
PARTIES/ATTORNEYS

Plaintiff	Antonio Zaranda Salinas	Jonas Bailey The Bailey Law Firm
Defendants	Juana Velzaquez Moreno Iran Yadira Zaranda Velazquez Michelle Stephanie Zaranda Velazquez	Emilie de la Motte Carmel & Naccasha LLP

TENTATIVE RULING**1. Demurrer**

The court grants defendants' request for judicial notice.

The court sustains the demurrer with leave to amend. The factual allegations in the first amended complaint span from paragraph 9 to paragraph 41 (pages 3 to 10). Paragraph 11-14 and 15 – 28, and 30-40 include allegations that are made on information and belief. Many of the allegations made on information and belief are not supported by factual allegations that would lead plaintiff to believe they are true. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) Other allegations made on information and belief would seem to come within plaintiff's knowledge and therefore it is puzzling that they were pled on information and belief. This pleading failure permeates all other causes of action alleged in the FAC. The court will allow leave to amend on those causes of action as well.

The court also observes that the pleading at issue here fails to denominate in which capacity plaintiff pursues each cause of action (e.g., as successor in interest of decedent and/or on behalf of plaintiff individually). (See Calif. Rules Court, rule 2.112.) This causes uncertainty and the court therefore directs that in any amended pleading plaintiff identify as to each cause of action in which capacity he asserts it, e.g., as decedent's survivor in interest or on his own behalf individually.

2. Motion for Sanctions

Whether for lack of evidence or simply because it is premature, the motion is denied without prejudice to its renewal, when appropriate.

MEMORANDUM

According to the complaint, Jose Ramiro Saranda Alvarez (decedent) had at least three children: Armando Saranda Salinas, plaintiff Antonio Zaranda Salinas, and Maria Guadalupe Zaranda Salinas. Decedent owned real property at 615 W. Alvin Ave. in Santa Maria. Decedent's son, Armando, his wife, Juana Velazquez Moreno, and their daughters, Iran and Michelle¹, moved in with decedent at the property upon their arrival from Mexico. Decedent was retired at the time they moved in, had money in savings, and was receiving his social security and pension directly deposited into his bank account(s). Decedent did not know how to read or write and trusted his family for assistance with such activities. Armando and Juana gained increasing control of decedent's finances and Juana acted as his primary caregiver. On October 16, 2020, decedent signed a Grant Deed conveying the property to himself, Armando, Juana, Michelle, and Iran as joint tenants.

In November 2021, decedent tested positive for COVID. He was ultimately admitted to the hospital on December 4, 2021. At the same time, Armando and decedent's daughter, Maria, were admitted to the hospital. Both Armando and Maria passed away at the hospital. Decedent was discharged on January 5, 2022. On February 17, 2022, Juana and Iran presented him with a gift deed conveying his interest in the property to Iran, which decedent signed. On March 8, 2022, Iran executed and recorded an Affidavit Death of Joint Tenant to remove Armando's name from the property's title and recorded the gift deed conveying decedent's interest to her.

In March of 2022, decedent moved in with his son, Antonio (the plaintiff in this action). Decedent died on November 28, 2023.

On January 19, 2024, plaintiff filed a complaint against defendants Armando, Juana, Iran, and Michelle for the following causes of action: (1) intentional misrepresentation (2) negligent misrepresentation; (3) fraud – concealment; (4) constructive fraud; (5) breach of fiduciary duties; (6) elder abuse [financial, physical, neglect, abandonment, & isolation]; (7) conspiracy; (8) survival action; (9) intentional infliction of emotional distress; (10) negligent infliction of emotional distress; (11) quiet title; (12) cancellation of written instruments; (13) constructive trust. On May 28, 2024, he filed an amended complaint omitting Armando as a defendant.

On July 29, 2024, Juana and Iran filed a cross-complaint against Antonio and his wife, Teresa Hernandez Zaranda, alleging elder abuse for forcibly removing

¹ For ease of reference, the court refers to the parties by their first names. No disrespect is intended.

decedent from his home, isolating him, and manipulating him into believing they betrayed him.

Procedural History

The procedural history of this case has been previously recounted and therefore the court won't repeat it again. Suffice it to say that the court strikes the opposition to the demurrer filed on September 5, 2024, as well as the declaration of Antonio Zaranda Salinas filed on the same date. The court will instead consider the opposition to the demurrer filed on December 23, 2024 and reply filed on December 30, 2024.

The court will not strike the opposition to the sanctions motion, as sanctions are sought against not only plaintiff, but plaintiff's attorneys of record, Blanca Mejia and Vincent Martinez, and the law firm of Twitchell & Rice, LLP.

Demurrer

A demurrer tests the legal sufficiency of a complaint. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) A demurrer admits, provisionally for purposes of testing the pleading, all material facts properly pleaded. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1247.) A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) No other extrinsic evidence can be considered. (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881—error for court to consider facts asserted in memorandum supporting demurrer; *Afuso v. United States Fid. & Guar. Co., Inc.* (1985) 169 Cal.App.3d 859, 862 (disapproved on other grounds by *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287)—error for court to consider contents of release which was not part of any court record; *640 Tenth, LP v. Newsom* (2022) 78 Cal.App.5th 840, 852, fn. 7—court ignores “a three page ‘Introduction’ resembling closing argument in a jury trial” and looks only to “well-pleaded factual allegations and matters properly subject to judicial notice.”)

Defendants demur on grounds that plaintiff lacks standing to bring some of the causes of action in the FAC, and alternatively, on grounds that the causes of action alleged are both uncertain and fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10.)

1. Request for Judicial Notice

Defendants request the court take judicial notice of the following:

- Code of Civil Procedure section 335.1 (2-year statute of limitations) for infliction of emotional distress causes of action (Evid. Code § 451(a)); and
- That Plaintiff has filed no probate action on behalf of the estate of the decedent, Jose Ramiro Saranda Alvarez; and
- Plaintiff's original lawsuit in this suit was filed January 19, 2024.

There is no opposition to this request and the court thus grants it.

2. Standing

Defendants challenge the following causes of action to the extent they are brought as successor in interest to decedent on the basis that they must instead be brought by a personal representative: intentional misrepresentation (1st cause of action); negligent misrepresentation (2nd cause of action); Fraud – Concealment (3rd cause of action); Conspiracy (7th cause of action); Quiet Title (11th cause of action); and cancellation of written instrument (12th cause of action).

Plaintiff's complaint is alleged on behalf of himself and as successor in interest to decedent. (See First Amended Complaint (FAC), Opening Para.) The “survival statutes,” which authorize a “survivor claim,” “prevent the abatement of the decedent's cause of action and provide for its enforcement by the decedent's personal representative or successor in interest.” (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1553, citing Code of Civ. Proc. §§ 377.20, 377.30.) A “decedent's successor in interest” means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action. (Code Civ. Proc., § 377.11.) Plaintiff alleges that he is a successor in interest to his father. (See First Amended Complaint (FAC), Opening Para.)

Defendants argue that fraud causes of action must be pursued exclusively by decedent's personal representative, citing *Grattan v. Wiggins* (1863) 23 Cal. 16 and *Chard v. O'Connell* (1941) 48 Cal.App.2d 475. However, both cases predate the currently operative survivor statute. According to Witkin:

“Under former law, the fact that there had been no probate, and therefore no appointment of a personal representative, did not give the heirs capacity to sue. Their remedy was to institute probate proceedings and have an executor or administrator appointed. (*Wood v. American Nat. Bank* (1938) 24 C.A.2d 313, 322, 74 P.2d 1051; *Chard v. O'Connell* (1941) 48 C.A.2d 475, 477, 120 P.2d 125.) However, C.C.P. 377.30 provides that a decedent's successor in interest may commence a surviving cause of action if there is no personal representative. Likewise, C.C.P. 377.40 provides that a surviving cause of action may be asserted against the decedent's successor in interest “to the extent provided by

statute.” (See 14 Summary (11th), Wills and Probate, §§ 559, 561; 14 Summary (11th), Wills and Probate, §§ 559, 561.)”

(4 Witkin Cal. Proc. (6th Ed. 2024) Plead § 136.)

As plaintiff has alleged he is decedent’s successor in interest, he has standing to pursue the denominated causes of action.²

3. Fraud Based Causes of Action (1st – 3rd Causes of Action)

Defendants argue that plaintiff has failed to allege sufficient facts to support the fraud causes of action. The well-known elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. (*Ibid.*)

Here, defendants point out that the misrepresentation was made to decedent, and not to plaintiff. This alone does not undermine the cause of action. As noted, plaintiff is suing as successor in interest of the decedent. The fraud causes of action survived decedent and plaintiff “steps into [the decedent’s] position,” as to those causes of action. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 905.) Thus, to the extent plaintiff is alleging a cause of action on behalf of the decedent, this argument is not a basis on which to sustain the demurrer.

However, to the extent plaintiff purports to bring this action on his own behalf (see FAC, ¶¶ 49, 59, 68, 77, describing the conduct as responsible for plaintiff losing his inheritance), the fraud causes of action are lacking in factual support because the alleged misrepresentations were not made to him. (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.) Even so, a general demurrer does not lie to only part of a cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by general demurrer. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167 [disapproved on other grounds by *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 948, & fn. 12].)

² The court recognizes that defendants assert plaintiff is not a beneficiary under decedent’s will. (Decl. of de la Motte filed 8/1/24 in support of Motion for Sanctions, ¶ 9.) The will was not attached to that declaration. Even if it had been, it is not a fact that appears on the face of the pleading or by judicial notice and is thus inappropriate on demurrer. Whether the existence of beneficiaries undermines plaintiff’s successor in interest designation must be presented for a factual determination. (See Code Civ. Proc., § 377.11—“For the purposes of this chapter, “decedent’s successor in interest” means the beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.”)

Defendants argue that plaintiff's allegations are inappropriately asserted on "information and belief." A "[p]laintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true'" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) A pleading made on information and belief is insufficient if it "merely assert[s] the facts so alleged without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true.'" (*Id.* at p. 551, fn. 5.) Defendants assert that "Plaintiff alleges upon information and belief that Defendants obtained signatures on a Gift Deed and a Grant Deed through fraud and undue coercion. Yet, there are no facts upon which this information and belief could be formed."

The factual allegations in the FAC span from paragraph 9 to paragraph 41 (pages 3 to 10). Paragraph 11-14 and 15 – 28, and 30-40 include allegations that are made on information and belief. For example, plaintiff alleges: "Plaintiff is informed and believes and on that basis alleges that Decedent did not know he conveyed his fee simple interest of the Subject Property to Defendants and Mr. Salinas until on or about February 2022 after Mr. Salinas's death." (FAC, ¶ 23.) Plaintiff has not alleged any information that leads him to believe this allegation is true. Did decedent express his surprise directly to plaintiff? Also, in paragraph 24, it is alleged that "Plaintiff is informed and believes and on that basis alleges that up to his passing on November 28, 2023, Decedent was actively looking for a way to gain back his fee simple interest of the Subject Property." What information lead plaintiff to believe this allegation is true?

Moreover, some allegations seem to come within plaintiff's knowledge, and therefore it is puzzling that they were pled on "information and belief." For example, in paragraph 16, it is alleged that "Plaintiff is informed and believes and on that basis alleges that Decedent did not know how to read or write his entire life and trusted his family to aid him with the reading and writing of documents." Does plaintiff know whether his father could read or write—or how he managed to conduct business without that ability? If so, does this allegation need to be on information and belief?

The court accordingly sustains the demurrer on this point. While it is true that the doctrine of less particularity may be appropriate here where the alleged wrongdoer is likely to have withheld information (see *Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at 550), the pleading must do more than assert every allegation on information and belief, particularly as fraud is involved. Leave to amend is appropriate. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Bounds v. Sup.Ct. (KMA Group)* (2014) 229 Cal.App.4th 468, 484—court should grant leave to amend if in all probability plaintiff will cure defect; *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, 1073.) This pleading failure permeates all

other causes of action alleged in the FAC. The court will allow leave to amend on those causes of action as well.

The court also observes that the pleading at issue here fails to denominate in which capacity plaintiff pursues each cause of action (e.g., as successor in interest of decedent and/or on behalf of plaintiff individually). (See Calif. Rules Court, rule 2.112.) This causes uncertainty and the court therefore directs that in any amended pleading plaintiff identify as to each cause of action in which capacity he asserts it, e.g., as decedent's survivor in interest or on his own behalf individually.

The court will consider the demurrer to the remaining causes of action only to the extent they raise arguments other than those resolved above.

4. Breach of Fiduciary Duty (4th - 5th Causes of Action)

A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, breach of fiduciary duty, and damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) There are two kinds of fiduciary duties--those imposed by law and those undertaken by agreement. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 416.) "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221.) "The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another." (*Vai v. Bank of America* (1961) 56 Cal.2d 329, 338.) Here, the FAC alleges, albeit on information and belief, that Juana had control over the decedent's property. (FAC, ¶¶ 17, 19.)

Plaintiff's causes of action for constructive fraud (4th) and breach of fiduciary duty (5th) allege defendants owed a fiduciary duty to decedent and/or plaintiff. (FAC at ¶¶66-67; 81.) Defendants seem to argue that no such relationship can have been formed because the decedent and the defendants had a familial relationship. ("Defendants are not aware of any legal authority supporting a fiduciary duty [between extended family members]. Defendants indeed felt a family duty to respect, care, and love Decedent, but that does not make them fiduciaries. Plaintiff's position would render the term "fiduciary" meaningless and also ubiquitous to apply to all loved ones." [Moving Points and Authorities, p. 7, ll. 12-15].)

Defendants have the burden to support their argument. They have cited no cases that suggest that a family members' well-meaning intent to help somehow impacts the determination whether a fiduciary duty exists when he or she takes control over property. The court thus rejects this argument.

5. Intentional Infliction of Emotional Distress (9th Cause of Action) and Negligent Infliction of Emotional Distress (10th Cause of Action)

Negligent and intentional infliction of emotional distress each have a two-year statute of limitations. (Code Civ. Proc., § 335.1; *Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 852-853.) “A cause of action for intentional infliction of emotional distress accrues, and the statute of limitations begins to run, once the plaintiff suffers severe emotional distress as a result of outrageous conduct on the part of the defendant.” (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 889.) There are two categories of negligent infliction of emotional distress claims: direct and bystander claims. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1071.) For a direct negligent infliction of emotional distress claim and an intentional infliction of emotional distress claim, the statute of limitations accrues once the plaintiff suffers severe emotional distress as a result of the defendant's conduct. (See *Wassmann*, at pp. 852-853.) “[B]ystander liability is premised upon a defendant's violation of a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another.” (*Burgess v. Superior Court*, *supra*, 2 Cal.4th at pp. 1072-1073.) A bystander claim “accrues at the time of the injury-producing event.” (*Campanano v. California Medical Center* (1995) 38 Cal.App.4th 1322, 1328-1329.)

These causes of action appear to be pled both on behalf of plaintiff in his individual capacity and as successor in interest to decedent. Thus, the dates of accrual may vary depending on the conduct that is alleged to cause the distress. As alleged, the causes of action are uncertain and therefore the court cannot resolve the issue on this pleading. This argument can be raised again to any amended pleading, if warranted.

6. Ruling

The court sustains the demurrer with leave to amend as detailed above.

Sanctions

Defendants move for an order awarding their attorney's fees and costs incurred as a result of the actions of plaintiff Antonio Zaranda Salinas (“Plaintiff”) and attorneys of record Blanca Mejia and Vincent Martinez of Twitchell & Rice, LLP in filing the first amended complaint. This motion is made pursuant to Code of Civil Procedure sections 128.5 (against Plaintiff) and 128.7 (against plaintiff and counsel, Ms Mejia, Mr. Martinez, and the law firm of Twitchell & Rice LLP).

1. Legal Standards

Pursuant to Code of Civil Procedure § 128.7, subdivision (a), every pleading, petition, other similar paper must be signed by at least one attorney of record in the attorney's individual name or, if the party is not represented by an attorney, must be signed by the party and an attorney or unrepresented party who presents a pleading, motion or similar paper to the court makes an implied “certification” as to its legal and factual merit; and is subject to sanctions for violation of this certification.³ A violation of any of these certifications may give rise to sanctions. (See *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 976.)

The certification is designed to create an affirmative duty of investigation as to both law and fact, and thus to deter frivolous actions and costly meritless maneuvers. (See *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* (1991) 498 U.S. 533, 550 [interpreting Federal Rule 11].) Whether the certificate is violated is tested objectively: whether the paper filed is frivolous, legally unreasonable or without factual foundation. When determining whether sanctions should be imposed, the issue is not merely whether the party would prevail on the underlying factual or legal argument. Instead, courts should apply an objective test of reasonableness, including whether “any reasonable attorney would agree that [the claim] is totally and completely without merit.” (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 448.)

Pursuant to Code of Civil Procedure section 128.5, “A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (Code Civ. Proc. § 128.5, subd. (a).) “Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading.” (Code Civ. Proc., § 128.5, subd. (b)(1).) “Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party.” (Code Civ. Proc., § 128.5, subd. (b)(2).)

“Code of Civil Procedure section 128.7 imposes a lower threshold for sanctions than is required under Code of Civil Procedure section 128.5. This is because Code of Civil Procedure section 128.7 requires only that the conduct be

³ Code of Civil Procedure § 128.7 (b) provides:

“By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: (1) Proper purpose: It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) Legal merit: The claims, defenses, and other legal contentions stated in the pleading or other paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) Evidentiary support: The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”

‘objectively unreasonable,’ while Code of Civil Procedure section 128.5 also requires ‘a showing of subjective bad faith.’” (*Guillemín v. Stein* (2002) 104 Cal.App.4th 156, 167, internal citation omitted.)

2. Merits

Here, defendants argue that sanctions pursuant to section 128.7 are appropriate because the allegations in the FAC do not have evidentiary support. The original complaint was filed on January 19, 2024. Defendant’s counsel states that during meet and confer efforts subsequent to filing, she provided “ numerous, voluminous documents to Plaintiff’s counsel, attorney Blanca Mejia, which directly dispute her client’s claims in the lawsuit” (de la Motte Decl., ¶ 4) such as:

- Decedent’s will (proving he intended give Plaintiff nothing by way of an inheritance) [attached as Exhibit A to declaration of Iran Zaranda];
- Juana Velazquez’s bank statements (proving she paid for the mortgage payments);
- Evidence her clients paid the down payment for the residence;
- Records from an attorney and primary treating doctor proving decedent had capacity to sign the Gift Deed in February 2022; and
- U.S. permanent residency cards for Juana, and her late husband, Armando Saranda, explaining the timing and reasoning for the title transfer, to show title transfer of the subject property was not with malicious ill will to defraud Plaintiff of his inheritance, but was part of an agreed upon plan to transfer the home upon securing permanent residence.

(de la Motte Decl., ¶ 5.)⁴

The amended complaint was filed on May 28, 2024 after the receipt of this evidence.

With the exception of the will, none of this evidence was filed with the court. The court is at a loss as to how it can make a determination whether “any reasonable attorney would agree that [the claim] is totally and completely without merit” (*Peake, supra*, at 448) absent review of the evidence that was provided to plaintiff’s counsel. The motion is thus denied without prejudice to its renewal with appropriate evidence.

More importantly, defendants cite no cases that address how to assess a motion for sanctions based on lack of evidentiary support when the plaintiff has been given leave to amend the allegedly offending complaint. Arguably, an order

⁴ Attorney de la Motte catalogs the evidence provided since the filing of the FAC in her declaration at paragraph 11. That evidence is not relevant to the inquiry whether “any reasonable attorney would agree that [the claim] is totally and completely without merit” at the time the FAC was filed.

granting leave to amend reflects an implicit determination that the complaint is not necessarily frivolous or otherwise sanctionable because it is conceivable that a valid cause of action can be pleaded. Even if a plaintiff could not successfully defend against either demurrer or summary judgment, that alone is insufficient to support the sanction of dismissal. (*Kumar v. Ramsey* (2021) 71 Cal.App.5th 1110, 1121.) Stated another way, litigation is not frivolous because parties have disputed issues of fact. (Cf. *Peake v. Underwood, supra*, 227 Cal.App.4th at p. 448 [fact that a plaintiff could not overcome a demurrer or survive summary judgment does not warrant imposition of sanctions].)

Notably, the cases are replete with instances where a motion for sanctions has been granted after a demurrer has been sustained *without* leave to amend. In order for the court to do so without losing jurisdiction, the two-step procedure for filing must be handled carefully. Under section 128.7. The moving party first *serves* the sanctions motion on the offending party *without filing it*. The opposing party then has 21 days to withdraw the improper pleading and avoid sanctions (the so-called “safe harbor” waiting period). At the end of the waiting period, if the pleading is not withdrawn, the moving party may then file the motion. (Code Civ. Proc. § 128.7(c)(1); *Primo Hospitality Group, Inc. v. Haney* (2019) 37 Cal.App.5th 165, 173-174; *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698-699.) In *Banks v. Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 Cal.App.4th 949, the court held: “. . . an order sustaining a demurrer without leave to amend does not bar a motion for section 128.7 sanctions unless the order is reduced to a judgment before the sanctions motion is served and filed. [Citations.]” (*Banks, supra*, 97 Cal.App.4th at p. 954.)

In *Day v. Collingwood* (2006) 144 Cal.App.4th 1116, the court discussed the *Banks* holding, and stated: “*Banks* makes clear that a section 128.7 motion that is served in compliance with the section 128.7, subdivision (c)(1) safe harbor provision need not be filed until after a final ruling on a challenged pleading.” (*Day v. Collingwood, supra*, 144 Cal.App.4th at p. 1128, citing to *Banks, supra*, 97 Cal.App.4th at p. 954.) Accordingly, the *Day* court held that section 128.7 does not require that a motion for sanctions be filed before the court renders a dispositive ruling on the pleading as to which sanctions are sought. (*Day, supra*, 144 Cal.App.4th at pp. 1126-1129.)

Whether for lack of evidence or simply because it is premature, the court denies the motion for sanctions without prejudice. “Because our adversary system requires that attorneys and litigants be provided substantial breathing room to develop and assert factual and legal arguments, sanctions should not be routinely or easily awarded even for a claim that is arguably frivolous. Courts must carefully consider the circumstances before awarding sanctions.” (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 448.)

3. Ruling

The motion for sanctions is denied without prejudice to its renewal, if appropriate.