

Tentative Rulings –November 9, 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.

Baseline Financial Services v. Daniel Johnson: 06CV4171

Plaintiff's Motion to Compel Responses to Form Interrogatories and Motion for Order Deeming Matters Admitted and for Monetary Sanctions

Plaintiff's Motion to Compel Responses to Form Interrogatories and Motion for Order Deeming Matters Admitted are granted.

Upon a failure to make a timely response to interrogatories, the propounding party may move the court for an order compelling a response. (C.C.P. §§ 2030.290, subd. (b).) The failure to serve a timely response waives any objection to the interrogatories, including those based upon privilege and work product doctrine. (C.C.P. §§ 2030.290, subd. (a).) The court may only grant relief from the waiver of objections upon a showing that the responding party has subsequently provided appropriate responses and the party's failure to make a timely response was based upon mistake, inadvertence, or excusable neglect. (C.C.P. §§ 2030.290, subd. (a).)

The court shall impose a monetary sanction against any party who unsuccessfully makes or opposes a motion to compel a response to discovery, unless the court finds that the party subject to the sanction acted with substantial justification or other circumstances exist to make the imposition of sanctions unjust. (C.C.P. §§ 2030.290, subd. (c).) In addition, the court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed. (Cal. Rules of Ct., Rule 341, subd. (a).)

Moreover, upon failure to make a timely responses to request for admissions, the propounding party may move for an order that the genuineness of documents and the truth of any of the matters specified in the request be deemed admitted. (C.C.P. §2033.280, subd. (b).) The court shall make such an order, unless it finds that the person who failed to serve the timely response, before the time for the hearing on the motion, serves a response in substantial compliance with the discovery provisions. (C.C.P. §2033.280, subd. (c).) The person who fails to make a timely response to the request for admission also waives all objections to said requests. (C.C.P. §2033.280, subd. (a).)

The court is required to impose monetary sanctions against any party whose failure to serve a timely response to requests for admissions necessitates a motion to compel. (C.C.P. §2033.280, subd. (c).)

As the defendant failed to submit timely verified responses to form interrogatories and request for admissions, the motion is hereby granted. The defendant is ordered to submit verified responses to form interrogatories to the plaintiff within 20 days of the date of the instant order. In addition, the truth of the matters and genuineness of the documents specified in the Request for Admissions are deemed admitted for the purposes of this action.

Plaintiff is awarded sanctions in the amount of \$1,052.00.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.

Mizrahi v. Gibbs: 05CV4007

Defendant's Motion to Expunge Lis Pendens

Pursuant to Plaintiff's request, as noted in the supplemental declaration in support of motion to be relieved as counsel, this motion is continued to December 14, 2006 at 3:15 p.m. in Department 2.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.

Qualls v. Clegg: 06CV4128

Plaintiff's Motion to Compel Discovery and Defendants' Demurrer to Complaint

These matters have been dropped from calendar, as a result of the November 2, 2006 hearing.

Mendez v. Jackson Rancheria Casino: 06CV4306

Defendants' Motion to Strike Untimely First Amended Complaint & Demurrer:

1. Motion to Strike:

C.C.P. §581 (f)(2) provides that a court may dismiss a complaint against a defendant when a demurrer is sustained with leave to amend and the plaintiff fails to amend within the allowed time and either party moves for dismissal.

There is no prejudice in allowing the late filing of the Amended Complaint. The plaintiff gave the defendants an extension of time in which to file a response to the amended pleading. The defendants were able to do so in a timely manner.

Therefore, in the interests of justice, the Motion to Strike the First Amended Complaint is denied.

2. Demurrer:

a. Judicial Notice:

The Court grants each of the defendants' requests for Judicial Notice.

Moreover, on its own motion, the Court hereby takes judicial notice of the Tribal Labor Relations Ordinance, which was judicially noticed in connection with the original demurrer.

b. Merits:

Demurrers are used to challenge defects that occur on the face of the complaint or from matters that may be judicially noticed. (Blank v. Kirwan (1985) 39 Cal. 3d 311, 318.) The face of the complaint includes those matters shown in exhibits attached to the complaint, which are incorporated by reference. (Frantz v. Blackwell (1987) 189 Cal.App.3d 91, 94.)

For the purposes of testing a cause of action, a demurrer admits the truth of all material facts properly pleaded. (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967.) The issue upon demurrer is whether the complaint states a valid cause of action, not whether the facts alleged therein are true. Therefore, no matter how unlikely the facts are, the plaintiff's allegations must be accepted as true for the purposes of ruling on a demurrer. (Del E. Webb v. Structural Materials Co. (1981) 123 Cal.App.3d

593, 604.) However, the exception to this rule is that allegations in the complaint will not be taken as true if they are contradicted or inconsistent with facts judicially noticed by the court. (*ibid.*)

The complaint will be construed liberally with an eye to substantial justice between the parties. (C.C.P. §452.)

Defendants demur pursuant to C.C.P. §430.10 (a), which states, in pertinent part:

The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:(a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.

This basis for a demurrer is a challenge to "the court's power to grant relief. The demurrer lies only where it appears on the face of the complaint that the court is not competent to act." (Rutter, Civ. Proc. Before Trial, §7:64 [emphasis in original]."

Tribal sovereign immunity provides immunity from lawsuit. (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1189.) An Indian Tribe is only subject to suit if Congress has authorized the suit or the Tribe has waived immunity. (*id.* at 1191.) Absent a waiver of immunity, the courts do not have subject matter jurisdiction over any lawsuit against a Tribe. (*Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 181-182.)

Tribal immunity extends to the Tribe's commercial activities. (*ibid.*; see also *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 388.) Moreover, a tribal entity is treated as the tribe for immunity purposes (*Redding, supra* at 388 (noting that an Indian Casino has been determined to be entitled to immunity because of the importance of gaming in promoting self-determination, the close link between the tribe and the casino, and the existence of federal law promoting Indian gambling).) To relinquish its immunity, the Tribe's waiver must be clear and unequivocal. (*Big Valley, supra* at 1193.) Waivers are strictly construed. (*ibid.*; see also *id.* at 1194-1195 (stating that waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged beyond what the waiver language requires).) If the tribe has consented to any suit, any conditional limitations placed upon its consent must be strictly construed. (*Campo, supra*, at 183.) Sovereign immunity may not be waived by implication. (*Big Valley, supra*, at 1196.)

In considering whether there is a waiver of immunity upon demurrer, it is improper to consider evidence outside of the complaint (other than those documents subject to judicial notice). (*Big Valley, supra*, at 1190 (noting that if the defendants file a motion to dismiss, then the court may go beyond the pleadings and consider documentary evidence in determining whether there was a valid waiver).) Article IV, Section 2 of the Tribal Constitution provides, in pertinent part:

[T]he Tribal Council is authorized to negotiate waivers of sovereign immunity from unconsented lawsuit, but no such waiver shall be effective unless the intent to so waive immunity, and the extent to which it shall be waived, is clearly stated in writing and approved by the Tribal Council pursuant to a duly called meeting.

Paragraph 10.2 (g) of the Gaming Compact provides:

Adopt and comply with standards no less stringent than federal laws and state laws forbidding employers generally from discriminating in the employment of persons to work for the Gaming Operation or in the Gaming Facility on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability; provided that nothing herein shall preclude the tribe from giving a preference in employment to Indians, pursuant to a duly adopted tribal ordinance.

Paragraph 10.2.1 of the Gaming Compact provides:

The Tribe shall adopt and, not later than 30 days after the effective date of this Compact, shall make available on request the standards described in subdivisions (a)-(c) and (e)-(k) of Section 10.2 to which the Gaming Operation is held. In the absence of a promulgated tribal standard in respect to a matter identified in those subdivisions, or the express adoption of an applicable federal statute or regulation in lieu of tribal standard in respect to any such matter, the applicable state statute or regulation shall be deemed to have been adopted by the Tribe as the applicable standard.

The Compact contains a limited waiver of immunity in Section 10.2 (d) in cases of patron injury claims and a limited waiver in Section 10.3 in connection with Unemployment Compensation Claims. Neither waiver applies to employee claims or to contract claims.

Resolution 2000-04 was adopted under §10 of the Compact and provides that Ordinance 2000-01 establishes the minimum standards for public health and safety at the Jackson Rancheria Casino. 2000-01 generally provides that the defendants shall comply with standards no less stringent than federal laws and state laws forbidding discrimination in employment.

Resolution 2006-07 was adopted on October 2, 2006, after the instant litigation commenced. It provides, essentially, that no tribal law or document provides for the resolution of employment claims in the Superior Court, that the tribe has not adopted FEHA as its governing law or conferred jurisdiction on any Superior Court, and that the Tribe does not waive sovereign immunity with respect to violation of standards regarding discrimination in employment. However, the Court finds that it would be inappropriate to consider said Ordinance, which was enacted after the instant litigation commenced.

Pursuant to §10.7 of the Compact, the defendants adopted the Tribal Labor Relations Ordinance on September 25, 1999. This Ordinance specifies the procedure required to resolve labor disputes, which involves adjudicating the claim within the Tribal Labor Panel. §13, (d) of said Ordinance provides, in pertinent part:

Under the third level of binding dispute resolution, either party may seek a motion to compel arbitration or a motion to confirm an arbitration award in Tribal Court, which may be appealed to federal court. If the Tribal Court does not render its decision within 90 days, or in the event there is no Tribal Court, the matter may proceed directly to federal court. In the event the federal court declines jurisdiction, the tribe agrees to a limited waiver of its sovereign immunity for the sole purpose of compelling arbitration or confirming an arbitration award issued pursuant to the Ordinance in the appropriate state superior court.

Plaintiff pled that she believes that the defendants have adopted an ordinance allowing them to be sued in California State Court or adopting FEHA, which would confer jurisdiction on the state court. However, the Tribal Constitution demonstrates that all waivers of sovereign immunity must be in writing and explicit. Resolution 2000-04 states that, pursuant to §10 of the Compact, the Tribe will comply with standards no less stringent than state and federal law in regards to matters of discrimination. There is no mention of waiver of immunity or any indication that the tribe adopted FEHA.

Plaintiff next pled that, pursuant to §10.7, the Tribe enacted an Ordinance allowing suit in California State Court for matters involving contractual disputes between the Tribe and employees. However, the Ordinance enacted under §10.7 contains a very limited waiver of immunity to allow suits in state court to either compel arbitration or to confirm an arbitration award. This lawsuit does not fall within one of those limited categories.

Although the allegations of the complaint are taken as true for the purposes of a demurrer, they are not when the allegations are contradicted by matters of which judicial notice is taken.

Based upon the foregoing the plaintiff has failed to amend her complaint to properly plead jurisdiction and, therefore, the demurrer is sustained without leave to amend. Defendants to prepare an order in compliance with Rule 391.