

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-5487 (Department 47) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 2.02(D).

**Department 47
Superior Court of California
720 Ninth Street
Roland L. Candee, Judge
S. Jacobs/P. Banks, Clerk
None, Bailiff**

Friday, July 28, 2006, 9:30 AM

Item 1 **02AS06638 NEHEMIAH CORP. OF CA VS. DON F. HARRIS, ET AL**

Nature of Proceeding: Miscellaneous Motion

Filed By:

Plaintiffs' Motion to Enforce Settlement is Granted. The request for prejudgment interest is denied.

Plaintiffs Nehemiah Progressive Housing Development Corp. and Nehemiah Corp. of America (Nehemiah) move the Court, under Code of Civil Procedure section 664.6, to enter judgment against defendants Don F. Harris (Harris) and Franklin Tanner Group, LLC (FTG) pursuant to the terms of the settlement in the two above-entitled actions entered orally and partly in writing before the Court on January 31, 2006. Plaintiffs contend that defendant failed to make the initial payment as required under the terms of the settlement agreement. A transcript of the reported proceedings was prepared by the official reporter. Code of Civil Procedure section 664.6 provides that if parties to pending litigation stipulate orally before the court or in a writing signed by the parties, the court may enter judgment pursuant to the terms of the settlement.

As with any contract, the settlement requires mutual consent. The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. (Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 811.) Outward manifestations thus govern the finding of mutual consent required by Civil Code sections 1550, 1565 and 1580 for contract formation. (Ibid.) If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation. (Id.) In order for the settlement agreement to be binding, the agreement must be sufficiently definite to enable courts to give it an exact meaning. (Id.; Civil Code § 3390(5).)

The financial terms of the agreement were that defendant Harris would pay \$650,000 in installments to a Nehemiah-affiliated organization, Nehemiah Community Foundation, Inc. (NCF), and that NCF would, in turn, make a \$150,000 grant to International Housing Solutions, Inc. (IHS) for the purpose of funding an orphanage in Chiapas, Mexico. Payment of the \$650,000 would be in accordance with the following schedule: Upon execution of a formal settlement agreement, the sum of \$325,000; on or before January 15, 2007, the sum of \$100,000; on or before June 15, 2007, the sum of \$100,000; and final payment, on or before December 15, 2007, the sum of

\$125,000. Within ten days after the first \$325,000 payment is made, NCF shall in turn make a grant of \$150,000 to IHS. It was further agreed that the Attorney General will be notified that a settlement of the case has been reached with a request that the Attorney General's Office approve the settlement. The parties agreed that the settlement shall be final and binding unless and until the Attorney General's Office actually disapproves of the settlement within a prescribed 60-day period.

In opposing the motion, defendant Harris asserts there is no binding settlement agreement because there was no meeting of the minds on the material terms of the agreement. Specifically, defendant Harris argues that 1) the material terms of the agreement cannot be performed because International Housing Solutions (IHS) (name changed to Hopeco Foundations, Inc. (Hopeco)) is no longer pursuing the completion of the Orphanage Project in Chiapas Mexico because it lost its tax exempt status and that prevents defendant from taking a personal tax deduction of \$150,000 as he intended; 2) plaintiffs Nehemiah's lawyer sent defendant Harris a second settlement agreement that purported to require him to take actions that were inconsistent with the settlement terms from the January 31, 2006 proceeding; and 3) since the settlement terms contemplated on January 31, 2006 required the execution of a formal settlement, and the parties were never able to negotiate the terms of the formal settlement agreement, the informal record of the settlement discussions is not enforceable.

The Court, having reviewed the reporter's transcript and relying on its own recollections of the settlement proceedings, finds that defendant Harris' payment of the settlement proceeds was not conditioned on IHS overseeing the administration of the NCF grant for the orphanage project as a 501(c)(3)tax-exempt organization. (See *Richardson v. Richardson* (1986) 180 Cal.App.3d 91, 97.) Further, when the terms of the settlement were orally recited on the record that was no mention by defendant Harris or his counsel that the \$150,000 grant from NCF was set up to give defendant a tax deduction. As there is not merit to defendant's assertion that such conditions exist, defendant is obligated to pay Nehemiah \$650,000 to settle the actions. Regardless of tax status of IHS, there is no prohibition in the law to prevent IHS from accepting the NCF grant to complete the orphanage project in Chiapas, Mexico.

As to defendant's second argument, the Court finds no merit that Nehemiah's lawyer changed the agreed upon terms based on the January 31, 2006 settlement. The settlement discussions that other lawyers for Nehemiah had with TheNehemiahChronicles.com do not have significance or impact on the settlement terms in these actions.

Defendant Harris' third argument that there is no enforceable settlement agreement because there is no formal agreement signed by the parties must also fail. An oral settlement before the court is enforceable under Code of Civil Procedure section 664.6 even if one of the terms was that a written agreement would be executed and never was. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1429-30.) If the oral agreement at issue shows no more than an intent to further reduce the oral agreement to a more formal written one the failure to follow it with a more formal writing does not negate the existence of the prior oral contract. (*Id.* at 1430) It is clear in these actions that there was a meeting of the minds of the parties on definite material terms of the stipulated settlement with the mutual intention that the oral agreement should thereupon become binding. The attorneys participated in reading the settlement into the record and the Court questioned each party to ensure that each party agreed to it. There was nothing tentative about the effect of the terms. Having orally agreed to

settlement terms before the court, parties may not escape their obligations by refusing to sign a written agreement that conforms to the oral terms. (Id. at 1431.)

In accordance with the above, plaintiffs' Motion to Enforcement Settlement is granted. Plaintiffs' counsel is directed to prepare the judgment in conformance to the terms of the stipulated settlement agreement as presented to the Court at the January 31, 2006 settlement conference. Additionally, plaintiffs' request for prejudgment interest is denied as the settlement agreement does not provide for the payment of prejudgment interest.

As to defendant's evidentiary objection for lack of foundation and objection to notice for defendant Harris to appear, the objections are overruled as plaintiffs have made a timely request under California Rules of Court 323(b) to present testimony. (See plaintiffs' Reply Brief.)

As to plaintiffs' objection to those specific portions of the declarations of Bob Jones and Don Harris, the objections are sustained.

Item 2 **02AS06638** **NEHEMIAH CORP. OF CA VS. DON F. HARRIS, ET AL**

Nature of Proceeding: OSC Re: SANCTIONS

Filed By:

The appearance of defendant George Golden is required on the Order to Show Cause in Case No. 02AS06638.

Item 3 **03AS02741** **NEHEMIAH PROGRESSIVE HOUSING DEV. VS. DON F. HARRIS, ET AL**

Nature of Proceeding: Miscellaneous Motion

Filed By:

See Ruling in Item #1.

Item 4 **04AS04172** **EVETTE PIEPER, ET AL VS. CALIFORNIA DEPT OF CORRDTIONS, ETAL**

Nature of Proceeding: Motion To Bifurcate

Filed By:

Defendants' motion to bifurcate trial of plaintiff's five survival causes of action from the wrongful death action and to try the former first or in the alternative to bifurcate trial of the liability issues from the compensatory and punitive damages issues is DENIED without prejudice to its reassertion before the trial judge. The court finds that the trial judge is in the best position to determine the order in which issues are to be heard at trial. Accordingly, the court finds that such issues should best be left to the trial judge for determination. The court notes that the trial judge can determine the order in which matters are to be heard at trial on his or her own motion at any time. (CC598).

Item 5 **04AS04274** **HARVEY D. CLARK III, ET AL VS. LLOYD C. MYERS II, ET AL**

Nature of Proceeding: Motion For Reconsideration

Filed By:

This motion is continued on the court's own motion to August 11, 2006 at 9:30 a.m. in Department 47. The initial motion having been heard by Judge Candee, the motion for reconsideration should be heard by him as well. Judge Candee is unavailable on the current hearing date

Item 6 **05AS01591 SABINO SANCHEZ, ET AL VS. SMUD**

Nature of Proceeding: Motion For Leave To Intervene

Filed By:

Proposed intervenor Pacific Specialty Insurance Company's motion to intervene as a party plaintiff is DENIED on the grounds that it was not asserted in a reasonable time after learning of the case. (See Allen v. California Water & Telephone Company (1945) 31 Cal. 2d 104, 108).

Proposed intervenor wishes to bring a subrogation action to recover sums it allegedly paid to plaintiff resulting from the alleged negligence of defendant herein. Proposed intervenor's attorney acknowledges that proposed intervenor was aware of this lawsuit in January of 2006, but did not learn of the trial date until recently. Defendant Sacramento Municipal Utility District ("SMUD") argues that intervention is not timely, but does not oppose it provided the court will continue the August 29 trial date. Defendant asserts that intervention would allow for a single trial which would be more efficient, but that it would necessitate additional time for trial preparation and discovery. As a consequence defendant argues a continuance would be required.

The court finds that the motion to intervene was not made in a reasonable time given that intervenor learned of the action approximately seven months ago, but waited until July 25 to file the instant motion on shortened time. Defendant SMUD's request to continue the trial to allow intervention cannot be considered as it was raised for the first time in opposition papers. Such a request could, however, be asserted either through a properly noticed motion or a stipulation of the parties.

Item 7 **06AS02739 JUDITH WADE VS. CHRIS FONG, ET AL**

Nature of Proceeding: Miscellaneous Motion

Filed By:

Appearance require. Fee waiver question.

Item 8 **03AM03681 TORRIA JOYCE, ET AL VS. GREAT AMERICAN STAGE**

Nature of Proceeding: Motion To Continue Trial

Filed By:

Good cause appearing, plaintiff's motion to continue trial in this limited civil action currently scheduled for August 8, 2006 is GRANTED. This matter shall be placed upon the September 18, 2006 trial setting calendar to be heard at 10:00 a.m. in Department 47.

The court finds good cause to continue trial as plaintiff's counsel is suffering from an acute medical condition which prevents him from representing plaintiff in this case and he requires additional time to associate trial counsel. Defendant does not oppose the trial continuance, but seeks to impose numerous conditions. The court finds good cause to continue trial without the imposition of such conditions.
