the meet and confer e-mails.

The matter is opposed by Perez on the grounds that Gomez failed to schedule the examination before the discovery cut off. Furthermore, 17 days before the cutoff, Gomez scheduled a medical examination by Dr. Ludwig, but it was cancelled because Gomez's Spanish translator did not appear. Perez agreed to appear for a second examination, but again the examiner cancelled the appointment, this time because he was sick. Perez then agreed to a third date and also agreed to a trial continuance, but based upon the understanding that the examination by Dr. Ludwig would be the only examination performed. Otherwise, it was agreed all pretrial dates remained tied to the August 12, 2024 trial date except as to expert depositions. As a result, Perez contends that it would be an abuse of discretion to grant the examination since discovery is closed. The opposition is supported by a declaration from attorney Jason Doucette and the stipulation to continue trial.

In the reply, Gomez contends he had no way of knowing Perez would claim neuropsychological conditions prior to when the parties exchanged the expert witness information. Gomez also argues that the examination is not "fact discovery" and the examination falls under expert discovery.

DISCUSSION

An Overview of the Law Related to Motions to Compel Examinations

Under Code of Civil Procedure section 2032.220, the defendant in a personal injury action may demand one physical examination. Otherwise, a mental or medical examination of a plaintiff must be obtained by leave of court and a showing of good cause. (Code Civ. Proc., §§ 2032.310-2032.320.) The motion must specify: (1) the date and time of the exam; (2) the place of the exam,

with good cause being shown if it is more than 75 miles from the examinee's residence; (3) the manner, conditions, scope and nature of the exam; and (4) the identity and specialty, if any, of the examiner. (Code Civ. Proc. § 2032.310, subd. (b).) More than one examination may be ordered as long as a showing of good cause is made. (*Shapira v. Superior Court* (1990) 224 Cal.App.3d 1249.) As for the demand in personal injury cases, the demand must not include a procedure that is painful, protracted, or intrusive and it also must be within 75 miles of the examinee's residence. (Code Civ. Proc. § 2032.220.)

Before moving for an order, the party seeking the examination must attempt in good faith to arrange the examination by agreement. A declaration attesting to those efforts must then be included with the motion. (Code Civ. Proc., §§ 2016.040 and 2032.310, subd. (b).) In addition, counsel's supporting declaration should specify facts supporting the allegation that the condition is in controversy, identify any previous examinations, and state facts demonstrating good cause for an additional examination. (Cal. Civil Discovery Practice (4th ed. Cal. CEB), § 10.46.) The defendant should also include a declaration from the examiner that sets forth the tests to be administered, the examination to be performed, the length of the examination, and the reasons why the examination is necessary. (*Ibid.*; Code Civ. Proc., §§ 2032.020, subd. (c), 2032.320, subd. (d).)

The Pending Motion

In this case, Perez argues that the right to conduct the mental examination has passed. Code of Civil Procedure section 2024.020 provides that "[e]xcept as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." The statute also provides that "[e]xcept as provided in Section 2024.050, a continuance or postponement of the trial date does not operate to reopen

discovery proceedings." Section 2024.030 similarly provides that "[a]ny party shall be entitled as a matter of right to complete discovery proceedings pertaining to a witness identified under Chapter 18 (commencing with Section 2034.010) on or before the 15th day, and to have motions concerning that discovery heard on or before the 10th day, before the date initially set for the trial of the action."

However, section 2024.050 addresses motions to complete discovery proceedings closer to the initial trial date or to reopen discovery. While the Court may permit such relief, it must be "on motion of any party" and the Court has to consider the various factors outlined in section 2024.050.

In this case, trial was set for August 12, 2024 and was continued to January 21, 2025. So we are beyond the date "initially set for trial." As a result, there is no longer a right to conduct the discovery identified in sections 2024.030 and 2024.020, with the exception of, as indicated in the stipulation and order, "expert depositions."

As for Gomez's suggestion that the stipulation covers the mental examinations, a "stipulation is a contract [Citation]; that being so, the rules for construction of contracts are said to govern." (*Los Angeles City School Dist. of Los Angeles County v. Landier Management Co.* (1960) 177 Cal.App.2d 744, 750–751.) The language of the contract governs its interpretation if the language is clear and explicit, the whole of the contract is to be given effect, and the contract is supposed to be interpreted to give effect to the mutual intention of the parties. (Civ. Code §§ 1636-1638 and 1641.)

The operative section of the stipulation in this case expressly references an extension only as to the "expert deposition" deadline and not "examinations" by experts. That is true despite the recital section of the stipulation referencing an "examination." In particular, the parties noted that

the "physical examination" of Perez needed to be completed and that Perez has agreed to permit the physical examination by Dr. Ludwig despite it being after the discovery cut off. So the recital serves as an acknowledgement that the discovery cut off has already passed as to examinations. The stipulation also makes clear that while the physical examination was going to be nevertheless permitted, the Court was only extending the deadline as to the "expert depositions." The parties clearly knew how to distinguish between depositions and examinations.

Overall, the discovery cut off deadline has passed for the mental examination and the stipulation does not provide for an extension of that deadline. That is significant because, as Perez notes, the court of appeal in *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal.App.4th 1568, 1571, concluded that it is an abuse of discretion to grant a motion to compel discovery after the discovery motion cutoff when the propounding party had not moved to reopen discovery under section 2024.050. The court nevertheless indicated the trial court has discretion to hear a motion after the date, but to do so the court must consider the various factors outlined in section 2024.050. (*Ibid.*) Gomez failed to address the factors in section 2024.050 in his motion or in the reply after *Pelton-Shepherd Industries, Inc.* was raised in the opposition.

CONCLUSION

Based on the foregoing, the Court **DENIES** the motion for leave to conduct the mental examination.

Plaintiff's counsel is ordered to provide notice.