TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, April 17, 2024 3:00 p.m.
Courtroom 17 – Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 17 in person or remotely by Zoom, a web conferencing platform. Whether a party or their representative will be appearing in person or by Zoom must be part of the notification given to the Court and other parties as stated below.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN ZOOM ONLINE:

D17 – Law & Motion
Meeting ID: 161 126 4123
Passcode: 062178
https://sonomacourt-org.zoomgov.com/j/1611264123

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
+1 669 254 5252

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, **YOU MUST NOTIFY** Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6725**, and all other opposing parties of your intent to appear, and **whether that appearance is in person or via Zoom**, by ***4:00 p.m. the court day immediately preceding the day of the hearing.***

1. MCV-261581, The Best Service Co., Inc. v. Reid

Defendant Christian M. Reid's ("Defendant") motion to set aside the default and default judgment is **DENIED**, per Code of Civil Procedure section 473(b). As a result, Defendant's demurrer is also **DENIED**.

PROCEDURAL HISTORY

Plaintiff The Best Service Co., Inc. ("Plaintiff") commenced this action due to a delinquency on a consumer loan and service agreement with Defendant and on Defendant's visa credit card with Golden I Credit Union. Plaintiff filed suit on May 6, 2022, and served the summons and complaint upon Defendant through substituted service on May 13, 2023. Defendant did not file a response, so Plaintiff filed a Request for Entry of Default, which the Court entered on July 12, 2023.

On July 18, 2023, Defendant's representative from Phoenix Law contacted Plaintiff's counsel wanting to settle the matter on behalf of Defendant. As proof of representation, Phoenix Law emailed a copy of a limited power of attorney executed by Defendant and by Phoenix Law on May 15, 2023. (See Declaration of Vasquez, Exhibit C.) Plaintiff's counsel extended a settlement offer, which both parties found acceptable. Plaintiff circulated a settlement agreement and stipulation for judgment based on the accepted settlement offer on July 19, 2023. Defendant did not execute either of these, and Phoenix Law also did not respond despite multiple phone calls from Plaintiff's counsel following up. Due to the lack of response, Plaintiff requested a default judgment from the Court on September 6, 2023. The next day, Defendant called Plaintiff's counsel claiming he never received service and did not know anything about the matter. The Court entered a default judgment on September 27, 2023, and Defendant later filed and served his motion to set aside and demurrer on March 7, 2024.

MOTION TO SET ASIDE

Legal Standard

C.C.P. section 473.5(a) allows a defaulted party to move to set aside the default entered against them when "service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action." The timeline for filing such motion is the earlier of these deadlines: "(i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." The motion shall be filed with an affidavit under oath that the defaulted party's lack of actual notice was not caused by his or her avoidance of service or inexcusable neglect. (C.C.P. § 473.5(b).)

C.C.P. section 473(b) allows the court to relieve a party from judgment that was taken against that party due to his or her mistake, inadvertence, surprise, or excusable neglect. The court may also correct clerical mistakes or errors on its own motion or on a party's motion. (C.C.P. § 473(d).)

Moving Papers

Defendant claims he never received proper service of the summons or complaint. He argues it may have been sent to his prior address and delivered on his ex-girlfriend, with whom he is not on good terms, after he moved out from that house. For this reason, Defendant requests relief from the default per C.C.P. 473(b).

In opposition, Plaintiff argues that Defendant failed to show in the motion that he is entitled to the relief requested because he did not rebut the presumption that the substituted service upon him was proper here.

In reply, Defendant argues he has not received the summons or complaint to this day. Defendant does not dispute any of the other facts stated in the opposition regarding his prior legal representation at Phoenix Law or the limited power of attorney he executed with that group.

Application

Defendant has not sufficiently demonstrated any mistake, inadvertence, surprise, or excusable neglect on his part. He failed to address how his prior representative at Phoenix Law was able to reach out on his behalf to Plaintiff's counsel regarding this action in order to settle on Plaintiff's claims if Defendant had never received service of the summons and complaint. For these reasons, the Court does not find that Defendant has sufficiently shown that his lack of actual notice was not caused by his own avoidance of service or inexcusable neglect. The motion to set aside is therefore **DENIED**.

DEMURRER

As the motion to set aside is denied, the Court **DENIES** the demurrer as moot.

CONCLUSION

Based on the foregoing, both of Defendant's motions are **DENIED**. Plaintiff shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

2. SCV-270354, Hansen v. Tognalda

Defendants' unopposed amended motion to compel discovery is **DENIED**, for failure to comply with California Rules of Court, rule 3.1300(c).

Moving party previously had not filed any proof of service of the motion. The Court continued the hearing to allow moving party to comply with rule 3.1300(c), which requires that a "proof of service of the moving papers must be filed no later than five court days before the time appointed for the hearing." Moving party subsequently filed a proof of service of only the minute order continuing the hearing. This is not sufficient to give notice to the parties against whom the motion was made of the content of the motion, even if it gives notice of the new hearing date. The motion continues to be procedurally deficient despite the additional time allowed for moving party to comply with rule 3.1300(c), so the Court will deny the motion. Moving party shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

3. SCV-270969, Piazza v. Piazza

Partition Referee Amy Harrington's ("Partition Referee") unopposed motion for approval of final report of sale of real property is **DENIED** for lack of proper service to lienholder.

PROCEDURAL HISTORY

Plaintiff/Cross-Defendant Olivia Piazza ("Plaintiff") and her father, Defendant/Cross-Complainant Eugene Piazza ("Defendant"), own the property located at 7541 Windward Drive, Rohnert Park, California 94928, APN: 159-660-065-000 (the "Property") as tenants in common. The Property is subject to a purchase money mortgage with NewRez, LLC, a lienholder. This Court ordered partition by sale of the Property pursuant to an Interlocutory Judgment on June 13, 2023, noting NewRez, LLC's purchase money mortgage.

Partition Referee entered into a listing agreement with broker Chelsie Runnings of Better Homes and Gardens Real Estate Wine Country Group. The broker listed the property on the market on for $799,000.00. Partition Referee published a Notice of Intention to Sell Real Property in the Sonoma Press-Democrat, which ran three times prior to the bid date. On March 13, 2024, Partition Referee received three offers in the amounts of $745,000, $735,000, and $650,000. Partition Referee accepted the highest bid from the Lapinkas and they executed the purchase agreement for the Property "as is" with no representation or warranty except as to title.

ANALYSIS

After an appointed partition referee makes a sale of property as ordered, the referee must report the following: (1) A description of the property sold to each purchaser; (2) The name of the purchaser; (3) The sale price; (4) The terms and conditions of the sale and the security, if any, taken; (5) Any amounts payable to lienholders; (6) A statement as to contractual or other arrangements or conditions as to agents' commissions; (7) Any determination and recommendation as to opening and closing public and private ways, roads, streets, and easements; and (8) Other material facts relevant to the sale and the confirmation proceeding.

(C.C.P. § 873.710.) The partition referee may also move for confirmation of the sale by noticed motion, at the hearing for which the court examines the report and any related witnesses. (C.C.P. § 873.720.) The court may confirm the sale or vacate it ordering a new sale if proper notice was not given, if the sale was unfair, if the sale price is disproportionate to the value of the property, or if it appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first ten thousand dollars and 5 percent on the amount in excess. (C.C.P. § 873.730.)

In the moving papers, Partition Referee identified the Property's description, the purchasers' names, the sale price, the terms and conditions of the purchase agreement (attached as an exhibit), descriptions of private and public access and easements on the Property, and that the Property is being sold "as is." However, there is no mention of lienholder NewRez, LLC or what amounts if any may be paid out to NewRez, LLC. The proof of service filed by Partition Referee on March 19, 2024, does not indicate service of the motion or notice of the hearing to NewRez,

LLC. As proper notice has not been given to this lienholder, and Partition Referee has otherwise not explained why this lienholder did not need to be served, the Court cannot approve the report.

CONCLUSION

Based on the foregoing, the motion is **DENIED**. Partition Referee shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b). However, if proof of service is provided to the court by the hearing date, the motion will be approved.

4. SCV-271212, Thomen v. Woods

Defendants/Cross-Complainants/Cross-Defendants Christa M. Bastian (served as Christi M. Bastian) and Eugene E. Bastian (together "Defendants") unopposed application for determination of good faith settlement is **GRANTED**, per Code of Civil Procedure ("C.C.P.") section 877.6(a)(2).

PROCEDURAL HISTORY

Parties in this matter have settled and Defendants are to pay their $100,000.00 auto insurance policy limits to Plaintiffs Mark and Tammy Thomen ("Plaintiffs") for settlement. Plaintiffs had sued Defendants for motor vehicle property damage and personal injury.

ANALYSIS

Legal Standard

C.C.P. section 877.6 allows a plaintiff to settle with one or more joint tortfeasors without releasing others as long as the settlement is in "good faith." A good-faith settlement discharges the settling defendant from liability to other parties for equitable contribution or comparative indemnity. (*City of Grand Terrace v. Sup.Ct. (Boyter)* (1987) 192 Cal.App.3d 1251, at 1262.) The determination of good-faith settlement is in the discretion of the trial court. (*Tech-Bilt Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 502.) What ultimately determines whether a settlement was made in good faith is "whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be." (*City of Grand Terrace v. Superior Ct.*, 192 Cal.App.3d 1251, 1262.) To this end, *Tech-Bilt Inc., supra,* 38 Cal.3d 488, requires that the settlement be within the "reasonable range" of settling tortfeasor's share of liability, taking into consideration the facts and circumstances of the particular case and evaluating the settlement on the basis of information available at the time of settlement. The factors include:

1. A rough approximation of the total recovery and settlor's proportionate liability;
2. The amount paid in settlement;
3. A recognition that a settlor should pay less in settlement than if found liable after trial;
4. The allocation of the settlement proceeds among plaintiffs;

5. Settlor's financial condition and insurance policy limits, if any; and
6. Evidence of any collusion, fraud or tortious conduct between the settlor and the plaintiffs aimed at making non-settling parties pay more than their fair share.

If one contests "good faith," the party seeking a good-faith determination must sufficiently demonstrate all the *Tech-Bilt* factors. (*City of Grand Terrace v. Sup.Ct. (Boyter)* (1987) 192 Cal.App.3d 1251, 1262.) However, the party contesting good faith must demonstrate that the settlement is so far "out of the ballpark" in relation to the *Tech-Bilt* factors as to be inconsistent with the equitable objectives of the statute. (*Tech-Bilt, supra*, at 499-500; *Widson v. International Harvester Co., Inc.* (1984) 153 Cal.App.3d 45.) A settlement does not lack "good faith" solely because the settling tortfeasor pays "less than his or her theoretical proportionate or fair share." (*Tech–Bilt, supra*, 38 Cal.3d at 499.)

Moving Papers

The uncontested motion suggests that the insurance policy limits figure of $100,000.00 is not grossly disproportionate to what a reasonable person at the time of settlement would estimate Defendants exposure to be. The settlement was reached after informal settlement negotiations and Defendants' counsel notes that there is no evidence of collusion, fraud, or any other conduct aimed at injuring the interests of any non-settling parties here.

Application

Here, the motion is uncontested, and the Court has previously granted an application by Defendants for good faith settlement with Plaintiffs on February 20, 2024. The Court finds that the full policy limits of Defendants' policy is not grossly disproportionate to what a reasonable person in Plaintiffs' position at the time of settlement would estimate the Defendants' liability to be. As such, the Court will grant the motion.

CONCLUSION

Based on the foregoing, the uncontested motion is **GRANTED**. Unless oral argument is requested, the Court will sign the proposed order lodged with the motion.

5. SCV-272585, Sterling Roofing Co., Inc. v. Arrowtown Construction, Inc.

Defendant/Cross-Complainant Arrowtown Construction Inc.'s ("Arrowtown") motion for summary adjudication as to all causes of action in Plaintiff Sterling Roofing Inc.'s ("Sterling") complaint is **DENIED**. Arrowtown's requests for judicial notice are **GRANTED**. Arrowtown's objections to the Declaration of Jagdfeld numbers 4, 5, 11, 12, and 13 are **SUSTAINED**, and all other objections are **OVERRULED**.

PROCEDURAL HISTORY

Sterling commenced this action to obtain money owed by Arrowtown for roofing work done and for materials provided by Sterling in connection to a construction project on a residential

remodeling in Sonoma for Heather Jordan and Joseph Beare (the "Owners"). Arrowtown, as the general contractor, sought a contract with Sterling for roofing work. Arrowtown disputes any additional amounts claimed by Sterling.

Sterling submitted a bid proposal for $82,437.00 for roofing and gutter materials installation at the outset of the Project. Neither party signed this proposal. Per Sterling, the bid was "based on the current price of labor and materials" and provided that if it was not accepted within 15 days, it was subject to Sterling's modification. The bid also provided that if Sterling commenced work but the bid was not accepted in writing, "performance of such work shall be deemed by all parties to be pursuant to the terms hereof, and no other terms." Per Arrowtown, it relied on the bid when preparing its own proposal to the Owners for the project. Sterling argues instead that, because neither party signed this proposal, there is no written contract that shows it was bound to this work for this specified amount.

Sterling received an initial payment of $50,000.00, but the roofing work was delayed for various reasons, including damaged materials. Ultimately, the work was never completed. Arrowtown argues that Sterling left the project without completing it. Sterling contends that the roofing work was completed, but Sterling refused to complete installation of the gutters after Arrowtown refused to make payment on the increased amount demanded for work and materials. Sterling demanded an increased amount of $104,117.00 for work done and an additional $4,567.50 for materials, for a total of $108,684.50. According to Sterling Clayton Bertlesman ("Bertlesman"), head of Arrowtown, verbally agreed to pay this increased amount after Sterling's president spoke to him about the increased cost of materials. Sterling has not substantiated this claim with any supportive document or declaration or testimony from Mr. Bertlesman to confirm this.

Sterling now seeks $58,684.50, which is this total amount demanded less $50,000.00 for the initial payment paid out, with interest. On September 29, 2023, Arrowtown sent a check to Sterling for $32,437.00, which represents the remaining balance on the $82,437.00 that was the original bid. Per Sterling's counsel, the check has not been cashed and the difference between the total amount paid and the amount demanded by Sterling is $21,680.00.

REQUEST FOR JUDICIAL NOTICE

Judicial notice of official acts and court records is statutorily appropriate. (Evid. Code §§ 452(c)-(d).) The court must take judicial notice of any matter requested by a party, so long as it complies with the requirements under C.C.P. § 452. (C.C.P. § 453.) Courts may take notice of public records, but not take notice of the truth of their contents. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

Subject to these restrictions, Arrowtown's requests for judicial notice are **GRANTED**.

EVIDENTIARY OBJECTIONS

Arrowtown has made fourteen objections to the Declaration of Jeremy Jagdfeld, President of Sterling. The Court rules as follows:

1. Objection 1 to Paragraph 1 is **OVERRULED**.
2. Objection 2 to Paragraph 7 is **OVERRULED**.
3. Objection 3 to Paragraph 9 is **OVERRULED**.
4. Objection 4 to Paragraph 10 is **SUSTAINED**.
5. Objection 5 to Paragraph 11 is **SUSTAINED**.
6. Objection 6 to Paragraph 14 is **OVERRULED**.
7. Objection 7 to Paragraph 15 is **OVERRULED**.
8. Objection 8 to Paragraph 16 is **OVERRULED**.
9. Objection 9 to Paragraph 17 is **OVERRULED**.
10. Objection 10 to Paragraph 19 is **OVERRULED**.
11. Objection 11 to Paragraph 20 is **SUSTAINED**.
12. Objection 12 to Paragraph 21 is **SUSTAINED**.
13. Objection 13 to Paragraph 24 is **SUSTAINED**.
14. Objection 14 to Paragraph 26 is **OVERRULED**.

ANALYSIS

Legal Standard

Motion for Summary Judgment or Adjudication

Per C.C.P. section 437c(f), a party may move for summary adjudication "as to one or more causes of action within an action, one or more affirmative defenses… if the party contends that… that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." A defendant or cross-defendant meets the burden of showing that a cause of action has no merit by showing that "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (C.C.P. § 437c(p)(2).) Meeting this burden will shift the burden to plaintiff or cross-complainant who must show that there remains a triable issue of "one or more material facts exists as to the cause of action or a defense thereto based on specific facts showing that a triable issue of material fact exists as to the cause of action or a defense." (*Ibid*.)

Moving party bears the burden of completely disposing of the subject cause of action, affirmative defense, claim for damages, or issue of duty. (C.C.P. § 437c(f).) A motion for summary adjudication shall proceed in all procedural responses as a motion for summary judgment, including the requirement of a notice of motion, separate statement, supportive memorandum, evidence in support, and request for judicial notice when appropriate. (C.C.P. § 437c(f)(2); C.R.C., Rule 3.1350.)

Breach of Contract

As Sterling points out in the opposition, in order to prevail on a cause of action for breach of contract, the plaintiff has to demonstrate the following: "(1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

Common Counts

If services were rendered under a contract that is not enforceable because it was not in writing, an action generally will lie upon a common count for quantum meruit. (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996.) A common count claim is proper if plaintiff is claiming a sum of money is due, either as "an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958.) The main elements of a common count: "(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.)

Moving Papers

Arrowtown moves for summary adjudication as to every cause of action in Sterling's complaint arguing that there is no triable issue of material fact as to the issues alleged, per C.C.P. sections 437c(c), 437c(f), and 437c(p). There is no signed written contract and the parties' claims are based on oral contracts. Both Arrowtown and the owners have denied by email that the demanded increased payment was agreed to by the parties. Arrowtown's motion argues that the common counts claim is not supported by any evidence of an agreed amount owed and that there is no evidence of a breach of contract as the roofing work needed for the project did not change from the time Sterling offered the proposal to the end of the project.

Arrowtown propounded discovery upon Sterling to obtain any information or documents that support the cause of action for account stated, but Sterling was not able to produce any document and responded that there were none. Sterling also admits to several things in discovery responses including that Arrowtown never agreed to the amount Sterling is demanding, that there was never any account stated for the work done, that Sterling did not complete the work for the project, and that neither party signed any of the proposals offered by Sterling. Sterling denies that there is the request to admit there is no wrongful withhold by Arrowtown for any amount owed to Sterling.

In opposition, Sterling argues the entire motion has no merit and contends there remains several triable issues of fact as to how much Sterling is owed for the work done, how the amount is to be calculated, and whether Arrowtown is in breach and has failed to fully and timely pay for services requested and rendered. It remains undisputed that there was a contract formed between the parties and that Sterling did perform on that contract even though it did not complete the roofing work. Sterling also disputes that there was a reason to stop performing as Arrowtown refused to pay the additional amount provided. Regardless, the parties continue to dispute how much is owed to Sterling given the lack of any signed bid proposal or contract.

In reply to the opposition, Arrowtown argues that the Court should grant its motion for summary adjudication because Sterling has admitted that there is no account stated issue, no evidence or argument that funds have been withheld, and because Sterling did not complete work on the project. Otherwise, Arrowtown reaffirms arguments made in the motion.

Application

As suggested by the moving papers, the parties continue to dispute how much is owed, even if they do not dispute that Sterling is owed money and Sterling did not complete the job. There is no signed contract that clarifies how much Sterling ought to be paid. Although Arrowtown denies being informed of the increased material costs, Sterling's president contends that he was transparent about these increases with Mr. Bertlesman from Arrowtown, who verbally agreed to pay. There exists a dispute as to whether this exchange occurred and, if it did, whether it impacts the amount that Arrowtown owes to Sterling for the work done on the project. There also exists a dispute of fact as to whether Mr. Bertlesman's purported agreement to the increased amount excuses Sterling's nonperformance after Arrowtown refused to pay after receiving the invoice.

As multiple triable issues of material fact remain on Sterling's causes of action, the Court will deny Arrowtown's motion.

CONCLUSION

Based on the foregoing, Arrowtown's motion is **DENIED**. Arrowtown's requests for judicial notice are **GRANTED**. Arrowtown's objections number 4, 5, and 11 to 13 are **SUSTAINED** and all others are **OVERRULED**. Sterling shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

6. SCV-273163, Johnson v. Stockham Construction, Inc.

1. Demurrer

This matter is on calendar for the demurrer of Defendant Stockham Construction, Inc. ("Defendant") to the first through seventh causes of action alleged in the complaint filed by Plaintiff Keith Johnson ("Plaintiff"). **The demurrer to Plaintiff's first, fifth, and sixth causes of action is SUSTAINED with leave to amend. The demurrer to Plaintiff's second, third, fourth, and seventh causes of action is OVERRULED.**

A. Complaint

Plaintiff's complaint alleges that in or around January 2016, Defendant hired Plaintiff to work as a full-time, non-exempt ceiling and acoustical foreman. Plaintiff alleges that he was wrongfully terminated on or about August 12, 2022. Plaintiff alleges that, previously, on April 1, 2022, he injured his right arm while performing job duties. The injury impaired major life activities and constituted a disability. The injury required surgery which occurred in mid-April 2022. Plaintiff was placed on medical leave to recover but was cleared to return to work, with restrictions, in July 2022. As a result, Plaintiff was placed in a retail store position. Work restrictions were lifted on or about August 8, 2022. Shortly thereafter, Plaintiff was terminated from employment. Plaintiff alleges that he was discriminated against and retaliated against for requesting work accommodations. Plaintiff's complaint alleges causes of action for: (1) Discrimination in Violation of Government Code section 12940, et seq; (2) Retaliation in Violation of Government Code section 12940 et seq.; (3) Failure to Prevent Discrimination and Retaliation in violation of Government Code section 12940(k); (4) Retaliation in violation of Government Code section 12945.2 et seq.; (5) Failure to Provide Reasonable Accommodations

in violation of Government Code section 12940, et seq.; (6) Failure to Engage in Good Faith Interactive Process in Violation of Government Code section 12940 et seq.; (7) Wrongful Termination in Violation of Public Policy; and (8) Failure to Permit Inspection of Personnel and Payroll Records.

While it appears that Plaintiff's complaint contains a typo as the complaint refers to "Respondent" as his employer but does not define Defendant as Respondent, it is clear from the complaint that Defendant was Plaintiff's employer and that Plaintiff intends to allege that it was Defendant who wrongfully terminated Plaintiff.

B. Causes of Action

(1) Discrimination in Violation of Government Code section 12940, et seq

Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel Nat. Inc*. (2000) 24 Cal.4th 317, 355.)

Here, the majority of Plaintiff's allegations are conclusory. For example, Plaintiff states he "was a member of multiple protected classes as a result of [his] disability, medical condition and/or the perception that Plaintiff was suffering from a disability and/or medical condition." (Complaint, ¶35.) For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law). (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 591; *290 Division (EAT), LLC v. City & County of San Francisco* (2022) 86 Cal. App. 5th 439, 452.)

Factually, Plaintiff alleges that he was no longer subject to any work restrictions when he was terminated from his employment. Therefore, he has not factually alleged that he was a member of a protected class, i.e., someone with a disability, when he suffered an adverse employment action. Alternatively, the complaint does not appear to allege that Defendant perceived Plaintiff to be disabled as Plaintiff was cleared to return to work without restrictions when his employment was terminated. Thus, it appears that the basis for the disability—the injury—had been resolved by the time Plaintiff was terminated. By filing a complaint, Plaintiff's counsel is certifying that the allegations have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. (CCP section 128.7.) Therefore, Plaintiff's attorney should be able to provide those facts which form the basis of the determination that the allegations have evidentiary support.

The demurrer to this cause of action is sustained.

(2) Retaliation in Violation of Government Code section 12940 et seq.

The elements of a claim for retaliation in violation of section 12940, subdivision (h), are: (1) the employee's engagement in a protected activity; (2) retaliatory animus on the part of the employer; (3) an adverse action by the employer; (4) a causal link between the retaliatory animus and the adverse action; (5) damages; and (6) causation. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.)

Defendant argues that Plaintiff's complaint fails to allege that he engaged in any protected activity which was a substantial motivating reason for the adverse employment action or that Defendant held any retaliatory animus toward Plaintiff.

The complaint must be "liberally construed, with a view to substantial justice between the parties." (CCP § 452.) Where allegations are subject to different reasonable interpretations, court

must draw inferences favorable to the plaintiff, not the defendant. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal. App. 4th 1228, 1238.)

Plaintiff concludes that Defendants discriminated and retaliated against him by terminating his employment and for exercising his right to request accommodation of his disability and/or medical condition. (Complaint, ¶22.) Plaintiff's factual allegations state he was fired just four days after he no longer required an accommodation. Thus, it is implied that Plaintiff was filed in retaliation for the injury and/or accommodation.

The demurrer to this cause of action is overruled.

(3) Failure to Prevent Discrimination and Retaliation in violation of Government Code section 12940(k)

This cause of action alleges that section 12940(k) requires defendant to take all reasonable steps necessary to prevent discrimination and retaliation from occurring and that Defendant breached this duty. While the cause of action for discrimination is insufficient, Plaintiff's cause of action for retaliation supports a cause of action for failure to prevent retaliation. Therefore, the demurrer to this cause of action is overruled.

(4) Retaliation in violation of Government Code section 12945.2 et seq.

This cause of action alleges that the California Family Rights Act ("CFRA") makes it unlawful to refuse to grant a request by any qualified employee to take medical leave. It also alleges that it is unlawful to retaliate against an employee for exercising their right to take leave under the CFRA. Again, while there are no facts alleged in the complaint that Defendant failed to provide Plaintiff with requested CRFA leave, the facts that are alleged imply that Defendant fired Plaintiff as a result of taking medical leave and/or requesting work accommodations. The demurrer to this cause of action is overruled.

(5) Failure to Provide Reasonable Accommodations in violation of Government Code section 12940, et seq.

This cause of action alleges that the FEHA requires an employer to make reasonable accommodations for the known physical disability and./or medical condition of an employee. The complaint concludes that "Defendants failed and refused to accommodate Plaintiff's disability, failed to engage in the interactive process with Plaintiff and continue to violate this obligation, up to and including the date of Plaintiff's termination or, if Defendant contends Plaintiff was never terminated, through the present and ongoing." (Complaint, ¶76.) However, the facts specific to this case establish that Defendant accommodated Plaintiff's medical condition by reassigning him to a retail position until such time as all work restrictions were lifted. There are no alleged facts that Plaintiff continued to need accommodations and that Defendant failed to provide them. Accordingly, as this cause of action fails to allege facts to support a cause of action, the demurrer is sustained.

(6) Failure to Engage in Good Faith Interactive Process in Violation of Government Code section 12940 et seq.

This cause of action alleges that the FEHA requires employers to engage in a timely, good faith, interactive process with the employee to determine effective reasonable accommodations in response to a request. Plaintiff's conclusory allegations state that Defendant failed to engage in that process. However, as stated above, the alleged facts that are particular to this case establish that Defendant did accommodate Plaintiff when Plaintiff requested accommodation. Therefore, this cause of action fails to allege facts sufficient to constitute a cause of action. The demurrer to this cause of action is sustained.

(7) Wrongful Termination in Violation of Public Policy

This cause of action alleges that Plaintiff was terminated at least in part on the basis of a perceived disability or in retaliation for requesting medical accommodations as a result of Plaintiff's temporary disability. Again, while there are no facts supporting disability discrimination, the liberally construed complaint does sufficiently allege retaliation. Accordingly, the demurrer to this cause of action is overruled.

C. Conclusion and Order

The portion of Plaintiff's complaint containing Plaintiff's causes of action fails to contain any case-specific facts. It only contains conclusory allegations laying out the elements of each cause of action. A complaint must allege a "statement of facts constituting the cause of action"—not a conclusion of facts. (CCP section 425.10.) Generic complaints devoid of case-specific facts are insufficient. Accordingly, the demurrer to Plaintiff's first, fifth, and sixth causes of action is SUSTAINED with leave to amend. The demurrer to Plaintiff's second, third, fourth, and seventh causes of action is OVERRULED.

Defendant's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

2. Motion to Strike

Defendant Stockham Construction, Inc. ("Defendant") also moves pursuant to CCP sections 435, 436, and 437, for an order striking portions of the complaint filed by Plaintiff Keith Johnson ("Plaintiff") that request or pertain to punitive damages. **The motion is DENIED.**

Punitive damages may be supported by allegations of malice, oppression, or fraud. (Civ. Code section 3294.) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294(c)(1).) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (Civ. Code section 3294(c)(2).)

Here, the complaint alleges that Defendant terminated Plaintiff's employment in retaliation for taking medical leave to obtain surgery for a work-related injury and/or for requesting an accommodation due to that injury.

In *Scott v. Phoenix Schools, Inc*. (2009) 175 Cal.App.4th 702, the only evidence of wrongful conduct directed toward Scott was her termination for an improper reason; that Scott was fired after she informed the parents of a prospective student that the school had no room for their child. Scott sued alleging her termination violated the public policy embodied in the state regulations. She alleged she was terminated for refusing to violate the staffing ratio regulations, the implication being that the admission of the extra child would have resulted in a regulatory violation. The jury awarded punitive damages for the violation of public policy. However, the appellate court determined there was insufficient evidence of malice or oppression.

Here, unlike in Scott v. Phoenix, the action is only at the pleading stage. Defendant has not provided authority that retaliation for taking leave or requesting an accommodation cannot constitute despicable conduct carried on with a willful and conscious disregard of Plaintiff's rights, or despicable conduct that subjected Plaintiff to a cruel and unjust hardship in conscious disregard of Plaintiff's rights.

The motion to strike is DENIED.

Plaintiff's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

7. SCV-273443, TBF Financial I, LLC v. Montes

Motion withdrawn by moving party on April 15, 2024.