TENTATIVE RULINGS

FOR: September 27, 2019

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. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. 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.

CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Pacific Service Credit Union v. Anastasia Renee Logan **19CV000245**

MOTION TO STRIKE DEFENDANT'S ANSWER AND/OR FOR JUDGMENT ON THE PLEADINGS

TENTATIVE RULING: Plaintiff's Request for Judicial Notice is GRANTED. The Court takes judicial notice of Defendant's answer to Plaintiff's Complaint, but not for the truth of the matters asserted therein. Plaintiff's motion for judgment on the pleadings is DENIED.

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Plaintiff's counsel is directed to contact Defendant forthwith and advise Defendant of Local Rule 2.9 and the Court's tentative ruling procedure. If Plaintiff's counsel is unable to contact Defendant prior to the hearing, Plaintiff's counsel shall be available at the hearing, in person or by telephone, in the event Defendant appears without following the procedures set forth in Local Rule 2.9.

Although Plaintiff's motion is captioned "Motion to Strike Defendant's Answer and/or for Judgment on the Pleadings," Plaintiff notices only a motion for judgment on the pleadings pursuant to Code of Civil Procedure section 438, subdivision (c)(1)(A). That section provides that a plaintiff may move for judgment on the pleadings where "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (*Ibid.*)

Plaintiff's verified Complaint asserts causes of action for breach of contract, and related common counts. Because Plaintiff's prayer is a demand for less than $25,000, the matter is a

limited civil case. (See Code Civ. Proc. § 90, *et. seq*.) Defendant filed an Answer through a completed Judicial Council Form.

Plaintiff first asserts that it is entitled to judgement on the pleadings because, while the Complaint in this matter is verified, the Answer is not. Not so. Answers in limited cases, like this one, need not be verified, even where the Complaint is. (Code Civ. Proc. § 92, subd. (b).)

Plaintiff next contends that, "Defendant's response to the complaint fails to deny any statement and therefore admits to the underlying debt." (Support Memorandum at 4:7-8.) Defendant's Answer, however, asserts that "Defendant generally denies each statement of the complaint or cross-complaint." (See Answer at ¶ 3, subd. (a).) Defendant accomplished this "general denial" by checking the box corresponding to paragraph 3, subdivision (a) of the Judicial Council form.

Plaintiff contends, in effect, that the general denial is "ineffective," in part, because the judicial council form states, "Do not check this box if the verified complaint or cross-complaint demands more than $1,000."[1] (See *Ibid*.) Plaintiff fails, however, to provide any authority for the proposition that checking the box in such case voids the Answer, nullifies its contents, or otherwise entitles a Plaintiff to judgment on the pleadings. And the Court is unaware of any such authority.

In limited civil cases, a general denial puts in issue all material allegations of the complaint, whether the complaint is verified or not. (Code Civ. Proc. § 431.30, subd. (d).) The Court finds that Plaintiff has failed to establish that Defendants' general denial is without effect or should otherwise be disregarded. As such, Defendants have put every material allegation of the Complaint in issue. (See *Ibid*.)

Based on the foregoing, Plaintiff's motion for judgment on the pleadings is DENIED.

John P. McGill, et al. v. Gene Webb **19CV000903**

PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE RE: INJUNCTION

TENTATIVE RULING: Plaintiffs John P. and Wanda McGill (individually and as trustees for the McGill Family Trust 2018) move for an order to show cause why an injunction should not issue directing defendant Gene Webb to remediate and correct the slide condition on plaintiffs' property that threatens to obstruct and/or destroy the only access into their property. Webb opposes.

A. Procedural Background

[1] It appears that the judicial council's reference to demands of more than $1,000 relates to Code of Civil Procedure section 431.40. That section is not, however, relevant here because Defendant's pleading is an Answer to the complaint for breach of contract.

On September 10, 2019, the Court continued the matter because the parties did not comply with Local Rule 3.3 requiring courtesy copies of all documents in excess of 15 pages, which were needed due to the lack of color copies of the submitted e-filed photographs of the purported slide moving downhill onto the driveway. The Court also ordered the parties to file a joint meet-and-confer declaration detailing their efforts to reach an agreement as to the request to direct repair and remediation of the slide condition on Webb's property that threatens the only access into or out of plaintiffs' property, and a plan or options to carry out that request. Without making any findings on the issues, the Court provided its initial inclination that it intended to grant plaintiffs' relief.

Following the Court ordered continuance and a stipulated continuance, the parties filed their joint meet-and-confer statement on September 20, 2019. Plaintiffs offered a proposed schedule of work, without accepting liability, that might serve as a basis for Webb to use. Webb offered no plan as he disputes there is any reasonable basis for an injunction as his land does not pose any danger to plaintiffs' property. Rather than reaching a reasonable resolution, as the Court had hoped, the parties have backed into their respective corners to litigate this case. The breakdown of the relationship between the neighbors is unfortunate.

Webb submitted a supplemental declaration from Jeff Raines, a civil engineer and geotechnical engineer, with the joint meet-and-confer statement. Plaintiffs object to the declaration.

Plaintiffs submitted the requisite courtesy copies. The Court is not in possession of any courtesy copies from Webb.

B. Court's Motion to Strike

On its own motion, the Court strikes the supplemental Raines declaration filed on September 20, 2019. (Code Civ. Proc., § 436, subd. (b).) The Court's previous order did not call for additional evidence, briefing, or any other materials relating to the motion other than courtesy copies and a joint meet-and-confer statement. The Court provided its initial inclination that it may grant plaintiffs' motion as a courtesy to the parties to give them an opportunity to cooperatively fix the problem without further delay and expense of litigation. The continuance was not an invitation to submit supplemental declarations or new evidence. The code provides the framework of what may be submitted in response to a motion, and Webb filed an opposition. The code does not permit the filing of additional materials as a run-around of a fully briefed motion.

C. Request for Judicial Notice

As already held in their motion for judgment on the pleading, plaintiffs' request for judicial notice is GRANTED IN PART AND DENIED IN PART. The request is granted as to the amended answer (exhibit E). (Evid. Code, § 452, subd. (d).) The request is denied as to the assessor's parcel map (exhibit A), the photographs of the slide area (exhibit B), and the answer (exhibit C). The assessor's parcel map is the subject of dispute due to the general denial, and thus, the Court cannot take judicial notice of the truth of the matters asserted therein. The

photographs are not the proper subject of judicial notice. The answer is not relevant as an amended answer was filed. Moreover, the Court notes plaintiffs cited Evidence Code section 451 as the basis for their request when the citation should have been to section 452.

D. Plaintiffs' Motion for a Mandatory Permanent Injunction

Plaintiffs' motion for an order to show cause why a permanent injunction should not issue pursuant to Code of Civil procedure sections 526 is DENIED WITHOUT PREJUDICE. "An injunction is statutorily defined to be 'a writ or order requiring a person to refrain from a particular act.' [Citation.] While the statute seems to limit that definition to prohibitory injunctions, an injunction may also be mandatory, i.e., may compel the performance of an affirmative act. [Citations.] In short, an injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act." (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1160.)

Plaintiffs seek a mandatory permanent injunction by invoking section 526 and seeking to compel Webb to take affirmative action to remediate and correct the slide condition of the property. A mandatory injunction is rarely granted before trial. (*Bd. of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295; see *Hagen* v. *Beth* (1897) 118 Cal. 330, 331 ["The granting of a mandatory injunction pending the trial, and before the rights of the parties in the subject matter which the injunction is designed to affect have been definitely ascertained by the chancellor, is not permitted except in extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal. [Citations.]"].) Plaintiffs have not met their heavy burden to demonstrate a mandatory permanent injunction is warranted prior to trial and before the rights of the parties are ascertained.

E. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs' motion for an order to show cause why a preliminary injunction should not issue pursuant to Code of Civil procedure sections 527 is GRANTED.

1. Applicable Law

Similar to a mandatory permanent injunction, "'[a] preliminary mandatory injunction is rarely granted,'" because "'the attempt is [being] made to compel the doing of affirmative acts.'" (*Id*., quoting 6 Witkin, Cal. Procedure (3d ed. 1985) Provisional Remedies, § 293, at p. 251.) "'[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.'" (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443, quoting *White v. Davis* (2003) 30 Cal.4th 528, 554; see *IT Corp. v. Cnty. of Imperial* (1983) 35 Cal.3d 63, 72.)

The elements of a nuisance claim are interference with a plaintiff's use and enjoyment of plaintiff's property, invasion of plaintiff's use and enjoyment involving substantial actual damage, and interference that is unreasonable as to the nature, duration, or amount. (*San Diego Gas & Electric Co. v. Super. Ct.* (1996) 13 Cal.4th 893, 938; see Civ. Code, § 3479 [anything

which obstructs the free use of property, so as to interfere with the comfortable enjoyment of property, or unlawfully obstructs the free passage or use of any street is a nuisance].) "Although it is not necessary to show that harm actually occurred, plaintiffs must show that a defendant's acts are likely to cause a significant invasion of a public right. 'Again, either a public or a private nuisance may be enjoined because harm is threatened that would be significant if it occurred, and that would make the nuisance actionable under the rule here stated, although no harm has yet resulted.' [Citation.]" (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988.)

2. Merits

Plaintiffs demonstrate they are likely to prevail on the merits of their complaint, at least for the nuisance cause of action, and the relative balance of harms favor plaintiffs based on the evidence presented.[2]

Plaintiffs have lived at 4328 Redwood Road since March 2000. (McGill Affidavit, ¶ 1.) The driveway is the only access into or out of the property. (*Id*.; McGill Decl., ¶ 2, Ex. 1 [parcel map].) The driveway is on a deeded right of way that permits plaintiffs, PG&E, and an adjacent neighbor to use the area for access. (McGill Affidavit, ¶ 1.) In March 2019, plaintiffs noticed the hillside along the driveway on Webb's property was moving and encroaching onto the area where they had placed hay wattles to direct runoff down to a concrete culvert. (*Id*.) The Webb property pushed the wattles up into a mud mass and pushed the asphalt driveway into a hump running parallel to the face of the slide. (*Id*.) Plaintiffs measured the movement using a stake from the wattles and a redwood tree that was on the other side of the driveway. (*Id*.) The measurements showed the slide had moved approximately ten to twelve inches. (*Id*.) By April 2019, the slide had moved another foot. (*Id*.)

Plaintiffs submitted color photographs of the slide and they confirm movement has occurred. (*Id*., ¶ 2; McGill Decl., ¶ 3, Ex. 2.) The photos are convincing significant evidence. The photos labeled as 0014-0017 and 0022-0025, for example, show an encroachment onto the driveway. According to plaintiffs, this encroachment is approximately three to four feet. (McGill Affidavit, ¶ 2.) The driveway once was twelve feet in width and now is eight feet in width. (*Id*., ¶ 4.) Plaintiffs are not claiming damages at this time. (*Id*., ¶ 9.) Plaintiffs intend to sell their home this year, but realtors have advised that the slide would impede any sale. (*Id*.) Plaintiffs just want the slide condition repaired so that access is not threatened and they can sell their house. (*Id*.)

Defendants attack plaintiffs' evidentiary support as not sufficient because plaintiffs are not experts on engineering matters. To further counter the evidence, Webb submits the declaration of Jeff Raines, a civil engineer and geotechnical engineer. Raines visited the property on July 26, 2019. (Raines Decl., ¶ 2.) Raines states there is an old, existing slope failure at the location plaintiffs identified in their complaint. (*Id*., ¶ 3.) The head scarp of the failure is located twenty to thirty feet uphill of the driveway. (*Id*.) The head scrape is heavily

[2] On June 14, 2019, plaintiffs filed their complaint for: (1) injunctive relief; (2) nuisance; (3) negligence; and (4) declaratory relief.

overgrown with brush.[3] (*Id*.) Raines provides the head scrape does not indicate any additional movement over the past year. (*Id*.) If there had been, the head scarp would have grown, and bare earth would be present. (*Id*.) Hence, any sloughing of the soil onto the driveway, if any has occurred over the past year, and does not represent the reactivation of the old slide. (*Id*.) Rather, it represents sloughing of the cut slope onto the driveway. (*Id*.)

According to Raines, the original slide was caused by over steeping of the slope due to the installation of the driveway and subsequent toe cutting due to drainage flows along the driveway. (*Id*., ¶ 4.) In other words, the failure was caused by the installation of the driveway. (*Id*.) Raines concludes that based on the length of the slide and the modest height of the head scarp, it is a shallow failure, and given the much steeper slope on the other side of the driveway and the age of the slide, he does not expect the uphill slide to move "significantly" in the future. (*Id*., ¶ 5.) Depending on the depth to bedrock, the downhill slope would likely fail first which would cause a failure of the uphill slope. (*Id*.)

The Court does not find Raines' declaration compelling. As plaintiffs proffer, Raines' opinion is offered without any reference or support to any documents, reports and/or test results, and the opinion is superficial in that it provides no explanation of what and how Raines arrived at his conclusion. Other than stating he visited the location, Raines fails to explain what investigation he conducted and how he conducted it. Raines also provides no support for his opinion regarding the original slide being caused by the installation of the driveway and toe cutting. Indeed, part of the driveway was installed in 1974, and there is no indication why it took nearly fifty years for the driveway to suddenly cause a slide. Finally, the conclusion that the uphill slide will not move "significantly in the future" does not rule out that the slide *will in fact move* or negate or explain the fact that a slide *currently is in progress and has moved* three to four feet onto the driveway. The conclusion also ignores the prior history of the site; that is, a prior slide occurred from the Webb property and was remedied. (McGill Affidavit, ¶ 5.) Certainly, three-to-four feet of sliding and the threat of future sliding could be considered "significant" with this history in mind.

In contrast to defendants' evidence, plaintiffs' declaration, affidavit, and photographs are buoyed by the Jim Glomb declaration submitted with the reply.[4] Glomb is a registered geologist and certified engineering geologist. (McGill Reply Decl., ¶ 5, Ex. C [CV].) Glomb reviewed the geotechnical data pertaining to the site and vicinity, including geotechnical reports and letters from others regarding the site. (Glomb Decl., at p. 1:26.) He visited the site on August 21, 2019, to evaluate geotechnically-related conditions concerning the driveway and adjacent slope to the west. (*Id*., at p. 1:27-28.) Glomb concluded an active landslide exists on the slope above the driveway. (*Id*. at p. 2:15-16.) The landslide is considered unstable and will likely continue to move downslope onto the driveway, particularly during periods of continued rainfall. (*Id*. at p. 2:16-17.) This occurrence will likely further damage the driveway and may obstruct access to the property. (*Id*. at p. 2:17-18.)

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[3] A photo is attached, but it is black and white. Webb did not submit a color courtesy copy as the Court requested on September 10, 2019. The Court has not considered the black and white photo as the e-copy is not readily visible.

[4] Webb did not object to the filing of the declaration before the September 12, 2019 continuance.

The evidence recited above is sufficient to establish the elements of the nuisance cause of action and to demonstrate the balance of harms favors plaintiffs. (See *O'Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1481 [the burden of proof is on plaintiff to show all elements necessary to support issuance of a preliminary injunction].) Although disfavored, this is a case where a mandatory preliminary injunction is warranted because plaintiffs have established Webb's property is unstable, likely to move again, and must be repaired before substantial damage occurs to the driveway and blocks plaintiffs' only access to their property. (See *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [nuisance includes omissions to perform duties, in addition to affirmative actions].)

3. Bond

Webb proposes a $600,000 bond without any evidentiary support. Generally, if a preliminary injunction is ordered, courts must require an undertaking, or allow a cash deposit, to cover any damages caused by the injunction. (Code Civ. Proc., §§ 529, 995.710.) "The duty to require an injunction bond does not apply in all cases. No such duty exists where . . . the bond requirement has been waived or forfeited." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 744.)

The Court would be within its discretion to find Webb waived the bond requirement, and may still do so, for failure to comply with the Court's September 10, 2019, order. Webb failed to offer a plan to remedy the situation in the joint meet-and-confer declaration as requested. The Court required this from Webb to stay ahead of the rainy season and to prevent the situation from worsening. Webb instead chose to deny all wrongdoing when he easily could have offered a plan in the alternative to his legal position. He chose not to do so.

The Court, however, defers a ruling on the bond issue until the costs of any plan are known. Webb may file a motion to determine the amount of the bond when the issue is ripe, although the parties should be able to meet-and-confer and reach an agreement on the matter. If a motion is filed, the Court reserves on the issue of whether Webb waived the bond requirement because the delay created for failing to offer a plan in early September may cause the cost of the remediation plan to increase, especially if the rains cause a serious landslide. Plaintiffs should not be responsible for posting a higher bond in such a situation.

F. Conclusion

Plaintiffs' request for judicial notice is GRANTED IN PART AND DENIED IN PART. The request is granted as exhibit E. The request is denied as to exhibits A-C.

On its own motion, the Court strikes the supplemental Raines declaration filed on September 20, 2019.

Plaintiffs' motion for an order to show cause why a permanent injunction should not issue pursuant to Code of Civil procedure sections 526 is DENIED WITHOUT PREJUDICE.

Plaintiffs' motion for an order to show cause why a preliminary injunction should not

issue pursuant to Code of Civil procedure sections 527 is GRANTED. Webb shall take immediate remedial/repair action to prevent his property from further encroaching and sliding over the driveway leading to plaintiffs' home. Webb shall submit a remedial/repair plan to the Court and serve and email plaintiffs with the plan on or before October 4, 2019.

A hearing is scheduled to review the plan on October 11, 2019, at 8:30 a.m. in Dept. B. Plaintiffs may submit any objections to the plan to the Court on or before October 7, 2019. Plaintiffs shall serve Webb's counsel via email. Webb may submit a reply on or before October 9, 2019. The expedited schedule is due to the fact the winter rains are approaching and plaintiffs' access to their property is in serious jeopardy, and the parties had an opportunity to hammer out a plan before the continuance.

The parties are again encouraged to work together to find a solution as they should be able to better work together to find an appropriate remedy to this problem without the further delay and expense of having the Court craft a remedial/repair plan.