Dept. 1 Civil Law and Motion Tentative Rulings for Friday, April 28, 2023 at 8:30 a.m.

If you wish to appear for oral argument, you must so notify the Court at (209) 588-2316, and all other parties by 4:00 p.m. on the court day preceding the hearing, consistent with CRC 3.1308. The tentative ruling will become the ruling of the Court if notice for oral argument has not been provided.

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1. **CV63646** **Brimage and Pate v. Rawhide Investment and Foust**
   Hearing on: Motion to Set Aside Dismissal
   Moving Party: Co-plaintiff Pate
   Tentative Ruling: Grant, with conditions

This is a tort and contract action involving ownership of a mobile home. A dispute arose between three putative heirs after two of them claimed to have acquired a separate interest in the mobile home. Plaintiffs John and LaCreshia allege that their half-brother (Foust) sold his share of their mother's mobile home to them for $10,000, but instead of signing the papers to transfer the mobile home to plaintiffs, Foust (in late 2020) sold the mobile home to co-defendant Rawhide Mobile Home Park in Jamestown, where the mobile home was situated. Rawhide then moved to evict plaintiffs from the home (see CVL63541). That UD action was stayed, and eventually "consolidated for all purposes" with the pending civil action (see Minute Order dated 09/19/22). Plaintiff John was dismissed via Minute Order from the action on 04/07/22. The entire action was dismissed via Minute Order on 03/13/23 when the remaining plaintiff, LeCreshia, failed to appear for trial.

Before the Court this day is a motion by LaCreshia to vacate that order of dismissal. Defendants are opposed to the motion. Although LaCreshia has a poor record of procedural compliance in this case, and was actually on notice of the trial date, her explanation is sufficient to warrant the relief sought. Her motion to vacate the dismissal must be GRANTED for a variety of reasons. However, that reprieve comes with strict conditions.

Pursuant to CCP §581(b)(5), "an action may be dismissed by the court, without prejudice, when either party fails to appear on the trial and the other party appears and asks for dismissal." Neither the 03/13/23 Minute Order, nor defense counsel's declaration filed 04/17/23, specify that defendants asked for dismissal. Even if they had, the dismissal could only be "without" prejudice, which means that plaintiff would be free to refile – serving no upside to anyone. Moreover, dismissals "without" prejudice are discretionary and should only be imposed when no lesser alternatives exist.

Separately, pursuant to CCP §583.420(a)(2)(B) and CRC 3.1340, "the court may dismiss an action for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant." Although the action was commenced more than two years ago, and subject to dismissal with proper notice (CRC 3.1340(b)) if the CRC 3.1342(e) factors are satisfied (see *Corrinet v. Bardy* (2019) 35 Cal.App.5th 69, 71), a discretionary dismissal hereunder is also limited to one "without" prejudice. See CCP §581(g) and *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 214-215. This does not solve the problem either since there was no notice and no discussion at the time regarding the factors.

Finally, every trial court has the inherent authority to dismiss an action where the plaintiff's conduct is severe and deliberate, and the trial court concludes that no alternatives less severe than dismissal are available to remedy the situation. However, dismissal is always a drastic remedy to be employed only in the rarest of circumstances. See *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915; *Guardianship of A.H.* (2022) 83 Cal.App.5th 155, 160-161; *Huang v. Hanks* (2018) 23 Cal.App.5th 179, 181-182; *Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 Cal.App.4th 1265, 1271; *Pearlson v. Does 1 To 646* (1999) 76 Cal.App.4th 1005, 1009. Since public policy favors trial on the merits over procedural dismissals, and dismissals hereunder can be "with" or "without" prejudice (depending on the circumstances), any doubts must be resolved in favor of keeping the action active, but with conditions. See *Corrinet, supra; Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1283; *Yao v. Anaheim Eye Med. Group, Inc.* (1992) 10 Cal.App.4th 1024, 1031; *Hansen v. Snap-Tite, Inc.* (1972) 23 Cal.App.3d 208, 214.

Plaintiff's declaration is hard to follow. She explains that she was unable to appear at trial on 03/13/23 because she lives "in a mountainous region, which has unpaved access roads" just outside of Soulsbyville, and that poor weather made it impossible to get out of her home for the better part of a week. This Court understands that plaintiff lives somewhere on or near Lynn Lane. Weather reports in the region for that time period suggest that weather may indeed have been an issue, but nothing impaired plaintiff's ability (indeed her duty) to call this Court and advise that she was unable to leave her home to appear for trial. Nevertheless, plaintiff further explains that she called defense counsel's office the Friday prior to trial and attempted to inform counsel of her challenges associated with the weather. There appears to be some disconnect regarding what plaintiff and counsel's assistant Jolene spoke about, but no declaration from Jolene herself accompanies the opposition papers. Counsel's representation as to what Jolene said, or rather what she was "authorized" to say, is not terribly helpful. Thus, it is assumed for present purposes that plaintiff said something substantive to Jolene. At the very least, defense counsel had an ethical obligation to inform this Court on 03/13/23 that plaintiff made some effort to contact him on Friday.

Plaintiff's declaration raises a separate concern. Her official address of record is 8400 Old Melones Road Space 52 in Jamestown. That is where notices go, including the recent OSC re: sanctions. That is not Lynn Lane in Soulsbyville. Pursuant to CRC 2.200, "a self-represented party whose mailing address, telephone number, fax number, or e-mail address changes while an action is pending must serve on all parties and file a written notice of the change." This Court does not condone the shell game of a party's claiming ignorance about court mailings while at the same time secreting their mailing address or location. Moreover, if she is no longer residing in the mobile home, the UD action would by definition be rendered moot.

Based thereon, the order dismissing the action (which technically included the UD action consolidated therewith) is hereby set aside, and the motion is GRANTED. Both the civil action and the UD action are returned to the active calendar. Plaintiff is hereby ordered to confirm under penalty of perjury her current physical residence address using a proper form, and if she no longer lives in the mobile home that is the subject of this litigation, she shall so state so that the

possession element of the UD action can be resolved. The parties shall meet and confer on a new trial date, which shall be a firm date for all purposes. Since plaintiff failed to exchange any of the required trial documents (witness lists, exhibits, etc.), she is ordered to exchange a trial brief, proposed instructions, witness lists and any motions in limine (see TCSC Local Rules 2.10.0-2.12.0 and TUO-CV-175) within 5 days of today – regardless of when the new trial date shall be set. Although defense counsel is not entitled to reimbursement for trial preparation (as that would have been needed in any event), defendants are entitled to be reimbursed for fees and costs incurred in appearing on 03/13/23. Defense counsel to prepare, file and serve a declaration setting forth with precision those costs defendants are seeking reimbursement for. Trial setting conference is set for May 5, 2023, at 9:30 a.m., in Department 1.

2. CVL64166 **Discover Bank v. Mouser**
Hearing on: Motion to Enforce Settlement (§664.6)
Moving Party: Plaintiff
Tentative Ruling: Continue for Further Service

This is a limited jurisdiction civil collections action involving an unsecured credit card account. On or about 04/22/22, plaintiff and defendant entered into a written settlement agreement by which plaintiff agreed to accept $3,229.21 as payment in full for the accrued debt of $4,021.43, on condition that defendant pay the amount in full (segregated by 12 monthly installments) on or before 02/28/23. Defendant was entitled to one 10-day right to cure before a default could be declared. Defendant further agreed that in the case of default, plaintiff would be entitled to a judgment in the amount of the debt actually owed, plus court costs, minus any payments actually made in the interim. According to plaintiff, defendant made payments totaling $1,345.50 (through July of last year), but then stopped altogether with no apparent justification.

Before the Court this day is a motion by plaintiff to enforce the settlement agreement, including the entry of judgment consistent therewith, pursuant to CCP §664.6. Pursuant thereto, if parties to pending litigation agree to settle in a writing signed by the parties or their attorneys of record, the court may enter judgment pursuant to the terms of that settlement. This statute was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. Not every settlement agreement is amenable to enforcement by way of this summary proceeding; sometimes, the parties will need to amend the operative pleading or file a new lawsuit. See *Machado v. Myers* (2019) 39 Cal.App.5th 779, 790-791; *Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal.App.4th 1367, 1375; *Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 328-329; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809; *Robertson v. Chen* (1996) 44 Cal.App.4th 1290, 1293.

If the evidence presented is accepted as true, plaintiff is clearly entitled to the relief sought. However, this Court notes that both the Notice of Default and this pending Motion were provided to defense counsel only, not defendant herself. While this would ordinarily suffice, a settlement agreement can sometimes indicate the implied termination of the attorney-client

relationship. See, *e.g., Maxwell v. Cooltech, Inc.* (1997) 57 Cal.App.4th 629, 632; *Panattoni v. Superior Court* (1988) 203 Cal.App.3d 1092, 1097; *Mizrahi v. Miscione* (1967) 252 Cal.App.2d 673, 677. To complicate matters, the settlement agreement provides that notice of default was to be provided "to defendant *or* defendant's attorney" (emphasis added) but defense counsel did not sign the stipulation, further suggesting that she did not expressly agree to accept notice of default or continue representing defendant beyond the settlement. While one would certainly expect defense counsel to notify her client about this pending motion, that is not always the case in what amounts to a post-judgment enforcement effort. This is why the Legislature has declared that notices associated with efforts to collect a judgment must be delivered directly to the debtor, even if the debtor is known to be represented by counsel. See, e.g., CCP §684.020(a), and see *Alcalde v. NAC Real Estate Investments & Assignments, Inc*., 580 F.Supp.2d 969, 972 (C.D.Cal 2008). The same applies to collection efforts made years after litigation has ended.

Plaintiff is ordered to effectuate personal service or certified mail, return receipt upon defendant individually, and to file proof of service thereof, at least 10 days prior to the next hearing date, which shall be May 19, 2023 at 8:30 a.m.

3. CV64633 Weller Construction v. Russell Sigler, Inc.
Hearing on: CMC and Trial Setting
Moving Party: N/A
Tentative Ruling: N/A

This is a breach of contract action involving defendant's agreement to design, construct and maintain for plaintiff a 45-ton chiller (including the defective back-up pump installed therein). The parties are here today for a continued Case Management Conference and Trial Setting Conference. This action was commenced on 07/05/22, and fully at issue by 08/18/22. Plaintiff envisions a four-day jury trial. Defendant envisions a one-day bench trial. Since plaintiff has apparently not tendered the jury fee deposit, it would appear that the jury request has been waived/forfeited. See CCP §§ 631(b) and (f)(5); TCSC Local Rule 2.07.0. The parties report previous settlement efforts, to no avail. The parties were ordered to provide updated CMC statements. See Minute Order dated 01/27/23. Only plaintiff complied. See CRC 3.725. This Court previously indicated an intention to try this case before the end of November, 2023. Doing so falls within the fast-track requirements. See Govt. Code §68607; Standards of Judicial Administration §2.2; CRC 3.729; and TCSC Local Rule 2.06.0. This Court is tentatively setting a two-day, long-cause bench trial for 11/06/23 in Department 4, as Judge Seibert has disqualified himself based on his prior representation of Weller Construction. Parties to discuss this proposed trial date. If the tentative date does not work for the parties, they are free to select another date before 11/06/23 for the trial.