

Civil Procedure Final Exam
Professor Sternlight
December 9, 2008

Exam # _____

INSTRUCTIONS

This is an open book exam. You may consult any notes, commercial or personal outlines, hornbooks, etc. However, you may not share your materials with any other person during the exam nor access substantive information on a computer or from a live person.

Check this exam for completeness at this time. It should be 6 pages long. Write your Exam number on this exam and make sure the Exam number also appears on any blue book or printed exam answer you turn in. Please also number the blue books if you use more than one.

Read (don't skim) each of the questions carefully before drafting your answers. Also, be sure to provide me with the reasoning underlying your answers. That is, tell me why you came to the conclusions you did. If you consider but ultimately reject certain options or arguments, please explain why. In general you should not add or make up any facts. However, if you find a particular question is ambiguous, or if you believe that I have omitted essential information, then explain any such ambiguity or problem and supply any additional information or assumptions you believe to be necessary to permit you to answer the question.

Put all of your answers in a blue book or in your printed exam answer. I will not give credit for information written on the exam itself. Also, I ask that you write only on one side of the page. You may use abbreviations so long as they are obvious or you define them. I will look at outlines if you ask me to. However, it is difficult to thoroughly set forth reasoning in an outline.

Please use only your Exam number to identify yourself. Do not attempt to identify yourself by, for example, referring to personal characteristics or to remarks made in class. Also, please refrain from including any personal notes in your exam.

You have three hours to complete the exam. I have indicated the point value for each question and you should allocate your time accordingly. Given my scoring system you will be sharply penalized for failing to answer questions.

Question 1 True false questions (33 points total; 3 points each)

El Mercado is a planned major development in the city of Gotham. (Gotham is part of the state of Nirvana). El Mercado, when completed, will include multiple condominium apartment buildings, stores, restaurants, movie theaters, parks, etc. It occupies a space of two square miles within the central part of Gotham. The owner of El Mercado is a private company, Gotham Enterprises Inc. (“GEI”). GEI’s president and majority shareholder is Jon Wayne, a very flamboyant and wealthy bachelor. Construction was commenced on January 1, 2006, and the project is expected to be completed by January 1, 2010. Subcontractors have been retained to work on various elements of the project, as discussed below.

Most unfortunately, several serious accidents have occurred during two years of construction on the El Mercado project. The most recent death was that of Linda Leeper, a high beam worker who, on June 1, 2008, fell to her death from high up on a crane being used on the El Mercado project. Linda was employed by subcontractor Cranes R Us (“CRU”). The president of CRU is Ima Robyn, who also happens to be the ex-wife of Jon Wayne.

With respect to each of the following propositions, state whether the proposition is true or false. Then, explain in one or two sentences why you believe the proposition is either true or false. You will receive no credit at all unless you provide an explanation for why the statement is true or false. You will also receive no credit unless you come to a conclusion as to whether the statement is true or false. Finally, I will not read any material in excess of two sentences. You will also do yourself a disservice by writing extremely long “sentences” because these questions are each only worth three points.

Note that the following propositions are independent of one another. While each proposition builds on the basic facts set out above, the propositions do not build on one another, and should be read separately from one another.

A. The Estate of Linda Leeper has filed a lawsuit in federal court against Defendants CRU and GEI. The suit contains three causes of action: (1) wrongful death against CRU; (2) wrongful death against GEI (claiming that pressure by GEI to rush the job caused a lack of attention to safety); and (3) breach of contract against CRU (alleging that prior to Linda’s death CRU failed to pay Linda for all the hours she had worked). Defendants have filed a motion under FRCP R. 21 to dismiss the complaint for misjoinder of claims and parties. The court should grant the motion.

B. Linda Leeper’s estate has filed a lawsuit in federal court against Defendants CRU and GEI, for wrongful death. Ten days after the filing of the Complaint CRU files a motion under R. 12(b)(5) to dismiss the complaint for insufficient service of process. Twelve days after the filing of the Complaint GEI files a motion under R. 12(b)(7) to dismiss the Complaint for failing to name an indispensable party, Jon Wayne. The court denies both motions, and both Defendants

file their Answers in a timely fashion. GEI's answer includes the defense of improper venue. GEI subsequently files a motion asking the court to dismiss the Complaint for improper venue. Even assuming the defense of improper venue is valid on its merits, the court should deny GEI's motion.

C. The Estate of Linda Leeper has filed a multi-million dollar claim in federal court against GEI and Jon Wayne for wrongful death. The Estate fears that Jon Wayne, a wealthy and flamboyant businessman, will flee the country in his private jet and transfer his personal assets and those of GEI to bank accounts in the Cayman Islands from whence they will never be recovered. The Estate should file a motion for a temporary restraining order ("TRO"), rather than a motion for a preliminary injunction ("PI"), because the PI requires notice be afforded to the opposing party and will therefore give Wayne a chance to transfer his assets elsewhere but the TRO does not require Plaintiff to give advance notice to Wayne.

D. Linda Leeper's estate has filed a lawsuit in federal court against Defendants CRU & GEI for wrongful death. CRU has filed a cross-claim against GEI alleging that GEI's president Jon Wayne ordered CRU to abandon some ordinary safety measures in order to get the El Mercado project completed more quickly, and that GEI is therefore responsible in whole or in part for any safety lapse on CRU's part. GEI now seeks to file a claim for breach of contract, in the same suit, against CRU alleging that CRU has been dilatory (too slow) in doing all its work on the El Mercado project. GEI's breach of contract claim seeks an injunction removing CRU from the El Mercado project. GEI must get the court's permission before filing this claim against CRU.

E. The Estate of Linda Leeper has filed a claim in federal court against GEI, CRU, Jon Wayne, and Ima Robyn for wrongful death. Defendant Robyn has filed a FRCP 12(b)(6) motion to dismiss for failure to state a claim arguing that the Complaint fails to describe any actions she allegedly took or did not take that allegedly led to Leeper's sad demise. It is true that the Complaint fails to mention Robyn by name or title, except in its caption. In considering the motion the court should apply the famous line from Conley v. Gibson, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," and deny the motion.

F. The Estate of Linda Leeper has filed a lawsuit in federal court against Defendants CRU and GEI. The suit contains three causes of action: (1) wrongful death against CRU; (2) wrongful death against GEI (claiming that pressure by GEI to rush the job caused a lack of attention to safety); and (3) breach of contract against CRU (alleging that prior to Linda's death CRU failed to pay Linda for all the hours she had worked). The Estate of Leeper has asserted an entitlement to both compensatory and punitive damages on all three claims. However, according to the law of the relevant jurisdiction, the state of Nirvana, punitive damages cannot be recovered on a claim for breach of contract. Defendant CRU seeks a ruling from the court to the effect that punitive damages cannot be recovered on a breach of contract claim. CRU should file a motion to dismiss under FRCP 12(b)(6) to eliminate the Estate of Leeper's claim for punitive damages.

G. The Estate of Linda Leeper has filed a claim in federal court against GEI for wrongful death in federal court. GEI, in its Answer, asserts that “upon information and belief Linda was an alcoholic with severe psychological problems who deliberately jumped to her death.” The lawyers for Linda Leeper’s estate, Mel Fellow and Ann G. Ree are extremely outraged by this statement, which they believe to be entirely unfounded. Ann argues that Plaintiff should immediately file a motion for Rule 11 sanctions with the court. Mel argues for a more moderate approach. Mel is right.

H. The Estate of Linda Leeper has filed a lawsuit in federal court against Defendants CRU & GEI for wrongful death. CRU has filed a cross-claim against GEI alleging that GEI’s president Jon Wayne ordered CRU to abandon some ordinary safety measures in order to get the El Mercado building project completed more quickly, and that GEI is therefore responsible in whole or in part for any safety lapse on CRU’s part. GEI has filed an Answer to the cross-claim, denying that Wayne ordered CRU to abandon ordinary safety measures. Three weeks subsequent to filing its Answer to the cross-claim, GEI filed a claim in bankruptcy, and now seeks to raise its bankruptcy as part of its defense to CRU’s cross-claim. However, because discharge in bankruptcy is an affirmative defense and because GEI failed to raise that defense in its initial answer, GEI has waived its right to claim discharge in bankruptcy as a defense to CRU’s cross-claim.

I. The Estate of Linda Leeper has filed a lawsuit in federal court against Defendants CRU and GEI. The suit contains three causes of action: (1) wrongful death against CRU; (2) wrongful death against GEI (claiming that pressure by GEI to rush the job caused a lack of attention to safety); and (3) breach of contract against CRU (alleging that prior to Linda’s death CRU failed to pay Linda for all the hours she had worked). Defendants have filed motions for summary judgment on all three claims, arguing that because Leeper was in this country illegally, and not a U.S. citizen as she had claimed, all of her claims must fail. The federal district court, having considered all the evidence submitted in connection with the summary judgment motions, and having reviewed the law, concludes that although Leeper was in the country illegally and although her damages may therefore be reduced, Leeper’s immigration status does not eliminate her claims. The court should deny Defendants’ motions for summary judgment in their entirety but should not grant summary judgment on this issue to Leeper.

J. The Complaint filed by the Estate of Linda Leeper against defendants CRU and GEI in federal court asserted that Leeper was a citizen of the United States. The court, in connection with ruling on Defendants’ motion for summary judgment, has ruled that in fact Leeper never became a citizen of the United States. CRU and GEI now seek to recover sanctions under R. 11 against the Estate of Leeper and its attorney, Abe Terney, on the theory that they lied in the Complaint. Assuming that Leeper misstated her immigration status when she was interviewed by Terney, she but not Terney may be sanctioned under R. 11 for this misstatement.

K. The Estate of Linda Leeper filed a lawsuit in federal court against Defendants CRU and GEI.

The suit contained claims for wrongful death against both Defendants and breach of contract against CRU. Defendants filed a motion for summary judgment on all three claims, arguing that because Leeper was in this country illegally, and not a U.S. citizen as she had claimed, all of her claims must fail. The federal district court, having considered all the evidence submitted in connection with the summary judgment motion, and having reviewed the law, denied these motions for summary judgment. The Estate of Leeper believes that the motion for summary judgment was not well supported by fact or law and should never have been filed in the first place. Having prevailed on the motion for summary judgment Leeper is entitled to win a R. 11 motion against both Defendants.

Question 2 (39 points total)

This question builds on the basic facts set out in Question 1, above (excluding the true/false statements).

The Estate of Linda Leeper has filed a lawsuit in federal court against Defendants CRU and GEI. The suit contains three causes of action: (1) wrongful death against CRU; (2) wrongful death against GEI (claiming that pressure imposed by GEI on CRU to rush the job caused a lack of attention to safety); and (3) breach of contract against CRU (alleging that prior to Linda's death CRU failed to pay Linda for all the hours she had worked). The Complaint alleges that Linda Leeper's death was not the first serious injury or death at the El Mercado workplace, and asserts that negligent actions and omissions by both GEI and CRU caused a series of deaths and serious injuries in connection with construction at the workplace.

GEI's Answer denies that it imposed pressure on CRU to rush the job and further denies that GEI played any role in causing injury to Linda Leeper or other workers.

Plaintiff, the Estate of Leeper, has submitted a R. 34 document request to defendant GEI. Item 3 of the document request states as follows:

3. Please provide a printed copy of all e-mails or documents, whether deleted or not, referring to any accidents, prevented accidents, or safety precautions or procedures on the premises of the planned development at El Mercado.

You are an associate working at the firm representing Defendant GEI. Your firm is concerned that it will be very expensive to try to comply with item 3 of Plaintiff's document request. Your preliminary attempt to learn about your client's document retention policies has revealed that responding to this request would require someone to look through both electronic and non-electronic documents. On the electronic side, your client recently changed servers and operating systems, so retrieving documents from prior to January 1, 2008 will require someone to access the older system. Many of GEI's older e-mails or deleted e-mails are stored on backup tapes, in various locations. Although construction on the site began on January 1, 2006, e-mails discussing the site could go back as early as 2003, when GEI first began to think about and plan

the construction project. As for paper records, looking for documents dealing with all aspects of safety and accidents on the site will require going through numerous file folders and cabinets in many persons' offices. Your firm estimates, conservatively, that a detailed search for all the requested documents could easily cost \$400,000. Providing physical copies of all the requested documents could also be very burdensome.

A. (8 points) The partner you work for has asked for your suggestion as to how to respond to item # 3. In particular, discuss whether it would make sense to have a phone conversation with opposing counsel regarding item #3. Your answer here should not duplicate what you are going to say in response to 2(B), below.

B. (31 points) If a phone conversation was held with respect to item #3, nothing was resolved. Plaintiff's attorney is behaving, in your view, very unreasonably, insisting that GEI answer item #3 in its entirety, Your firm has decided to file a motion for a protective order. Please write a memo to the partner discussing what you think you should argue in the motion for a protective order. Cite relevant Rules as appropriate. Discuss your likelihood of success on the motion that you propose.

Question 3 (28 points)

This question builds on the basic facts set out in questions 1 and 2 above (excluding true/false questions). Linda Leeper's lawsuit was filed in federal court on July 1, 2008. So far, discovery is ongoing and no summary judgment motions have been filed. A few depositions have been taken, but many others remain to be taken. The court has not yet ruled on defendant GEI's motion for a protective order with respect to item 3 of Plaintiff's document request.

You are an associate in the firm representing defendant GEI. To date, December 9, 2008, your client has been billed \$65,000 for the work done by your firm. The district court has set up the following schedule:

1. February 2, 2009 - completion of discovery
2. April 6, 2009 - exchange of expert reports
3. June 8, 2009 - pretrial statements due
4. August 3, 2009 - trial commences

The partner you work for has stated that she is not particularly familiar with ADR, but hears it can be wonderful. She wants you to write a memorandum discussing the pros and cons of inviting Plaintiff to participate in binding arbitration. Write the memorandum from the perspective of your client, GEI, and explain what binding arbitration is and why it might or might not be desirable in this case at this stage of the litigation. This federal district court is not going to order this case into binding arbitration, so any binding arbitration would have to be agreed to voluntarily by both parties. Your memo should not discuss forms of ADR other than binding arbitration.