

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable James P. Kleinberg Presiding

Paula Bastian, Courtroom Clerk

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To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS

DATE: 11/19/09 TIME: 9 A.M.

PREVAILING PARTY SHALL PREPARE THE ORDER

(SEE [RULE OF COURT 3.1312](#))

LINE #	CASE #	CASE TITLE	RULING
LINE 1	104CV014964	Cavalry Portfolio Services v Ojeda	Order of Examination
LINE 2	104CV025739	Capital One Bank v Mendaros	Order of Examination
LINE 3	108CV130351	Neil v Bo Peep and Company	Order of Examination
LINE 4	109CV136561	Calvert v Walker	Order of Examination
LINE 5	109CV132833	South Bay Children's Medical Group v South Bay Children's Medical Center	Click on LINE 5 for ruling
LINE 6	109CV136310	Comerica v Victor Sloan Enterprises	Click on LINE 6 for ruling
LINE 7	108CV103926	Martinez v Nchekwube	Click on LINE 7 for ruling
LINE 8	109CV152514	Sonic-Saturn v Kofnovec	Petition to compel arbitration unopposed and GRANTED
LINE 9	109CV140446	Sweeney, Mason v DiGiorgio and Peninsula Fireplace	Click on LINE 9 for ruling
LINE 10	109CV145447	Household Finance v Cardenas	Plaintiff's Motion for judgment on the pleadings unopposed and GRANTED
LINE 11	109CV150199	Molina v Northwest Trustee Services	Case settled; Motions <i>off calendar</i>
LINE 12	109CV141742	Discover Bank v Kandola	Off Calendar
LINE 13	108CV118363	Browne v Chang	Off Calendar

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Case Name: *South Bay Children's Medical Group, Inc. v. South Bay Children's Medical Center, Inc., et al.*

Case No.: 1-09-CV-132833

The demurrer to the first cause of action as to Fox is OVERRULED. The cross-complaint alleges that Fox received consideration—the provision of wares, performance of work and services and expenditures of funds.

The demurrer to the second cause of action is OVERRULED. The cross-complaint alleges that “the parties operated under the terms of the agreement for a period of years,” which is sufficient to allege an implied in fact contract. (See Cal. Civ. Code § 1621.) Further, the cross-complaint does not allege that Center restricted Cross-defendants in conducting their practice. (See *Conrad v. Medical Bd. of Cal.* (1996) 48 Cal.App.4th 1038, 1043-1044.)

The special motion to strike the third through fifth causes of action is DENIED. Cross-defendants fail to meet their initial burden to demonstrate that the act or acts of which the cross-complainants complains were taken in furtherance of their right of petition. Contrary to Cross-defendants' assertions, the third through fifth causes of action do not incorporate the allegations of the sixth and seventh causes of action.

The sixth cause of action alleges that Cross-defendants defamed Cross-complainants because they “alleged in a lawsuit that [Cross-complainants] conspired to conduct and participate in a pattern of racketeering activity...[;] knew these allegations to be false, has no evidence that these allegations have any merit and intentionally filed such allegations in an effort to personally, publicly and financially harm these individuals... [; and,] intended to file such allegations in its amended complaint to further assure that these volunteer board members would be further damaged as the allegations threaten insurance coverage for each of the plaintiffs.” (See cross-complaint, ¶¶ 56-58.) Cross-defendants meet their initial burden to demonstrate that the act or acts of which the cross-complainants complains were taken in furtherance of their right of petition. In opposition, Cross-complainants do not argue or present evidence that they have a probability of prevailing on the claim. Further, Cross-complainants do not argue that the defamation claim does not arise from the Cross-defendants' right of petition. The failure of the FAC to conform with section 425.15 does not demonstrate a probability of prevailing as to any of the cross-complaint's claims. Accordingly, the special motion to strike the sixth cause of action of the cross-complaint is GRANTED.

The seventh cause of action for intentional infliction of emotional distress alleges that Cross-defendants “intentional[ly] filed an action that named only these three volunteer board members out of several”; “intentionally and [with] malice of forethought calculated false accusations that he intended to use to [a]ffect each of these plaintiffs personally and financially, even as he originally offered them positions with the organization on the promise that they would be protected from false claims by insurance coverage provided by Group”; “intentionally filed this action with reckless disregard for the truth with the express intent of [a]ffecting each and every plaintiff financially and emotionally”; and, “knowingly caused this action to [be] filed against the individual volunteer board members with the intent to cause the resulting severe emotional and financial distress to each of the individually named plaintiffs, Agostino, Burke and Bradley as well as to ruin the possibility of plaintiff Center from

recovering financially and/or locating another medical service group.” (CC, ¶¶ 62-64, 66.) As in the sixth cause of action, Cross-defendants meet their initial burden to demonstrate that the acts addressed by the seventh cause of action were taken in furtherance of their right of petition. In opposition, Cross-complainants do not argue or present evidence that demonstrate that they have a probability of prevailing on their IIED claim. Accordingly, the special motion to strike the seventh cause of action of the cross-complaint is likewise GRANTED.

The attorney’s fees request is not ruled on by the Court because it was not addressed in the parties’ memoranda.

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Case Name: *Comerica Bank v. Victor Sloan Enterprises, Inc., et al.*

Case No.: 1-09-CV-136310

Plaintiff Comerica Bank's ("Plaintiff") motion for summary judgment on its complaint against defendants Victor Sloan Enterprises, Inc., and Victor Sloan ("Defendants") is DENIED. Plaintiff has satisfied its initial burden by presenting evidence to establish that: (1) Company signed the subject promissory notes; (2) Plaintiff performed its contractual obligations by loaning Company the agreed upon amounts of money; (3) Company failed to repay the indebtedness pursuant to the terms of the contracts; (4) the amounts due and owing on the notes; (5) Sloan executed a written guaranty agreeing to repay all monies Company owed to Plaintiff; and (6) Sloan has not paid the sums due pursuant to the terms of the guaranty he signed. (See Undisputed Material Facts (UMF) # 2-4; 6-18.)

However, Defendants have raised several triable issues of material fact. A triable issue of material fact exists concerning whether the contract Plaintiff is suing on is the current enforceable contract, or whether it was superseded by a novation in which Defendants contend that they paid \$300,000 into a CD and \$161,000 additionally for new and different contract terms. (See Disputed Material Facts (DMF) #1.) Additionally, the superseding novation agreement raises additional triable issues of material fact regarding the applicable interest rate, and whether Defendant Sloan performed his contractual obligations under the novation agreement. (See DMFs #2, and 3.)

Civil Code section 1698, subdivision (b) provides "A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. An oral modification of a written contract is "executed" within the meaning of Civil Code section 1698, so as to permit its enforcement, when one party has fully performed and there was consideration for the oral modification. (See *Weber v. Jorgensen* (1971) 16 Cal. App. 3d 74.) Whether a written contract has been modified by an executed oral agreement is a question of fact. (*Id.*) Here, defendants allege that they fully performed their obligations by depositing the \$300,000 in the bank controlled CD, and paying an additional \$161,400. (See DMF #3.)

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Case Name: *Martinez v. Nchekwube, et al.*

Case No.: 1-08-CV-103926

Defendant Emeka Nchekwube, M.D.'s (Defendant) motion for reconsideration of the prior order denying his motion for summary judgment/summary adjudication is GRANTED. The court has again reviewed the motion for summary judgment/summary adjudication filed by Defendant and considered it in light of the new circumstance of the passing of plaintiff Joseph P. Martinez (Plaintiff). However, the motion for summary judgment/summary adjudication is again DENIED.

A survival claim may be brought by the decedent's estate to recover pecuniary damages (e.g. medical expenses and lost earnings) incurred prior to death as well as punitive damages; however, the estate is not entitled to an award for decedent's pain, suffering, or disfigurement. (See *Code of Civil Procedure section 377.34; County of Los Angeles v. Sup. Ct.* (1999) 21 Cal.4th 292, 295-296.) Likewise, emotional distress damages also may not be recovered in a survival action, thus precluding an action by the decedent's estate for negligent or intentional infliction of emotional distress. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530.)

Defendant correctly points out that Plaintiff's estate cannot seek to recover any general damages Plaintiff suffered because of the alleged negligent conduct of Nchekwube now that he has died. However, Nchekwube is still not entitled to a grant of his motion for summary judgment/summary adjudication because his original motion for summary judgment did not present evidence precluding Plaintiff's ability to recover other pecuniary forms of damages which are still recoverable despite his death. Nchekwube's original motion did not address the issue of damages; rather, it sought summary judgment based on the statute of limitations and lack of breach of the standard of care. Accordingly, the new fact that Plaintiff has died does not affect the conclusions stated by the court its October 6, 2009 order denying Nchekwube's motion for summary judgment/summary adjudication.

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Case Name: *Mason v. DiGiorgio*

Case No. 1-09-CV-140446

Plaintiff's Motion to Compel answers and responses to Request for Admissions (Set One) and have those admissions deemed admitted is unopposed and GRANTED.

Objections are deemed waived.

Plaintiff's Motion for monetary sanctions is GRANTED in part. Defendant Peninsula Fireplace, Inc. shall pay \$290 to counsel for Plaintiff within 30 calendar days of order.

Plaintiff to prepare Order.

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