TENTATIVE RULINGS

DEPARTMENT N17

Judge Craig L. Griffin

Date: April 29, 2024
Time: 2:00 PM

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#	Case Name	Tentative
1	Kuo v. Modiry	Defendants Justin Modiry and Reyna Modiry ("Defendants") seek an order striking the punitive damages allegations from the Complaint as follows: page. 7, Para. 27 and page 10, Prayer for Relief, Para. 3. Defendants contend the Complaint fails to allege any facts to support punitive damages in this case and that the Complaint fails to allege facts that Defendants' "intentionally" trespassed or that they acted with malice. To support exemplary damages, the complaint must allege facts of defendant's oppression, fraud, or malice. (CC § 3294(a).) "Malice" is defined as conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (CC § 3294(c)(1).) "Oppression" is defined as despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (CC § 3294(c)(2).) "Fraud" is defined as an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. (CC § 3294(c)(3).)

To establish "willful and conscious disregard," plaintiff must establish that defendant: (1) was aware of the probable dangerous consequences of his or her conduct; and (2) willfully and deliberately failed to avoid those consequences. (Taylor v. Superior Court (1979) 24 Cal.3d 890, 895-896; TRG, CAPI, 3:262.)

"The adjective 'despicable' connotes conduct that is ... so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. … [A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.] The wrongdoer … must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. … Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate. …." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210.) "Despicable conduct" has been described as having "the character of outrage frequently associated with crime." (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.) "Consequently, to establish malice, 'it is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless.'" (*Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1044; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211 ["[R]ecklessness alone is insufficient to sustain an award of punitive damages…."].)

Here, the Complaint alleges that Plaintiffs and Defendants' properties share a common boundary; that Plaintiffs were informed of Defendants' construction plans by way of a "HOA Neighbor Awareness" form; that Plaintiffs review of the blueprints for their project caused them concern as it was ambiguous regarding the common boundary and requested that Defendants generate a new set of plans to further define the extent of the project to avoid intrusion into their property; that Plaintiffs objected to Defendants' erection of a fence along the common boundary and repudiated their signatures on the "HOA Neighbor Awareness" form; that Defendants and their contractors "ignored the strong and clear verbal and written objections of Plaintiffs" and proceeded with the construction which resulted in an artificial turf frame crossing onto their property; that in the process two of Plaintiffs' palm trees were destroyed in addition to a series of mow strips surrounding the trees; that Plaintiffs hired a surveyor which shows that Defendants are encroaching on their property; and that verbal and written communications between Plaintiffs and Defendants' contractors reveal that the workers found property line markers during the constructions but continued onto their side of the property. (*See* Complaint, ¶¶ 7-14.)

Plaintiff's cause of action for trespass alleges in paragraph 17 that Defendants acted "intentionally, recklessly, or negligently" in causing the artificial turf frame to enter onto their side of the

		common boundary. The allegation of intentional and reckless conduct is conclusory. The facts as alleged in paragraphs 7 through 14 do not rise to a level of "willful and conscious disregard" of Plaintiffs or their rights. Accordingly, Defendants Justin Modiry and Reyna Modiry's Motion to Strike Portions of Complaint is GRANTED, with 20-days leave to amend.
2	Roe HB v. Doe 1, School District	The demurrer to the complaint of Plaintiff Jane Roe HB ("Plaintiff") filed by Defendant Anaheim Union High School District (the "District") is **OVERRULED**. The District's only basis for its demurrer is that Plaintiff's lawsuit is untimely because it was not filed before January 1, 2023, pursuant to the revival provision of Code of Civil Procedure section 340.1(q). Plaintiff contends California Emergency rule 9 tolled the revival period of section 340.1, subdivision (q), such that Plaintiff's claims would not expire until June 27, 2023. Emergency Rule 9 provides that "[n]otwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020." Thus, according to Plaintiff, her Complaint filed on June 22, 2023, is timely. Plaintiff's argument is well-taken. Plaintiff relies on *Roe v. Doe* (2023) 98 Cal.App.5th 965 in support of her argument. In that matter, the Court of Appeal reversed the trial court's dismissal order and explained: To be clear, plaintiff contends the trial court erred in dismissing his complaint with prejudice on grounds that his claims were time-barred. His argument begins, as it did below, by recognizing that section 340.1, subdivision (q), created a three-year lookback window, reviving all civil claims arising from childhood sexual assault that were barred as of January 1, 2020, and allowing such claims to be brought within three years of January 1, 2020. He next contends that Emergency rule 9 tolled this three-year revival period for 178 days—from April 6, 2020, to October 1, 2020—moving the deadline to file childhood sexual assault claims to June 27, 2023. He asserts that had the court dismissed his case without prejudice, he would have been able to timely refile his complaint and certificates of merit ahead of the June 27, 2023, deadline. He is correct on all points. …[C]ontrary to the court's finding, section 340.1, subdivision (q), is part of a statute of limitations. " 'Statute of limitations' is the collective term applied to acts or parts of acts that prescribe the periods beyond which a plaintiff may not bring cause of action." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806, 27 Cal.Rptr.3d 661, 110 P.3d 914.) Subdivision (q) is "part of" section 340.1, the statute that governs the period within which a plaintiff must bring a tort claim based on childhood sexual assault. Thus, Emergency rule 9, which tolled statutes of limitations for civil causes of action that exceed 180 days, tolled section 340.1, subdivision (q)'s three-year lookback window for 178 days. Plaintiff's claims

		thus did not expire until June 27, 2023, and so the dismissal order should have been without prejudice. (*Roe*, supra, 98 Cal.App.5th at 972-973.) Based on the above authority, Plaintiff's deadline to file the instant childhood sexual assault action was thus extended to June 27, 2023, due to the tolling provisions of Emergency rule 9. Plaintiff's Complaint filed on June 22, 2023, is thus timely. The District's arguments for why *Roe* is inapplicable to the present case lack merit. Although the plaintiff's arguments in *Roe* were unopposed and the Legislative history of section 340.1 was not specifically discussed and the case involved the failure to file certificates of merit with respect to a private entity defendant, the Court of Appeal addressed the exact question at issue in the instant litigation, i.e., whether Emergency rule 9 tolled section 340.1(q)'s three-year revival period. The Court of Appeal answered in the affirmative. The District fails to adequately show how any of the foregoing distinctions renders the holding in *Roe* inapplicable to the present matter. In addition, the District's argument that a decision of the Fifth District Court of Appeals is not binding on this Court is unsupported by any authority and is incorrect. "'Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state.'" (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 569, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Based on the foregoing, the demurrer is **OVERRULED**. The District is to file an answer to the complaint within 20 days. The parties' requests for judicial notice are **GRANTED**. (Evid. Code § 452(a), (c).) Counsel for Plaintiff is ordered to give notice of this ruling.
3	Aska Sakan v. Omar	O/C; Substitution of attorney filed.
4	Whitworth vs. Coast Motoring	Pro per plaintiff Jim O. Whitworth's ("Plaintiff") Petition to Confirm Arbitration Award ("Petition") is **GRANTED in part and DENIED in part**. Plaintiff requests the court confirm the Mandatory Fee Arbitration award ("Award") served on 06/29/23. (Whitworth Decl., Ex. A.) The arbitrators held that neither Plaintiff nor defendant Jason Merrell ("Merrell") owed anything to the other, that neither should take anything from the other, and that there was no written fee agreement between Plaintiff and Merrell. The court will confirm the award and grants the Petition on that basis. (Civ. Proc. Code § 1286; Bus. & Prof. Code § 6203.)

		The court denies Plaintiff's request for attorney fees as 1) the Award did not find Plaintiff was the prevailing party or award any attorney fees to Plaintiff; and 2) Plaintiff is in pro per and not entitled to attorney fees for his own services (*Leiper v. Gallegos* (2021) 69 Cal. App. 5th 284, 288; *Trope v. Katz* (1995) 11 Cal.4th 274, 292). Plaintiff to give notice.
5	Merrell v. Ford Motor Company	Status Conference
6	Nabard vs. Americor Funding, LLC	Defendant Americor Funding, LLC's ("Defendant") Motion to Compel Arbitration and Stay Action ("Motion") is **GRANTED**. "In similar language, both the FAA and the CAA provide that predispute arbitration agreements are valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract. [Citation.] Thus, enforcing valid arbitration agreements is favored under both state and federal law." (Tiri v. Lucky Chances, Inc. (2014) 226 Cal. App. 4th 231, 240; See also, 9 U.S.C.A. § 2; Civ. Proc. Code § 1281.4.) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972 ("*Engalla*"); *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 91-92.) Defendant has met its initial burden by identifying valid arbitration agreements ("Agreements" – Lester Decl. ¶ 8, Exs. 1-15) between it and plaintiffs Amir Nabard, Andrew Kochi, Chad Fonesca, Colleen Barrett ("Barrett" individually), Issaac Barrera, Jerrell Sharp, Leslie Estrada, Robert Mackey, Rodwell Pascascio, Roxanna Lisenby, San De Vroede, Sir-Julian Riley, Stephanie Flores, Sylvester Jefferson, and Tanner Kinnett ("Plaintiffs" all together). There is no evidence (and no arguments from Plaintiffs) that the Agreements were either substantively or procedurally unconscionable. (*Davis v. Kozak* (2020) 53 Cal. App. 5th 897, 905; *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal. 4th 83, 102 and 113 ("*Armendariz*"); *OTO, L.L.C. v. Kho* (2019) 8 Cal. 5th 111, 126–27.) Nor do the Agreements contain any unlawful terms. (*Armendariz, supra*, 24 Cal. 4th at 102.) Defendant has met its initial burden. Plaintiffs bear the burden of showing by a preponderance of the evidence some defense to the Agreements. Plaintiffs incorrectly argue Defendant waived arbitration by its actions in this matter. There was no unreasonable delay as Defendant demanded arbitration approximately 2.25-months after filing an answer. Defendant notified the court in its CMC statement prior to the trial date being set that the arbitration was the proper venue, that Defendant wanted contractually binding arbitration, and that Defendant intended to file the present Motion. (ROA #17.) Defendant's actions were consistent with the right to arbitrate,

		Defendant did not substantially invoke the litigation machinery, did not delay in seeking a stay, did not take advantage of discovery procedures, and did not affect, mislead, or prejudice Plaintiff. (*St. Agnes Med. Ctr. v. PacifiCare of California* (2003) 31 Cal. 4th 1187, 1196.) Plaintiffs arguments regarding Defendant's failure to provide employment files and injunctive relief not being proper for arbitration are not persuasive as Plaintiffs cite to no case or evidence supporting those arguments. Plaintiffs also failed to identify how they were affected, misled, or prejudiced by an approximately 2.25-month delay between the answer being filed and the demand for arbitration. Plaintiffs have failed to meet their burden of showing any defense to the Motion or Agreements. The Motion is **GRANTED** and parties are ordered to individually arbitrate their claims. The court notes Defendant requested arbitration before the American Arbitration Association ("AAA"), to which Plaintiffs did not object. All Plaintiffs, other than Barrett, are ordered to participate in arbitration before the AAA. As Plaintiff Barrett's arbitration agreement requires arbitration before JAMS, the court orders Barrett and Defendant to arbitrate their issues through JAMS. The arbitrations are to occur pursuant to the terms of the Agreements. The request for a stay of this matter pending the outcome of arbitration is also granted. (9 U.S.C.A. § 3.) Due to the stay, Plaintiffs' two pending motions to compel Defendant's further responses to sets Requests for Production and Requests for Admission (ROA ##35, 39) are hereby vacated from the 05/13/24 calendar. The current 07/01/24 trial date for this matter is also vacated. The court will set a status conference regarding status of arbitrations for July 26, 2024 at 9:30 am. Defendant to give notice.
7	AMC Investment, Inc. v. Ying et al	The Motion to Bifurcate, filed by Plaintiff AMC Investment, Inc. on 3/18/24 is **MOOT**. The Motion asked the Court to order bifurcation, to require Plaintiff's equitable claims to be tried first in a bench trial, which Defendant Roy Ying opposed. But on 4/15/24, Plaintiff dismissed its only legal cause of action (the First Cause of Action, for slander of title): the Court therefore ordered on 4/15/24 that as the remaining causes of action are equitable, trial for this matter would proceed entirely as a bench trial. (See ROA 300.) The Motion to bifurcate is therefore **MOOT**.

		Counsel for Plaintiff is to give notice of this ruling.
8	Lerner vs. Toyota Motor Sales, U.S.A., Inc.	The Court notes that the Complaint does not state facts showing that the action has been commenced in the proper county. Code of Civil Procedure section 395, subdivision (b), provides in relevant part: "In an action arising from an offer or provision of goods . . . intended primarily for personal, family or household use . . . the superior court in the county where the buyer or lessee in fact signed the contract, where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action is the proper court for the trial of the action." The court **ORDERS PLAINTIFF TO SHOW CAUSE** why the case should not be transferred from Orange County. The OSC hearing will be held on **May 20, 2024, at 2:00 p.m.** Pursuant to Code of Civil Procedure section 396a(a), Plaintiff's counsel is ordered to file a declaration showing this case has been commenced in the proper superior court under Code of Civil Procedure section 395(b) and/or Civil Code section 2984.4. Plaintiff's counsel is further ordered to attach a copy of the underlying purchase or lease agreement as an exhibit to the declaration showing where the agreement was made. The evidence and any written briefs are to be filed at least 9 court days before the hearing." Plaintiff Gabriella Lerner's motions to compel further responses to Form Interrogatories, Special Interrogatories and Requests for Production of Documents, Sets One, filed under ROA Nos. 15-17 are **CONTINUED to June 10, 2024 at 2:00 PM** in this Department. The parties/counsel have not engaged in sufficient attempts to meet and confer regarding these motions. (*See Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1293 [Discovery Act requires moving party to declare he or she has made a serious attempt to obtain an informal resolution of each issue; rule designed to encourage parties to work out their differences informally to avoid necessity for formal order, which lessens burden on court and reduces unnecessary expenditure of resources by litigants].) Since the parties failed to sufficiently meet and confer, the parties are **ORDERED** to engage in additional attempts to meet and confer on all matters in dispute raised in these motions, including a telephonic or in-person conference ***(not email)***, no later than 5/20/24. The parties/counsel are **ORDERED** to file a JOINT STATUS REPORT indicating whether court intervention remains the only option to resolve this discovery dispute, and if so, why, no later than nine court days before the new hearing date. The parties are strongly encouraged to familiarize themselves with Department N17's General Policies and Procedures, as well as the Song Beverly Discovery Stip. and Order, listed on the court's website.

		Clerk to give notice.
9	Grosch vs. General Motors LLC	**A) Motion to Compel Further Responses to Form Interrogatories** Plaintiff Gayle Grosch's ("Plaintiff") Motion to Compel defendant General Motors LLC's ("GM") responses to Form Interrogatories, Set One ("FROG"), is **GRANTED** pursuant to Civ. Proc. Code § 2030.300. Plaintiff requests the court order GM serve further responses to FROG Nos. 12.1, 15.1, and 17.1. As to FROG No. 12.1, GM does not have to produce Plaintiff's contact information or the contact information for individual independent service centers co-defendant/non-parties, but GM does have the duty to make an inquiry into any of its employees that may have information relating to the Vehicle and its repair history. (Civ. Proc. Code § 2030.220.) Merely stating "GM call center advisors with whom Plaintiff may have communicated" does not comply with the requirement to make a reasonable and god faith inquiry. Additionally, vague references to certain documents produced by GM are not proper as GM is required to refer to the section and specify the writings from which the answer may be derived. (Civ. Proc. Code § 2030.230.) The response does not provide sufficient information for Plaintiff to ascertain the information sought and likely does not have contact information for witnesses. The motion is granted as to FROG No. 12.1. As to FROG No. 15.1, which asks GM to identify each denial and special/affirmative defense in its pleadings and identify the facts they are based upon, witnesses, and documents supporting them, GM provided no information in reference to any of its 26 affirmative defenses. The motion is granted as to FROG No. 15.1. As to FROG No. 17.1, GM did not really provide any responsive information to the FROG or underlying Requests for Admission ("RFA"). Additionally, vague references to certain documents produced by GM is not proper as GM is required to refer to the section and specify the writings from which the answer may be derived. (Civ. Proc. Code § 2030.230.) The response does not provide sufficient information for Plaintiff to ascertain which document (and document section) is responsive to which RFA. The motion is granted as to FROG No. 17.1. The court denies Plaintiff's request to order objection-free responses as hybrid responses (a mix of objections and substantive responses) such as the ones produced by GM preserve objections even if the verifications were not timely served. (Civ. Proc. Code § 2030.250(a); *Food 4 Less Supermarkets, Inc. v. Superior Ct.* (1995) 40 Cal. App. 4th 651, 657.)

Plaintiff's request for monetary sanctions of $1,938 against GM and its attorneys of record is granted pursuant to Civ. Proc. Code § 2030.300(d). The full amount appears to be reasonable.

B) Motion to Compel Further Responses to Special Interrogatories

Plaintiff's Motion to Compel defendant GM's responses to Special Interrogatories, Set One ("SPROG"), is **GRANTED in part and DENIED in part.**

Plaintiff requests the court order GM serve further responses to SPROG Nos. 29 and 40.

As to SPROG No. 29, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Civ. Proc. Code § 2017.010.) " ' "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) "For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement.' . . . Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence." (Lipton v. Superior Court (1996) 48 Cal.App.4th 1599, 1611–1612.)

The request seeks information is overbroad as it covers all vehicles instead of just the make, model, and year of the subject vehicle. To the extent there is a policy that covers the model and year of the subject vehicle, the information should be produced. When limited to the subject vehicle, the request is not unduly burdensome, oppressive, and seeks relevant information. To the extent the request seeks confidential, proprietary, and trade secret information in the form of GM's internal policies and procedures, parties can enter into a stipulated protective order as referenced in some of GM's responses and requested by Plaintiff.

The motion is granted as to SPROG No. 29, but limited to policy covering the same make, model, and year as the subject vehicle.

As to SPROG No. 40, the request seeks confidential information of third-parties, it is also beyond the scope of appropriate discovery as each vehicle that may have been repurchased has its own unique issues and the description of the issues ("engine, oil leak, and transmission concerns") is vague and not specific as to the same problems the Vehicle suffered.

The motion is denied as to SPROG No. 40.

The court denies Plaintiff's request to order objection-free responses. (Civ. Proc. Code § 2030.250(a); *Food 4 Less Supermarkets, Inc. v. Superior Ct.* (1995) 40 Cal. App. 4th 651, 657.)

As Plaintiff was only partially successful, monetary sanctions are denied.

C) Motion to Compel Further Responses to Requests for Production

Plaintiff's Motion to Compel defendant GM's responses to Requests for Production, Set One ("RFP"), is **GRANTED in part and DENIED in part.**

A motion to compel further responses to RFP is permissible in certain instances. (Civ. Proc. Code § 2031.310.)

Plaintiff requests further responses and production as to RFP Nos. 9, 11, 13, 15, 18-20, 30-33, 35-36, 40-46

GRANTED for Nos. 9, 18-20, 35 as to non-privileged documents covering the same make, model, and year of the subject Vehicle; otherwise **DDENIED**.

DENIED for Nos. 11 as vague, ambiguous, and overbroad to "complaints" as well as seeks make, model, and year of vehicles different than subject vehicle.

GRANTED for No. 13 as the response does not identify any arbitration specifically offered by GM to Plaintiff.

GRANTED for Nos. 15 for non-privileged documents subject to a stipulated protective order parties are directed to meet and confer on.

DENIED for Nos. 30-33 as the term "nonconformity" is vague (there is no Civ. Proc. Code § 1793.22) and it seeks to invade non-parties rights to privacy, there are also no allegations of oil leak in the complaint (No. 30).

GRANTED for No. 36 as to the subject vehicle, otherwise **DENIED**.

DENIED for Nos. 40-41, 43 as there are no allegations of oil issues or loss of acceleration in the complaint.

GRANTED for Nos. 42 and 44-46 as to non-privileged documents subject to protective order with third-party confidential information redacted; otherwise **DENY**.

The court denies Plaintiff's request to order objection-free responses. (*Food 4 Less Supermarkets, Inc. v. Superior Ct.* (1995) 40 Cal. App. 4th 651, 657.)

The request for monetary sanctions is **DENIED**.

		D) Motion to Compel Further Responses to Requests for Admission Plaintiff's Motion to Compel defendant GM's responses to Requests for Admission, Set One ("RFA"), is **DENIED** A motion to compel further responses to RFA is permissible in certain instances. (Civ. Proc. Code § 2033.290.) **DENIED** as to RFA Nos. 1, 3-5, and 8 as code sections cited (Civ. Proc. Code §§ 1791, 1793.22, and 1791.2 (respectively)) do not exist. Although Plaintiff attempts to change the code section to "Civ. Code" in the motion, the requests that are at issue cover Civ. Proc. Code. **DENIED** as RFA Nos. 46-47 as GM provided a response in compliance with Civ. Proc. Code § 2033.220(c). The court denies Plaintiff's request to order objection-free responses. (*Food 4 Less Supermarkets, Inc. v. Superior Ct.* (1995) 40 Cal. App. 4th 651, 657.) The request for monetary sanctions is **DENIED**. GM is order to serve further responses to the above noted written discovery requests and pay the ordered monetary sanctions within 30-days of written notice of the court's ruling. Plaintiff to give notice.
10	Avila v. Vu	Before the Court at present is the "Motion for an Order Compelling Enforcement of Settlement Agreement and/or to Enter Judgment Against Cindy T. Vu Pursuant to Terms of Stipulated Settlement Agreement (C.C.P. §664.6)" filed by Plaintiff Jose Avalos Avila ("Plaintiff") on 2/21/24. No Opposition thereto has been filed. However, as Plaintiff failed to provide a proof of service with the Motion, Plaintiff has not shown that Defendant Cindy T. Vu has been duly served with the Motion. The hearing is therefore **CONTINUED** to June 10, 2024, at 2:00 p.m. Plaintiff is to promptly: (a) give notice of both the Motion and of the new hearing date to Defendant Vu (both to her former counsel and to her personally, per the substitution of attorney filed on 2/26/24, by mail and by email) no later than ; (b) file a proof of service reflecting that this has been done; and (c) give notice of this ruling.
11	Clark v. Sevilla HOA	The Motion for Summary Judgment by plaintiff Kimberly Clark-Williams is DENIED. This is a dispute between plaintiff (a unit owner and former board member) and the Sevilla Homeowners Association ("HOA"). Beginning in Oct. 2021, plaintiff made a request to inspect

documents of the HOA pertaining to contracts the HOA had entered into as well as other HOA records. At some point thereafter, a petition was commenced by other owners to recall plaintiff's election as a board member. While the petition was pending, the plaintiff also made a request for documents relating to the petition. The FAC asserts claims based on the failure to allow inspection of the documents requested in October and November 2021 as well as the request to review the recall petition on 8/17/22. (FAC at ¶¶15, 17.)

HOA's Request for Judicial Notice

The HOA's request for judicial notice is GRANTED as to Item Nos. 1-3. (Evid. Code §452(d)) The request for judicial notice is DENIED as to Item 4. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 - only relevant material is subject to judicial notice.)

HOA's Objections To Declaration of Kimberly Clark-Williams

The HOA's objections to paragraphs 2 & 3 of the Clark declaration are OVERRULED. The HOA's objections to paragraphs 5-7 are SUSTAINED (hearsay).

HOA's Objections to Declaration of Newel Williams

The HOA's objections to paragraphs 2 and 3 of the Williams declaration, as well as to Exhibit 1, attached thereto, are SUSTAINED (hearsay). Mr. Williams testified that the information contained in the exhibit was simply a restatement of information he was provided by plaintiff. (Williams Depo is attached as Exh. 15 to Defendant's exhibits)

HOA's Objections to Declaration of James Judge

HOA objects to portions of paras. 2-8 of Judge's declaration. The portions objected to consist of Judge's description of events and his interpretation of the events. His comments and conclusions are not material to the disposition of this motion. Under C.C.P. § 437c(q), the Court need only rule on those objections it deems material to its disposition. Accordingly, the Court DECLINES TO RULE on objections 2-8.

Plaintiff's Objections to Declaration of attorney Jean Moriarty

Plaintiff asserts four objections which are numbered 3, 4 8 and 10. None of the objections are material to the disposition of this motion. Accordingly, the Court DECLINES TO RULE on objections 3, 4, 8 and 10. (C.C.P. § 437c(q).)

Plaintiff's Objections to Declaration of attorney Christy Han

Plaintiff asserts objections nine objections to portions of paragraphs 3-8 of attorney Christy Han's declaration. None of the objections are material to the disposition of this motion. Accordingly, the Court DECLINES TO RULE on objections 1-9. (C.C.P. § 437c(q).)

Plaintiff's Objections to Declaration of Travis Pettit

Plaintiff asserts three objections to the declaration of Travis Petit, the account manager for Antis Roofing. All three objections are OVERRULED.

Plaintiff's Objections to Declaration of Steven Peak

Plaintiff asserts three objections to the declaration of Steven Peak, the owner of Peak Lighting. All three objections are OVERRULED.

Merits Of Motion

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., §437c(a)(1).)

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., §437c(c).)

"A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." Code Civ. Proc., § 437c(p)(1).

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) That burden can be met if the plaintiff "has proved each element of the cause of action entitling the party to judgment on that cause of action." (*S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co*. (2010) 186 Cal.App.4th 383, 388)

When the notice of motion seeks only summary judgment, the presence of any triable issue requires denial of the motion. The court may not summarily adjudicate claims or defenses as to which no triable issue was raised unless requested in the notice of motion.

		(*Homestead Sav. v. Superior Court* (1986) 179 Cal.App.3d 494, 498.) Although nine causes of action are pled in the FAC, there is not a single cause of action mentioned in the Motion. Further, the motion does not address the elements of any of the causes of action. Similarly, the Separate Statement does not mention any cause of action. Plaintiff has failed to submit evidence relating to each cause of action, and has failed to explain how the evidence proves each element of each cause of action. For example, as defendant points out, plaintiff has failed to submit evidence of damages, which would be necessary to obtain summary judgment as to the Negligence cause of action. "Unlike a contract action where the plaintiff is entitled to a judgment and nominal damages without proof of actual damages, a negligence action may not be maintained in the absence of proof of actual, proximately caused damages." (*Garton v. Title Ins. & Tr. Co.* (1980) 106 Cal. App. 3d 365, 381–82; see also, CACI VF-400 re recoverable damages for negligence) Here, the plaintiff submits no evidence of damages to establish the Negligence c/a. Since plaintiff has failed to establish each of the causes of action alleged, the motion for summary judgment must be denied in its entirety. In addition, the HOA has effectively disputed plaintiff's UMF No. 4. The HOA has submitted evidence which contradicts the statement made in UMF No. 4. The HOA has also objected to the declaration of Newell Williams, upon which UMF No. 4 is based. Accordingly, the HOA has established a question of material fact. For the foregoing reasons, plaintiff's Motion for Summary Judgment is DENIED. Counsel for plaintiff is ordered to give notice of this ruling.
12	Tave v. Howell	Before the Court is a motion for summary judgment filed by Defendant, Mary W. Howell ("Defendant") directed to the complaint of Plaintiff, Thomas W. Tave ("Plaintiff"). For the reasons set forth below, the motion is **DENIED**. (Code Civ. Proc., § 437c.) As an initial matter, the Court notes that Defendant is seeking summary judgment only. When the notice of motion seeks only summary judgment, the presence of any triable issue requires denial of the motion. The court may not summarily adjudicate claims or defenses as to which no triable issue was raised unless requested in the notice of motion. (Weil & Brown, Cal. Prac. Guide, Civ. Proc. Before Trial, §10:88, citing *Homestead Sav. v. Sup.Ct. (Dividend Develop. Corp.)* (1986) 179 Cal.App.3d 494, 498 (citing text).) Further, even if the notice of motion could be deemed to set forth a request for summary adjudication in the alternative, the motion is procedurally defective because Defendant does not repeat the "specific cause of action, affirmative defense, claims for damages, or issues of duty" stated in the notice verbatim in the Separate Statement as required by CRC 3.1350(b). Due to the issues noted

above, the Court will treat this motion as a motion for summary judgment only. As such, any triable issue of material fact requires denial of the motion.

In the motion, Defendant argues summary judgment is warranted because: (1) Plaintiff was a co-owner of the dog (Baxter) who bit him and therefore cannot recover under any of his causes of action; (2) assumption of risk is a complete bar to all of Plaintiff's causes of action; (3) Plaintiff is not part of the class of persons who can recover under Civil Code section 3342; (4) as to Plaintiff's common law strict liability action, the cause of action fails because Baxter did not have a "dangerous" or "vicious" propensity; and (5) Plaintiff's causes of action for negligence and intentional infliction of emotional distress fail because Defendant reasonably controlled her dog considering Baxter's prior behavior and the lack of foreseeability. Each argument is discussed below.

1. *Triable issues exist as to whether Plaintiff was a co-owner of Baxter.*

Defendant contends an "owner" is one who treats the dog as living in their house and undertakes to control the dog's actions and is the one "to whom [the dog] belongs", citing to *Buffington v. Nicholson* (1947) 78 Cal.App.2d 37, 42. While Defendant's evidence appears sufficient to meet her initial burden on the issue of Baxter's ownership, (*see* Defendant's Separate Statement of Undisputed Material Facts ["UMF"] 7-13, 19), Plaintiff's evidence raises a triable issue of fact as to whether Plaintiff owned Baxter. (See Plaintiff's Undisputed Material Facts ["PUMF"] 55, 58-62, 78-82, 105-106.) The Court finds the foregoing is sufficient to raise a triable issue of fact as to whether Plaintiff was an owner of Baxter. Because a triable issue of material fact exists as set forth above, and the presence of any triable issue defeats a motion for summary judgment, the motion must be denied. However, as discussed below, Defendant failed to show she is entitled to summary judgment based on her remaining arguments as well.

2. *Triable issues exist as to assumption of risk.*

Defendant contends assumption of risk is a complete bar to all of Plaintiff's causes of action. Defendant cites authority for the proposition that assumption of the risk is a defense to common law strict liability for dog bite injuries, strict liability based on Civil Code Section 3342, and to negligence claims, but she fails to make any argument whatsoever or point to any authority showing that assumption of the risk is a defense to Plaintiff's causes of action for intentional infliction of emotional distress, which is an intentional tort distinct from negligence. (See, e.g., *Christiansen v. Superior Court* (1991) 54 Cal.3d 868, 904-905.)

"Issues not supported by argument or citation to authority are forfeited." (*Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 762; see also, *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 1318 ["Points that are raised that are not supported by reasoned

argument and citations to authority may be deemed forfeited."].) Thus, because Defendant failed to address the causes of action for intentional infliction of emotional distress, she failed to meet her initial burden of demonstrating that *all* causes of action are barred by the defense of assumption of risk. As noted, Defendant does not seek summary adjudication of the causes of action separately. Thus, Defendant's motion on this ground fails.

3. Triable issues exist as to Civil Code section 3342.

Civil Code section 3342 provides:

The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner. (Civ. Code § 3342(a).)

Defendant contends Plaintiff is not part of the class of persons who can recover under Section 3342 because the law is meant to protect the public, not co-owners of dogs bitten in their own homes and Plaintiff also was not on the property at the "invitation" of Defendant, but was living with and paying rent to Defendant. As to the first point, as discussed above, a triable issue of fact exists as to whether Plaintiff was a co-owner of Baxter. As to the second point, Defendant cites no authority to support her contention that Plaintiff cannot recover because he was living with and paying rent to Defendant. Moreover, Defendant concedes in the reply that "recovery has been allowed for tenants bitten by dogs residing at a property with a dog who was not theirs." (Reply at 7:9-10.) Because a triable issue exists as to whether Plaintiff was a tenant (*see* PUMF 51-53, 71) and whether Plaintiff co-owned Baxter (*see* PUMF 55, 58-62, 78-82, 105-106), Defendant's argument in this regard fails.

4. Triable issues exist as to whether Baxter had a "dangerous" or "vicious" propensity.

Defendant argues that Plaintiff's common law strict liability action fails because there is no evidence that Baxter had a "dangerous" or "vicious" propensity. At common law, a dog owner is not strictly liable for a dog bite unless they have knowledge of the dog's vicious propensity. (See, e.g., *Hicks v. Sullivan* (1932) 122 Cal.App. 635, 639; *Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791.)

A triable issue exists as to whether Defendant had knowledge that Baxter had a "dangerous" or "vicious" propensity. (See PUMF 64-66.) Moreover, Defendant was aware that Baxter bit Plaintiff on March 3, 2021. (PUMF 101.) Thus, the evidence supports an inference that Defendant had knowledge that Baxter had dangerous propensities at the latest after the March 3, 2021 incident, and

therefore at least with respect to the dog bite incidents occurring on March 22, 2021, and May 8, 2021. It is noted again that this is a motion for summary judgment, not summary adjudication of specific causes of action. Thus, Defendant failed to show she is entitled to summary judgment on this ground.

5. *Triable issues exist as to whether Defendant acted as a reasonable dog owner would under similar circumstances.*

Defendant argues that Plaintiff's negligence claims fail because Defendant reasonably controlled her dog considering Baxter's prior behavior and the lack of foreseeability. Defendant cites to *Drake v. Dean* (1993) 15 Cal.App.4th 915, 931, for the proposition that the issues, with respect to negligence, are whether the animal posed a risk of harm to others, whether that risk was reasonably foreseeable, and if so, whether the defendant failed to exercise ordinary care to avert that risk by controlling the animal.

Here, as discussed above, the evidence shows that Defendant was aware that Baxter bit Plaintiff on March 3, 2021. (PUMF 101.) A reasonable trier of fact could thus find that, after this date, the risk that Baxter could bite Plaintiff again was reasonably foreseeable to Defendant. With respect to whether Defendant exercised ordinary care to avert that risk, Defendant points to the fact that Plaintiff participated in Baxter's care and voluntarily encountered Baxter on a daily basis. However, Defendant fails to explain how this circumstance demonstrates that Defendant exercised ordinary care with respect to Baxter. A defendant does not satisfy its burden of proof by producing evidence that does not exclude the possibility that the plaintiff may possess or may reasonably obtain evidence sufficient to establish their claim. (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1441-1442.) Defendant's evidence showing that Plaintiff participated in Baxter's care and lived with Baxter does not eliminate the possibility that Plaintiff can produce evidence showing that Defendant failed to adequately control Baxter.

Defendant also points to the fact that Plaintiff lived at the residence from 2018 to March 3, 2021 without incident and Baxter had never bitten another person before March 3, 2021. This argument fails to take into account that Plaintiff's complaint alleges he was bit by Baxter on three separate occasions, two of which occurred after March 3, 2021. Thus, the fact that Baxter may not have bitten anyone prior to March 3, 2021, does not establish as a matter of law that Defendant acted reasonably with respect to the incidents occurring after said date.

Regarding Defendant's contention that Plaintiff likely caused the incidents by "violently" beating Baxter, Defendant again fails to adequately explain how this circumstance demonstrates that Defendant exercised ordinary care with respect to Baxter. Moreover, a triable issue exists as to whether Plaintiff provoked the attacks. (See Plaintiff's Response to UMF 14-16; PUMF 94-99.) Thus, Defendant failed to demonstrate the nonexistence of a triable issue of fact as to whether she reasonably controlled Baxter.

		Based on the foregoing, the motion is **DENIED**. The Court declines to rule on Plaintiff's evidentiary objections as not material to the disposition of the motion. (Code Civ. Proc., § 437c(q).) Defendant did not separately file any evidentiary objections. To the extent Defendant seeks to interpose objections in her Responsive Separate Statement, the Court declines to rule on said objections as they are not filed in compliance with California Rules of Court, rule 3.1354. (CRC, rule 3.1354(b); *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 8.) Counsel for Plaintiff is ordered to give notice of this ruling.
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