

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA

MINUTE ORDER

DATE: 05/19/2016

TIME: 03:00:00 PM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM:

CASE NO: **56-2016-00476697-CU-OE-VTA**

CASE TITLE: **Taitai vs City of Port Hueneme**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the Demurrer and Motion to Strike under submission, now rules as follows:

The Court overrules the demurrer to causes of action 1 and 2. The Court sustains the demurrer to causes of action 3 and 4 with leave to amend. The Court sustains the demurrer to causes of action 5 and 6 without leave to amend. Plaintiffs' first amended complaint is to be filed within 20 days.

Judicial Notice of Plaintiffs' Gov't Tort Claims:

A plaintiff seeking recovery for tort from a public entity must file a tort claim with the entity under the California Tort Claims Act ("CTCA"). This allows provides the public entity with an opportunity to evaluate the claim and make a determination as to whether it will pay on the claim. Failure to timely file a tort claim renders the complaint subject to demurrer. *V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509 (affirming trial court decision to sustain demurrer without leave to amend on the ground that V.C.'s failure to timely comply with the requirements of the Tort Claims Act barred her action). The court takes judicial notice of Taitai's tort claim of 5/5/15, Bear's tort claim of 5/11/15, and the joint amended tort claim that Taitai and Bear filed together on 5/18/15. The court also takes judicial notice of the supplemental materials provided by the City.

Are the causes of action concerning unemployment insurance subject to the Tort Claims Act?

As a threshold issue, Plaintiffs argue that their claims are not subject to the CTCA since *Government Code* section 905(j) expressly exempts from the CTCA any claims arising out of the *Unemployment Insurance Code*. Plaintiffs argue that even though they filed tort claims, they were not required to do so. *Government Code* section 905(j) provides that all claims for money or damages against a local public

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entity must be presented to that entity except for "claims arising under any provision of the Unemployment Insurance Code, including but not limited to, claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deduction from wages in excess of the amount prescribed."

The court concludes that exemption set forth in section 905(j) does not apply to this case. Ps are asking for "money" related to the Unemployment Insurance Code and therefore the gravamen of this case is not that Ps *were denied unemployment benefits*, but that their efforts to seek unemployment benefits led to retaliation/harassment by the City. Ps argue in their opposition that, in fact, they are seeking unemployment benefits as well. This is true but the City is not the entity that would pay on those benefits. Rather it would be the unemployment insurance fund. As stated by the court in Nasrawi v. Buck Consultants LLC (2014) 231 Cal.App.4th 328, 339:

"Generally, "the statutory exceptions specified in section 905 are given a strict construction." (Dalton v. East Bay Mun. Utility Dist. (1993) 18 Cal.App.4th 1566, 1573 [23 Cal. Rptr. 2d 230] (Dalton).) Courts have construed the section 905, subdivision (f) exception specifically as applying only "where an individual seeks money due under the terms of an existing pension system." (Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan (2007) 150 Cal.App.4th 1487, 1497 [59 Cal. Rptr. 3d 587], citing Dalton, supra, at p. 1574.) Where, as here, plaintiffs allege "tortious wrongdoing by [the] defendant[]," section 905, subdivision (f) is not implicated. (Dalton, supra, at p. 1574 [former utility district employees were required to file a claim pursuant to § 905 before asserting breach of fiduciary duty claim against district's retirement system].) Accordingly, plaintiffs were required to satisfy the claim presentation requirement."

By analogy, pension benefits are akin to unemployment benefits. The plaintiff in Nasarwi, similar to the Plaintiffs in our case, was not seeking payment of pension funds, but damages for wrongdoing with regard to the pension. The same could be said here: Ps seek damages for discrimination/harassment concerning their efforts to seek unemployment benefits. A tort claim was necessary because the claim against the City is not for the failure of the City pay unemployment benefits. The Court concludes that the Labor Code causes of action are not exempt from CTCA

Were Ps' Tort Claims Untimely?

Ds argue that the tort claims are not timely. In this case, Plaintiffs were allegedly told not to file for unemployment benefits in spring 2014. Their claims accrued when this interference allegedly took place. Plaintiffs did not file their government claim until May 5, 2015 (Taitai), May 11, 2015 (Bear), and May 18, 2015 (combined). This is well beyond the six month claim filing requirement. Ps argue in opposition that Ds have waived any timeliness defenses under the CTCA by failing to timely respond within 45 days of receipt of the government claims. Here, the City's response was dated June 30, 2015 and this is 47 days after the tort claims were presented. Ps also argue that the violations have been continuing, and they did not simply accrue in May 2014. Additionally, it is alleged that Taitai was discriminated against in May 2015 and he timely filed a tort claim in November 2015.

The parties would appear to be in agreement that the alleged wrongful conduct began in May 2014. The allegations in the complaint are a bit uncertain as to when exactly Taitai was first discriminated against, but paragraphs 41 and 42 suggest that it was mid-May 2014. The time period seems to be the same for Bear. (See ¶46 "leading up to the summer of 2014". The season appears to be May through

September. ¶28.) The time period for filing a tort claim is six months after injury to the person. Gov't Code §911.2. Clearly, the tort claims all filed in May 2015 were filed long after six months had elapsed. However, Defendants cannot raise the timeliness issue because the evidence shows that City did not respond within 45 days to the tort claim. Gov't Code §911.3(b).

Did Ds waive the timeliness argument?

A public entity cannot raise a timeliness defense if the entity fails to respond to the claim within 45 days. Gov't Code §911.3. Ps argue that Ds were not timely, as they failed to respond within that time period. Ds argue that the copy of the tort claim indicates 5-18-15. Ps have the better argument here. There is a proof of service attached to the amended claim that is submitted by Defendants as Exhibit 3 to their request for judicial notice. They say that the top of the document shows a receipt date of 5-18-15. That may be the case, but it is very difficult to make out the number on the copy; it is illegible. Even so, the better evidence is that the proof of service attached to the claim reflects overnight service on 5/14/15. Attached as Ex 5 to the Opposition is a tracking slip from Fed Ex that shows a delivery from P's firm on 5/15/15. The reference to the shipment is "Taitai/Bear." May 15th was a Friday. The City probably did not open the package and stamp it received until Monday May 18th, assuming that is what the stamp says. So, the evidence suggests that Ps are correct and that D's response on June 30, 2015 was, in fact, late. See Phillips v. Desert Hospital Dist. (1989) 49 Cal.3d 699, 701-02 ("These sections [910.8, 911 and 911.3] (1) require a public entity to notify a claimant of any insufficiencies of content or timeliness that prevent a claim as presented from satisfying the requirements of the act and (2) provide that failure to give such notice waives any defenses based on those insufficiencies."

Are there continuing violations?

The court is not convinced that the allegations in this case were continuing in nature. With respect to Taitai, he was allegedly discriminated against and told he would not be rehired if he tried to get unemployment. The fact that he may have had subsequent similar conversations with the City does not undercut that his action accrued at the time that of the initial conduct. With Bear, he promised to not seek unemployment insurance if he took the job. His alleged damages also accrued at the time he had to promise not to seek unemployment insurance in order to get the job.

Are the 5th and 6th causes of action within the scope of the Tort Claims?

Ps 5th and 6th causes of action are for extortion and civil rights violation. The allegations underlying these causes of action are the same as appear in the rest of the complaint: the City's conduct wrongfully deprived Ps of exercising their rights to unemployment insurance.

The general rule is that there must be a connection between the allegations in the tort claim and the causes of action in the complaint. Ds argue that the 5th and 6th COAs were not included in the tort claims submitted by Ps. This is true, see Ex 1-3 to Request for Judicial Notice; none of the three complaints attached to the tort claims submitted by Ps (Taitai, Bear and then Taitati/Bear combined), include these causes of action. However, the facts underlying these additional causes of action are the same as for the other causes of action. "If the claim gives adequate information for the public entity to investigate, additional detail and elaboration in the complaint is permitted." Stockett v. Association of California Water Agencies Joint Powers Ins. Authority (2004) 34 Cal.4th 441, 449:

"Only where there has been a "complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim," have courts generally found the complaint barred. (Blair v. Superior Court, supra, at p. 226, 267 Cal.Rptr. 13.) Where the complaint merely elaborates or adds further detail to a claim, but is

predicated on the same fundamental actions or failures to act by the defendants, courts have generally found the claim fairly reflects the facts pled in the complaint."

(*Stockett* at 447. See also *White v. Superior Court* (1990) 225 Cal.App.3d 1505, 1511 (court allowed plaintiff to add additional causes of action that were not included in the tort claim finding that her "complaint and her claim were predicated on the same fundamental facts-Officer Sanford's alleged mistreatment of plaintiff. The causes of action for negligent hiring, training, and retention and for failure to train, supervise, and discipline merely sought to show direct responsibility of San Francisco for Officer Sanford's conduct. Plaintiff did not shift the fundamental facts about her injury.") The Court concludes that the 5th and 6th causes of action are within the scope of the Tort Claim.

Are the 5th and 6th causes of action time barred?

Once a public entity rejects a claim, the claimant has six months to file suit. Gov't Code §945.6(a). Where the public entity's rejection is consistent with Gov't Code §913, the six month period starts at the time that notice was personally delivered or deposited in the mail. City employee Michelle Ascencion declares that she sent the rejection letter on 6/30/15. (Ascencion Dec at 4(d)). Technically, the rejection letter was not sent under Gov't Code §913. This is because the reason for the rejection was procedural: failure to timely file the tort claim. That process is described in section 911.3. Upon receipt of the §911.3 rejection, Plaintiffs should have sought leave to file a late claim pursuant to §911.4. Had the Plaintiffs gone through the process of applying for relief to file a late claim, and had the City decided to reject the claim, the City would have rejected the claim consistent with Gov't Code section 913, which advised the claimant of the six month period to file the action.

Ps filed their action on January 5, 2016; more than six months after the rejection letter. Ps take this issue on in their complaint, when they argue that they first sought relief in federal court and the pendency of that action tolled the time period that Ps had to file suit. This is an accurate statement of the law, and Ds do not contest it. Title 28 USC section 1367(d) tolls limitations periods "while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period."

Defendants argue that the federal complaint *did not include the 5th and 6th causes of action*; so there cannot be any tolling for *non-existent* causes of action. However, if the tort claim sufficiently puts the public entity on notice of the issues to investigate it does not matter that the claimant adjusts his pleading slightly during the litigation. Having concluded that the tort claims are broad enough to cover the 5th and 6th causes of action, the failure of Ps to meet the six month deadline of §945.6 is unimportant in this action.

Are Haas, Nichols and the City Immune from Liability?

Ds argue that City Manager Haas and Deputy City Manager Nichols are both immune from liability under Gov't Code §820.2 and so is the City. Immunity exists where the injury results from the employee's exercise of discretion as related to planning and policymaking. *Naswri v. Bank Consultants, LLC*, (2014) 231 Cal. App. 4th 328, 341. Ps argue in opposition that immunity cannot be resolved in the pleading stage of this action. The acts that the individual defendants took were retaliatory and discriminatory; they were not the exercise of discretion. Illegal retaliation and discrimination are not "policy decisions". *Taylor v. City of Los Angeles Dept of Water and Power*, (2006) 144 Cal. App. 4th 1216, 1238. Ds argue in reply that the issue of immunity must be resolved at the earliest stage of proceedings.

Ds are correct that immunity can be resolved at the pleading stages. They cite to *Catsouras v.*

Department of California Highway Patrol (2010) 181 Cal.App.4th 856. But that is only where the issue is one that can be determined as a matter of law without factual inquiry. *Id.* at 893. It is simply too early in this stage of the case to make the determination that Haas and Nichols were acting within their discretion. The City *might* have made a well-reasoned policy decision to no longer hire employees who would seek unemployment benefits. But, the complaint says otherwise. At ¶35, Ps allege that Haas and Nichols began a campaign of identifying lifeguard employees who had exercised their rights to unemployment and discriminated and harassed them. At ¶42, Ps allege that Nichols told Ps that collecting unemployment was a motivating factor in not being rehired. Moreover, the critical distinguishing factor with *Naswari* is that the decision to file litigation or not cannot reasonably be said to violate law.

1st and 2nd Causes of Action Against Haas and Nichols:
Labor Code section 98.6 provides in relevant part:

"(a) No person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights, which are under the jurisdiction of the Labor Commissioner, or has testified or is about to testify in any such proceeding or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her."

Labor Code section 96(k) provides:

"The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

.....
(k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises."

Section 98.6(b)(3) further provides that "[a]n employer who violates this section is liable for a civil penalty ." Defendants argue that the individual section 98.6 retaliation claims fail as a matter of law because that code section can only be used for a claim against the company-employer, not an individual supervisor. (Notice of Removal ¶ 15.) Defendant cites to Section 98.6(b)(1), (2), and (3), where it is stated that an "employer" is liable to an employee for violations of the provision. Defendants cite to no California cases interpreting § 98.6 in a way that supports their position, but instead cite only to the statute itself, emphasizing the word "employer." In similar circumstances, California district courts have relied on California cases interpreting other, similar non-Labor Code statutes. *See, e.g., Thompson v. Genon Energy Services, LLC*, 2013 WL 968224, at *4 (N.D.Cal.2013). In the absence of clear case law interpreting the issue of who may be held liable under section 98.6, in deciding whether Hass and Nichols are proper defendants, the Court declines to preclude individual liability at this stage of the case.

Have Ps alleged liability under Labor Code §98.6 and §1102.5?

In addition to the question of whether the individual defendants have liability under §98.6 and §1102.5, Defendants argue that Ps have not generally stated facts that support either cause of action. *Labor*

Code section 1102.5 provides in relevant part: "(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation." *Labor Code* sections 98.6 and 98.7 provide a private right of action that prohibits a person from discriminating against, retaliating against, or taking any adverse action against any employee or applicant for the exercise of any rights and protections afforded under the *Labor Code*, including, without limitation, the conduct described in *Labor Code* section 96(k). (See *Labor Code* §98.6(a).)

With respect to section 98.6, Ds argue that there is no authority that violations of the *Unemployment Insurance Code* can form the basis of a section 98.6 cause of action. Plaintiffs argue that section 98.6 specifically references *Labor Code* section 96(k) which prohibits an employer from taking adverse action against a person for "lawful conduct occurring during nonworking hours away from the employer's premises." Plaintiffs argue that the activity at issue in this case, to wit, seeking, applying for, and/or obtaining unemployment benefits, falls within the meaning of such lawful conduct. Plaintiffs rely on *Unemployment Insurance Code* section 1342 which provides that an employee cannot waive benefits under the *Unemployment Insurance Act*. *Unemployment Insurance Code* section 1342 provides in pertinent part: "Any waiver by any person of any benefit or right under this code is invalid." As recently stated by one court:

"Under California law, statutory rights may be waived only if "(1) the statute does not prohibit waiver, (2) the statute's public purpose is incidental to its primary purpose, and (3) the waiver does not seriously undermine any public purpose the statute was designed to serve." (Lanigan v. City of Los Angeles (2011) 199 Cal.App.4th 1020, 1030, 132 Cal.Rptr.3d 156, citing Sharon S. v. Superior Court (2003) 31 Cal.4th 417, 426, 2 Cal.Rptr.3d 699, 73 P.3d 554.) More specifically, many statutory rights designed for the protection of a class of employees, including the Labor Code rights identified in the TAC, are unwaivable. (Lab.Code, §§ 219, subd. (a), 1194, subd. (a).)"

(Pinela v. Neiman Marcus Grp., Inc., 238 Cal. App. 4th 227, 253, 190 Cal. Rptr. 3d 159, 181 (2015), reh'g denied (July 29, 2015), review denied (Sept. 16, 2015).)

Plaintiffs additionally allege that *Labor Code* sections 98.6, 232, 232.5, and section 1102.5 make it illegal for an employer to coerce employees and applicants to opt out of the mandatory, unwaivable unemployment insurance system through threats and termination. Plaintiffs have persuaded the Court that causes of action one and two are adequately plead and are not subject to demurrer. As such, the demurrer to causes of action one and two are overruled.

3rd and 4th COAs against Haas and Nichols Fail to State Facts

Ds argue that Plaintiffs cannot maintain a cause of action for intentionally and negligently interfering with the existing economic relationship between Ps and EDD. According to Defendants, such claims cannot rest on disruptions of relationships with a governmental entity. The economic relationship only extends to commercial dealings, not expectancies relating to governmental services. (See, *Blank v. Kirwan*, supra, 39 Cal. 3d at p. 330 ["We also refused to extend the tort to protect expectancies beyond those involved in ordinary commercial dealings -- a person's expectancy in the outcome of a government licensing proceeding is not protected against outside interference."].) The California Supreme Court elaborated on this issue in a later decision:

"There were two reasons in *Blank* why plaintiff failed to state a cause of action. First, the requisite

relationship with third persons involved as yet unknown or nonexistent patrons; **the relationship between the defendant city and plaintiff could not be characterized as an economic one.** "Second, even if the relationship between plaintiff and the city could be so characterized, it would make little difference. The tort has traditionally protected the expectancies involved in ordinary commercial dealings -- not the 'expectancies,' whatever they may be, involved in the governmental licensing process. (See Prosser & Keeton, [supra,] p. 1006.) Plaintiff does not attempt to justify such an expansion of the tort. Nor would he likely have been successful if he had." (39 Cal.3d at p. 330.) Thus, the plaintiff in Blank failed to show any real expectation of economic advantage because the city council's discretion to grant or deny applications for a poker club license was broad and negated any expectancy as a matter of law. (*Id.*, at pp. 330-331.)"

(*Youst v. Longo* (1987) 43 Cal. 3d 64, 75, emphasis added.)

There are no allegations that the City refused to provide paperwork to EDD or otherwise actually interfered with Ps applying for unemployment benefits with EDD. It is clear from the complaint that before each season commenced applicants had to submit paperwork with the City to resume their work as lifeguards. (§39). It is clear throughout the complaint that the lifeguards were going to "resume" their work with the City. (§§39 41, 42). This Court has doubts about whether there are sufficient allegations to establish the requisite "commercial dealing" that appears to be required by *Blank* and *Youst*.

Another issue of concern for the Court is whether at the time of the alleged conduct by Defendants, there was an "existing relationship" between Plaintiffs and EDD. As summarized by the court in *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507: "*These two decisions, Blank and Youst support the view that the interference tort applies to interference with existing noncontractual relations which hold the promise of future economic advantage. In other words, it protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise*" (*Id.* at p. 524.) The Court in *Westside Center, supra*, concluded that "a defendant's tortious conduct must have interfered with a specific existing relationship, not simply with the formation of one in the future." (*Id.* at p. 525.) In doing so, the court noted that "These requirements presuppose the relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise" (*Id.* at p. 526). As with the "commercial dealings" requirement, the Court has doubts about whether Plaintiffs can sufficiently plead the requisite "existing relationship" between Plaintiffs and EDD but will afford Plaintiffs an opportunity to do so. Therefore, the demurrers to the third and fourth causes of action are sustained with leave to amend.

Bear's 5th COA for Extortion Fails to State Facts -

In *Malin v. Singer* (2013) 217 Cal.App.4th 1283, the Court summarized the elements of extortion as "*the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear*" (Pen. Code, § 518.) *Fear, for purposes of extortion 'may be induced by a threat, either: [¶] . . . [¶] . . . To accuse the individual threatened . . . of any crime; or, . . . To expose, or impute to him . . . any deformity, disgrace or crime[.]'* (Pen. Code, § 519.) *'Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.'* (Pen. Code, § 523.)' [Citations.]' (*Id.* at p. 1294.)

In the case before the Court, there is no allegation that the individual Defendants demanded money or

threatened to report the Plaintiffs to the authorities or expose them to disgrace. Ps argue that the threat of extortion does not actually have to produce an exchange of money and argue that the benefit of not having to pay EDD satisfies the requirement. The Court disagrees. As evidenced by the Jury Instruction for extortion, Defendants must have threatened to use force or fear to obtain Plaintiffs' consent to give the Defendants money or property or to do an official act. (See, CALCRIM 1830.) There was no demand for money money and money not paid to EDD does not satisfy this element. As such, the Court sustains the demurrer to the 5th cause of action without leave to amend.

6th COA fails to state sufficient facts under CC §52.1 --

Ds argue that there can be no cause of action for a violation of CCP section 52.1 without violence or intimidation by threat of violence. CCP section 52.1 (j) provides that "Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the **speech itself threatens violence** against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, **violence will be committed against them or their property and that the person threatening violence** had the apparent ability to carry out the threat." (emphasis added). This limitation precludes a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 ["From the foregoing, it is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence."].) In the case before the Court, we have no allegations other than that Haas and Nichols used words in discussing matters of contention with Plaintiffs. In these discussions, there is no allegation of threats of violence. The Court sustains the demurrer to the sixth COA without leave to amend.

Motion to Strike:

The motion to strike the request for punitive damages is granted. The allegations against the Defendants do not meet the standards of CC section 3294. The motion to strike attorney fee allegations is granted. "Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127 [158 Cal. Rptr. 1, 599 P.2d 83].) Plaintiffs have not identified any statutory or contractual basis for such fees. None of the *Labor Code* provisions cited by Ps (§98.6, §98.7, and §1102.5) provide for attorneys fees. Attorneys' fees under a private attorney general theory are not appropriate since Ps are not seeking class wide relief but rather personal relief. Courts may strike prayers for attorney fees where a party demonstrated no potential basis for their recovery. (*Agricultural Ins. Co. v. Sup. Ct.* (1999) 70 Cal.App.4th 385, 404.) In the prayer, Ps seek disgorgement of monies wrongfully obtained. But, there are no facts at all in the complaint as to the defendants obtaining any monies from P. The Court strikes the allegations of ¶51-56. The allegations are irrelevant and superfluous. They relate to general financial issues with the City that have no relevance to the causes of action at issue.

Notice to be given by clerk.