

ZOLLO v. GOODMAN

21CV45708

DEFENDANT'S MOTION TO STRIKE (1) PRAYER FOR PUNITIVE DAMAGES AND (2) IRRELEVANT AVERMENTS

This is a personal injury action arising out of a traffic accident between two motorcycles. Before the Court this day is a defense motion to strike both the prayer for punitive damages and a host of arguably irrelevant allegations. No opposition appears in the court file despite what appears to be valid proof of service of the motion on plaintiff. Defendant confirms the lack of receipt of any opposition to the motion.

Contrary to popular belief, there is no true heightened pleading requirement for a punitive damage prayer based on malice or oppression (as there is for fraud). However, conclusions of law without factual support are insufficient to withstand pleading attack. (See *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 650; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033.) In the context of a non-intentional motor vehicle accident, a prayer for punitive damages is presumptively improper, and must be supported by specific facts demonstrating "despicable" conduct. (See *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 936; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210.) Nothing of the sort is included in the operative pleading.

Pursuant to CCP §§ 435 and 436, a party may also move for an order striking from a pleading any irrelevant or improper matter. In general, a matter is considered irrelevant and/or improper if it is not essential to the statement of the claim or defense, or if it is neither pertinent to nor supported by an otherwise sufficient claim or defense. (See CCP §431.10(b) and (c).) A review of the operative pleading reveals copious references to investigations by law enforcement and insurance companies, none of which is appropriate to include in a complaint against the driver absent very specific limitations. (See Evid. Code §1152; Veh. Code §20013; in accord, *Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 205.)

Although defendant requests surgical excision of various pages/lines from the operative complaint – which is one way to address the concern – this Court notes that the entire operative complaint is uncertain because it lacks any precision regarding the incident itself (see CCP §§ 396b, 425.10), and the operative pleading does not comport with the formatting requirements of CRC 2.111(6) or 2.112. In such circumstances, a holistic attack by way of demurrer is also proper. (See *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1014.)

The motion to strike is GRANTED. Rather than the proposed surgical excision, plaintiff is ordered to file and serve within 10 days a First Amended Complaint deleting the

aforementioned defects. Although some flexibility is warranted given plaintiff's election to proceed *in pro per*, plaintiff may wish to use the Judicial Council forms to reduce the chances of a defective pleading.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendant to prepare a formal Order pursuant to CRC 3.1312 in conformity with this ruling.

BOREM v. GORE et al

21CV45752

DEFENDANT'S MOTION TO QUASH SERVICE OF THE SUMMONS

In this civil action, plaintiff contends that defendants shot and killed his dog, and then trespassed onto his property in an effort to remove the remains undetected. Before the Court this day is motion by defendant Ian Braman to quash plaintiff's service of the summons upon him. No opposition appears in the court file despite what appears to be valid proof of service of the motion on plaintiff.

Plaintiff filed a Proof of Service indicating that Ian Braman was personally served with the summons and complaint on 01/04/22 at 3:00 p.m. at his workplace. However, defendant advises that the service package was in fact left with a co-worker (Kathy Bandy) because defendant was on the phone. Defendant admits to receiving the service package within 10 minutes of its delivery to the office, and further admits that he went to greet the process server in the lobby, but that the process server had already left. (See Braman Decl Para 5-7.)

Personal service can be effectuated in any one of three ways: (1) handing the service package directly to the defendant; (2) leaving the service package in close proximity to a reluctant defendant; or (3) handing the service package to someone actually *or impliedly* authorized by the defendant to accept it. (See CCP §§ 415.10, 416.90; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1183; *Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1018.) Although defendant failed to negate Kathy's implied authority to accept the papers, it is plaintiff's burden to establish by a preponderance of the evidence that she indeed *had* ostensible authority. (See *Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1163.) Plaintiff's silence is interpreted as a tacit admission that the burden was not met, and that in this instance personal service did not in fact occur. Moreover, while defendant further addresses substituted service, that did not occur since plaintiff did not make good efforts to re-serve, and did not mail the service package. (See CCP §415.20; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.)

Even though plaintiff failed to perfect personal or substituted service on defendant, the motion to quash is nevertheless DENIED. When there is no default at stake, service of process should be liberally construed. (*Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778.) In this instance, the record shows colorable and reasonable compliance, with actual notice therefrom within 10 minutes (give or take). This is sufficient. (See *American Express Centurion Bank v. Zara* (2011) 199

Cal.App.4th 383, 391; *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 407-413.)
Defendant Braman shall file a responsive pleading to the complaint within 20 days.

The Clerk shall provide notice of this Ruling to the parties forthwith. Since plaintiff is in pro per, no further formal order shall be required.

DiamlerChrysler Financial v. Fibrow

CF7774

PLAINTIFF'S MOTION TO AMEND JUDGMENT

This is a collections case. Plaintiff secured a default judgment against defendant on 01/16/08 in the amount of \$20,828.27. The Judgment has since been renewed, and now stands at \$49,033.25. Before the Court this day is a motion by plaintiff-creditor to include various alias used by defendant-debtor.

Pursuant to Calaveras County Superior Court Local Rule 3.3.7 (adopted 1/1/18), "all matters noticed for the Law & Motion calendar **shall** include" specified language in the Notice of Motion, and "failure to include this language in the notice may be a basis for the Court to deny the motion." Based on plaintiff's failure to include the required language, the motion is DENIED, without prejudice to refile, to the extent it otherwise is timely and appropriate pursuant to relevant statutes. Should plaintiff elect to refile the motion, this Court will require – as it does with any post-judgment motion to amend – personal service upon the defendant-debtor.

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