SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 4/25/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (4/24/2024) you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website here:
https://reservations.scscourt.org/

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV422506	Richard Goulart vs San Felipe Ranch et al	Motion: Judgment on Pleadings by Defendant City of San Jose Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court will prepare the order.
LINE 2	23CV423441	Christopher Fronczek vs Brian Farber et al	Hearing: Demurrer to FAC by Debbie Bowers, BioDot, ATS automation tooling Ctrl Click (or scroll down) on Line 2 for tentative ruling. The court will prepare the order.

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DATE: 4/25/2024 TIME: 9:00 A.M.

LINE 3	23CV427433	Bank of America, N.A. vs Thai Pham	Motion: Order that matters in plaintiff Bank of America, N.A. ("Plaintiff")'s request for admission of truth of facts ("RFA") set one, be deemed admitted by defendant Thai Q Pham pursuant to Code of Civil Procedure sections 2023.010 et seq. and 2033.280. Unopposed and GRANTED.
LINE 4			
LINE 5			
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1
Case Name: *Goulart v. San Felipe Ranch et al.*
Case No.: 23CV422506

I. Factual and Procedural Background

Richard Anthony Goulart ("Plaintiff") brings this action against San Felipe Ranch, Lost Valley Ranch, Fields Cattle Company, City of San Jose ("the City"), County of Santa Clara, and the State of California (collectively, "Defendants").

On or around November 14, 2022, Plaintiff was driving his motorcycle northbound on highway US-101 near Coyote Creek Golf Drive, an unincorporated area of Santa Clara County. While driving, a cow escaped from Defendants' pasture and wandered onto the road and into the path of Plaintiff's travel. The cow caused a violent collision and resulted in injuries and damages to Plaintiff.

On October 27, 2023, Plaintiff filed an amended Judicial Form Complaint against Defendants, asserting the following three causes of action:

1) General Negligence;
2) Strict Liability; and
3) Negligence Per Se.

On March 20, 2024, the City filed a motion for judgment on the pleadings ("JOP") to each cause of action.[1] Plaintiff opposes the motion.

II. Analysis

a. Legal Standard

A motion for judgment on the pleadings is the functional equivalent of a general demurrer. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548 [overruled in part on other grounds].) "[T]he only significant difference between the two motions is in their timing." (*People v. 20,000 United States Currency* (1991) 235 Cal.App.3d 682, 691.) A defendant can move for judgment on the pleadings on the grounds that (1) the court has no jurisdiction of the subject of the cause of action alleged in the complaint and/or (2) the complaint does not state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(i)-(ii).) The grounds for the motion must appear on the face of the complaint and in any matters subject to judicial notice. The Court accepts as true all material factual allegations, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

b. Meet and Confer Efforts

Code of Civil Procedure section 439, subdivision (a) provides, "[b]efore filing a motion for judgment on the pleadings pursuant to this chapter, the moving party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to the motion for judgment on the pleadings for the purpose of determining if an agreement can be reached that resolves the claims to be raised in the motion for judgment on the pleadings." If informal resolution is not accomplished and a motion is ultimately filed, the

[1] The City makes several arguments related to a fourth cause of action. The Court does not find a fourth cause of action in Plaintiff's form complaint and therefore will not address any arguments related to the non-existent cause of action.

moving party shall file and serve a declaration with the motion addressing the meet and confer process. (Code Civ. Proc. § 439, subd. (a)(3).) "A determination by the Court that the meet and confer process was insufficient shall not be grounds to grant or deny the motion for judgment on the pleadings." (*Id.* at § 439, subd. (a)(4).)

Plaintiff uses a large portion of his opposition to assert that the City failed to meet and confer with him prior to filing its motion for judgment on the pleadings. The Younes Declaration filed in support of Plaintiff's opposition to the JOP states that on February 20, 2024, counsel for the City sent Plaintiff an email attempting to meet and confer. Thereafter, Plaintiff made several attempts to contact counsel over the phone but the City was non-responsive. (Younes Decl., ¶ 7.) In the Huang Declaration, in support of the City's motion, counsel indicates his February 20, 2024 email stated the grounds for the motion and requested a response by March 1, 2024 (Huang Decl., ¶ 3.) Counsel indicates that as of March 15, 2024, Plaintiff's counsel did not call or write him to meet and confer. (Huang Decl., ¶ 4.) Thus, it does appear that attempts were made to meet and confer and that neither party was successful in contacting the other party. The Court declines to determine the meet and confer profess was insufficient. Nevertheless, the Court reminds the parties they should not treat Code of Civil Procedure section 439, subdivision (a) as a procedural hurdle and should, instead, undertake the obligations set forth therein with sincerity and good faith.

c. Government Code sections 815 and 835 Generally

"The basic architecture of the [Government Claims] Act is encapsulated in Government Code section 815. Subdivision (a) of that section makes clear under the Act, there is no such thing as common law tort liability for public entities; a public entity is not liable for any injury 'except as otherwise provided by statute.' 'But even when there are statutory grounds for imposing liability, subdivision (b) of section 815 provides that a public entity's liability is "subject to any immunity of the public entity provided by statute.'"" (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 139 (*Los Angeles*) [internal citations omitted].)

"'The ***sole*** statutory basis for imposing liability on public entities as property owners is Government Code section 835.'" (*Los Angeles, supra,* 62 Cal.App.5th at p. 139 [emphasis added].) "Section 835 states, 'Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that . . . [t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.'" (*Ibid.*, quoting Gov. Code, § 835, subd. (b).)

d. Second Cause of Action - Strict Liability

The Court will address the second cause of action for strict liability first. Plaintiff alleges strict liability for violations of Food and Agriculture Code sections 16904 and 17121. The City contends Plaintiff fails to allege a mandatory duty under these code sections, as required by Government Code section 815.6. In opposition, Plaintiff merely states he has alleged a mandatory duty by citing to the California Food and Agricultural Code. Plaintiff's opposition does not cite to any authority to support his argument. Courts may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the party reached the conclusions he wants the court to adopt. (See *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153; see also *People v.*

Dougherty (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority will be disregarded].)

"Government Code section 815.6 . . ., unchanged since its enactment in 1963, provides: 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.'" (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498.) "Whether an enactment creates a mandatory duty is a question of law . . . The enactment's language 'is, of course, a most important guide in determining legislative intent, but there are unquestionably instances in which other factors will indicate that apparent obligatory language was not intended to foreclose a governmental entity's . . . exercise of discretion.' Second, but equally important, section 815.6 requires that the mandatory duty be 'designed' to protect against the particular kind of injury the plaintiff suffered." (*Id.* at p. 499.)

Food and Agriculture Code section 16904 states that in an action arising from a collision between a motor vehicle and domestic animal on a highway, there is no presumption or inference the collision was due to negligence on the part of the animal's owner. (See e.g., *Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1624.) Food and Agriculture Code section 17121 defines what is considered a "lawful fence" to prevent the ingress and egress of livestock. Neither section creates a mandatory duty for a public entity. Thus, Plaintiff cannot allege a strict liability cause of action against the City based on these two code sections.

Accordingly, the motion for judgment on the pleadings as to the second cause of action is GRANTED without leave to amend. (*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 105 ["'where the nature of plaintiff's claim is clear, but under substantive law no liability exists, leave to amend should be denied, for no amendment could change the result'"].)

e. First Cause of Action – General Negligence

The City asserts that it is not liable for an injury arising out of an act or omission of the public entity or its employees except as provided by statute. (JOP, p. 2:22-24, citing Gov. Code, § 815, subd. (a).) Thus, the City contends, it can only be liable in tort based on a specific statute declaring the public entity to be liable or creating a specific duty of care on part of the public entity.

In this case, Plaintiff first cause of action alleges the City allowed a dangerous condition to exist on public property "in that they, including their employees, were aware or had sufficient time and notice to discover the dangerous condition of the public road way where cows were wandering on public roadways without being adequately confined" and that the City failed to manage the cows or move the cows to a more suitable place to prevent them from accessing the road. (Form Compl., p. 5, ¶ 5.) The Complaint further alleges the City failed to construct fences to prevent cows from accessing the road and failed to post signage warning motorists of loose cattle. (*Id.* at p. 6, ¶¶ 1-2.) Plaintiff asserts the City had a mandatory and/or statutory duty to keep its property free from dangerous conditions and keep the roadways safe and the City's breach of that duty proximately caused Plaintiff's injuries. The Complaint additionally alleges that the dangerous condition created a reasonably foreseeable risk of the kind of injury which Plaintiff suffered. Thus, Plaintiff alleges a violation of Government Code section 835.

Defendant contends that if Plaintiff has alleged a violation of section 835, Plaintiff still fails to allege a statute creating a mandatory duty to state a negligence cause of action. The Court finds this argument persuasive as to the first cause of action. The Complaint's first cause

of action is devoid of any allegations stating an enactment imposing a mandatory duty on the City to maintain signage, construct fences, or keep highways free from cattle. Further, Plaintiff does not address the City's mandatory duty argument in his opposition. (See e.g., *D. I. Chadbourne, Inc. v. Superior Court of San Francisco* (1964) 60 Cal.2d 723, 728, fn. 4 [failure to oppose an argument may be treated as a concession of that argument].) Moreover, statutory causes of action must be pled with sufficient particularity and the Complaint fails to meet this standard. (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802 [In order to state a claim for liability in tort against a public entity, "every fact essential to the existence of statutory liability must be pleaded with particularity, including the *existence of a statutory duty*."][emphasis added]; see also *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 ["statutory causes of action must be pleaded with particularity"].) Accordingly, Plaintiff's first cause of action does not sufficiently allege a duty.

As such, the motion is GRANTED with 30 days' leave to amend as to the first cause of action.

f. Third Causes of Action – General Negligence and Negligence Per Se

The third cause of action for negligence per se alleges the City had a duty "pursuant to law, including but not limited to Santa Clara City Code 6.05.020 (animals running at large)." (Form Compl., p. 8 ¶ 2.) The City Code applies to the City's alleged failure to secure a barrier on its property as the owner of the escaped cow. Santa Clara City Code section 6.05.020 states: "It shall be unlawful for the owner or custodian of any animal to allow such animal to run at large. The owner or person charged with responsibility for an animal found running at large shall be strictly liable for a violation of this section regardless of the precautions taken to prevent the escape of the animal and regardless of whether or not he knows that the animal is running at large."

The City asserts that it is a "matter of judicial notice that the boundaries of the City of Santa Clara, a charter city, do not extend that far . . . and, by definition, an unincorporated area is outside of the City of Santa Clara. The laws of the City of Santa Clara do not apply to where plaintiff's accident happened." (JOP, p. 5:5-15 [emphasis omitted].) The City, however, has not filed a separate request for judicial notice indicating the boundaries of the City of Santa Clara. (See California Rules of Court, Rule 3.1113, subdivision (l) [party must submit a separate request for judicial notice and list the specific items for which notice is requested].) In any event, the specific Code section cited by Plaintiff creates liability for the owner of the animal, not the owner of the property.

Again, Plaintiff's opposition does not substantively respond to arguments made regarding the City Code. Further, Plaintiff cites no authority that a Santa Clara City Code is somehow applicable to the City of San Jose. The Court finds nothing contained in the Santa Clara City Code that indicates it is applicable to the City of San Jose. Thus, the Code section does not create a mandatory duty for the City.

Based on the foregoing, the motion for judgment on the pleadings is GRANTED without leave to amend as to the third cause of action.

III. Conclusion and Order

The motion for judgment on the pleadings is GRANTED as to the first cause of action with 30 days' leave to amend. (See Code Civ. Proc., § 438, subd. (h).) The motion is GRANTED as to the second and third causes of action without leave to amend.

The Court shall prepare the final order.

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Calendar Line 2
Case Name: *Christopher Fronczek v. Brian Farber, et al.*
Case No.: 23-CV-423441

Demurrer to the First Amended Complaint by Defendants Debbie Bowers, BioDot, Inc., and ATS Automation Tooling Systems Inc.

Factual and Procedural Background

This is an employment action involving sexual assault and other claims brought by plaintiff Christopher Fronczek ("Plaintiff") against defendants Brian Farber ("Farber"), Debbie Bowers ("Bowers"), BioDot, Inc. ("BioDot"), and ATS Automation Tooling Systems Inc.[2] ("ATS") (collectively, "Defendants").

According to the first amended complaint ("FAC"), BioDot designs and manufactures precision liquid dispensing and material-handling systems used by corporate customers to manufacture diagnostic tests. (FAC at ¶ 3.) ATS is a multi-national conglomerate that builds automation systems for many industries, including medical devices, pharmaceuticals, telecommunications, semiconductor, fiber optics, automotive, computers, solar energy and consumer products. (Id. at ¶ 4.) ATS fully-owns, operates, and controls BioDot. (Ibid.)

In May 2016, Plaintiff was hired by BioDot as an Applications Scientist/Laboratory Specialist and began working there in August 2016. (FAC at ¶ 14.) Plaintiff's job responsibilities included: (1) supporting the development of customer applications; (2) working closely with R&D in the development of new products; (3) designing and managing test plans for new products and core materials; (4) working closely with the marketing team in providing technical literature; (5) giving technical presentations at conferences and trade shows; (6) supporting and training customers in the field; (7) managing scientists and training internal personnel; (8) writing technical documents and user manuals; and (9) managing the company's applications lab. (Id. at ¶ 17.)

In September 2021, Plaintiff and his then-supervisor, Farber, attended a business trip in Atlanta, Georgia. (FAC at ¶ 21.) During the trip, Plaintiff alleges Farber sexually assaulted him causing him to suffer physical injuries and extreme emotional distress. (Id. at ¶¶ 30-41, 43-44.)

Shortly after Plaintiff complained to BioDot about Farber's assault, the company commenced an "investigation" into Plaintiff's complaint. (FAC at ¶ 56.) Plaintiff however alleges the "investigation" was nothing more than a whitewash to give BioDot and Farber the opportunity to build up their defenses. (Id. at ¶ 57.) For example, nobody from BioDot or ATS ever told Plaintiff (the party who had reported and complained of the assault) Farber's version of events or gave Plaintiff an opportunity to respond to Farber's allegations. (Id. at ¶ 62.)

Once the "investigation" into his complaint was complete, Bowers, Plaintiff's direct supervisor, and BioDot immediately intensified their scrutiny of Plaintiff and commenced a systematic campaign to manage him out of the company. (FAC at ¶ 77.) In addition, Bowers

[2] According to the moving papers, ATS is now known as ATS Corporation. (See Notice of Motion at p. 1, fn. 1.)

began imposing more duties on Plaintiff in hopes of making him fail or quit the company. (Id. at ¶ 81.) Nevertheless, Plaintiff completed all of his assigned tasks competently and timely. (Id. at ¶ 82.)

On May 17, 2022, just six months following the "sham investigation" of Plaintiff's reported assault, BioDot and Bowers placed Plaintiff on a 30-day Performance Improvement Plan ("PIP"). (FAC at ¶ 107.) Plaintiff alleges the criticisms contained in the PIP were all unfounded, trumped up and intended to create a false paper trail to support his dismissal. (Id. at ¶ 108.) But, on June 2, 2022, about halfway through the 30-day PIP, BioDot, at Bowers' direction, terminated Plaintiff's employment. (Id. at ¶ 109.)

On September 18, 2023, Plaintiff submitted a complaint to the Department of Fair Employment and Housing for sexual harassment and retaliation and obtained an immediate right-to-sue notice. (FAC at ¶ 112.)

On September 25, 2023, Plaintiff filed a complaint against Defendants alleging the following causes of action:

- First Cause of Action: Sexual Harassment in Violation of FEHA[3] [against Farber, BioDot, and ATS];
- Second Cause of Action: Assault [against Farber, BioDot, and ATS];
- Third Cause of Action: Battery [against Farber, BioDot, and ATS];
- Fourth Cause of Action: Whistleblower Retaliation – Labor Code, § 1102.5 [against BioDot and ATS];
- Fifth Cause of Action: FEHA Retaliation [against BioDot and ATS];
- Sixth Cause of Action: Failure to Prevent Harassment and Retaliation in Violation of FEHA [against BioDot and ATS];
- Seventh Cause of Action: Defamation [against Bowers, BioDot, and ATS];
- Eighth Cause of Action: Intentional Infliction of Emotional Distress [against all Defendants];
- Ninth Cause of Action: Wrongful Termination in Violation of Public Policy [against BioDot and ATS];
- Tenth Cause of Action: Violation of Labor Code, § 203 [against BioDot].[4]

On December 11, 2023, defendant Farber filed an answer generally and specifically denying allegations of the complaint and asserting affirmative defenses.

On December 19, 2023, defendants Bowers, BioDot, and ATS (collectively, "Moving Defendants") filed a demurrer to the complaint. The demurrer, challenging only the seventh cause of action for defamation, was scheduled for hearing on February 13, 2024. Prior to the hearing, this court (Hon. Monahan) posted a tentative ruling sustaining the demurrer with leave to amend on the ground the claim was barred by the one-year statute of limitations. Neither party appeared at the hearing to contest the tentative ruling. Thus, the court adopted the tentative ruling as its final order.

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[3] FEHA refers to the Fair Employment and Housing Act.

[4] The tenth cause of action is mistakenly labeled as the eleventh cause of action in the body of the complaint. (See Complaint at p. 26.)

On February 16, 2024, Plaintiff filed the operative FAC against Defendants alleging the following causes of action:

- First Cause of Action: Sexual Harassment in Violation of FEHA [against Farber, BioDot, and ATS];
- Second Cause of Action: Assault [against Farber, BioDot, and ATS];
- Third Cause of Action: Battery [against Farber, BioDot, and ATS];
- Fourth Cause of Action: Whistleblower Retaliation – Labor Code, § 1102.5 [against BioDot and ATS];
- Fifth Cause of Action: FEHA Retaliation [against BioDot and ATS];
- Sixth Cause of Action: Failure to Prevent Harassment and Retaliation in Violation of FEHA [against BioDot and ATS];
- Seventh Cause of Action: Defamation [against Bowers, BioDot, and ATS];
- Eighth Cause of Action: Intentional Infliction of Emotional Distress [against all Defendants];
- Ninth Cause of Action: Wrongful Termination in Violation of Public Policy [against BioDot and ATS];
- Tenth Cause of Action: Violation of Labor Code, § 203 [against BioDot].

On March 12, 2024, defendant Farber filed an answer generally and specifically denying allegations of the FAC and asserting affirmative defenses.

On March 18, 2024, Moving Defendants filed the motion presently before the court, a demurrer to the FAC. Plaintiff filed written opposition. Moving Defendants filed reply papers.

A further case management conference is set for June 18, 2024.

Demurrer to the FAC

Moving Defendants argue the seventh cause of action for defamation is barred by the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (c).

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible

legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.)

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab, Inc.*).) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-1316.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc., supra,* 153 Cal.App.4th at p. 1316.)

Analysis

Like the prior demurrer, Moving Defendants argue the seventh cause of action for defamation is barred by the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (c). That section applies to:

> "An action for libel, slander, false imprisonment, seduction of a person below the age of legal consent, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code,

for that person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding the animal or fowl or in the course of the practice of veterinary medicine on that animal or fowl." (Code Civ. Proc., § 340, subd. (c).)

"In common with other statutory limitations of the period within which an action may be brought, this statute serves to protect potential defendants from stale claims and to encourage plaintiffs to be diligent. Such provisions, by creating limits on the period during which a person's conduct may engender litigation and liability, promote predictability and stability." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246 (*Shively*).)

"In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues." (*Shively, supra,* 31 Cal.4th at p. 1246.) In general, a cause of action in tort accrues at the time of injury and thus a cause of action for defamation accrues at the time the defamatory statement is "published." (*Id.* at p. 1247.) "[P]ublication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed." (*Ibid*.)

Here, Plaintiff alleges defendant Bowers needlessly and intentionally made defamatory oral statements about him to numerous persons, including coworkers and Plaintiff's supervisors. (FAC at ¶ 166.) The facts alleged in support of the defamation claim are set forth in paragraph 111 of the FAC which provides:

> "On the day she terminated Plaintiff's employment, Bowers called an all-hands meeting while Plaintiff was being escorted by BioDot's Controller to gather his belongings and leave the building. Plaintiff was informed by multiple sources that during the all-hands meeting, speaking about Plaintiff, Bowers said words to the effect of, 'He's not my friend. He's not BioDot's friend. So he's not your friend.' She also announced that Plaintiff was unstable and a potential danger to BioDot and its employees, and that BioDot would therefore be newly-hiring armed security guards to protect the employees from Plaintiff. One or more armed security guards were, in fact, present on site for nearly a month." (FAC at ¶ 111.)

As stated above, the alleged statements occurred on June 2, 2022, the day of Plaintiff's termination and accrual date for the defamation claim. Since Plaintiff did not file this action until September 25, 2023, beyond the one-year limitations period, Moving Defendants assert the defamation cause of action is time-barred.

In opposition, Plaintiff contends the one-year limitations period is tolled by the doctrine of equitable tolling.

"To toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases." (*Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298, 303 (*Bonifield*) [overruled on another ground in *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618].) "Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended." (*Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 3.)

"The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*).)

"Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citations.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. [Citation.]" (*McDonald, supra,* 45 Cal.4th at p. 100.)

"The doctrine of 'equitable tolling' is supported by several important policy considerations. First, it serves the fundamental purpose of the statutes of limitations by providing timely notice of claims to defendants, without imposing the costs of forfeiture on plaintiffs. [Citations.] Second, it avoids the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts. [Citation.] Third, it lessens the costs incurred by courts and other dispute resolution tribunals, because disposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve. [Citation.]" (*Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1100 (*Downs*).)

"A plaintiff seeking the benefit of equitable tolling must show three elements: ' "timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." ' [Citation.] Where a claim is time-barred on its face, the plaintiff must specifically plead facts that would support equitable tolling. [Citations.]" (*Long v. Forty Niners Football Co., LLC* (2019) 33 Cal.App.5th 550, 555; see *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912 [the party invoking equitable tolling bears the burden of proving its applicability].)

The court previously sustained the demurrer because Plaintiff did not allege facts to support the doctrine of equitable tolling. Plaintiff now alleges facts to establish equitable tolling in paragraphs 176-200 in the FAC. Those paragraphs state in relevant part:

- Plaintiff retained the law firm Hopkins & Carley to represent him in this matter in June 2022, shortly following the termination of his employment by BioDot.
- Plaintiff first put Defendants on notice of his claims against them, specifically including the June 2, 2022 defamation of his character committed by Bowers, on or around June 24, 2022 via a letter his attorneys sent to Katie Dunn, Senior Human Resource Generalist of BioDot, and Kathy Markowiak, Vice President of Human Resources of ATS.
- In or around late June or early July 2022, the parties' attorneys exchanged emails about the possibility of a pre-litigation mediation.

- On or around October 18, 2022, Plaintiff's attorneys received an email from Karen Wentzel, counsel for Defendants, that Defendants agreed to participate in a mediation to attempt to resolve the dispute without litigation.
- Plaintiff's attorneys proposed a list of potential mediators. On or about November 15, 2022, defense counsel responded that Defendants agreed to retired Judge Jamie Jacobs-May serving as the mediator of this dispute.
- Although Plaintiff tried to schedule the mediation sooner, the mediation ended up getting scheduled for February 14, 2023.
- The mediation before Judge Jacobs-May took place on that date and was unsuccessful.
- In May 2023, Hopkins & Carley informed Plaintiff that the firm was declining to accept the case on a pure contingency fee basis and that he should therefore seek replacement counsel. They also recommended that the new attorneys file a complaint, rather than Hopkins & Carley filing a complaint and then substituting counsel.
- However, Hopkins & Carley never informed Plaintiff that his defamation cause of action based on Bowers' conduct on June 2, 2022 had a one-year statute of limitations. They also never informed Plaintiff that there was urgency to find replacement counsel and file a complaint before June 2, 2023. Rather, they only ever discussed two-or-more-year statutes of limitations and communicated a need to find replacement counsel and file a complaint before the two-year statute of limitations on the Farber sexual assault and battery expired in late September 2023.
- Plaintiff had no idea there was a one-year statute of limitations on his defamation cause of action until after he had retained new counsel to replace Hopkins & Carley, which was already months after June 2, 2023.
- Plaintiff retained Law Offices of Cody Jaffe to be his new attorney in this matter on August 29, 2023.
- Over the course of the ensuing several weeks in September 2023, Plaintiff and his former attorneys at Hopkins & Carley provided further information and documents to Mr. Jaffe, and had many telephone and email communications with Mr. Jaffe, to facilitate his preparation, filing and serving of a complaint.
- Although the court ended up stamping the complaint for damages as filed on September 25, 2023, Mr. Jaffe actually electronically filed it on the morning of September 22, 2023, as memorialized by a confirmation email from his e-filing vendor, First Legal. (See FAC at ¶¶ 176-177, 179, 183-186, 191-193.)

Despite these allegations, Moving Defendants argue in part there is no basis for equitable tolling based on attorney neglect. (See Demurrer at pp. 7:18-8:21; *Bonifield*, *supra,* 94 Cal.App.4th at p. 306 ["attorney neglect does not satisfy the standard of reasonableness and special circumstances required by California's equitable tolling doctrine"]; see also *Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, 928-929 [attorney neglect is not a basis upon which to set aside a judgment of dismissal for failure to comply with statute of limitations].) In opposition, Plaintiff contends that allegations of attorney error were not intended to address equitable tolling and the statute of limitations. Instead, Plaintiff claims these allegations were meant to show Plaintiff acted in good faith in bringing his case to court following unsuccessful mediation. (See OPP at pp. 11:27-13:1.)

Alternatively, Moving Defendants assert that voluntary private mediation does not support equitable tolling. (See Demurrer at pp. 5:10-7:17.) In doing so, Moving Defendants cite: (1) *Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402 (*Acuna*); and (2)

65 Butterfield v. Chicago Title Ins. Co. (1990) 70 Cal.App.4th 1047 (*Butterfield*). These California appellate cases however are distinguishable as they pertain to informal negotiations or discussions and do not even mention mediation and its connection with a claim of equitable tolling. (See *Acuna, supra,* 217 Cal.App.4th at p. 1416 ["Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine."]; see also *Butterfield, supra,* 70 Cal.App.4th at p. 1063 ["Butterfield cites no authority holding that merely engaging in informal negotiations equitable tolls the statute."].)

Moving Defendants also urge the court to rely on *Silvia v. EA Tech. Servs*. (N.D. Cal. 2017) 2017 U.S. Dist. LEXIS 84247 (*Silvia*), an unpublished federal decision from the Northern District of California. On the issue of equitable tolling, the district court states in pertinent part:

> Plaintiff Silvia does not allege any facts showing she was pursuing an alternate remedy that excused her from timely filing her administrative claim. The equitable tolling doctrine is inapplicable because the allegations do not support that Plaintiff's discrimination claims were being considered or resolved in a separate procedural context. (See *Acuna, supra,* 217 Cal.App.4th at p. 1417.) While the parties did attend an all-day mediation with Mr. Fries on October 14, 2016, this mediation alone does not justify equitable tolling. Plaintiff Silvia submits the parties were engaged in a mediation process "with the intention of *informally* resolving the issues," and that there were two mediation periods that totaled a period of 220 days; she contends that the FEHA administrative statute of limitations should be tolled for this period of time. Plaintiff herself identifies this process as "informal" – such informal discussions and negotiations do not equitably toll the FEHA statute of limitations to file an administrative complaint with DFEH. (See *Acuna, supra,* 217 Cal.App.4th at p. 1416.)
>
> (*Silvia, supra,* 2017 U.S. Dist. LEXIS 84247 at p. *8.)

As a preliminary matter, *Silvia*, an unpublished federal decision, is not binding on this court but may have persuasive value. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6 [although not binding, courts may consider unpublished federal district court opinions as persuasive].) The court however does not find this case persuasive on the issue of the interplay between equitable tolling and voluntary mediation. Although concluding mediation does not justify equitable tolling, the district court relies on *Acuna* which, as stated above, mentions *only* informal negotiations and discussions without any direct reference to mediation. Along those lines, the *Silvia* court also emphasizes that plaintiff identified the process as "informal." By contrast, in this case, Plaintiff does not set forth allegations of informal discussions and negotiations but rather a specific mediation agreed upon by the parties that took place on February 14, 2023 and was ultimately unsuccessful. (See FAC at ¶¶ 183-186.) Thus, *Silvia* appears to be inapposite.

In opposition, the court is not persuaded by the trial court orders cited by Plaintiff as they are not binding on this court and fail to disclose the reasoning relied upon in the court's decision. (See *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148 ["Trial court decisions are not precedents binding on other courts under the principle of stare decisis."].) More persuasive is Plaintiff's reliance on *Putnam v. Oakland Unified Sch. Dist*. (N.D. Cal. 1995) 1995 U.S. Dist. LEXIS 22122 (*Putnam*), another unpublished federal court decision from the Northern District of California. *Putnam*, on a motion for summary judgment, concluded equitable tolling applied in pursuit of mediation:

> "The administrative claim was timely filed since the limitations period was tolled during the seven months Plaintiffs pursued the alternative administrative remedy of mediation. The District had timely notice of Plaintiffs' claims and the underlying facts, and Plaintiffs acted reasonably and in good faith in pursuing mediation prior to filing a claim for damages, thereby meeting all requirements for equitable tolling." (*Putnam, supra,* 1995 U.S. Dist. LEXIS 22122 at p. *23.)

Moving Defendants contend *Putnam* is distinguishable as mediation constituted "an alternative administrative remedy" in the unique context of an administrative adjudication of a disabled student's access to public school facilities. (See Demurrer at p. 6:10-12.) But, as pointed out in opposition, there is nothing in the *Putnam* decision to suggest that its holding is dependent on the fact that mediation was an "alternative administrative remedy." (See OPP at p. 8:2-3.) Nor do Moving Defendants direct the court to *Silvia* or any other decision which disapproves of *Putnam* on the issue of equitable tolling and its connection to mediation.

And, while neither side cites any California state court authority directly on point, this court is more persuaded that the issue of equitable tolling, where pleaded with sufficient facts and based on voluntary private mediation, is sufficient to overcome a pleading challenge on general demurrer based on the statute of limitations. This is particularly so given that mediation and the equitable tolling doctrine share similar policy goals in effectively trying to reduce or limit litigation in the courts:

> "Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts." (Code Civ. Proc., § 1775, subd. (c); see *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1103 ["The purpose of mediation is to resolve disputes 'in a fair, timely, appropriate, and cost-effective manner' without derailing the litigation."]; see also *Downs, supra,* 58 Cal.App.4th at p. 1100 [policy considerations in support of equitable tolling].)

Based on the foregoing, the demurrer to the seventh cause of action in the FAC on the ground that the pleading is barred by the one-year statute of limitations is OVERRULED.

Disposition

The demurrer to the seventh cause of action in the FAC on the ground that the pleading is time-barred by the one-year statute of limitations is OVERRULED.

The court will prepare the Order.

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