CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 21
HEARING DATE: 01/08/20

1. TIME: 9:00 CASE#: MSC14-01467
CASE NAME: JOHNSON VS. LEE
HEARING ON MOTION TO BE RELIEVED AS COUNSEL
FILED BY DAVID JOHNSON
**** TENTATIVE RULING: ****

Unopposed motion to relieve counsel from representing plaintiff David Johnson is granted.

2. TIME: 9:00 CASE#: MSC17-01831
CASE NAME: PHILIP FERREIRA VS. ROBERT WANDLING
HEARING ON OSC RE PRELIMINARY INJUNCTION
PER TRO FILED ON 12-16-19
**** TENTATIVE RULING: ****

Motion continued by stipulation to January 15, 2020 at 9:00 a.m.

3. TIME: 9:00 CASE#: MSC18-00831
CASE NAME: CADLES OF WEST VIRGINIA VS. CHRISTIAN ROUSSET
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
FILED BY CADLES OF WEST VIRGINIA LLC
**** TENTATIVE RULING: ****

Before the Court is a motion for summary judgment (the "Motion") filed by Plaintiff Cadles of West Virginia, LLC ("Plaintiff" or "Cadles"). The Motion relates to Plaintiff's Complaint for Breach of Contract. Defendant Christian J. Rousset ("Defendant" or "Rousset") is in pro per.

Plaintiff moves for summary judgment on the grounds that "it is undisputed that Defendant entered into a written agreement whereby Defendant borrowed money and agreed to pay the same back with interest" and that Defendant "materially breached his obligation to repay amounts due and owing."

The Court notes at the outset that while Plaintiff has filed a request for judicial notice of Plaintiff's Complaint and Defendant's Answer to the Complaint, there is no additional evidence on file. Although Plaintiff's Statement of Undisputed Material Facts references exhibits 5, 6, 8, and 9, the Court is not in possession of them.

On reply, Plaintiff objects to Defendant's responsive documents on the grounds that they were untimely served and fail to comport with the requirements of Code of Civil Procedure § 437c(b)(3) and California Rule of Court 3.1350(e). The Court notes that Defendant's "Affidavit in Support of Answer to Complaint and Summary Judgment" appears to meet the requirements of a declaration under Code of Civil Procedure § 2015.5 as it is executed under penalty of perjury. Furthermore, even if the Motion were unopposed, Plaintiff has not met its burden on summary judgment, as discussed further, below. The Motion is denied, without prejudice.

Request for Judicial Notice

Plaintiff requests judicial notice of its Complaint for Breach of Contract (and exhibits thereto) as well as Defendant's Answer to Complaint for Breach of contract (and exhibits thereto). The Court need not take judicial notice of pleadings in its own file. However, due to factual issues regarding the agreement, judicial notice is not proper. The Request is denied.

Standard

Code of Civil Procedure ("CCP") §§ 437c(c) provides, in relevant part:

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Section 437c(p)(1) provides:

> A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

The party moving for summary judgment has the burden of persuasion to show there is no triable issue of material fact and thus it is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850. Only if the moving party successfully meets this burden does the burden shift to the opposing party to make its own prima facie showing of the existence of a triable issue of material fact. *Ibid*.; *see also Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.

Evidentiary Objections

Neither party made any evidentiary objections.

Analysis

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.

Here, the contract and its terms appear to be in dispute. Plaintiff has requested judicial notice of a "Business Micro Express & Express Line/Loan Application" as well as a document entitled "Business Loan Disclosure of Terms and Conditions." These documents are not appropriate for judicial notice as they are subject to dispute. See Roussett Affidavit at ¶ 5 (Defendant testifies under penalty of perjury that he "has requested on numerous occasions the promissory note

which as of today, Plaintiff has failed to provide for the record.") As a consequence, Plaintiff has failed to establish the existence of a valid contract. Furthermore, Plaintiff has not provided any evidence of Defendant's breach or Plaintiff's damage.

Plaintiff has not met its burden under CCP § 437c. The Motion is denied, without prejudice.

4. TIME: 9:00 CASE#: MSC18-01535
CASE NAME: VEGA VS. YAPSTONE
HEARING ON MOTION TO DEEM MATTERS ADMITTED
FILED BY YAPSTONE, INC.
**** TENTATIVE RULING: ****

Defendant's motion to deem RFA's admitted, to compel interrogatory responses from plaintiff Paula Vega and for sanctions, is denied. Plaintiff provided the requested discovery responses the day before the motion was filed, rendering the motion moot.

To the extent defendant is dissatisfied with the content of the responses, defendant should meet and confer with plaintiff and then engage the services of the Discovery Facilitator, if necessary. The court cannot address entirely new issues via reply.

5. TIME: 9:00 CASE#: MSC18-01777
CASE NAME: DIXON VS. SCHWARTZ
FURTHER CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

No appearance necessary. See Line 6.

6. TIME: 9:00 CASE#: MSC18-01777
CASE NAME: DIXON VS. SCHWARTZ
HEARING ON MOTION FOR SUMMARY JUDGMENT
FILED BY STOKELY PROPERTIES, INC.
**** TENTATIVE RULING: ****

Defendants' unopposed motion for summary judgment is granted. Defendants have established, through plaintiff's admissions, that there is no triable issue of material fact and that defendants are entitled to judgment as a matter of law. CCP 437c(c). Defendants should prepare a judgment and a separate order of dismissal.

7. TIME: 9:00 CASE#: MSC18-01961
CASE NAME: KATHI KALNOKI VS. ALTA BATES HOSPITAL
HEARING ON MOTION TO STRIKE 3rd Amended COMPLAINT
FILED BY KHASHAYAR MONTAZERI M.D.
**** TENTATIVE RULING: ****

Defendant Montezari's Motion to Strike punitive damages **is granted pursuant to CCP § 425.13.**

Pursuant to CCP § 436, Montezari brings this motion to strike the prayer for punitive damages as they are barred by CCP § 425.13 and the allegations are insufficient to support an award of punitive damages.

The Court may strike out "any irrelevant… matter asserted in any pleading." CCP § 436. "Irrelevant matter" means immaterial allegation. (CCP § 431.10(c).) "An immaterial allegation in a pleading is… A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10(b)(3).) The motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (See *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.)

Plaintiff has not alleged compliance with Code of Civil Procedure § 425.13. It provides: "In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed." "[W]henever an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, then the action is one "arising out of the professional negligence of a health care provider," and the party must comply with section 425.13(a)." (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 191-192.)

Here, Plaintiff's cause of action is predicated on alleged acts directly related to the Defendant's performance of professional services. The allegations arise from the manner in which Dr. Montezari performed and communicated with Plaintiff concerning her medical care and treatment. Plaintiff cannot seek punitive damages unless she had been granted leave to do so by the Court.

As with demurrers, the same liberal policy regarding amendments applies to motions to strike. Defendant's motion to strike is therefore granted with leave to amend, provided Plaintiff complies with CCP § 425.13 and the Court allows the prayer for punitive damages.

8. TIME: 9:00 CASE#: MSC18-01961
CASE NAME: KATHI KALNOKI VS. ALTA BATES HOSPITAL
HEARING ON DEMURRER TO 3rd Amended COMPLAINT
FILED BY KHASHAYAR MONTAZERI M.D.
**** TENTATIVE RULING: ****

Defendant Dr. Khashayar Montezari's demurrer to the Third Amended Complaint **is sustained with leave to amend as to the 4th Cause of Action for Negligence.** The demurrer **is sustained without leave to amend** as to the 5th Cause of Action for Intentional Misrepresentation and the 6th Cause of Action for Intentional Infliction of Emotional Distress.

Any amended complaint shall be filed and served on or before January 29, 2020.

Background

In November of 2017, Plaintiff came under the professional care of Defendant Dr. Khashayar Montezari at John Muir Medical Center. Plaintiff alleges Dr. Montezari, while knowing the critical medical condition of Mrs. Kalnoki, intentionally or negligently discharged Mrs. Kalnoki on November 5, 2017. Plaintiff alleges her discharge came about as the result of her relatives withdrawing their consent to allowing Dr. Montezari to further treat Plaintiff. Plaintiff alleges Dr. Montezari discharged her in retaliation, disregarding her critical illness.

Plaintiff also alleges Dr. Montezari was extremely rude and made disparaging statements about her, sometimes in her presence. Finally, Plaintiff alleges Dr. Montezari misrepresented the condition of her illness.

Demurrer

Defendant Dr. Montezari demurs to the Third Amended on the ground the 4th (Negligence), 5th (Intentional Misrepresentation), and 6th (Intentional Infliction of Emotional Distress) causes of action on the ground each cause of action fails to state facts sufficient to constitute a cause of action. (CCP §430.10(e).)

The limited role of a demurrer is to test the legal sufficiency of a complaint. It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) For purposes of a demurrer, all properly pleaded facts are admitted as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) On demurrer the complaint must be liberally construed with a view to substantial justice between the parties. (Code Civ. Proc., § 452.) A demurrer lies only for defects appearing on the face of the complaint or from matters of which the court must or may take judicial notice. (Code Civ. Proc., § 430.40; see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

4th C/A (Negligence and Medical Malpractice)

The demurrer to the Fourth Cause of Action for Medical Malpractice is sustained with leave to amend.

Plaintiff alleges Dr. Montezari, while knowing the critical and dire medical condition of Plaintiff, maliciously discharged her. Plaintiff alleges Dr. Montezari failed to properly medicate and care for her while she was under his care. She alleges Dr. Montezari's treatment fell below the standard of care in his capacity as a physician. As a result, Plaintiff sustained life threatening injuries and damages.

"The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.)

Defendant demurs to the 4th C/A on the ground the Third Amended Complaint improperly tries to classify the cause of action as both "negligence" and "medical malpractice," which is improper because the allegations arise out of the provision of health care services. In *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, our Supreme Court stated, "As to any given defendant, only one standard of care obtains under a particular set of facts, even if the plaintiff attempts to articulate multiple or alternate theories of liability." (*Ibid* at p. 998.) "[A] plaintiff cannot, on the same facts, state causes of action for ordinary negligence as well as professional negligence, as a defendant has only one duty that can be measured by one standard of care under any given circumstances." (*Bellamy v. Appellate Dep't* (1996) 50 Cal.App.4th 797, 804.)

Defendant argues the allegations make clear that while at John Muir Hospital, Plaintiff came under the professional care of Defendant Montezari. The test of whether a health care provider's negligence constitutes professional negligence is whether the negligence occurred in the rendering services for which healthcare provider is licensed.

In the Opposition, Plaintiff concedes most of the alleged negligent acts by Dr. Montezari were committed during the doctor-patient relationship. Plaintiff admits the appropriate cause of action appears to be for medical malpractice and the claim for general negligence should be removed.

In the Reply, Defendant notes Plaintiff's concession, but argues the medical malpractice action is insufficient and uncertain.

While Plaintiff alleges Dr. Montezari maliciously discharged Plaintiff, there are no allegations of what caused Plaintiff's injuries. Was it the discharge, Defendant's bedside manner or Defendant's failure to medicate? Plaintiff has not alleged sufficient facts showing a proximate causal connection between the negligent conduct and the injury. In fact, it is not clear which alleged negligent conduct by Dr. Montezari caused the injury. As Defendant has argued, he cannot determine from the allegations what duty he breached and how said breach caused any harm. Therefore, the demurrer is sustained with leave to amend as to the medical malpractice claim. To the extent the Third Amended Complaint alleges general negligence against Dr. Montezari, the demurrer is sustained without leave to amend.

5th C/A (Intentional Misrepresentation)

Defendant's demurrer to the Fifth Cause of Action for Intentional Misrepresentation is sustained without leave to amend.

Plaintiff alleges Dr. Montezari made false representations to Plaintiff that her condition was stabilized, her blood test was normal, and that she could be safely discharged from further hospital care to a nursing facility. Plaintiff alleges such representations were made in contradiction of the pertinent diagnostic studies showing Plaintiff's true condition.

"The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage. (*Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co.* (2018) 24 Cal.App.5th 153, 178.)

Defendant Montezari demurs to the 5th Cause of Action on the ground Plaintiff failed to plead the cause of action with the required specificity. This cause of action sounds in fraud and therefore must meet the pleading requirement for fraud. "Each element of a fraud count must be pleaded with particularity so as to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action, although less specificity is required if the defendant would likely have greater knowledge of the facts than the plaintiff." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 231.)

Here, Plaintiff does not state when the alleged misrepresentations were made by Dr. Montezari. Plaintiff alleges generally that she was treated at John Muir in November 2017, but she remained in the hospital for approximately four months. Plaintiff failed to state facts to show how Dr. Montezari communicated the intentional misrepresentations, when he made the representations, and where he made the representations. Plaintiff failed to allege the misrepresentations were made with the express intent to induce Plaintiff's reliance.

Moreover, the allegations are conclusory and unsupported by any facts. Plaintiff alleges Defendant's representations were knowingly false, but she fails to state facts to support this conclusory allegation. Plaintiff also alleges Dr. Montezari made representations in contradiction to the diagnostic studies, but there are no allegations that Dr. Montezari was aware of the diagnostic studies.

In the Opposition, Plaintiff argues that, in reading the complaint in its entirety, she had alleged sufficient facts to state a prima facie case for intentional misrepresentation. Plaintiff alleges that she was in a near death condition on November 5, 2017, when Dr. Montezari represented in the discharge report that she was in a stable medical condition.

However, in the Reply, Defendant points out that the Opposition states Dr. Montezari made the alleged misrepresentations on November 5, 2017 in "his discharge report," but there are no allegations in the Fifth Cause of Action referencing a discharge report of any kind.

The Court agrees with Defendant that Plaintiff failed to allege the cause of action with the required specificity. Additionally, Plaintiff has not alleged facts showing actual reliance on

the representations that she was stable enough to be discharged on November 5, 2017. Plaintiff alleges that she remained at John Muir Medical Center for approximately four more month. (TAC, 28:16-19.) Since Plaintiff remained at John Muir, despite Dr. Montezari's representations, the element of reliance has not been pled. Also, since Plaintiff was not transferred to a nursing facility, the Third Amended Complaint does not allege damages resulting from the misrepresentations. The demurrer is sustained without leave to amend.

6th C/A (Intentional Infliction of Emotional Distress)

The demurrer to the Sixth Cause of Action is sustained without leave to amend.

Plaintiff alleges Dr. Montezari repeatedly and persistently made rude and outrageous statements to Plaintiff and her relatives, including such statements that if she did not like the treatment at John Muir she could go elsewhere. Also, he allegedly stated that if she did not like the treatment he provided, she should hire an attorney and sue him. Plaintiff alleged Dr. Montezari conspired with other hospital personnel to have her removed from the facility, without regard for her medical condition. Plaintiff was maliciously discharged on November 5, 2017, triggering harassment by John Muir Hospital's employees in the form of consistent, repeated presentation of unpaid bills for millions of dollars to Plaintiff and her relatives.

"A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051, internal quotations marks omitted.)

Defendant demurs on the ground Plaintiff failed to allege facts that Dr. Montezari's conduct was outrageous. Plaintiff has alleged poor bedside manner, which may be unpleasant but not outrageous conduct. "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Cervantez* v. *J.C. Penney Co*. (1979) 24 Cal. 3d 579, 593.) "Generally, conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' (Rest.2d Torts, § 46, com. d.)" (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.)

Additionally, Defendant argues the fact that Dr. Montezari recommended discharge and the hospital subsequently requested payment for medical bills is not actionable as outrageous conduct. Plaintiff does not allege Dr. Montezari ever intended to cause Plaintiff severe emotional distress. Alternatively, Plaintiff does not allege that Dr. Montezari acted with reckless disregard of the probability that Plaintiff would suffer emotional distress.

In the Opposition, Plaintiff argues the totality of the circumstances set forth in complaint establishes this cause of action. Plaintiff maintains Dr. Montezari intentionally, maliciously, and without medically valid justification, discharged Plaintiff from the hospital despite her medical condition, as means of retaliation. Dr. Montezari repeatedly and persistently made rude and outrageous statements to Plaintiff. Plaintiff was in an extremely fragile condition, suffering from

life-threatening illnesses of ineffective endocarditis, sepsis, colitis, and C-diff and other ailments. In addition to her physical illnesses, Plaintiff suffered mental impairment. Plaintiff had sustained anoxic brain damage, which left her with a diminished mental capacity. She was also taking numerous anti-seizure drugs that made her mentally and emotionally more vulnerable to abuse. In fact, after the discharge, Plaintiff spent four months in the hospital, with a large portion of the time spent in the ICU.

Here, Plaintiff argues Dr. Montezari was keenly aware of Plaintiff's susceptibility to emotional distress. Plaintiff alleges the conduct was despicable, malicious, outrageous, intentional, shocking to the conscience, and beyond the pale of all decency.

Plaintiff has not alleged facts showing Defendant's conduct was extreme and outrageous. "A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.] And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.'[Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) "Liability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' [Citations]." (*Hughes, supra* at p. 1051.)

Moreover, while Plaintiff has alleged Defendant's conduct was intentional, Plaintiff has not alleged Defendant intended to cause Plaintiff severe emotional distress. "In evaluating whether the defendant's conduct was outrageous, it is 'not . . . enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.)

Here, Plaintiff has alleged Dr. Montezari made rude comments and attempted to discharge her prematurely by making certain misrepresentations. Plaintiff failed to allege facts showing extreme and outrageous conduct and failed to allege facts showing Defendant acted with intent of causing emotional distress. Plaintiff has not demonstrated how the cause of action can be amended. The demurrer is sustained without leave to amend.

9. TIME: 9:00 CASE#: MSC18-02027
CASE NAME: DECARLO VS. FORD MOTOR COMPANY
HEARING ON MOTION TO COMPEL FURTHER PRODUCTION OF PMK
FILED BY KASSI DECARLO
**** TENTATIVE RULING: ****

Off calendar at request of moving party.

10. TIME: 9:00 CASE#: MSC19-00177
CASE NAME: GREENE VS FAY
HEARING ON MOTION FOR ATTORNEY FEES AND COSTS
FILED BY U.S. BANK, N.A.
**** TENTATIVE RULING: ****

Defendant's motion for attorney fees is **denied**. If defendant contests this tentative ruling, defendant's counsel shall make a personal appearance; an appearance by CourtCall, or a special appearance by an attorney who is not counsel of record, shall not be allowed. The basis for this ruling is as follows.

A. The Timing Of The Trustee's Sale.

The Court finds that defendant has not persuasively distinguished the governing case law. (See, *Chacker v. JP Morgan Chase Bank, N.A.* (2018) 27 Cal.App.5th 351, 356-359; *Hart v. Clear Recon Corp*. (2018) 27 Cal.App.5th 322, 327-329.)

Defendant first attempts to distinguish the *Chacker* decision (ignoring entirely the *Hart* decision) by arguing that "unlike here, the mortgage loan in *Chacker* had not yet been foreclosed and so a loan existed to which attorney fees might be added." (Memorandum, p. 4, lines 11-13.) This argument lacks merit, because it ignores an important holding of *Chacker*. The Court of Appeal held in pertinent part as follows:

> As for the Chase Defendants' argument that adding the attorney fees amount to the loan balance would be unjustified because they are no longer the active servicers or trustees of the deed of trust, Justice Scalia's observation in another context is apt: *the Chase Defendants "must take the bitter with the sweet."* [Emphasis added, citation omitted.] The Chase Defendants' argument for why they are entitled to seek attorney fees in the first place—despite being nonparties to the contract that serves as the foundation for their fee request—depends on their assertion that they acted as the lender's agents and stood in the lender's shoes. They cannot repudiate that position merely because the upshot, required by the terms of the contract on which they rely, is that the fees they seek to recoup are added to the balance of a loan agreement that has since been assigned to another financial institution.

(*Chacker*, supra, 27 Cal.App.5th at 358-359.) The court found that the servicer should not be allowed to recover a judicial award of attorney fees even though this left the servicer without a way to collect its attorney fees.

The same is true in the case at bar: defendant "must take the bitter with the sweet." Defendant could have waited until its judgment was final, recorded an amended notice of default with all attorney fees and costs added, and then collected its attorney fees and costs from the proceeds of the foreclosure sale. Instead, defendant chose to foreclose before a judgment had even been entered. By rushing to foreclose, defendant waived the one proper way to collect its attorney fees and costs.

B. The Promissory Note.

Defendant also attempts to distinguish the *Chacker* decision by arguing that defendant is pursuing attorney fees under the promissory note, and not the deed of trust. This highly strained argument lacks merit for two reasons.

First, the promissory note and the deed of trust must be construed together as one contract. (See, Civ. Code, § 1642; *Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1320 ["[i]t is a general rule that several papers relating to the same subject-matter and executed as parts of substantially one transaction, are to be construed together as one contract"].) Second, if a mortgage lender could obtain a money judgment under a secured promissory note by treating it as being somehow independent of the corresponding deed of trust, this would completely vitiate California's anti-deficiency legislation — including the statute prohibiting a deficiency judgment when the lender has chosen nonjudicial foreclosure. (See, Code Civ. Proc., § 580d, subd. (a).)

C. The Deed of Trust Clause.

Finally, defendant attempts to distinguish the *Chacker* decision by arguing as follows: "Plaintiff's DOT does not specify that attorneys' fees are to be added to the secured balance of the subject mortgage loan." (Memorandum, p. 4, lines 20-22.) This argument is factually inaccurate. The subject deed of trust provides in pertinent part as follows: "This Security Instrument will protect Lender in case I do not keep this promise to pay those amounts [including attorney fees] with interest." (Defendant's RJN, Exh. 1 [Deed of Trust, p.7, ¶ 7].) The only way the deed of trust could "protect Lender" is if attorney fees and costs are added to the balance due under the promissory note and deed of trust.

The Court notes that there is no provision in the promissory note or deed of trust providing that the holder of the beneficial interest is entitled to bring a motion for attorney fees if it is the prevailing party in litigation. The only enforcement mechanism for recovering attorney fees is that addressed in the previous paragraph. Thus, the *Chacker* and *Hart* decisions cited above are directly on point.

D. Tabbing Exhibits.

The exhibits to defendant's request for judicial notice are not tabbed. (See, Cal. Rules of Court, rule 3.1110, subd. (f). See also, Local Rule 3.42, subd. (3).) The Court previously admonished defendant's counsel on this point, when counsel's failure to tab exhibits required the continuance of a hearing and the filing of amended documents. (See the Court's minute orders for June 12, 2019.)

Future violations of this rule by defendant's counsel — in this action or other actions — will result in an award of monetary sanctions against the attorney or attorneys shown on the caption of the noncompliant document, and may result in the striking of the noncompliant document. In the Court's experience, noncompliant documents are often fax-filed,

so defendant's counsel will wish to be explicit about tabbing exhibits in their instructions to any fax-filing service they may choose to employ.

11. TIME: 9:00 CASE#: MSC19-01331
CASE NAME: BULLOCK VS. CITY OF ANTIOCH
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY CITY OF ANTIOCH
**** TENTATIVE RULING: ****

Defendant City of Antioch's demurrer to the First Amended Complaint **is sustained with leave to amend.**

Plaintiffs shall file and serve any amended complaint on or before January 29, 2020.

Background

Plaintiffs are sixteen retired individuals who were employed in various job classifications and in various collective bargaining units at the City of Antioch. They retired from the City at different times in different years. Defendant City of Antioch provides retiree health benefits through CalPERS. Plaintiffs are eligible participants in Defendant City of Antioch's retiree Medical-After-Retirement benefit.

The insurance premium for CalPERS health insurance plans is deducted from the retiree's monthly annuity payment from CalPERS. The City then reimburses the retiree for a portion of the retiree healthcare premium based on the caps that were set in 2005. The collective bargaining agreements, MOUs between the City and the labor unions representing the City employees, state: "The City shall pay the PERS required Minimum Employer Contribution (MEC) per month on behalf of each active and retired employee who participates in the City's health insurance plans."

Plaintiffs allege the City is essentially paying the required MEC using the retiree's benefit money. The City is not paying the MEC, the retiree is. Plaintiffs allege that deducting the MEC from the reimbursement to the retiree is not in accord with the express language of the MOU.

It is the City's position that it has paid the MEC directly to PERS, as it has done since 2004, when it first joined CalPERS. Since 1993, the City has been a party to a Medical-After-Retirement Plan ("MAR"). Under the MAR, which is incorporated into all of the City's labor agreements, the City contributes more than the floor set by the MEC. The MAR sets a cap on the total employer contribution to retirees' health benefits.

Demurrer

Defendant demurs to the FAC on two independent grounds. First, collateral estoppel bars this action, because it raises the same issues previously decided on the merits against a party in privity with Plaintiffs. Even if collateral estoppel did not apply, Plaintiffs have not

exhausted their remedies under the MOUs. Secondly, Plaintiff failed to file timely claims under Government Code §910 *et seq.*

The limited role of a demurrer is to test the legal sufficiency of a complaint. It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) For purposes of a demurrer, all properly pleaded facts are admitted as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) On demurrer the complaint must be liberally construed with a view to substantial justice between the parties. (Code Civ. Proc., § 452.) A demurrer lies only for defects appearing on the face of the complaint or from matters of which the court must or may take judicial notice. (Code Civ. Proc., § 430.40; see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On demurrer the allegations of the complaint are assumed to be true. (*Adelman v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 352, 359.) "A demurrer is simply not the appropriate procedure for determining the truth of disputed facts." (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.)

Plaintiffs are Collaterally Estoppel from Asserting the Claims in the FAC

"Collateral estoppel (or as it is sometimes known, issue preclusion) precludes a party from relitigating an issue of fact or law if the issue was litigated and decided in a prior proceeding." (*Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1229.) Collateral estoppel applies where the plaintiff has not sought review of the administrative findings through a writ of mandamus. "An aggrieved employee is not necessarily compelled to petition for a writ of mandamus as a prerequisite to filing a civil action, but he or she must abide by the collateral estoppel effect of the unchallenged administrative findings. (*California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal.App.4th 174, 181.)

The collateral estoppel "doctrine applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements.' [Citation.]" (*Id.* at p. 341.) (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943-944.)

A. Identical Issues

Here, Defendant argues Plaintiffs make the same arguments that Local 3 made before the Board of Administrative Appeals and the City Council. Like Local 3, Plaintiffs contend the City should pay them the full amount of the MAR capped contribution in addition to making the MEC payments directly to PERS. Defendant maintains the issue was decided in earlier proceeding.

On June 22, 2017, Local 3 filed a grievance with the City Manager on behalf of retirees, asserting that the City should pay retirees the full amount of the cap in addition to paying the

MEC to PERS. Local 3, on behalf of the retirees, alleged that the City's failure to do so violated 12.1(B) of the MOU, which provides: "[t]he City shall pay the PERS required Minimum Employer Contribution (MEC) per month on behalf of each active and retired employee who participates in the City's health insurance plans." On July 20, 2017, the City Manager denied the grievance, finding the City was correctly paying the difference between the MAR cap and MEC contribution to retirees. Local 3 appealed to the Board of Administrative Appeals. After hearing on the merits, the Board of Appeals issued a written decision upholding the denial of the grievance. Pursuant to City's municipal code, a Council member referred the decision to the City Council, which upheld the Board of Administrative Appeals' determination, on November 14, 2017. No party sought judicial review of the City Council's decision.

Plaintiffs argue the proceedings upon which the City relies involved only one of the City's five non-safety labor unions. Plaintiff argues the City's decision cannot be afforded preclusive effect beyond Local 3. The issue presented in the Local 3 matter was not identical, and it did not consider violation of Gov. Code § 22892. The issue in Local 3 focused on alleged violation of Local 3's MOU.

While Plaintiffs have argued the issues are not identical to those raised by Local 3, Plaintiffs have not alleged facts that show a demonstrable difference from the interest and rights raised by Local 3 in the previous proceeding.

B. Issues Litigated and Final Decision

The issues in the Local 3 matter were litigated in an impartial administrative proceedings. The parties appeared with legal counsel. There was a full and fair evidentiary hearing. Both sides called witness, presented testimony under oath, introduced exhibits into evidence, and made opening and closing arguments. The Board made written factual findings based on the preponderance of evidence. Further arguments were conducted before the City Council. Defendant argues the process satisfied the requirements for an adjudicatory hearing. A final decision was made by the City of Antioch.

Plaintiffs make no special allegation of bias in the proceedings before the City's Board of Administrative Appeals or City Council.

C. Privity

Collateral estoppel may be applied only if due process requirements are satisfied. "'In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 720.)

"[U]nder the modern doctrine of collateral estoppel, '. . . the word 'privy' has acquired an expanded meaning. The courts, in the interest of justice and to prevent expensive litigation, are striving to give effect to judgments by extending 'privies' beyond the classical description. [Citation.] The emphasis is not on a concept of identity of parties, but on the practical situation.

The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion.'[Citation.]" (4 Cal. App. 3d at p. 937.) (*Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 152.) "'Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . . .' [Citations.]" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070.)

In the final analysis, the determination of privity depends upon the fairness of binding a party with the result obtained in earlier proceedings in which it did not participate. "'Whether someone is in privity with the actual parties requires close examination of the circumstances of each case.'" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070.)

Defendant argues privity exists between Plaintiffs and the retirees on whose behalf Local 3 sought relief. Defendant argues the identity of interests is so absolute, and the closeness of the relationship between the City's retirees and those of Local 3 are so obvious, that it is inescapable privity exists and collateral estoppel applies. Plaintiffs concede that the MOUs at issue contain the same language regarding the MAR and MEC, and that all the Plaintiffs are City retirees with rights identical to those the City retirees represented in the grievance and administrative proceedings. Only retirees receive MAR benefits.

Plaintiffs, on the other hand argue, the parties in the previous matter were the City and Local 3. Here, the "already-retired Plaintiffs' were not parties nor were they in privity with Local 3. Plaintiffs argue the labor unions' obligation under the Meyers-Melias-Brown Act to represent employees in their respective bargaining units ends when those employees retire. (See *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.* (1971) 404 U.S. 157, 165.) Local 3 did not have standing to adjudicate the already-retired Plaintiffs' claims. Retirees are not employees within the meaning of section 8 (a)(5) of the National Labor Relations Act. (See *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 165.) Plaintiffs argue the City's other labor unions are not bound by the decision, and anyone already formerly in the Local 3 bargaining unit who was retired at the time Local 3 filed its grievance cannot be bound by the decision.

On November 14, 2017, a final decision holding that the MAR includes the MEC was reached. The decision was issued after a full evidentiary hearing in which the interests of the Plaintiffs were represented by Local 3. Plaintiffs cite to no case that holds a labor union cannot adequately represent retirees in a grievance process. As Defendant points out in the Reply, Plaintiffs make no specific allegation as to how their interests were not adequately represented by Local 3. Furthermore, Plaintiffs' complaint fails to include allegations showing why they should not have reasonably expected to be bound by the prior adjudication. For this reason, the Court sustains the demurrer with leave to amend.

Exhaustion of Administrative Remedies

Defendant argues Plaintiffs have not exhausted their remedies under their respective MOUs. Each agreement between the City and an employee organization contains a dispute resolution process. The claims being raised by Plaintiffs were subject the grievance procedure outlined in the MOUs. There are no allegations in the FAC showing Plaintiffs followed the grievance process outlined in the applicable MOU.

Plaintiffs' Opposition does not address the failure to allege compliance with the grievance process under the MOU. Therefore, Plaintiffs have not properly alleged exhaustion of administrative remedies.

Claims Presentation under Government Code §910 *et seq.*

Defendant also demurs on the ground that Plaintiffs failed to file timely claims under Government Code §910 *et seq.* Section 905 empowers local agencies to require presentation of claims in this category before filing suit. The City of Antioch enacted an ordinance requiring that "all claims for money and damages against the city…" Plaintiffs' allegations fail to demonstrate or excuse compliance with the claim presentation requirements. Plaintiffs did not present claims to the City until December 19, 2018, more than one year after their claims accrued.

Plaintiffs allege compliance with the claims presentation requirement. (FAC, ¶¶15-17.) The City of Antioch denied the claims as untimely. The Court declines to sustain the demurrer on this ground.

Defendant's Request for Judicial Notice

Defendant requests the Court to take judicial notice of the following:

1. Exhibit A—The City's MOU with Operating Engineers Local No. 3
2. Exhibit B—City's MAR plan
3. Exhibit C—OE Local 3 June 22, 2017 grievance
4. Exhibit D—City's Manager's Denial of Grievance
5. Exhibit E—OE Local 3's Appeal
6. Exhibit F—Minutes of September 27, 2017 Board of Administrative Appeals Special Hearing
7. Exhibit G—Board of Administrative Appeals' Decision
8. Exhibit H—City of Antioch's Municipal Code Section 1-4.03(c)
9. Exhibit I—Board of Administrative Appeals' staff report to City of Antioch

12. TIME: 9:00 CASE#: MSC19-01771
CASE NAME: LILIBETH BERSABAL VS. IMPAC MORTGAGE
HEARING ON DEMURRER TO COMPLAINT
FILED BY IMPAC MORTGAGE CORP.
**** TENTATIVE RULING: ****

Impac's unopposed demurrer to the complaint is sustained with leave to amend. The causes of action do not state facts sufficient to allege a claim against Impac.

13. TIME: 9:00 CASE#: MSC19-01885
CASE NAME: RAHMANY VS. SEENO CONSTRUCTION
HEARING ON DEMURRER TO COMPLAINT
FILED BY ALBERT D. SEENO CONSTRUCTION CO., et al.
**** TENTATIVE RULING: ****

The demurrer is **overruled**. Defendants have failed to demonstrate that the claims and issues raised by plaintiff in this matter were the subject of any previous action, or that privity exists such that res judicata applies to bar plaintiff's complaint.

Background

Plaintiff, Najib Rahmany, filed his complaint for construction defect on September 12, 2019. He alleges one cause of action for "Violation of Standards for Residential Construction." In this cause of action, plaintiff complains of many defective conditions including defective waterproofing of windows and patio doors, defective hardscape and drainage systems, defective plumbing and utility lines, structural concerns, and electrical fixtures. (Complaint, 8:1-11:26.)

Defendants, having first satisfied the statutory meet and confer requirements (see Declaration of Matthew S. Cole, Ex. E), demur to plaintiff's complaint, asserting that the home's previous owners also sued defendants in 2012 for construction defect pursuant to California's Right to Repair Act (Civ. Code §§ 896, et seq.) (Points and Authorities in Support of Demurrer, hereinafter "Demurrer," 3:14-19.) Defendants argue that, pursuant to Code of Civil Procedure § 430.10, subds. (a), (b), and (e): (1) *res judicata* (both claim and issue preclusion) deprives this Court of jurisdiction, (2) *res judicata* deprives plaintiff of the requisite capacity to sue, and (3) plaintiff fails to state facts sufficient to constitute a cause of action based on *res judicata*.

Discussion

The limited role of a demurrer is to test the legal sufficiency of a complaint. It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) For purposes of a demurrer, all properly pleaded facts are admitted as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) The complaint must be "liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc. § 452.)

Claim Preclusion

As defendants correctly point out, to determine whether claim preclusion bars another action or proceeding, courts look at whether the two proceedings involve the same cause of action. (Demurrer, 5:27-6:1; see also *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) Defendants argue that plaintiff's cause of action here is the same as that asserted by the previous owners in the 2012 case.

Claim preclusion prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896.) In California, the primary right theory defines a cause of action. (*Mycogen Corp., supra,* 28 Cal.4th at 904.) A cause of action is not determined by the prayer or the title, but rather by the gist of the action as framed by the pleadings and the facts in the case. (*Stoney Creek Orchards v. State of California* (1970) 12 Cal.App.3d 903, 907-908, citations omitted.) While defendants attach the caption page from the 2012 case, which identifies

"Violation of Building Standards as Set Forth in California Civil Code § 896," this is not determinative of the claims or issues litigated. Additionally, Civil Code section 896 includes 45 building standards, only some of which are referenced in the current case. The statute could therefore potentially give rise to many different causes of action, depending on the particular defect.

Generally speaking, there is some privity between sellers and buyers with respect to certain real property claims, such as quiet title. (See *Swartfager v. Wells* (1942) 53 Cal.App.2d 522, 529, quoting 30 Am. Jur. 959, §§ 226, 227 ["general rule" is that party to whom property is transferred is in privity for *res judicata* purposes].) However, construction defect claims accrue to the owner who experiences the actual, appreciable harm, and do not pass on to the successor purchaser without manifest intent by the seller. (See *Krusi v. S.J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995, 1005.) Subsequent owners can bring claims if the damage they suffer is fundamentally different from the earlier damage. (*Id.* at 1006.) This is consistent with the general rule that privity exists when "the nonparty has an identity of interest with, and adequate representation by, the party in the first action and the nonparty should reasonably expect to be bound by the prior adjudication." (*Helfand v. National Union Fire Ins. Co*. (1992) 10 Cal.App.4th 869, 902; see also *Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 719 ["adequate representation prong" met when the interests of the party to be bound are similar to those of the party litigating and when the litigating party had a strong motive to assert that common interest].)

As plaintiff points out, the previous owners had recently sold the subject home to plaintiff when they dismissed their claims in the prior suit. This fact undermines any motive they may have had for asserting their rights in the previous litigation, and indicates that they were unlikely to be adequate representatives of plaintiff's interests. As noted by plaintiff, the sale may have been *why* they dismissed their claims. No evidence supports any intent by the previous owners to pass on their claims to the new homeowners.

Because there is no privity for the purposes of the defect claims, and because the causes of action raised in the previous litigation are not apparent from the information presented with the motion, claim preclusion does not bar plaintiff's complaint.

Issue Preclusion

Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. The doctrine applies only where (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding, (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided; (4) the decision in the former proceeding was final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.)

As discussed above, defendants have not sufficiently explained how the issues in the current case are identical as in the previous proceeding. There is also no privity between the plaintiff and the previous owners for the purposes of *res judicata*.

As a result, defendants have not shown that collateral estoppel bars plaintiff's complaint.

Request for Judicial Notice

Defendants request judicial notice of the first two pages of the complaint in this action, the first two pages of the complaint in the 2012 lawsuit, the request for dismissal with prejudice in the previous lawsuit, and the electronic court docket from the 2012 lawsuit. The request is unopposed and is **granted**.

Plaintiff requests judicial notice of the grant deed from the previous owners, dated November 24, 2014. The request is unopposed and is **granted**.

14. TIME: 9:00 CASE#: MSC19-02125
CASE NAME: LAWRENCE VS. SYNBIOBETA, LLC
HEARING ON DEMURRER TO COMPLAINT
FILED BY SYNBIOBETA, LLC, JULIAN ERGGELET
**** TENTATIVE RULING: ****

Defendant SynBioBeta and Julian Erggelet's demurrer to cause of action four in the complaint is **sustained with leave to amend**. Plaintiff may file and serve an amended complaint by January 22, 2019.

Defendants demur to cause of action four in the complaint for harassment based on race. "Actionable harassment consists of more than 'annoying or "merely offensive" comments in the workplace,' and it cannot be 'occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature.' [Citation] Whether the harassment is sufficiently severe or pervasive to create a hostile work environment 'must be assessed from the "perspective of a reasonable person belonging to [the same protected class as] the plaintiff." ' [Citation.] In making this assessment, we consider several factors, including ' "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." ' [Citation.]" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 940.)

Plaintiff is African American and was the only African American working at SynBioBeta. (Comp. ¶20.) SynBioBeta has seven permanent employees and does not have a human resources department. (Comp. ¶20.) Thus, there was no one Plaintiff could report any issues to. (Comp. ¶20.)

Plaintiff alleges that she was discussing couch covers with Anissa Cooke, the Director of Operators. Cooke stated that her African American friend said that the reason African American people have couch covers is because of their Jerry curl gel. Plaintiff explained this was not the case. (Comp. ¶23.) Plaintiff also alleges that during a weekly team meeting, Julian Erggelet suggested holding an upcoming conference at a plantation in North Carolina. (Comp. ¶ 27.) Plaintiff was upset over this suggestion and Cooke talked with Plaintiff about it. (Comp. ¶27.) Cooke told Plaintiff that she did some research and plantations were no longer what they used to be. Cooke also stated that she did not think Erggelet meant to be malicious; although Cooke

admitted she had not spoken with Erggelet about his comment. Cooke said she would talk to Erggelet and Plaintiff agreed to accept an apology from Erggelet, however, nothing ever came out of this discussion. (Comp. ¶28.)

These allegations are insufficient to show that there was severe or pervasive harassment based on Plaintiff's race.

Plaintiff points out that in *Cornell* the court held that the comments by plaintiff's supervisor were insufficient to show severe or pervasive harassment on their own. However, the court went on to explain that these comments must be viewed in context with the supervisor's other allegedly harassing conduct. (*Cornell, supra,* 18 Cal.App.5th at 941.) In *Cornell*, plaintiff alleged she was disabled due to severe obesity. Plaintiff's supervisor made several comments about her weight and/or her size. In addition, he ordered shirts that too small for her and reported her to personnel because she was resisting the uniform policy by not wearing the required shirts. (*Ibid*.) Plaintiff was also paid less than another employee and was denied extra hours and internal job openings. (*Ibid*.) However, this conduct was linked to the supervisor's alleged harassment of the plaintiff because the supervisor responded to questions about plaintiff's pay by stating that " '[w]ell, just look at her, she's going to be jealous of anybody and she just isn't a good fit and I'm going to have to look for someone else.' " (*Id.* at 921.) Thus, there was evidence that plaintiff's lower pay was related to the supervisor's alleged bias against her based on her disability.

Here, Plaintiff alleges several other incidents that occurred during her employment with SynBioBeta. Plaintiff alleges that the CEO made Plaintiff come into work with her young daughter when she could not obtain other childcare arrangements and the CEO later got mad at Plaintiff due to her daughter's behavior. (Comp. ¶21.) Plaintiff alleges she was asked by the CEO to say that a neighbor of the CEO worked at SynBioBeta when that was not true. (Comp. ¶24.) Plaintiff alleges that she was required to take sick time when her father was hospitalized rather than being offered CFRA leave, which she was eligible for. (Comp. ¶26.) Finally, Plaintiff alleges that she was required to come in on a day when all other employees were given the day off and it was on this day that the CEO told her that her employment with SynBioBeta was terminated. (Comp. ¶30.) None of these facts appear related to Plaintiff's allegations of racial harassment and they do not change the Court's determination that the facts alleged are insufficient to show severe or pervasive harassment

Therefore, the Court finds that Plaintiff has not alleged sufficient facts to state a claim for harassment under FEHA. As this is the first demurrer, the Court will give Plaintiff leave to amend.

Defendants' request for judicial notice is denied as unnecessary. However, the Court appreciates Defendants' efforts to include a copy of the operative pleading with the demurrer.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 21
HEARING DATE: 01/08/20

15. TIME: 9:01 CASE #: MSC18-00666
CASE NAME: DEGRANO VS. CONAM MANAGEMENT CORP.
HEARING ON MOTION TO CONTINUE TRIAL AND RELATED DATES PER STIP.
FILED BY CONAM MANAGEMENT CORP., et al.
TENTATIVE RULING:

Unopposed motion to continue trial is granted. The case is reassigned for all purposes to Judge Burch, Department 23. The Issue Conference is now set for June 30, 2020 at 11:00 a.m. and the trial date is July 13, 2020 at 10:00 a.m. All statutory and discovery cut-offs are based on the new trial date. The court will revise and sign the order provided.