

# GUARANTY HOLDINGS OF CALIFORNIA INC. v. CATTANEO

20CV44713

## DEFENDANT'S DEMURRER TO and MOTION TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT

Plaintiff is seeking damages for harm to real property, claiming that defendant has removed and is withholding fixtures.

Two matters are before the court, a Demurrer and a Motion to Strike, both addressing the First Amended Complaint. However, the moving papers fail to include the language required by Local Rule 3.3.7.

All matters noticed for the Law & Motion calendar shall include the following language in the notice:

3.3.7 Tentative Rulings (Repealed Eff. 7/1/06; As amended 1/1/18) All parties appearing on the Law and Motion calendar shall utilize the tentative ruling system. Tentative Rulings are available by 2:00 p.m. on the court day preceding the scheduled hearing and can be accessed either through the court's website or by telephoning 209-754-6285. The tentative ruling shall become the ruling of the court, unless a party desiring to be heard so advises the Court no later than 4:00 p.m. on the court day preceding the hearing including advising that all other sides have been notified of the intention to appear by calling 209-754-6285. Where appearance has been requested or invited by the Court, all argument and evidence is limited pursuant to Local Rule 3.3. All matters noticed for the Law & Motion calendar shall include the following language in the notice:

**Pursuant to Local Rule 3.3.7, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m. the court day before the hearing. The complete text of the tentative ruling may be accessed on the Court's website or by calling 209-754-6285 and listening to the recorded tentative ruling. If you do not call all other parties and the Court by 4:00 p.m. the court day preceding the hearing, no hearing will be held and the tentative ruling shall become the ruling of the court. [Emphasis in original.]**

Failure to include this language in the notice may be a basis for the Court to deny the motion.

Based on the foregoing, the demurrer and the motion are **DENIED**, without prejudice to renew, complying with Rule 3.3.7, if otherwise allowed by law.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal Order is required.

# KIRK v. KIRK

22CV46213

## EXECUTOR OF (DEFENDANT) ESTATE'S MOTION FOR SUBSTITUTION OF PARTY

This case involves partition and accounting of real property between two 50% owners.

Defendant William Gary Kirk, Jr. has passed away. The motion before the court seeks to substitute the estate's executor, Angela Lynn Kirk, for decedent. However, the moving papers fail to include the language required by Local Rule 3.3.7.

All matters noticed for the Law & Motion calendar shall include the following language in the notice:

3.3.7 Tentative Rulings (Repealed Eff. 7/1/06; As amended 1/1/18) All parties appearing on the Law and Motion calendar shall utilize the tentative ruling system. Tentative Rulings are available by 2:00 p.m. on the court day preceding the scheduled hearing and can be accessed either through the court's website or by telephoning 209-754-6285. The tentative ruling shall become the ruling of the court, unless a party desiring to be heard so advises the Court no later than 4:00 p.m. on the court day preceding the hearing including advising that all other sides have been notified of the intention to appear by calling 209-754-6285. Where appearance has been requested or invited by the Court, all argument and evidence is limited pursuant to Local Rule 3.3. All matters noticed for the Law & Motion calendar shall include the following language in the notice:

**Pursuant to Local Rule 3.3.7, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m. the court day before the hearing. The complete text of the tentative ruling may be accessed on the Court's website or by calling 209-754-6285 and listening to the recorded tentative ruling. If you do not call all other parties and the Court by 4:00 p.m. the court day preceding the hearing, no hearing will be held and the tentative ruling shall become the ruling of the court. [Emphasis in original.]**

Failure to include this language in the notice may be a basis for the Court to deny the motion.

In the instant matter, the Court finds that considerations exist to excuse non-compliance with Local Rule 3.3.7 in the interests of judicial economy. (Plaintiff is cautioned this is a rare instance where the Court does not deny a pending motion for the failure to include the mandated language which will be strictly required in future Law and Motion matters).

Plaintiff has remedied the status of the parties by filing an amended complaint substituting the executor for the decedent. Therefore, this motion is **DENIED** as moot.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal Order is required.

# TANNER v. HATCHER

22CV46354

## DEFENDANT'S MOTION TO TAX COSTS

Plaintiffs submitted a Memorandum of Costs after trial. Defendant has brought this motion to tax costs. Plaintiffs made a Code of Civil Procedure (CCP) Section 998 Offer to Compromise for \$25,000 on March 17, 2023, but It was not accepted. After trial, the court ordered Judgment in favor of plaintiffs for \$30,074.00, i.e., an amount greater than plaintiffs' pre-trial offer. The submitted Memorandum of Costs included costs associated with John R. Gibson (expert) amounting to \$2,525.63 and post-CCP § 998 offer interest of \$2,527.40.

The California Supreme Court has established that a plaintiff can recover post-offer costs for an expert witness if three conditions are met: (1) the plaintiff makes an offer to compromise that meets the statutory time and content requirements; (2) the defendant does not accept the offer; and (3) the defendant does not obtain a result in the action that is more favorable than the offer (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4<sup>th</sup> 1014, 1020). In assessing these criteria, the recovery of expert fees depends on the reasonableness of the offer, the outcome compared to the offer, and the court's discretion. (*Id.*; *Gonzalez v. Lew* (2018) 20 Cal.App.5<sup>th</sup> 155, 160)

The losing party cannot simply argue that the submitted costs were not necessary or reasonable. Rather, the losing party must present evidence to prove that the claimed costs are not recoverable (*Seever v. Copley Press, Inc.* (2006) 141 Cal. App. 4<sup>th</sup> 1550, 1557). The defendant has not met the burden to establish that the costs are not chargeable or are unreasonable.

In response to defendant's Motion to Tax Costs, a Declaration of John R. Gibson was submitted, detailing the time the expert witness spent after the expiration of the CCP § 998. No objection to the validity or reasonableness of CCP § 998 offer was made, the services listed in the Declaration of John R. Gibson are reasonable, they relate to post-offer tasks, and were necessary for the trial.

Defendant's Motion to Tax Costs is **DENIED**.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiffs to prepare a formal Judgment in conformity with this Ruling.

# WELLS FARGO BANK, N.A. v. KENDRICK

23CF14227

## PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for Summary Judgment. There is no opposition to the motion. The moving party to be granted summary judgment must establish that there is no triable issue of fact and it is entitled to judgment. (*Harman v. Mono General Hospital* (1982) 131 Cal.App.3<sup>rd</sup> 607, 613.)

Upon reviewing the Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment (Separate Statement) multiple references to supporting evidence for each Cause of Action are present. The plaintiff omitted the Complaint's Second Cause of Action for Breach of Contract (Implied) in the description and numbering of Causes of Action, and then listed the four Common Counts in its Separate Statement as the Second through Fifth Cause of Action. The Court will refer to the causes of action as they are pled in the Complaint.

- First Cause of Action – Breach of Written Contract. Plaintiff cites its Qualified Witness Declaration, Declaration of counsel, and Requests for Admission to support fourteen (14) specific material facts that establish the elements of Breach of Written Contract Cause of Action, that is: defendant applied for credit card; card issued with Customer Agreement; card used; payments and charges were made; monthly statements sent; no billing disputes made; last payment made June 20, 2022; and balance due \$24,615.60.
- Second Cause of Action – Breach of Contract (Implied). Omitted from Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment.
- Third Cause of Action for Money Lent. Plaintiff cites its Qualified Witness Declaration, Declaration of counsel, and Requests for Admission to support seven (7) specific material facts that establish the elements of Money Lent Cause of Action, that is: plaintiff issued a credit card; pursuant to agreement charges reflected money lent by plaintiff; defendant promised to repay charges (loans); no challenges to credit card statements; balance due \$24,615.60.
- Fourth Cause of Action for Money Paid. Plaintiff cites its Qualified Witness Declaration, Declaration of counsel, and Requests for Admission to support six (6) specific material facts that establish the elements of Money Paid Cause of Action, that is: Plaintiff issued card; pursuant to agreement money was paid on behalf of defendant as charges made; defendant agreed to repay principal and

interest; account was used and balance incurred; no disputes; and unpaid balance due of \$24,615.60.

- Fifth Cause of Action for Open Book Account. Plaintiff cites its Qualified Witness Declaration, Declaration of counsel, and Requests for Admission to support nine (9) specific material facts that establish the elements of Open Book Account Cause of Action, that is: Plaintiff issued card; defendant was permitted to make and incur charges; defendant was to repay principal and interest; plaintiff kept written account of debits and credits; monthly account statements were sent to defendant; no disputes to account were made; account was used and balance incurred; no disputes; last payment was June 20, 2022; and unpaid balance due of \$24,615.60.
- Sixth Cause of Action for Account Stated. Plaintiff cites its Qualified Witness Declaration, Declaration of counsel, and Requests for Admission to support eight (8) specific material facts that establish the elements of Open Book Account Cause of Action, that is: defendant applied for and received credit card; defendant made charges and incurred a balance; defendant agreed to repay principal and interest; plaintiff kept a written account and sent monthly statements; no record of disputes on the account; and a balance of \$24,615.60 is owed.

The undisputed material facts justify summary judgment for five of the six Causes of Action as they establish the lack of a triable issue of fact; but the motion's Separate Statement does not address the Complaint's Second Cause of Action for Breach of Contract (Implied). This motion seeks Summary Judgment, not alternatively *and/or* Summary Adjudication. The court can only consider a motion for summary adjudication if the party who brings the motion for summary judgment duly notifies that they are seeking summary adjudication as an alternative to summary judgment, should the court deny summary judgment (*Gonzales v. Superior Court* (1987) 189 Cal. App.3<sup>rd</sup> 1542, 1545–1546; *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4<sup>th</sup> 97, 115.)

The case of *Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5<sup>th</sup> 1003, 1020, discusses the requirements of strict compliance with separate statement requirement of California Code of Civil Procedure (CCP) § 437c:

The statute governing the format of summary judgment moving papers, “is permissive, not mandatory: ‘[f]acts stated elsewhere [other than in the separate statement] *need not be* considered by the court ... .’ (*Fleet v. CBS, Inc.* (1996) 50 Cal.App.4<sup>th</sup> 1911, 1916, fn. 3.) Whether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion.” (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4<sup>th</sup> 308, 315–316.)

Although the Separate Statement is silent, the Second Cause of Action is addressed in the Points and Authorities. Additionally, in the five remaining causes, the unopposed facts supporting these various theories are addressed. The same elements also address the elements of a cause of action for breach of an implied contract.

In the Points and Authorities, plaintiff argues: "As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. . . While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." See

*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3<sup>rd</sup> 268, 275; see also *Friedman v. Friedman* (1993) 20 Cal.App.4<sup>th</sup> 876, 888." (Points and Authorities, page 6.)

The elements of a breach of contract cause of action are: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) breach; and (4) that the breach caused Plaintiff's harm. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3<sup>rd</sup> 887, 913.) Here, each of the five causes of action are premised on the contention that defendant failed to repay money advanced on the credit card and had not in any way engaged in informal resolution procedures in the Cardholder Agreement. These elements are set out for each of the causes of action, *inter alia*, and would apply to the Second Cause of Action as well.

Plaintiff's Motion for Summary Judgment is **GRANTED**.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff has filed a Proposed Order and a Proposed Judgment, both of which the Court intends to sign.