

TENTATIVE RULINGS

FOR: July 6, 2017

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. C (Historic Courthouse)

Conservatorship of Joanne R Zimmer

16PR000059

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the Conservator is acting in the best interest of the Conservatee. Thus, the case is set for a biennial review hearing in two years, on July 2, 2019 at 8:30 a.m. in Dept. 2. The court investigator shall prepare a biennial investigator report for the next hearing date.

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Conservatorship of Ovando, Hortensia

26-33383

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the Conservator is acting in the best interest of the Conservatee. Based on the report of the court investigator, the Court determines by clear and convincing evidence that Conservatee cannot communicate, with or without reasonable accommodation, a desire to participate in the voting process, and therefore orders Conservatee disqualified from voting pursuant to Elections Code section 2208. The case is set for a biennial review hearing in two years, on July 2, 2019 at 8:30 a.m. in Dept. 2. The court investigator shall prepare a biennial investigator report for the next hearing date.

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Conservatorship of Richard Blunt

26-64233

PETITION FOR RENEWAL OF APPOINTMENT OF LPS CONSERVATOR

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. C (Historic Courthouse)

Kenefick Ranches Winery, LLC v. Swanky Wine Snob LLC, et al.

17CV000440

MOTION TO SET ASIDE JUDGMENT AND DEFAULT

APPEARANCE REQUIRED

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Conservatorship of Salvador Cuevas

16PR000060

REVIEW HEARING

TENTATIVE RULING: The clerk is directed to calendar a one-year review hearing. The matter is continued to August 17, 2017, at 8:30 a.m. in Dept. F to allow for the filing of the court investigator's report.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Zwischen Builders, LLC, v. Rodney Ellison

16CV000076

DEMURRER TO THE THIRD AMENDED CROSS-COMPLAINT

TENTATIVE RULING:

Cross-defendants Joshua Parke, Sarah Parke, Zwischen Builders, LLC (collectively "cross-defendants"), and American Contractors Indemnity Company's ("ACIC") request for judicial notice of the first amended complaint and the second amended cross-complaint is GRANTED, but not for the truth of the matters asserted therein. (Evid. Code, § 452, subd. (d).)

Cross-defendants' demurrer to the second cause of action for breach of fiduciary duty on the ground of uncertainty is OVERRULED. The Court twice previously overruled cross-defendants' demurrer to the second claim on the ground of uncertainty.

Cross-defendants' demurrer to the second cause of action for breach of fiduciary duty on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. First, as cross-defendants proffer, the third amended cross-complaint is inconsistent with the prior pleadings in an attempt to impose a fiduciary duty on cross-defendants. In the second amended cross-complaint, the Ellisons "dispute[d] that there was an enforceable agreement between the parties that would entitle Cross-Defendants to an equity interest in the Property" (RJN, Ex. 1, ¶ 28.) The Ellisons now claim the opposite in the third amended cross-complaint. (See Third Amended Cross-Compl., ¶ 27 ["The parties entered into a joint-venture by way of their agreement"].) Although the Ellisons are free to allege inconsistent claims, the Ellisons do not explain the shift in their factual allegations. Second, the Ellisons do not directly address Corporations Code section 16202 in their opposition. The Ellisons, therefore, concede the argument as to this issue is meritorious. Third, the Ellisons have not adequately alleged a joint business enterprise. "The essential element of a joint venture is an undertaking by two or more persons to carry out a single business enterprise jointly for profit." (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 525.) The Ellisons allege they own the property at issue. (Third Amended Compl., ¶ 9.) Cross-defendants are not co-owners. The Ellisons, as the sole owners of the property, allege they entered into an oral agreement with cross-defendants for the "construction, remodel, design, and rebuild" of a home on the property. (*Id.*, ¶¶ 9, 17.) Indeed, "[t]he Ellisons were to pay Cross-Defendants on a time and materials basis." (*Id.*, ¶ 17.) The parties "discussed additional compensation by way of a deferred payment, and agreed on a sweat equity investment concept whereby Cross-Defendants would defer a certain amount of their hourly rate to their investment in the Property in exchange for a return on that investment based on the amount of the Property's appreciation." (*Id.*, ¶ 10.) These allegations are insufficient because cross-defendants allegedly only agreed to take a "deferred payment" after being hired to remodel the home "on a time and materials basis." This is not a joint business enterprise. The pleading is clear: the only reason cross-defendants are entitled to any extra compensation is because they allegedly agreed to "defer a certain amount of their hourly rate." Even construing the allegations in a light most favorable to the Ellisons, these are allegations of an owner (the Ellisons) and an independent contractor (cross-defendants) relationship.

ACIC's demurrer to the second cause of action for breach of fiduciary duty on the ground of failure to state sufficient facts is OVERRULED. On July 14, 2016, the Ellisons dismissed ACIC as a cross-defendant as to all causes of action with prejudice except for the sixth claim.

The parties are to appear for the trial management conference.