

## **Tentative Rulings –December 28, 2006**

**To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. Notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.**

### **Blim v. Tidball: 06CV4228**

#### ***Motion to Compel Further Responses to Request for Production of Documents, Form Interrogatories, and Special Interrogatories***

C.C.P. §2030.210 provides that a party may respond to an interrogatory in any of the following ways: an answer containing the information to be sought, an exercise of the party's right to produce writings, or an objection to the interrogatory.

C.C.P. §2030.220 provides:

(a) Each answer in a response to interrogatories shall be as complete and straightforward as the information reasonably available to the responding party permits. (b) If an interrogatory cannot be answered completely, it shall be answered to the extent possible. (c) If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party.

C.C.P. §2031.210 provides that a party may respond to a request for production of documents in one of the following ways: a statement that the party will comply with the particular demand for inspection and any other related activities, a representation that the party lacks the ability to comply with the demand for inspection of the particular item or category of item, or an objection to the particular demand.

Moreover,

A statement that the party to whom an inspection demand has been directed will comply with the particular demand shall state that the production, inspection, and related activity demanded will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production. (C.C.P. §2031.220.)

A representation of inability to comply with the particular demand for inspection shall affirm that a diligent search and a reasonable inquiry have been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the same and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of items. (C.C.P. §2031.240.)

A discovery response is insufficient if, in response to a specific inquiry, the responding party provides only a portion of the information sought. (Deyo v. Kilbourne (1978) 84 Cal.App.3d

771.) Moreover, a party cannot rely upon conclusory statements to evade explicit discovery requests. (id.)

Discovery responses must be complete and responsive. (Deyo, supra.) A party should not respond to a discovery request simply by referring to a document or pleading. (id.) Rather, if a document is essential to the response, the document should be identified and summarized, such that the answer is fully responsive to the question. (id.)

A party who receives a response to interrogatories or request for production of documents may move for further responses, should the initial responses be inadequate. (C.C.P. §2030.300; §2031.310) Such a motion may be made if the objections stated in the responses are without merit or too general. (C.C.P. §2030.300; §2031.310.)

**REQUEST FOR PRODUCTION OF DOCUMENTS:**

Plaintiff did not technically comply with the requirements of §§2031.220 and 2031.240, as he did not state that the documents produced were all of the documents in his possession, custody, and control and he failed to state that a diligent search and reasonable inquiry had been made into the discovery of responsive documents. Therefore, the motion to compel further responses to request for production of documents is granted in its entirety.

**FORM INTERROGATORIES:**

Plaintiff failed to sufficiently address all sub-parts of interrogatories 7.1, 7.2, 9.1, 10.1, 11.1, and 20.8. Moreover, as to interrogatory 20.8, Plaintiff failed to summarize the document referred to in the response. Plaintiff failed to provide the address of the health care provider in interrogatory 6.7 (a) and failed to provide the address of his destination in interrogatory 20.3. Thus, the motion to compel is granted as to said interrogatories or portions of interrogatories.

It appears that there is a typographical error in interrogatory 8.3. If there is an error, the plaintiff is ordered to correct the same.

Plaintiff must act with due diligence in responding to interrogatories. Therefore, Plaintiff is ordered to amend interrogatory 12.4 to reflect any investigation into the existence of any photographs taken by CSAA.

The motion is denied as to interrogatories 8.8, 12.1, 12.3, and 20.4.

**SPECIAL INTERROGATORIES:**

The motion is granted as to special interrogatory 1. Defendant made a sufficient showing that Ms. Blim may be a percipient witness regarding prior musculoskeletal injuries sustained by the plaintiff. Moreover, Defendant is not requesting actual employment records from Ms. Blim. Rather, he is requesting a name and business address.

Defendant is to prepare an order in compliance in Rule 391.

**In re Hemenway: 06CV4545**

***Petition for Transfer of Structured Settlement***

There is no tentative ruling in this matter. All parties are required to appear, either telephonically or via CourtCall.

**Thomas Hadley Construction, Inc. v. Larsen: 06CV4136**

***Defendants' Motion to Attorney Fees and Costs***

C.C.P. §1032 provides that the prevailing party in a matter may recover costs. A prevailing party includes a defendant in whose favor a dismissal is entered. (C.C.P. §1032.) As a dismissal was entered in favor of the defendants, they are entitled to costs.

C.C.P. §1033.5 outlines the items allowable and not allowable as costs. Recoverable costs include: filing, motion and jury fees; taking, videotaping, and transcribing necessary depositions, and travel expenses to attend depositions; service of process fees; premiums on necessary surety bonds; attorney fees, when authorized by contract, statute, or law; and court reporter fees. (C.C.P. §1033.5.)

Putting aside the issue of attorney fees, the defendants are entitled to the following costs: filing and motion fees, \$400; deposition fees, \$1,553; service of process fees, \$95 (defendants failed to specify what the "other" SOP fees of \$15 was for); surety bond premiums, \$1,077; and recording fees, \$218.

Defendants admit that the contract in question does not provide for attorney fees. Rather, Defendants contend that they are entitled to attorney fees, pursuant to Civil Code §§3260 and 3260.1.

Civil Code §3260 provides, in pertinent part:

(b) The retention proceeds withheld from any payment by the owner from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section....(g) In the event that retention payments are not made within the time periods required by this section, the owner or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.

Retention payments are payments that relate to work already performed, which are not already paid; but, instead, are withheld until the completion of the entire project. (McAndrew v. Hazegh (2005) 128 Cal.App.4th 1563 (explaining that retention, for the purposes of §3260, means that the owner will hold back a percentage of the amounts due as a security for the contractor's full and complete performance).) Before the two-percent penalty or attorney fees may be recovered under §3260 (g), the contractor must establish that the owner being sued has actually withheld retention payments. (id.)

In their moving papers, the defendants admit that the instant dispute involves amounts that were not necessarily retention payments.

Moreover, attorney fees pursuant to Civil Code §3260 are only awarded in cases where the retention payments are not made within the required time periods, i.e. where a bona fide dispute does not exist. (Denver D. Darling, Inc. v. Controlled Environments Construction, Inc. (2001) 89 Cal.App.4th 1221 (adding that the two-percent penalty and attorney fee provisions are directed at the situation where the contractor withholds retention payments beyond the specified times and without cause).) In this instance, any withholding of funds was made because there was a bona fide dispute between the parties. For the defendants to allege otherwise would be admitting that they wrongfully withheld retention payments from the plaintiff.

Finally, if the legislature had intended to provide for the payment of attorney fees to the prevailing party in every instance where the contractor sued to collect unpaid amounts, it would not have used the limiting language of "retention payments."

Accordingly, the defendants are not entitled to attorney fees pursuant to Civil Code §3260.

Civil Code §3260.1 provides:

(a) This section is applicable with respect to all contracts entered into on or after January 1, 1992, relating to the construction of any private work of improvement. (b) Except as otherwise agreed in writing, the owner shall pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due thereunder as to which there is no good faith dispute between the parties. In the event of a dispute between the owner and the contractor, the owner may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. If any amount is wrongfully withheld in violation of this subdivision, the contractor shall be entitled to the penalty specified in subdivision (g) of Section 3260. (c) Nothing in this section shall be deemed to supersede any requirement of Section 3260 respecting the withholding of retention proceeds.

By the statutory language alone, §3260.1 does not support the award of attorney fees, even in a dispute over contractually agreed upon progress payments. §3260.1 only provides that the contractor is entitled to the penalty outlined in §3260. The only "penalty" portion of §3260 is the two-percent interest provision. Attorney fees are not part of the "penalty."

Moreover, §3260.1 states that only the contractor may recover the penalty outlined in §3260. This would mean that an owner would not be allowed to recover. One cannot presume that the legislature intended to favor contractors over owners.

Thus, the defendants are not entitled to attorney fees under §3260.1. As such, there is no authority for awarding the defendants attorney fees in this action.

As the defendants are not entitled to attorney fees in this action, the total costs recoverable are \$3,343.00.

Defendants to prepare an order in compliance with Rule 391.