

Monday, December 13, 2021

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**TO REQUEST A HEARING ON ANY MATTER ON THIS CALENDAR, YOU MUST CALL THE COURT AT (209) 257-2692 BY 4:00 P.M. ON THE DAY PRECEDING THE HEARING. 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 WILL BECOME THE ORDER OF THE COURT. NO FURTHER NOTICE OF THE COURT'S RULING WILL BE PROVIDED.**

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18-CVC-10813

PIERSON, RAYMOND

VS.

RUSHING, PHYLISS

**CIVIL MISCELLANEOUS MOTION**

TENTATIVE RULING:

Plaintiff's Motion for Reconsideration of the Court's Order of September 22, 2021 is DENIED.

Request for Judicial Notice

Plaintiff requests the court take judicial notice that the motion for reconsideration fax filing was initiated prior to 5:00 p.m. on October 12, 2021, but due to the length of the document (21 pages) the transmission was not completed until 5:06 p.m. Plaintiff's request for judicial notice of the time and date of Plaintiff's fax transmission is unsupported by legal authority. Plaintiff's request is DENIED.

Timeliness:

The court's ruling was served by mail on September 23, 2021. Plaintiff's motion for reconsideration was filed on October 13, 2021 and a "Second Amended" motion for reconsideration was filed on October 14, 2021. Plaintiff attaches a purported copy of the stamped envelope from the court alleging it shows that the ruling was not actually mailed until September 24, 2021. The date on the envelope cannot be seen on the copy submitted to the court. (Second Amended Mtn., Exh A.)

While the motion for reconsideration, filed October 13, 2021, may have been filed one (1) day late, pursuant to CCP § 1008, the issue of timeliness is not addressed in the Opposition.

Motion:

Plaintiff fails to meet his burden under Code of Civil Procedure section 1008 in two ways. First, Plaintiff's declaration in support of reconsideration is deficient. The party making the application shall state by affidavit (1) what application was made before, (2) when and to what judge, (3) what order or decisions were made, and (4) what new or different facts, circumstances, or law are claimed to be shown. CCP §1008(a) (emphasis added).

Plaintiff's motion does include a declaration, but the declaration fails to include what Judge Plaintiff is referencing, and is substantively defective as new or different facts, circumstances, or law are not set forth. Section 1008 governs reconsideration of court orders whether initiated by a party or the court itself. "It is the exclusive means for modifying, amending or revoking an order. That limitation is expressly jurisdictional." (Gilberd v. AC Transit (1995) 32 Cal.App.4th 1494, 1500 citing Morite of California v. Superior Court (1993) 19 Cal.App.4th 485, 490.) According to the plain language of the statute, a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon "new or different facts, circumstances, or law." (Gilberd, supra, 32 Cal.App.4th at 1500.)

Even if the motion is considered timely, and the required, completed affidavit had been present, the motion fails to set forth new facts, circumstances, or law within the meaning of the statute. Section 1008 does not apply where, as here, a party simply disagrees with a court's ruling. (Gilberd, supra, 32 Cal.App.4th at 1500.) Plaintiff's motion simply rehashes the facts known to the court at the time of its ruling.

Further, "...it has long been settled that the court will refuse to consider a new motion supported by substantially the same showing as the one denied. (Glade v. Glade (1995) 38 Cal.App.4th 1411, 1457 ["The party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time."]) Even if the information included in Plaintiff's points and authorities (and absent from his declaration) are considered new facts or law, Plaintiff fails to provide a satisfactory explanation as to why he did not produce it earlier, in his reply to RUSHING's motion.

The court notes that Defendant RUSHING reserved the hearing date of December 13, 2021 for Defendant's Motion for Trial Preference, but no such motion was filed.

Unless a hearing is requested, this ruling is effective immediately. Neither further notice of the ruling nor a formal order per CRC 3.1312 is required.

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**MOTION TO STRIKE****TENTATIVE RULING:**

Plaintiff's Motion to Strike is DENIED.

Plaintiff's Demurrer to First Amended Answer is OVERRULED.

**Request for Judicial Notice**

Plaintiff requests the court take judicial notice of the following documents in the court file, pursuant to Evidence Code §§ 452(d) and 453:

- (1) Plaintiff's Complaint filed April 5, 2021.
- (2) Defendant's Answer filed September 13, 2021.
- (3) Defendant's First Amended Answer filed September 24, 2021.

Plaintiff's request for judicial notice is granted.

**Motion to Strike**

Per CCP §436, the court may, upon a motion made pursuant to CCP §435 or at any time in its discretion, strike out "any irrelevant, false, or improper matter inserted in any pleading" or strike "out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

**Twenty-First Affirmative Defense:**

Plaintiff moves to strike the twenty-first affirmative defense of the second amended answer pursuant to CCP § 436(a)-(b), (improper manner, not drawn in conformity the law) and CCP § 473 (amendments to pleadings permitted by court). The twenty-first affirmative defense expressly reserves the right of Defendant to assert additional defenses or claims which may become known to Defendant during the course of the cause of action. (FAA, pg.5 lines 22-27 – pg.6 lines 1-2.) Plaintiff moves to strike the twenty-first affirmative defense on the ground that CCP § 473 controls the right to amend an answer and that cannot be circumvented by an affirmative defense.

The twenty-first affirmative defense is not in conflict with CCP § 473. Plaintiff's motion to strike the twenty-first affirmative defense should be denied.

**Prayer for Relief - Attorneys Fees:**

Plaintiff seeks to strike the prayer for relief for attorneys fees pursuant to CCP § 436(a)-(b) and N.S. v. D.M. (2018) 21 Cal.App.5th1040, 1046-1047.

"Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees." (Mountain Air Enterprises, LLC v. Sundowner Towers, LLC (2017) 3 Cal.5th 744, 751.) This default rule can be modified by contract, statute, or rule. (Travelers Cas. & Sur. Co. of Am. v. PG&E (2007) 549 U.S. 443, 448, 127 S.Ct. 1199, 167 L.Ed.2d 178.) Plaintiff's complaint does not request attorney's fees.

Defendant argues that it is too soon to strike its prayer for attorney's fees as Defendant has not had the opportunity to conduct discovery, and that the allegations in Plaintiff's complaint are ambiguous as to which specific agreements were allegedly breached. Further, that discovery may unearth other applicable contracts in this matter, which do provide for attorneys fees. At this stage of the pleadings, prior to discovery being conducted, Defendant's prayer for attorney's fees has not been established as an "improper matter" under CCP § 436.

**Jury Trial:**

Plaintiff seeks to strike Defendant's demand for a jury trial pursuant to CCP § 436(a)-(b) and CCP § 631.

Defendant filed a Request for Jury Trial and Notice of Jury Fee Deposit on October 12, 2021. The issue is moot.

**Demurrer**

A defendant must set forth only the "essential facts" of the affirmative defense, "sufficient to acquaint [plaintiff] with the nature, source and extent" of the defense. (Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 608.) This is known as the "fair notice" test. "Generally speaking, the determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action." (South Shore Land Co. v. Petersen (1964) 226 Cal.App.2d 725, 732.) A party against whom an answer has been filed may object by demurrer where the answer does not state facts sufficient to constitute a defense. (Code Civ. Proc., § 430.20(a).) The ground for objection must appear on the face of the answer, or from any matter of which the court is required to or may take judicial notice. (Code Civ. Proc., § 430.30(a).) Each of the Second through Twentieth affirmative defenses, as pled by Defendant in the First Amended Answer, set forth "essential facts" of the affirmative defense, "sufficient to acquaint [plaintiff] with the nature, source and extent" of the defense. (Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 608.)

Unless a hearing is requested, this ruling is effective immediately. Neither further notice of the ruling nor a formal order per CRC 3.1312 is required.