CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 21
HEARING DATE: 11/04/20

1. TIME: 9:00 CASE#: MSC17-01521
CASE NAME: MCGUINESS VS. CHEVRON
HEARING ON MOTION FOR SUMMARY JUDGMENT FILED BY CHEVRON SHIPPING COMPANY, LLC
**** TENTATIVE RULING: ****

The Court continues the hearing on this motion to November 18, 2020 at 9:00 am.

The trial setting conference previously scheduled for 11/13/20 is continued to November 20, 2020 at 8:30 am.

2. TIME: 9:00 CASE#: MSC17-02200
CASE NAME: ALCATRAZ VS CONTRERAS
HEARING ON DEMURRER TO DENISE CONTRERAS' FIRST AMENDED ANSWER (FILED 10-06-2020 BY PLAINTIFFS)
**** TENTATIVE RULING: ****

This matter is moot, and the hearing is taken off-calendar. An amended answer was filed on October 30, 2020.

3. TIME: 9:00 CASE#: MSC18-00091
CASE NAME: VAN PELT VS SPARER, ET AL
HEARING ON MOTION TO/FOR RECONSIDERATION FILED BY DUSTIN PHINEAS REVERE
**** TENTATIVE RULING: ****

The court continues the hearing to November 18, 2020 at 9:00 a.m.

4. TIME: 9:00 CASE#: MSC18-00581
CASE NAME: NAJJAR VS. GOLDSTEIN
HEARING ON MOTION TO/FOR ORD CMPLNG DEPONENT TO APPEAR FOR 2ND DAY OF DEPO FILED BY GEORGE NAJJAR
**** TENTATIVE RULING: ****

The motion is denied without prejudice. The motion must be heard by the Discovery Referee.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 21
HEARING DATE: 11/04/20

5. TIME: 9:00 CASE#: MSC18-00581
CASE NAME: NAJJAR VS. GOLDSTEIN
HEARING ON MOTION TO/FOR ORDER TO SEAL PROPOSED FIFTH AMENDED COMPLAINT FILED BY ALEX GOLDSTEIN, NEW U LIFE, INC.
**** TENTATIVE RULING: ****

Before the Court is defendants' motion to seal the fifth amended complaint ("Motion"). The Motion is unopposed by plaintiff. However, for a motion to seal, the opposition is really the people of the State of California and their interest in an open and transparent judicial system. The Court evaluates the Motion pursuant to California Rules of Court, rules 2.550 and 2.551. California Rules of Court, rule 2.550(d) requires the Court to make specific express factual findings prior to sealing court records:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

California Rule of Court, rule 2.551(b)(3)(A) specifies the procedures for lodging records subject to a protective order with the Court. The Motion seeks to bypass these procedures in favor of a retroactive order to seal the contents of the proposed fifth amended complaint, attached as Exhibit A to the motion for leave to amend.

"A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (California Rules of Court, rule 2.551(b)(1).) The burden of establishing the requisite facts is on the party seeking the sealing of the documents. (*See H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894.)

Defendants do not narrowly tailor their request. Counsel declares that the Fifth Amended Complaint contains "financial allegations," including "allegations relating to Defendants' bank account balances, ending balances, withdrawals, tax returns, and other financial information." It is unclear which pages, lines, causes of action, etc. they are concerned about.

Further, the broad reference to existing in a "competitive space" where competitors routinely "try to learn one another's private information" is insufficient to justify sealing the relevant pleading retrospectively.

Defendants' argument that previous versions of the complaint can apprise the public of the contents of the operative complaint is unavailing. The Court finds that there is no overriding interest that supports sealing the operative complaint.

The Motion is **denied**.

6. TIME: 9:00 CASE#: MSC18-00581
CASE NAME: NAJJAR VS. GOLDSTEIN
HEARING ON DEMURRER TO 5th Amended COMPLAINT of NAJJAR FILED BY NEW U LIFE, INC., ALEX GOLDSTEIN
**** TENTATIVE RULING: ****

Defendants demur to the Eleventh Cause of Action (Violation or Penal Code §496(a)) asserted in plaintiff's Fifth Amended Complaint, asserting that the damages available thereunder are unavailable here because plaintiff is attempting to "dress up" a straightforward business dispute as a "criminal matter." The demurrer is **overruled**.

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A demurrer cannot be sustained to part of a cause of action or to a particular type of damage or remedy. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047.)

Penal Code § 496, subdivision (a) states, in relevant part: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished…" Subdivision (c) states, "Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees."

"While section 496(a) covers a spectrum of impermissible activity relating to stolen property, the elements required to show a violation of section 496(a) are simply that (i) property was stolen or obtained in a manner constituting theft, (ii) the defendant knew the property was so stolen or obtained, and (iii) the defendant received or had possession of the stolen property." (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 126.) Here, regardless of whether he is able to prove the elements, plaintiff has alleged them. (See Fifth Amended Complaint, ¶¶227-228, 230.)

7. TIME: 9:00 CASE#: MSC18-00847
CASE NAME: HATCH VS. AVALONBAY
HEARING ON MOTION FOR SUMMARY SUMMARY JUDGMENT OR IN ALT SUMMARY ADJUDICATION FILED BY AVALONBAY COMMUNITIES INC.
**** TENTATIVE RULING: ****

Defendant Avalonbay Community, Inc.'s motion for summary judgment is denied. A triable issue exists whether the stairs were code-compliant and whether any noncompliance was a substantial factor in causing plaintiff's fall. (Pltf's Add'l Fact Nos. 18-27; Moore Decl., ¶ 8-12; Pltf's Depo. at 78:20-25.)

Background

This case arises out of a fall that occurred on May 31, 2016 at an apartment complex at 121 Roble Road in Walnut Creek as plaintiff was descending an exterior stairway.

Plaintiff's complaint alleges causes of action for negligence and premises liability. In the negligence cause of action, plaintiff alleges that as a result of defendant's management of its property there was moss-like plant matter, or another slippery substance, on the stairs, which caused her to fall.

Plaintiff gave deposition testimony in which she admitted there was no moss-like or other slippery substance on the stairs. Without amending her complaint, she disclosed in interrogatory responses, and has argued during the course of the lawsuit, that she fell, at least in part, because the stairs are not code-compliant: they have a sloped landing and risers and runs that are too big or too small, and there is general inconsistency in the construction of the stairway.

Defendant now moves for summary judgment, arguing that plaintiff has failed to submit any evidence that the slippery condition she alleged in the FAC existed, that there was any code violation, or that any code violation was a substantial factor in causing the accident.

Requests for Judicial Notice

The court grants plaintiff's Request for Judicial Notice filed 10/21/20 and defendant's filed 8/3/20.

Discussion

The pleadings serve as the outer measure of materiality on a motion for summary judgment. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) They define the prima facie showing the defendant must make. The court could stop there and rule that, because plaintiff has admitted the condition alleged in her pleadings did not exist, summary judgment should be granted. However, plaintiff could always seek permission to amend her complaint, forcing defendant to file a new motion for summary judgment. (*See Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1384; *see also Kirby v. Albert D. Seeno Construction Co.* (1993) 11 Cal.App.4th 1059, 1066-1067 ("Summary judgment is . . . inappropriate where the opposing party submits evidence indicating that a mistake was made.")

Further, despite its absence from the pleadings, plaintiff's new theory was disclosed to defendant in discovery, and defendant has presented the evidence necessary to meet it. Therefore, the court overlooks the defect in the pleadings and treats them as sufficiently amended to put defendant on notice of the theory that the fall occurred, at least in part, because the stairs were not code-compliant.

In the face of defendant's showing that the stairs were code compliant and were not a substantial factor in causing plaintiff's fall, plaintiff must raise a triable issue of fact on those two points. The court concludes she has done so.

Plaintiff has presented evidence from an expert that the stairs were not code compliant. (*See* Pltf's Add'l Fact Nos. 18-27.)

As to causation, plaintiff relies on the opinion of her expert that the code violations "created a hazardous condition that increased the likelihood of a misstep and fall, such as [plaintiff's]." Plaintiff also relies on her own testimony that she "just immediately felt like I went to step and it wasn't there" – the type of sensation one might have if the rise were too great or the run too small. The court also notes that plaintiff relies on negligence per se under Evidence Code section 669 and that "[t]he breach of a statutory duty will often suffice to give rise to an inference from which a jury may find that a given injury was the actual and proximate result of the violation." (*Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 765.)

While all this does not present the strongest case for causation, it is sufficient, in the court's view. In the usual case, and here, causation is an issue of fact for the jury. (*See Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 288.)

8. TIME: 9:00 CASE#: MSC18-02211
CASE NAME: AGYEKUM VS. BONIS
HEARING ON MOTION TO/FOR ORDER DEEMING PLTFS REQUEST FOR ADMISSION FILED BY EDWARD AGYEKUM
**** TENTATIVE RULING: ****

Plaintiff's motions to compel against defendant Alec Adams are denied.

Plaintiff elected to default the defendant on June 29, 2020. The default results in defendant Adams admitting all well-pleaded facts in the complaint and precludes the defendant from participating in the action. Plaintiff has cited no authority for the proposition that a court may entertain discovery motions against defaulted parties. If plaintiff wishes to obtain discovery from defendant, he will have to obtain a judgment and seek post-judgment discovery, or move to set aside the default and begin again.

9. TIME: 9:00 CASE#: MSC18-02211
CASE NAME: AGYEKUM VS. BONIS
HEARING ON MOTION TO/FOR TO COMPEL ALEC ADAMS RESPONSE TO FORM INTEROG FILED BY EDWARD AGYEKUM
**** TENTATIVE RULING: ****

See Line 8.

10. TIME: 9:00 CASE#: MSC18-02211
CASE NAME: AGYEKUM VS. BONIS
HEARING ON MOTION TO/FOR TO CMPL DEF ALEC ADAMS RESP TO PLTF DMND FOR INSPE FILED BY EDWARD AGYEKUM
**** TENTATIVE RULING: ****

See Line 8.

11. TIME: 9:00 CASE#: MSC19-00027
CASE NAME: MATAMOROS VS ARELLANO, ET AL.
HEARING ON MOTION TO/FOR ENFORCE SETTLEMENT AGREEMENT FILED BY MICHAEL MATAMOROS
**** TENTATIVE RULING: ****

Plaintiff's motion to enforce the settlement pursuant to CCP 664.6 or, in the alternative, to reform the agreement is denied.

Plaintiff contends that the term requiring the non-party Jollys to "grant the necessary easement rights" is superfluous since all parties already have easement rights to the lateral on the Jolly property. Plaintiff points to correspondence from the Water District which confirms that both contemplated water lines could be placed within the Jollys' "existing private lateral easement." Plaintiff maintains that adding a second waterline within the existing easement would not "overburden" the Jolly property.

Defendants disagree that the Jollys' permission to grant easement rights is unnecessary. They attach the actual Jolly easement which repeatedly authorizes only a single underground waterline. They also note that if the Jollys do not consent to the solution of adding a second underground pipe line, whether within the existing easement or parallel to it, the defendants could find themselves defending a lawsuit brought by the Jollys about the scope of the easement. They also point out that the opinion of those at the Water District has no legal effect.

The Court finds that the Jollys' permission is an essential term of the settlement agreement. The parties agreed to a settlement conditioned on the Jollys' consent and, at the time of the settlement, the parties appeared to believe that the Jollys would likely grant permission. The fact that the Jollys have declined to consent does not render the term a mistake of fact that the court may simply reform via deletion. The parties had valid reasons for including the term and it is not clear that the parties could force the two waterline solution on the Jollys without risking a lawsuit.

12. TIME: 9:00 CASE#: MSC19-00635
CASE NAME: DINO'S CONCRETE VS. HIDDEN GLE
HEARING ON MOTION TO/FOR BE RELIEVED AS COUNSEL FILED BY HIDDEN GLEN, LLC,
**** TENTATIVE RULING: ****

Mr. Davis' motion to be relieved as counsel for defendant Hidden Glen is denied without prejudice. Mr. Davis' did not use the mandatory Judicial Council form MC-052 which walks attorneys through the notice requirements. Counsel's proof of service does not provide all the information required in paragraph 3 of the form. If Mr. Davis is able to provide the necessary information to the court before or at the time of the hearing, the court can grant the motion. Otherwise, the motion will be denied without prejudice.

13. TIME: 9:00 CASE#: MSC19-00777
CASE NAME: ANGELIQUE STEPANOFF VS DANEKKA
HEARING ON MOTION TO/FOR DETERMINATION OF GOOD FAITH SETTLEMENT FILED BY DANELLA ALEXANDER-KENT, SABRINA KENT
**** TENTATIVE RULING: ****

Unopposed motion for determination of a good faith settlement between the Kent defendants and plaintiff is granted pursuant to CCP 877.6(a)(2).

14. TIME: 9:00 CASE#: MSC19-01101
CASE NAME: MECHANICS BANK VS. ORION PACIF
HEARING ON MOTION TO/FOR APPROVAL OF FINAL ACCT & RPT OF RECVR FILED BY JERRY WANG
**** TENTATIVE RULING: ****

Unopposed motion for approval of final account and report of Receiver, discharge of Receiver, exoneration of Receiver's bond and surety, and payment of Receiver's fees is granted. The court declines to consider the late-filed supplemental declaration of Ms. Tang which failed to include a proof of service. The court will sign the original order provided.

15. TIME: 9:00 CASE#: MSC20-00271
CASE NAME: MENASCO VS KILARR
HEARING ON DEMURRER TO COMPLAINT of MENASCO FILED BY CONSTANCE KILARR
**** TENTATIVE RULING: ****

The hearing on the demurrer is continued to 9:00 a.m. on December 9, 2020.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 21
HEARING DATE: 11/04/20

15. TIME: 9:00 CASE#: MSC20-00615
CASE NAME: SINGH VS HOME DEPOT, INC.
HEARING ON DEMURRER TO COMPLAINT of SINGH FILED BY PTR REAL ESTATE LLC
**** TENTATIVE RULING: ****

PTR Real Estate LLC's demurrer is sustained, with leave to amend. Any amended complaint shall be filed and served on or before November 18, 2020.

Background

The Complaint alleges that at approximately 7:45 p.m. on March 30, 2019, plaintiff was putting his Home Depot purchases into the trunk of his vehicle when he was approached from behind by an unknown person, who shoved him from behind. As plaintiff turned toward the assailant, the latter pulled a hammer out of a small bag and struck plaintiff on the left side of the face beneath the eye. The incident was not recorded because there were no surveillance cameras at the Home Depot in the area where it occurred. There was inadequate lighting and no guards to monitor the area. Defendants negligently managed, controlled and/or operated the Property and failed to monitor the Property to prevent the kind of Incident that occurred. (Complaint, ¶ 11-26.)

Defendant PTR, which was added to this case by a Doe amendment filed August 10, 2020, now demurs, arguing the Complaint fails to show it owed a duty to protect plaintiff from an unforeseeable attack by an unknown assailant.

Discussion

Plaintiff has submitted an evidentiary declaration in support of his Opposition to the demurrer. The court may not consider it. "As a demurrer challenges defects on the face of the complaint, it can only refer to matters outside the pleading that are subject to judicial notice." (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223.)

The legal principles that govern this type of case are set forth in *Melton v. Boustred* (2010) 183 Cal.App.4th 521. The existence of a legal duty "depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." (*Melton*, *supra*, 183 Cal.App.4th at 529.) Everyone in California has the duty to use ordinary care or skill in the management of his property or person. (*Id.* at 530, citing C.C. § 1714.) A departure from this fundamental principle involves the balancing of a number of considerations, which are outlined in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112. (*Ibid.*) In general, in the absence of a special relationship, this duty does not include a duty to protect others from the conduct of a third party. (*Melton*, *supra*, 183 Cal.App.4th at 521; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) One special relationship that gives rise to a duty to protect is that of business proprietor and invitee. (*See Melton*, *supra*, 183 Cal.App.4th at 535.)

Even when a special relationship exists, a person has no duty to provide protection against injury from *criminal conduct* by a third party in the absence of heightened foreseeability

of the risk of such injury. This is because criminal conduct is hard to predict and prevent. (*Melton*, *supra*, 183 Cal.App.4th at 532.)

"Heightened foreseeability is satisfied by a showing of prior similar criminal incidents (or other indications of a reasonably foreseeable risk of violent criminal assaults in that location)." (*Delgado*, *supra*, 36 Cal.4th at 245.)

In determining whether this heightened degree of foreseeability has been established, the defendant's knowledge is critical. . . . When the court engages "in any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware.'" (*Melton*, *supra*, 183 Cal.App.4th at 536.) "[G]eneral knowledge of the possibility of violent criminal conduct is not in itself enough to create a duty under California law." (*Williams v. Fremont Corners, Inc*. (2019) 37 Cal.App.5th 654, 668.)

Applying these principles, the court concludes that the Complaint fails to allege a cause of action against defendant PTR.

The Complaint alleges that plaintiff was a business invitee of defendants and thus that a special relationship exists. However, it fails to allege any facts establishing heightened foreseeability of the physical attack that occurred here. It alleges no "prior similar incidents (or other indications of a reasonably foreseeable risk of violent criminal assaults in that location.)" (*Delgado*, *supra*, 36 Cal.4th at 240; *see Melton's* discussion of *Francis T.*) "[I]n cases involving liability for third party criminal conduct, 'the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents.'" (*Melton*, at 538.)

The Complaint does allege that in "today's society people are commonly assaulted and/or robbed in store parking lots." (¶ 24.) But this is just a conclusion, and one that is at odds with the statement by the courts that a high degree of foreseeability is required to impose a duty on a landowner to protect against criminal conduct precisely because it is "*difficult if not impossible* in today's society to predict when a criminal might strike." (*Melton*, *supra*, at 531-532 (emphasis added).)

Plaintiff tries in various ways to avoid the requirement of alleging facts showing a heightened degree of foreseeability. He begins by arguing that such foreseeability is a requirement only when a plaintiff bases his case on the defendant's failure to provide security guards. However, that is erroneous. The heightened foreseeability requirement applies to many types of security measures. After *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4h 606, where it ruled that heightened foreseeability is required to impose liability on a landowner for the failure to provide security guards, the California Supreme Court in *Delgado* made clear that a heightened degree of foreseeability is also required to impose a duty to "provide bright lighting, activate and monitor security cameras, provide periodic 'walk-throughs' by existing personnel, or provide stronger fencing." (*Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th 224, 243, fn. 24.) A lower standard – reasonable foreseeability – may be used only where "harm can be prevented by simple means or by imposing merely minimal burden." (*Ibid.*; *see also Melton*, *supra*, 183 Cal.App.4th at 536.)

Plaintiff next argues his Complaint need not allege facts showing heightened foreseeability because he is not arguing now that defendant was required to take any particular security measures, only unspecified measures that were reasonable under the circumstances. (Opp. at 7:12.) This is not sufficient. For cases of this type that are resolved at summary judgment or trial, one of the court's tasks is to balance the foreseeability of the criminal act against the "burdensomeness, vagueness, and efficacy" of the proposed security measures. (*Delgado*, *supra*, 36 Cal.4th at 679.) For it to do that, the plaintiff must have identified those measures previously, at least minimally in the complaint, and presumably subsequently in responses to special interrogatories.

In *Williams*, for instance, "[Plaintiff] alleged that [defendant] breached its duty by failing, in various ways, to provide adequate security on the premises, to monitor the parking lot close to the bar, and to properly light the area." Similarly, here, in paragraphs 19-21, plaintiff alleges that "there were no surveillance cameras," there was "inadequate lighting," and "there were no guards or monitoring of the area." These allegations are incorporated into the subsequent causes of action. (*See* ¶ 28.) Not only has plaintiff been more specific in his allegations than he now argues he needs to be, he is required to be this specific. He must allege the facts that give rise to the duty to prevent criminal conduct and the types of measures he claims would have prevented it. Otherwise a court could never grant a motion for summary judgment in this type of case, as courts have, except by ignoring the rule that the pleadings define the scope of such a motion.

Finally, plaintiff argues heightened foreseeability is not required because of the special relationship between himself and PTR. However, this is wrong too. Heightened foreseeability and special relationship are not separate tests, but part of the same test. Many of the cases cited by both parties raise a possibility of duty only because a special relationship exists, such as between business proprietor and invitee. Such a relationship does impose duties that a defendant not in a special relationship would not owe, such as a duty to provide assistance to an ill customer, to warn patrons of known dangers, or to telephone 911. (*Delgado*, *supra*, 36 Cal.4th at 241.) However, the duties owed by business proprietors in a special relationship with invitees do not extend to protective measures to prevent criminal assaults by third parties (as opposed to providing assistance after they have occurred) unless there is heightened foreseeability. (*See Id.* at 240-241 and fn. 24.)

Separate from his heightened foreseeability arguments, plaintiff argues that the question of duty here should not be determined on a demurrer, before all the facts are known. However, he cites a case, *Melton*, where that is precisely what occurred. (*Melton*, *supra* (Court of Appeal affirmed trial court's order sustaining demurrer to complaint that alleged defendant homeowner owed plaintiff a duty to prevent an attack that occurred at a party the homeowner announced on a social networking website). Faced with a demurrer on the grounds of lack of duty, the court must examine whether the pleaded facts give rise to a duty and sustain the demurrer if they do not. (*See Southern California Gas Leak Cases* (2017) 18 Cal.App.5th 581, 595.) The pleaded facts here do not establish a duty to protect against the attack that occurred.

17. TIME: 9:00 CASE#: MSC20-00845
CASE NAME: STEPHENSON VS CITY OF RICHMOND
HEARING ON DEMURRER TO 1st Amended COMPLAINT of STEPHENSON FILED BY CITY OF RICHMOND, A GOVERNMENT ENTITY
**** TENTATIVE RULING: ****

Before the Court is a demurrer by defendant City of Richmond (the "City") to the second cause of action of plaintiff Lisa Stephenson's first amended complaint ("FAC"). For the reasons set forth, the demurrer to the second cause of action is **sustained, without leave to amend.**

Procedural History

Plaintiff alleges she was the Human Resources Director for the City of Richmond, a position from which she was terminated on May 5, 2020. (FAC ¶¶ 13, 35) She filed the complaint initiating this action against the City for discrimination and other claims on May 13, 2020.

The City filed a demurrer to the second, third, and fourth causes of action of Stephenson's original complaint. The Court sustained the City's demurrers to the second and fourth causes of action, with leave to amend, and overruled the City's demurrer to the third cause of action. Stephenson filed the FAC, and the City demurs again to the second cause of action of the FAC for harassment in violation of the Fair Employment and Housing Act ("FEHA").

Standards Applicable to Determination of Demurrer

In ruling on the demurrer, the Court must accept as true all well-pleaded factual allegations of the FAC, but not legal conclusions or contentions. (*City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 865; *Carloss v. County of Alameda* (2015) 242 Cal. App. 4th 116, 123.) The Court gives the FAC "a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]." (*Id.* at 123 [quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318].)

Further, facts material to the elements of a statutory cause of action asserted against a public entity, such as the FEHA harassment claim asserted in Plaintiff's second cause of action, must be pled with specificity. (*See Soliz v. Williams* (1999) 74 Cal.App.4th 577, 584-585; *Fischer v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604 [facts in support of each of the requirements of the FEHA statute must be pled with specificity in order to state a claim for employment harassment].)

Analysis

An employer's harassment of an employee based on race or other protected classifications is an unlawful employment practice under FEHA. (Govt. Code § 12940(j).) Government Code § 12926(o) provides that the protected categories of race, religious creed, sex and others identified in the FEHA statutes "include[] a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics." California case law recognizes claims under FEHA for associational harassment. (*See, e.g., Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028 [associational disability discrimination]; *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860 ("*Thompson*") [associational harassment based on race].)

A. Requirements to State A Harassment Claim Under FEHA

Stephenson alleges that she suffered harassment because of her association with and advocacy for other employees who claim the City discriminated against them based on their race or gender. The City contends that the conduct Stephenson alleges the City committed does not satisfy the requirements for an employment harassment claim under FEHA and applicable case law.

Government Code § 12940(j) makes it an unlawful employment practice for "an employer . . . because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, to harass an employee. Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Govt. Code § 12940(j)(1).) The California Code of Regulations defines harassment as including:

> (A) Verbal harassment, e.g., epithets, derogatory comments or slurs **on a basis enumerated in the Act**;
>
> (B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, **when directed at an individual on a basis enumerated in the Act**;
>
> (C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings **on a basis enumerated in the Act**; or
>
> (D) Sexual favors, e.g., unwanted sexual advances, which condition an employment benefit upon an exchange of sexual favors.

(Cal. Code of Regs., tit. 2 § 11019(b)(2) [emphasis added].) (*See also Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 35 [FEHA " 'explicitly prohibits an employer from harassing an employee on the basis of race, sex, or [ethnicity].' [Citation omitted.] Harassment includes ' " 'epithets, derogatory comments or slurs . . . .' " ' [Citation omitted.]"].)

A number of recent cases address the conduct necessary to state a claim for harassment in an employment relationship. Harassment generally must be either "verbal, physical, or visual and communicate[] an offensive message to the harassed employee. [Citations and internal quotations omitted.]" (*Thompson, supra,* 186 Cal.App.4th at 877.) FEHA does not impose a "civility code"; its provisions "are not designed to rid the workplace of vulgarity." (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 161.) The offensive behavior must relate to a protected category such as disability, gender or race, and must be sufficiently severe or pervasive so as to interfere with the employee's working conditions or work performance, creating an objectively abusive work environment and one subjectively perceived by the employee as abusive. (*Id.; Mokler v. County of Orange* (2007) Cal.App.4th 121, 145 [though acts may constitute "rude, inappropriate, and offensive behavior," in order to be actionable "a workplace must be ' "permeated with 'discriminatory intimidation, ridicule and

insult," [citation] that is ' "sufficiently severe or pervasive to alter the conditions of the victims employment and create an abusive working environment." [Citation, internal quotations omitted.]' "]; *Lyle v. Warner Bros.Television Productions* (2006) 38 Cal.4th 264, 283 ["Although annoying or 'merely offensive' comments in the workplace are not actionable, conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful, even if it does not cause psychological injury to the plaintiff."].)

As a result, "an employee generally cannot recover for harassment that is occasional, isolated, sporadic or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Id.*) (*See also Thompson, supra,* 186 Cal.App.4th at 877; Govt. Code § 12923(a)-(d) [explaining hostile work environment].) Racial, ethnic or sexual harassment is judged from the position of a reasonable person who is a member of that protected group considering all the circumstances. (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517-518.) (*See also Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130–131; *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 389.)

Further, harassment claims are legally distinct from a claim for discrimination, as harassment is based on conduct outside of the actions necessary for the employee or supervisor to perform his or her job. To state a claim for harassment, the conduct must be outside the scope of conduct or job duties necessary to personnel and business management and the conduct must be "severe or pervasive" so as to create a hostile work environment. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 870.) Instead, " '[h]arassment claims are based on a type of conduct that is avoidable and unnecessary to job performance. No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management.' " (*Serri v. Santa Clara University, supra,* 226 Cal.App.4th at 869 [quoting *Reno v. Baird* (1998) 18 Cal.4th 640, 646, *superceded by statute on other grounds*].) In *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55 ("*Janken*"), a case addressed in the Court's ruling on the demurrer to Plaintiff's original complaint, the Court explained that "[C]ommonly necessary personnel management actions such as hiring and firing, job or project assignments, . . . promotion or demotion, performance evaluations,. . . deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. **These actions may retrospectively be found discriminatory if based on improper motives**, but in that event the remedies provided by the FEHA are those for **discrimination, not harassment.**" (*Id.* at 64–65 [emphasis added].)

Relying on *Janken* and *Reno v. Baird,* the Court in *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390 rejected the employee's claim that a work suspension constituted harassment. The Court held that "A disciplinary suspension does not constitute harassment under FEHA as a matter of law." (*Jumaane v. City of Los Angeles, supra,* 241 Cal.App.4th at 1407.)

B. Plaintiff's Allegations Supporting Harassment Claim

Plaintiff alleges that she received and reported multiple incidents of racial and gender discrimination from other City employees, and that she advocated for those employees and assisted them in pursuing their racial and gender discrimination complaints against the City.

(FAC ¶¶ 16-22.) She alleges that after reporting these claims to the City, the City through its City Manager and others harassed her because of her advocacy for the other employees.

Stephenson alleges the following acts of harassment: (1) an outside investigator hired by the City (Ms. Shaw) met with Plaintiff and said she appeared "sleepy" at a prior City meeting, without directly stating that she appeared to be unfit for duty or on illicit drugs (FAC ¶ 24); (2) based on that meeting, Stephenson was told she had to leave and was "ordered to remove herself" from her office premises (FAC ¶¶ 24, 26); (3) her removal violated City protocols which require two supervisors to certify an employee's impairment on the job before the employee can be removed for suspected drug or alcohol use (FAC ¶ 24); (4) Plaintiff offered to take a drug test, but her offer was declined (FAC ¶ 24); (5) City Manager Martinez called a meeting of the Human Resources Department and announced Stephenson would be on a two to four week leave, and that Ms. Greer would be the acting HR director in Stephenson's absence, but refused to state the reason she was on leave (FAC ¶ 25); (6) City Manager Martinez and other supervisors reported to City Council members that she had exhibited "odd behavior" in meetings (FAC ¶ 25); while on administrative leave, the City offered to engage in an interactive process with Stephenson, and Stephenson was ordered to participate in a Fitness for Duty Examination ("FFDE"), which she passed and was allowed to return to work (FAC ¶ 26).

Paragraphs 24 through 26 contain a number of other allegations regarding the City's motivations and intentions in engaging in these acts, and regarding Stephenson's perceptions of these acts as humiliating, disparaging, and designed to cause her to be perceived as impaired by her co-workers. (FAC ¶¶ 24-26.) She alleges the City's conduct was a hostile, personal attack on Plaintiff, and that being forced to undergo the FFDE was humiliating to her. (FAC ¶¶ 24, 26.) She alleges any concerns expressed by the City about her well-being were pretextual. (FAC ¶¶ 24-26.) These allegations may ascribe reasons for the City's conduct, but its motivations and intentions underlying its actions are not allegations of harassing conduct.

C. Application of the Law to Plaintiff's Harassment Allegations in the FAC

Stephenson does not allege that she was subjected to offensive racial or gender-based comments, physical actions, or visual displays, or other offensive conduct directed at her on the basis of those or any other protected categories under Government Code §§ 12940(j)(1) and 12926(o). Instead, Stephenson alleges that she was subjected to various personnel management actions that she characterizes as "harassment" allegedly because of her association with and advocacy for other employees who claimed the City discriminated against them. Those actions alleged in the FAC, without any other allegations of harassment within the meaning of FEHA, § 11019(b)(2) of title 2 of the California Code of Regulations, and the case law, do not state facts sufficient to state a cause of action for harassment. While any forced administrative leave, suspension from work assignments or termination may reasonably cause an employee to feel disparaged and to feel hostility from the employer, the acts without more constitute personnel management decisions not actionable on a harassment theory in the absence of other allegations that qualify as harassment, as *Roby v. McKesson Corp.* (2009) 47 Cal.4th 687 ("*Roby*"), relied on by Plaintiff, illustrates.

In *Roby,* the California Supreme Court held that the legal distinction between the requirements for a discrimination claim and a harassment claim under FEHA does not mean that evidence of personnel actions directed against the employee cannot be considered in a harassment claim.

(*Id.* at 706-707.) While the Court in *Roby* recognized that "some official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message" (*id.* at 709), here, unlike in *Roby*, Stephenson does not allege facts showing other hostile or offensive acts directed at Plaintiff by the City Manager or others or that created a hostile work environment toward her outside of personnel management actions. (*Id.* at 708-709 [describing the supervisor's demeaning comments about the employee's body odor and arm sores, refusal to respond to the employee's greetings in the office, "demeaning facial expressions and gestures" toward the employee, and disparate treatment of the employee compared to other employees in giving out small gifts, none of which the Court concluded could "fairly be characterized as an official employment action," but instead "were events that were unrelated to [the supervisor's] managerial role, engaged in for her own purposes."].)

The statement by the outside investigator in her meeting with Stephenson that Plaintiff appeared "sleepy" in a meeting is not what would typically be characterized as a slur, or a vulgar or offensive comment directed toward any protected categories such as race or gender. The statement was made in the context of the first of a series of personnel management actions in which Stephenson was directed to remove herself from the work premises and was placed on leave. Requiring a fitness for duty examination in and of itself is another personnel management action permitted under the Government Code and regulations. (Govt. Code § 12940(f)(2); Cal. Code of Regs., tit. 2, § 11071(d)(1) and (2).) Plaintiff may be able to prove the City had no basis to require the FFDE and that its administrative actions of placing Stephenson on leave, requiring the FFDE, and terminating her violated the City's personnel policies, and were pretextual, discriminatory, and retaliatory. However, those personnel management actions do not support a claim for harassment in the absence of allegations of other verbal, physical or visual acts of harassment within the meaning of title 2 of the California Code of Regulations § 11019(b)(1) and the case law.

D. Sham Pleading Argument

The City argues that the sham pleading doctrine applies to preclude the new allegation in paragraph 24 of the FAC that Ms. Shaw told her she appeared "sleepy" at a prior meeting and that the City did not state the City believed she may have been on illicit drugs. The City argues the allegation materially contradicts her prior allegation in paragraph 24 of the original complaint that alleged she was told by Ms. Shaw that Stephenson appeared to be under the influence of illicit drugs. (Memo. ISO Dem. p. 7. ll. 11-17, p. 11, ll. 4-26.) The City argues that the statement in Plaintiff's Opposition memorandum that the prior allegation was a mistake is insufficient to make the "clear showing" the prior allegation was a mistake and the basis for the mistake under *Deveny v. Entropin* (2006) 139 Cal.App.4th 408, 424. For purposes of ruling on the demurrer, however, the Court does not need to determine whether Plaintiff's explanation for the change in the allegation is adequate under the sham pleading doctrine, since even with this amended allegation and other amendments to the FAC, the Court finds the second cause of action fails to allege sufficient facts to state a harassment cause of action for the reasons stated.

E. Conclusion

The Court previously provided Plaintiff an opportunity to amend the harassment cause of action to allege facts constituting harassment and not merely personnel management decisions under

Janken and other authorities. Plaintiff failed to do so. Therefore, the demurrer to the second cause of action is **sustained, without leave to amend.**

18. TIME: 9:00 CASE#: MSC20-01201
CASE NAME: CATERPILLAR FINANCIAL VS FEDER
HEARING ON WRIT OF POSSESSION (AFTER HEARING)
**** TENTATIVE RULING: ****

Caterpillar's unopposed application for writ of possession is granted. The Court will sign both the order for writ of possession and the turnover order provided.

19. TIME: 9:00 CASE#: MSC20-01367
CASE NAME: MCNULTY VS ARCATA
HEARING ON MOTION TO/FOR TRANSFER CASE TO HUMBOLDT COUNTY FILED BY CITY OF ARCATA
**** TENTATIVE RULING: ****

Continued to 12/09/20 per stip.

20. TIME: 9:01 CASE#: MSC19-00697
CASE NAME: BRADFORD VS MEDIANEWS GROUP, I
HEARING ON MOTION TO/FOR CONTINUE TRIAL, RESCHEDULE DISCOVERY, CMC FILED BY JEFF ANDERSON, JEFF ANDERSON
**** TENTATIVE RULING: ****

Defendants' motion regarding discovery and setting a CMC date is granted.

At the ex parte hearing scheduling this matter, the court vacated the trial dates because prior counsel was appointed to the bench and new defense counsel had just substituted in. The court then granted plaintiff's request to amend the complaint to add a claim for punitive damages.

Given these developments, the Court agrees that discovery must remain open for limited purposes. Defendants are entitled to discovery directed to the newly added punitive damage

claim. All outstanding written discovery propounded by either side as well as depositions pending at the time the motion was filed on October 21, 2020 must be completed, subject to motions to compel. And already identified experts may be deposed. No other discovery is permitted.

Defendants have indicated that they intend to move to strike the punitive damage claim. If that motion fails, defendants intend to seek summary adjudication of the claim. The Court agrees the defense is entitled to pursue these motions now that the trial has been vacated and the new claim allowed.

Rather than set a trial date at this time, the court sets a case management conference for February 8, 2021 at 8:30 a.m. At that time, the pleadings should be settled and the parties will have a better idea of when trial should be scheduled.

21. TIME: 10:30 CASE#: MSN20-1495
CASE NAME: WEBB VS MCCREARY
HEARING ON ELDER/DEPENDENT ADULT ABUSE RESTRAINING ORDER - PROTECTED PERSON: JANET WEBB
**** TENTATIVE RULING: ****

Parties to appear.