

**TENTATIVE RULINGS**

**FOR: October 2, 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.

**PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.**

**Conservatorship of Thomas R. McCalla**

**19PR000122**

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON AND ESTATE

**APPEARANCE REQUIRED**

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**Estate of Margaret M. Cairns**

**PR18599**

THIRTY-FIFTH ANNUAL ACCOUNT AND REPORT AND PETITION FOR APPROVAL THEREOF, FOR APPROVAL OF TRUSTEE AND ATTORNEY COMPENSATION

**APPEARANCE REQUIRED**

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

**Capital One Bank (USA), N.A. v. Susan E. Moore**

**19CV000948**

PLAINTIFF’S DEMURRER TO AND MOTION TO STRIKE CROSS-COMPLAINT

**TENTATIVE RULING:** The demurrer of Capital One Bank (USA), N.A. (Capital One) to the Cross-Complaint is SUSTAINED WITH 10 DAYS’ LEAVE TO AMEND.

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

Capital One demurs to the Cross-Complaint on the ground that the single cause of action, for breach of written contract, asserted therein does not state facts sufficient to constitute a cause of action.

A complaint must contain "facts constituting the cause of action." (Code Civ. Proc. § 425.10, subd. (a)(1).) A demurrer is treated as "admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213-14.) In reviewing a demurrer, the court must "construe the allegations of a complaint liberally in favor of the pleader." (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 438.)

To state a cause of action for breach of contract, a party must allege facts which, if true, are sufficient to establish the following: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 402.)

The Court finds that the Cross-Complaint fails to allege facts sufficient to establish Capital One's breach. Cross-Complainant alleges that Capital One breached the agreement by, "failing to provide cross-complainant with monthly statements showing its receipt of cross-complainant's monthly \$100 payments and by further failing to send to cross-complainant by mail monthly payment coupons or slips for cross-complainant's use in making her agreed \$100 per month payments." (Complaint at § BC-2.) Through its opposition to the demurrer (titled a Response), Cross-Complainant argues that Capital One "had a corresponding implied contractual obligation to send each and every month to [Cross-Complainant] monthly statements verifying that [Capital One] had received [Cross-Complainant]'s prior month's payment along with a tear-off payment coupon for [Cross-Complainant] to use for the succeeding month's payment." (Response at 3:8-13.)

Cross-Complainant admits that the alleged written agreement does not "specifically include" a requirement that Capital One "would continue to remit monthly statements to [Cross-Complainant]." (*Id.* at 4:18-21.) Cross-Complainant argues that the implied duty, that she alleges Capital One breached, arises out of the following language in the alleged written agreement: "[w]hen mailing your payment, please write the last 4 digits of your account number on it and include the attached payment slip." (Cross-Complaint at Exh. A.) Cross-Complainant argues that

this language evidences an agreement by Capital One to “continue to remit monthly statements to [Cross-Complainant].” (Response at 4:20-21.) Cross-Complainant then appears to argue that these monthly payment slips are a “basic assumption on which the contract was formed,” and that as a result, under California law, Capital One had an implied duty under the contract to continue providing monthly payment slips and monthly account statements. (*Id.* at 4:21-25.)

The Court finds that no reasonable trier of fact could conclude, from the single quoted phrase in the alleged written agreement, that Capital One agreed, as a material consideration under the contract, to provide Cross-Complainant with on-going monthly statements and/or monthly payment slips. The inclusion of the term “please” in the subject sentence strongly suggests that the “attached payment slip” was being provided to facilitate a courtesy that Capital One was requesting from Cross-Complainant. This is inconsistent with the slip being provided pursuant to a contractual obligation. Moreover, there is simply nothing in the alleged written agreement that suggests that any additional statement or payment slip would be forthcoming, let alone that the provision of statements and/or payment slips on a monthly basis was a material obligation under the written agreement.

It is generally an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The Court finds, based on the totality of circumstances that it is reasonably possible for Plaintiffs to cure the defects through amendment. Therefore, Capital One’s demurrer is SUSTAINED WITH 10 DAYS’ LEAVE TO AMEND.