

**DEPARTMENT TEN
JUDGE MICHAEL MATTICE
707-207-7310
TENTATIVE RULINGS SCHEDULED FOR
MONDAY, JUNE 18, 2018**

**STAR-WEST SOLANO MALL, LLC v. LIN
Case No. FCS049194**

Demurrer and Motion to Strike First Amended Cross-Complaint filed by Cross-Defendants STAR-WEST SOLANO MALL, LLC, and STARWOOD RETAIL PARTNERS, LLC

TENTATIVE RULING

Demurrer

The court requires counsel to appear and be prepared to discuss whether DANGUI LIN, as Administrator of the ESTATE OF DAN SHENG LIN, may recover damages for the emotional distress DAN SHENG LIN allegedly sustained prior to his death, in view of the provisions of CCP Section 377.34, which preclude recovery of damages for pain and suffering by a decedent, and *Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 927, and *Ambruster v. Monument 3: Realty Fund VIII Ltd.* (N.D. Cal. 1997) 963 F. Supp. 862, which held that damages for pain and suffering include damages for emotional distress.

The court finds that the first amended cross-complaint ("FACC") fails to allege sufficient facts to state a cause of action for intentional infliction of emotional distress. The FACC does not allege facts indicating outrageous conduct on the part of cross-defendants. The allegations that cross-defendants provided false billing statements and failed to resolve the crime in the area are not sufficient in this regard. In addition, the FACC does not allege facts indicating that cross-defendants acted with intent to cause the decedent emotional distress or with reckless disregard for doing so.

The FACC also fails to allege sufficient facts to state a cause of action for negligent infliction of emotional distress. The FACC does not allege that cross-defendants had a duty to cross-complainant or that they breached this duty.

To the extent the cause of action for intentional infliction of emotional distress and the cause of action for negligent infliction of emotional distress are based on conduct of cross-defendants that allegedly occurred prior to November 14, 2015, they are barred by the two-year statute of limitations of CCP Section 335.1.

The FACC also fails to allege sufficient facts to state a cause of action for fraud. The law is well established that a cause of action for fraud must be alleged with particularity. (Witkin, 5 *California Pleading*, 5th ed., §711, p. 126). The FACC does not sufficiently allege how, when, where, to whom and by what means the alleged misrepresentations were made, as required. Nor does it allege facts indicating justifiable reliance by the decedent, as also required.

Motion to Strike

The court's ruling on the demurrer renders the motion to strike moot. However, the court notes that the FACC also does not allege sufficient facts to state a claim for punitive damages in that it does not allege facts indicating that cross-defendants acted with malice, oppression, or fraud toward the decedent, as required. The allegations of intentional infliction of emotional distress and fraud are not sufficient in this regard. In addition, cross-complainant has not established how the allegations in the FACC against Solano Mall, LP, are relevant to cross-complainant's claims.

N.P. v. KAISER FOUND. HOSP., ET AL. Case No. FCS050482

Special Motion to Strike

TENTATIVE RULING

Defendants' special motion to strike is granted.

Defendants have established that Plaintiff's entire action arises out of a third party's disclosure of information in response to subpoenas issued in the course of a criminal proceeding, which constitutes protected activity. (*Greka Integrated, Inc. v. Lowry* (2005) 133 Cal.App.4th 1572, 1580.) Accordingly, the burden has shifted to Plaintiff to establish that there is a reasonable probability that he will prevail on his claims. (Code Civ. Proc. § 425.16(b)(1); *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

Plaintiff has not met this burden. Defendants' conduct of producing records in response to subpoenas issued in the course of judicial proceedings is subject to the litigation privilege. (*Foothill Fed. Credit Union v. Superior Court* (2007) 155 Cal.App.4th 632, 635.) The Court also notes that Defendants did not disclose any protected or privileged information to anyone not authorized to receive them, having produced records directly to the criminal court with jurisdiction over the subpoenas, under seal, as required by Penal Code section 1326 and Evidence Code section 1560, and that it was the criminal court that ordered disclosure of the materials to criminal defense counsel. (Decl. of Gill, ¶¶ 7-8, 14.) The

issuance of a subpoena duces tecum in a criminal matter is purely a ministerial act and the person on whose behalf the subpoena was issued has no access to the records produced until there is a judicial determination that the person is legally entitled to receive the records. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074.) The function of the criminal court is to review the documents and determine which, if any, documents are material and should be disclosed. (*People v. Martinez* (2009) 47 Cal.4th 399, 453.) The criminal court was statutorily required to assert any privileges, on its own motion, on behalf of Plaintiff. (See, *People v. Pack* (1988) 201 Cal.App.3d 679, 685 [“the trial court was statutorily required to assert the psychotherapist-patient privilege, on its own motion, on behalf of” the victim].)

No fees or costs are awarded at this time. Although entitled to an award of attorneys’ fees and costs as a prevailing defendant, Defendants have not met their burden of providing the Court with a proper basis for determining the amount of fees and costs reasonably incurred for the motion. (*Christian Research Inst. v. Alnor* (2008) 165 Cal.App.4th 1315, 1320.) Defendants must provide evidence sufficient to allow the Court to determine the appropriate hours expended in making the motion, hourly rates, and whether the hours were reasonably expended. (*Ibid.*)