

Tentative Rulings

Law & Motion and Family Law Calendar for February 11, 2013

February 7, 2013, 4:00p.m.

Department Two

To request a hearing on any matter on this calendar, you must call the Court at 530/283-6305 by 12:00 noon, February 5th, notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

If you do appear and want the matter reported by an official court reporter in unlimited civil, family law or probate, you must pay the \$30.00 court reporter appearance fee as provided by GC§68086(a)(1)(A) before the hearing begins.

Probate – 9:00 a.m.

PR11-00048 – Conservatorship of Cozart

Tentative Ruling: **Appearance required of the Public Guardian.** The court has not received the final accounting.

Case No. PR13-00003 – Estate of Bienkowski

Tentative Ruling: **Granted, upon receipt of proof of publication.** If proof is filed prior to the hearing, the court intends to grant the Petition for Probate and Appointment of Co-Administrators. Petitioners are to prepare the Order.

Case No. PR12-00024 – Estate of Schmidt

Tentative Ruling: **Granted.** The court, having received a copy of the Will and Inventory and Appraisal, the court finds that notice has been given as required by law, and grants the Petition to Determine Succession to Real Property.

Case No. PR12-00013 - Conservatorship of Brandes

Tentative Ruling: **Appearance required.** The court has not received the conservator's review report.

Case No. PR13-00002 – Matter of Collis

Tentative Ruling: **Appearance required.**

Civil – 9:30 a.m.

Case No. CV12-00280 – Campbell vs. Bank of New York Mellon

Tentative Ruling: **Sustained, without leave.** Upon consideration of the pleadings and papers and with good cause shown, defendants’ Demurrer to the complaint is sustained, without leave to amend. The complaint fails to set forth facts sufficient to state a valid cause of action against Defendants. It is further ordered that defendants are dismissed from this action without prejudice. To the extent a lis pendens is recorded against the property located at 575 First Avenue, Chester, California 96020, it is hereby expunged.

Case No. CV09-00194 – Martin vs. Lake Almanor Lakeside Villas

Tentative Ruling: **Denied.** The motion by plaintiffs, Troy and Yvonne Glenn (collectively “Glenns”), for summary adjudication of their fourth and fifth causes of action against defendant, Almanor Lakeside Villas Homeowners Association (“HOA”), is denied.

In their motion, the Glenns seek a judgment permanently enjoining the HOA from enforcing Section 4.09 of the Covenants, Conditions and Restrictions of Kokanee Subdivision (“CC&R’s”) against them, on the grounds that the HOA waived its right to enforce any restriction against the rental of properties for periods of less than 30 days.

The waiver of restrictive covenants may be established by a showing that “. . . substantially all of the landowners have acquiesced in a violation so as to indicate an abandonment. . . . There must be a sufficient number of waivers so that the purpose of the general plan is undermined.” (*Kapner v. Meadowlark Ranch Association* (2004) 116 Cal.App.4th 1182, 1189-1190 (“*Kapner*”).) However,

“[a]ll case law on the subject of waiver is unequivocal: ‘Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations]. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and “doubtful cases will be decided against a waiver.” ’ [Citations.]” (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1320. (Citation omitted.)¹)

The Glenns proffer, as an undisputed fact, that “all homeowners” operated under the assumption that rentals of any duration were permissible from 2000-2004. (Separate Statement of Undisputed Facts in Support of Motion (“UMF”), 17.) Additional undisputed facts offered by the Glenns are that, once Bylaw Section 14.01 was passed in May 2005, “all homeowners” and “the HOA board” believed that the issue had been addressed, with short-term rentals allowed,

¹ While the Glenns’ initial burden is to produce evidence showing a prima facie case, the Court must ultimately view that evidence “. . . ‘through the prism of . . . [their] substantive evidentiary burden.’ ” (*Hoch v. Allied-Signal Inc./Bendix Safety Restraints Division* (1994) 24 Cal.App.4th 48, 60; *see, Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 850 (burdens of production shift, but burdens of persuasion remain the same as at trial).)

and that, after May 2005, the issue of rental restrictions was not raised again until the summer of 2007. (UMF 22, 28.)

In support of these material facts, the Glenns proffer the declaration of the developer, Brent Tucker (“Tucker”). (See, Exhibit A to the Glenns Request for Judicial Notice (“RJN”), paras. 10, 12-13.) Additional evidence produced in support of UMF 22 includes (1) testimony by Timothy O’Brien (“O’Brien”), the real estate broker for the developer, that “. . . everyone was under the opinion [in 2005] that changing the bylaws would be sufficient . . .” (Deposition of O’Brien, Exhibit A to Declaration of Tory Griffin, p. 137:11-14); (2) Minutes of the HOA’s annual meeting, on February 19, 2005, which state that an amendment to Section 4.09 of the CC&R’s “was discussed” (Exhibit H to the Declaration of Catherine Manske (“Manske Decl.”), attached as Exhibit D to RJN, p. 4); and (3) Minutes of the meeting of the HOA’s board of directors on May 4, 2005, reflecting the adoption of a bylaw which allowed for rentals of less than 30 days (Manske Decl., Exhibit I).

This evidence is by no means “clear and convincing.” One cannot ascertain from the record the total number of homeowners at any time from 2000 to 2008, and thus the number of homeowners which would constitute “substantially all” under the analysis of *Kapner, supra*. Nor can one determine to whom O’Brien was referring in his testimony that “everyone” assumed the bylaw was sufficient. Nor is there evidence of any homeowner’s specific intent (but for Tucker’s) to relinquish a “. . . ‘known right [to enforce Section 4.09 of the CC&R’s] after knowledge of the facts.’ ” (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga, supra*, 175 Cal.App.4th at 1320.) However, the Glenns’ evidence does appear sufficient to establish a prima facie case, shifting the burden of production to the HOA.

The HOA has met that burden, producing evidence that homeowners were expressing concerns about short-term rentals beginning in 2004 through 2007, raising triable issues as to UMF 28.² (Separate Statement of Undisputed Facts in Support of Defendant’s Opposition to Motion (“HOA Response”), UMF 28; Declaration of Robert Rhoades in Opposition to Motion (“Rhoades Decl.”), paras. 4-6.) Triable issues are also raised as to UMF 26, in which the Glenns state that they were unaware of any controversy regarding short term rentals before they purchased their property. (See, Deposition of Yvonne Glenn (“Yvonne Depo.”), Exhibit B to Manske Decl., pp.46:13-49:17, 67:10-68:7 (Coldwell Banker agents showed Yvonne Glenn “rental board” with bookings for weekly rentals); *but see*, HOA Resp. to UMF 26, Yvonne Depo., Exhibit G to Declaration of David Blinn, pp. 61:3-24, 83:8-24 (the Glenns knew there were CC&R’s that contained restrictions on an owner’s right to rent).) Having raised the issue, the Glenns are foreclosed from contending that it is irrelevant. (See, *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 (separate statement concedes materiality of facts included).)

The HOA has also produced evidence in support of additional material facts, from which one could infer that relatively few homeowners intentionally and knowingly relinquished their right to enforce Section 4.09 of the CC&R’s. (See, e.g., HOA Resp., Additional Material Facts (“AMF”) 2 (members did not vote in 2005 on the bylaw amendment); AMF 3 (as rentals became more prevalent between 2004 and 2007, they became more of a problem); AMF 4 (at annual meeting in April 2008, with 19 members present, all but one voted to strictly enforce Section

² Additionally, the HOA’s objections to Tucker’s declaration about the “assumptions” or “beliefs” of other homeowners and/or members of the HOA board regarding short-term rentals are sustained, rendering UMF 17 unsupported by any admissible evidence.

4.09 of the CC&R's); AMF 6 (vote in November 2009, to amend Section 4.09 of the CC&R's, did not pass); Rhoades Decl., paras. 3-8, 11, Exhibit C (Minutes of April 5, 2008 annual meeting).) This evidence raises triable issues as to the very material fact of whether “. . . substantially all of the landowners have acquiesced in a violation . . .” of Section 4.09 of the CC&R's. (*Kapner, supra*, 175 Cal.App.4th at 189.)

Evidentiary Rulings: Sustained: HOA objections Nos. 1-2; Glens objections Nos. 2-5.
Over-ruled: Glens objections No. 1.

Case No. CV12-00169– Matter of Johnson

Tentative Ruling: **Appearance required.** If there is no appearance, the court intends to dismiss this action.

Case No. CV09-00209 – McBride vs. Noland

Tentative Ruling: **Granted.** The motion to quash and dismiss, brought by the defendants, Tubit Enterprises, Inc. (“Tubit”) and Collins Pine Company dba Collins Pine and/or Collins (“Collins”), is granted.

Tubit and Collins move to quash service of the summons and to dismiss this action against them, pursuant to *Code of Civil Procedure section 418.10(a)(3)*,³ for failure to serve the summons upon them within three years, as required by *section 583.210(a)*. The Court takes judicial notice, pursuant to *Evidence Code section 452(d)(1)*, of its files herein, which establish that the original Complaint was filed on August 9, 2009, the first amended complaint on February 1, 2011, and the Amendment, naming Tubit and Collins as Does 3 and 4, respectively, on November 16, 2012. Tubit was served on November 21, 2012 and Collins on November 26, 2012, more than three months beyond the three-year period mandated by *section 583.210(a)*. (*See*, Declaration of Phillip R. Botto in Support of Motion to Quash/Dismiss, filed herein December 24, 2012, paras.10-11, Exhibit A.)

Under *section 583.240*, the computation of the time in which service must be made does not include any periods during which certain conditions exist, including a stay of the action which effects service, and/or when service, for any other reason, was “impossible, impracticable, or futile due to causes beyond the plaintiff’s control.” (*See, Highland Stucco and Lime, Inc. v. Superior Court* (1990) 222 Cal.App.3d 637, 644-645 (trial court order expressly staying service upon other defendants constitutes a “condition” under *section 583.240 (b) and (d)*)).

Again taking judicial notice of the files herein, plaintiff’s counsel informed the Court in July 2010 of the bankruptcy filing of defendants Steven and Ursula Shoemaker (“Shoemakers”); counsel did not, however, advise that there were additional parties, other than the Shoemakers, who may be added, or by what date they may be served. (*See*, Plaintiff’s Case Management Statement, filed July 8, 2010, paras. 3.b.(1), (3).) The record also reflects that the case management conference was continued from time to time and that, on December 13, 2010, plaintiff’s counsel advised the Court that he could not serve “an additional defendant” until the bankruptcy stay was lifted. (*See*, Case Management Conference Orders, entered July12, August 23, October 13, and December 13, 2010.)

³ All further statutory references are to the *Code of Civil Procedure* unless otherwise specified.

Hence, unlike the record in *Highland Stucco, supra*, there is nothing to suggest that this Court ordered plaintiff to refrain from naming, and effectuating service on, parties other than the Shoemakers. Further, the automatic stay of the Shoemakers' bankruptcy proceedings is of no force or effect with respect to other potential defendants, such as Tubit and Collins. (*See, Santa Monica Hospital Medical Center v. Superior Court* (1988) 203 Cal.App.3d 1026, 1036 (automatic stay does not toll periods for codefendant not in bankruptcy).) Lastly, the record is devoid of any evidence that plaintiff exercised reasonable diligence in identifying and serving Tubit and Collins within three years of the commencement of this action.

With the motion to quash and dismiss granted, the defendants' motion to strike and demurrer become moot. Plaintiff's late-filed request for judicial notice is granted.

Case No. CV09-00263 – Nord vs. Nord

Tentative Ruling: **Appearance required.** If there is no appearance, the court intends to dismiss this action.

Case No. CV09-00243 – Owens vs. Kerns

Tentative Ruling: **Appearance required.** Hearing on plaintiffs' Motion to Compel Discovery.

Case No. CV13-00003 - Petition of Meeker

Tentative Ruling: **Appearance required.** The court notes there is no proof of publication in the file.

Family Law – 10:30 a.m.

Case No. FL11-00193 – Barreno vs. Wingfield

Tentative Ruling: **Appearance required.**

Case No. FL13-00016 – Mar. of Baty

Tentative Ruling: **Appearance of the petitioner required.** The court will conduct a financial hearing on the fee waiver request.

Case No. FL10-00304 – Champlin vs. Hecker

Tentative Ruling: **Appearance required.** The court notes that counsel for respondent has not provided any further information to the court, as indicated on January 14, 2013.

Case No. FL11-00284 – Charlie vs. Roberts

Tentative Ruling: **Appearance required.**

Case No. FL09-00258 – Charlie vs. Roberts

Tentative Ruling: **Appearance required.**

Case No. FL10-00264 – Mar. of Patterson

Tentative Ruling: **Appearance required.** If a mediated agreement is submitted prior to the hearing, this matter may be taken off calendar.

Case No. FL12-00019 – Sousa vs. Manjeot

Tentative Ruling: **Appearance required.** The court will review the recommendation with the parties.

CASE MANAGEMENT CONFERENCE TENTATIVE RULINGS

Case No. LC12-00186 – Cavalry SPV vs. Pursha

Tentative Ruling: **No appearance required.** At plaintiff's request, this case management conference is continued to April 8, 2013, at 1:30p.m.

Case No. LC11-00313 – Deere Credit Inc. vs. Broad

Tentative Ruling: **No appearance required.** The court has received plaintiff's Opposition to the Order to Show Cause, and continues the OSC to April 8, 2013, at 1:30p.m.

Case No. LC12-Q0240 – Eriksen-Norris vs. Bond

Tentative Ruling: **Appearance required.** If there is no appearance, the court intends to dismiss this action.

Case No. CV12-00196 – Gurman vs. Gilliland

Tentative Ruling: **Appearance required.** The parties should be prepared to discuss ADR options and set a trial date.

Case No. LC12-P0121 – Griffith vs. Harris

Tentative Ruling: **Appearance required.** If there is no appearance, the court intends to dismiss this action.

Case No. LC12-00187 – Persolve vs. Washoe

Tentative Ruling: **Appearance required.** The parties should be prepared to discuss ADR options and set a trial date.

Case No. CV12-00203 – Wells Fargo vs. Olah

Tentative Ruling: **No appearance required.** The court has received a notice of settlement. This case management conference is continued to March 25, 2013, at 1:30p.m. If a dismissal is filed prior to this date, the CMC will be taken off calendar.

Case No. CV12-00008 – Almanor Lakefront LLC vs. Owens and CV09-00243 – Owens v. Kerns

Tentative Ruling: **Appearance required.**

Moonlight Fire Cases –

CV09-00205 – CDF vs. Howell, CV10-00255 – Brandt vs. SPI, CV09-00306 – California-Engles Mining vs. SPI, CV10-00264 – Cosmez vs. Walker , CV09-00245 – Grange Ins. vs. Howell, CV09-00231 – Guy vs. Walker

Tentative Ruling: **Appearance required.**

Case No. CV11-00064 – Stutsman vs. The Schomac Group, Inc.

Tentative Ruling: **Appearance required.** If there is no appearance, the court intends to dismiss this action.

Case No. CV12-00184 Worthen vs. Feather River Rail Society

Tentative Ruling: **Appearance required.** OSC hearing on defense counsel's failure to appear on 1/28/13. The parties should be prepared to discuss ADR options and set a trial date.