Superior Court of California

County of Mendocino

Civil Law & Motion or Probate Tentative Ruling for the following:

Case Name: **KEEL , BRIAN P. VS CRITSER, MICHELLE M.**

Case Number: **23CV00795**

Hearing Date: **12/19/2025**

Prior to a Civil Law & Motion or Probate hearing, the Court may issue a tentative ruling (CRC 3.1308). After reviewing the issued tentative ruling, a party may request to present oral argument and must notify both opposing parties and the Court no later than 4:00 p.m. on the court day before the hearing of their intent to appear. Notice to the Court should be sent by e-mail to tr@mendocino.courts.ca.gov. The tentative ruling will become the ruling of the Court if oral argument has not been requested timely. The prevailing party must prepare and submit a proposed order unless an order that is consistent with the tentative decision has been previously lodged (Local Rule 2.6).

Tentative Ruling is as Follows:

Cross-Complainant's Renewed Motion to Amend Second Amended Cross-Complaint
TENTATIVE RULING: Deny the motion

Defendant/Cross-Complainant Michelle M. Critser ("cross-complainant" or "Critser") has filed a "renewed motion" which seeks to relitigate this Court's Order of September 5, 2025. That Order denied Critser the right to amend her Second Amended Cross-Complaint ("SACC") to assert four additional causes of action: fraud, constructive fraud, money had and received, and unjust enrichment.

Plaintiff/cross-defendant Brian P. Keel ("cross-defendant" or "Keel") opposes the motion on the grounds that: (1) Critser's motion violates Code of Civ. Proc. § 1008; (2) the purported "new" facts are neither new nor material; and (3) this court's three grounds for denying the motion in the first place are still applicable. Keel also challenges the four additional causes of action on substantive grounds.

This Court's Order of September 5, 2025, denied Critser's attempt to amend her cross-complaint for a third time on three grounds: (1) the case was set for trial on October 27, 2025; (2) there was an unreasonable delay in bringing the motion given that the discovery responses upon which it was based were obtained in April, 2025, but the motion was not filed until July 22, 2025; and (3) the allegations in the proposed Third Amended Cross-Complaint ("TACC") all arise out of the same factual scenario alleged in the prior cross-complaints to support claims for conversion and misuse of monies. Citing unreasonable delay and prejudice to the opposing party, this Court denied Critser's motion.

The trial date of October 27 was continued to late spring 2026 because Critser revealed in her pretrial conference materials her intention to call witnesses not previously disclosed. Keel had a right to obtain discovery regarding those witnesses and their anticipated testimony. Furthermore, Keel has filed significant motions in limine that required responses and consideration before proceeding to trial. Third, the court's

availability in late October did not allow for the trial to commence. Critser's suggestion that the trial should not have been continued or was for reasons unknown, is preposterous. Furthermore, the fact that the trial date has been continued to a date certain given counsels' and the court's availability does not support granting the motion now.

Code of Civ. Procedure § 576 provides:
Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order.

Code of Civ. Procedure § 1008 provides in pertinent part:

(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

(b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.
(e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

Civ. Code § 3517 provides:
No one can take advantage of their own wrong.

"The leading published opinions in this [First] Appellate District, all from Division Two, have expressly followed *Morite v, Superior Court* (1993) 19 Cal.App.4th 485 in affirming that section 1008 is both jurisdictional and the exclusive procedural means for renewal of a previously denied motion or reconsideration of an interim order. [Citations omitted.]" See, e.g., *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 384-385.

"Courts have construed section 1008 to require a party filing an application for reconsideration or a renewed application to show diligence with a satisfactory explanation for not having presented the new or different information earlier. [Citations omitted.]" *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.App.4th 830, 839.

"Regarding compliance with the Brown Act, Westlands' "'new facts'" were found to be 'events that occurred in October 2019, long before the hearing on the [December 2019 motion].' It was further held that Westlands failed 'to explain why it could not have presented these facts at the time of the original hearing, and it appears that it could have done so, since the evidence was apparently in its possession at that time.' [Citation omitted.*]" Westlands Water Dist. v. All Persons Interested* (2023) 95 Cal.App.5th 98, 123.

"[D]efendants may not make *seriatim* motions that seek the same relief; rather Defendants were obligated to put forth all of their reasons for an award of attorneys' fees when they made their initial request. That is the teaching of *Baldwin[, supra,* 59 Cal.App.4th 1192, 69 Cal.Rptr.2d 592]." *California Correctional Peace Officers Assn. v.* Virga (2010) 181 Cal.App.4th 30, 45.

Legal Analysis

Because cross-complainant failed to file the instant "renewed" motion to amend the SACC within 10 days after service upon the party of written notice of entry of the Order of September 5, 2025, it is governed by Code of Civ. Proc. § 1008(b). Therefore, cross-complainant must base her motion "upon new or different facts, circumstances, or law."

Here, however, cross-complainant relies largely upon facts which were known at the time the initial motion was filed and does not explain why these facts were not presented then. For example, cross-complaint knew at the time the initial motion was made the difficulty of sifting through voluminous discovery, of counsel's drafting a motion for summary judgment at the same time she was drafting this motion, and of counsel's working on a New York litigation while drafting the initial motion. There is no excuse provided for cross-complainant's failure to articulate these facts in the initial motion.

Indeed, cross-complainant alleges only two new facts: (1) the continuance of the trial to June 1, 2026 (discussed above), and (2) cross-defendant's use of the term "seasoned money" at his deposition. As to (2), no matter what happened to the money in the interim, it does not change any alleged harm to cross-complainant. It is a semantic difference, but not a distinction.

As cross-defendant contends, the three grounds upon which this court denied the initial motion still apply. First, to allow the continuance of the trial to June 1, 2026, to inure to cross-complainant's benefit would violate Civ. Code § 3517 and permit cross-complainant to benefit from her belated and wrongful disclosure of eight percipient witnesses for the first time in her pretrial statement.

Second, there is no reason to disturb this court's finding of unreasonable delay. The delay here of over three-months (from the time of receiving the discovery and the filing of the motion) is inexcusable. Such delay is, in itself, grounds for denying the motion. However, here there is also substantial prejudice to cross-defendant. Adding new causes of action, at this late date, when there was a firm trial date, pending motions in limine hearings in less than 30 days, would, as cross-defendant contends, require him to "recalibrate his entire case," when he had been relying on the SACC for two years. Accordingly, this court's finding of unreasonable delay in advancing these new causes of action is well-founded.

Third, the facts supporting the four causes of action cross-complainant seeks to add are basically the same as those supporting the existing two causes of action. The new causes of action still concern cross-defendant's alleged misuse of at least $1,000,000.00 of cross-complainant's funds. Thus, there is no reason why these new theories of liability could not have been advanced before.

Accordingly, cross-complainant's "renewed" motion should be denied.

In ruling on this motion, the court has considered all memoranda filed including the reply memorandum as well as the:

Declaration of Counsel in Support of Renewed Motion to Amend Second Amended Cross-Complaint filed on November 14, 2025 and

Declaration of Joseph E. Brighenti in Support of Plaintiff/Cross-Defendant Brian P. Keel's Opposition to Defendant/Cross-Complainant Michelle M. Critser's Renewed Motion to Amend Second Amended Cross-Complaint filed on December 1, 2025.

The objection filed by Keel concerning Critser's failure to follow the Rules of Court is over-ruled. Both parties are advised that future failures to comply with the Rules of Court including page limits will result in sanctions.