SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: May 21, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

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Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV375334	David Duff et al vs Earth Bound Homes, Inc. et al	Western Surety Company's Motion for leave to file a cross-complaint in interpleader pursuant to Code of Civil Procedure sections 426.50, 428.10(a)-(b), and 428.50 is GRANTED. A notice of motion with this hearing date and time was served U.S. mail and e-serve on April 19, 2024. No party opposed the motion, indicating there are no meritorious arguments to prevent granting this relief. (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Relief is also appropriate under the cited code sections. Moving party to prepare formal order.
2	21CV385498	SANDRA BRADFORD vs A GRACE SUB ACUTE AND SKILLED CARE et al	Plaintiff's motion to compel is GRANTED. Defendant cites no authority to support the argument that Evidence Code sections 1156-57 are applicable to a state investigation. That is not surprising, since those code sections are intended to protect peer review of medical activities within an organization or medical committee to promote improving care. If such peer evaluations were discoverable, reviewers would be unable to provide candid feedback which would harm the public good. Here, these nurses were interviewed in the context of a state agency investigation. Not only is that not peer review, but permitting discovery into this investigation will not have the same detrimental impact on candor, since those participating in a state investigation are required to be forthcoming. Defendant's argument that the document identifying these nurses would not be admissible is also unpersuasive. The standard for discovery is whether it is reasonably likely to lead to admissible evidence, not whether it is based on admissible evidence. (Code Civ. Pro. § 2017.010 (Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.") The fact that the document might not be admissible has no bearing on whether the identity of the nurses interviewed to prepare the document might lead to the discovery of admissible evidence. (Code Civ. Pro. § 2017.010 ("Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter. . ..") Defendant is therefore ordered to produce verified, code compliant responses to these special interrogatories within 20 days of service of the formal order. The Court does not view this opposition as substantially justified and further orders Defendant to pay Plaintiff $1285.00 in fees and costs associated with preparing this motion within 30 days of service of the formal order, which order the Court will prepare.

3	21CV392536	RADNET MANAGEMENT, INC. vs SHIT-FONG LO	Plaintiff's motion to have matters in requests for admission deemed admitted is DENIED. Default was entered against Shit-Fong Lo individually and as trustee of Chi Chiu Lo Trust on July 17, 2023. This discovery was then served on February 14, 2024— at a time when Defendant had no ability to act in the case other than to move to set aside default. (*Bailey v. Citibank, N.A.* (2021) 66 Cal.App.5th 335; *Steven M. Garber & Assocs. v. Eskandarian* (2007) 150 Cal.App.4th 813, 819.) Any other motions by a defendant in default are unauthorized and void. (*Humphrey v. Bewly* (2021) 69 Cal.App.5th 571, 580.) A defendant in default does not even have right to notice of subsequent proceedings, such as the default prove-up hearing or a case management conference. (*Bailey v. Citibank, N.A.* (2021) 66 Cal.App.5th 335; *Rios v. Singh* (2021) 65 Calk.App.5th 871, 886.) During the May 2, 2024 case management conference, the Court invited Plaintiff to submit legal authority on or before March 15, 2024 supporting the relief it seeks against this defendant in default. The Court did not locate such briefing. Since Defendant would have been unable to file a motion for protective order, for example, or to submit any other briefing in response to this motion to compel, the Court is hard pressed to see how the Court can grant the relief sought here. Court to prepare formal order.
4	22CV395955	Sonasoft Corporation vs Ankur Garg et al	Plaintiff's motion to enforce settlement pursuant to Code of Civil Procedure section 664.6 is GRANTED. Moving party to prepare form of order consistent with the parties' stipulation attached as Exhibit R.
5	22CV397470	Hai Nguyen et al vs Ramesh Balakrishnan et al	Defendant/Cross Complainants Ramesh and Shradha Balakrishnan's motion for summary judgment against Plaintiffs/Cross-Defendants Hai T. Nguyen and Tien Nguyen is CONTINUED to June 4, 2024 at 9:00 a.m. in Department 6. In preparing for this motion, the Court identified several additional documents necessary for proper consideration of the motion that had not been processed by the clerk's office, necessitating additional time for preparing a tentative ruling. No further notice of this continuance needs to be provided.

6-7	22CV398490	Beverly Paulson et al vs Grace Baptist Church et al	James Chelly's motion for reconsideration is DENIED. First, the testimony quoted at the top of page 2 of Mr. Chelly's reply merely says that Mr. Zapien did not know if James Chelley was working at 7:00, 7:30 p.m. on the night of the incident. It does not definitively say Mr. Chelly was not working. Other parts of Mr. Zapien's testimony seem to support that Mr. Zapien did not know whether Mr. Chelly was working. Further, Mr. Chelly's argument ignores this part of the Court's summary judgment ruling: "Even if the Court was to accept Mr. Chelly was injured while "off-duty" or outside his work hours, his injuries still occurred within the course of his employment because he was assisting and protecting his employer's guests in furtherance of his employer's interests, which was reasonably expected. (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal. App. 4th 346.) It has also long been recognized by the California Supreme Court that in doing the natural and humane thing in an emergency an employee does not step outside the course of employment because his actions are within the scope of what is contemplated he may do or is reasonably expected to do under the circumstances. (*Ocean Accident & Guarantee Corp. v. Industrial Acc. Com*. (1919) 180 Cal. 389 [an employee's injuries occurring while rescuing a child from being run over by a car on the employer's premises arise out of and in the course of his employment. It is reasonably within the course of employment that an employee should attempt to prevent an accident on his employer's premises, particularly where the employer would not improbably be responsible for the accident.]." (Order, pp. 9-10.) This case law is dispositive. Regarding Plaintiff's motion for leave to amend, the Court was unable to locate a redlined copy of the proposed amended complaint or any other method for the Court to easily discern what precise amendments Plaintiff seeks to make. Accordingly, Plaintiff is ordered to submit a redline of the amended complaint to Department6@scscourt.org today, and the parties are ordered to appear at the hearing for the Court's ruling.
8	22CV408447	ALEJANDRA VERGARA vs GABRIELA VERGARA	Defendants' motion for summary judgment is GRANTED. Scroll to line 8 for complete ruling. Court to prepare formal order.
9	23CV413383	Najid Opeyany vs Jerry Little et al	Defendants' demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Defendants' motion to strike is therefore moot. Scroll to line 9 for complete ruling. Court to prepare formal order.
10	23CV416415	EBUS, Inc. vs Hi.Q., Inc. et al	Amy S. Park, Enoch O. Ajayi, and O'Melveny & Myers LLP's motion to be relieved as counsel is GRANTED. However, a company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Although this case is stayed as to Hi.Q, Inc., Hi.Q, Inc. can only appear in this action through counsel. Thus, Hi.Q, Inc. is ordered to appear on June 27, 2024 and identify counsel who will monitor this case on Hi.Q, Inc.'s behalf for status conferences during the stay then act for Hi.Q, Inc. when the stay is lifted. Court will modify and use order on file.

Calendar Line 5
Case Name: *Alejandra Vergara v. Gabriela Vergara*
Case No.: 22CV408447

Before the Court is Defendant, Gabriela Vergara's motion for summary judgment. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from the alleged breach of a Trust Allocation Agreement ("Agreement") and its related Promissory Note. According to the complaint, the parties' father executed the Juan F. Vergara 2012 Living Trust and placed the real property located at 2932 Vanport Drive, San Jose, California ("Property") in the Trust. (Complaint, ¶ 1.) Upon their father's death, on December 1, 2020, Alejandra, Gabriela, and Rafael Vergara entered the Agreement with their stepmother, Nancy Frederick, to distribute the Property in a manner that would result in Gabriela owning the property while still preserving the then-current property tax rate. (Complaint, Ex. A.) The Agreement required Defendant to sign a promissory note in Plaintiff's favor in the amount of $205,000 to be paid within six months. (Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment ("PUMF"), ¶ 4.) At the same time, Defendant executed a promissory note in Plaintiff's favor for the principal amount of $205,000 (the "Note"). (PUMF, ¶ 5.) The Note states: "For value received, the undersigned promises to pay Alejandra Vergara, or order, at the place designated by the holder hereof, the sum of Two Hundred and Five Thousand Dollars ($205,000.00). Payment shall be made within six months of the date of this promissory note, or upon sale of the property. No interest shall accrue." Since executing the Note, the Property has not been sold. (PUMF, ¶ 17.)

Plaintiff never requested Defendant to pay the balance under the Note at any time in 2021. (PUMF, ¶ 22.) Instead, throughout 2021, Plaintiff told Defendant she would accept payment from Defendant's portion of the inheritance she was to receive, and that Defendant could pay the balance of the Note later. (PUMF, ¶ 18.) On October 10, 2021, and on January 12, 2022, Plaintiff confirmed, via text communication with Defendant, her willingness to receive the balance of the Note later in the future. (PUMF, ¶¶ 19, 20.)

In early 2022, Plaintiff needed money to finalize the purchase of her new home. In their text communications Defendant informed Plaintiff that she was still waiting for probate but agreed for

Plaintiff to take her 50% share of the $131,363.60.00 balance in their joint account for her purchase. (PUMF, ¶ 21[1]; Defendant's Decl. Exhibit 6.)

On November 2, 2022, Plaintiff demanded full payment of the Note after the parties' dispute over allocation of the funds in a Merril Lynch account that belonged to their stepmother. From November 3, 2022, until February 28, 2023, Defendant made several attempts to repay the outstanding balance to no avail. (PUMF, ¶¶ 31-38, 45, 54-57.) On February 28, 2022, Defendant learned of Plaintiff's refusal to accept payment and her intent to return the last issued check. (PUMF, ¶ 59.)

On December 12, 2022, Plaintiff filed her verified complaint for (1) breach of contract, (2) fraud and misrepresentation, (3) recission, (4) declaratory relief.

II. Legal Standard

A defendant moving for summary judgment has the initial burden to make a prima facie showing there is no merit to a cause of action and that therefore the defendant is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (p)(2); *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) To satisfy this burden, the moving defendant must show that at least one of the elements of the cause of action has not been established by the plaintiff and cannot reasonably be established or must establish the elements of a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar, supra*, at p. 849; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480 (*Jessen*).) If the moving defendant meets this burden, then the burden shifts to the plaintiff to show that there is at least one triable issue of material fact regarding the cause of action or as to the complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849; *Jessen, supra*, at p. 1484.)

Summary judgment is appropriate if there are no triable issues of material fact, and the moving party is entitled to judgment as a matter of law. (Code of Civ. Proc. § 437c, subds. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607. 618) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof."

[1] Plaintiff does not dispute the evidence, but does dispute "the characterization of the amount withdrawn as 'Defendant's portion of the joint bank account funds' [as] incorrect (and unnecessary)." (PUMF, ¶ 21.)

(*Aguilar, supra*, at p. 850, fn. omitted; accord, *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Courts are required to liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents of University of California v. Superior Court*, supra, 4 Cal.5th 607 at 618).

Defendant moves for summary judgment on Plaintiff's claims for (1) breach of contract, (2) fraud and misrepresentation, (3) recission, and (4) declaratory relief.

III. Analysis

A. Breach of Contract

To establish breach of contract, a plaintiff must show: (1) the contract existed, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) Defendant must make a prima facie showing there is no merit to this cause of action before the burden will shifts to Plaintiff to show the existence of a triable issue of material fact for at least one element of her breach of contract claim.

Defendant contends Plaintiff cannot establish the element of breach because (1) she waived the right to enforce the May 1, 2021, payment date by accepting a delayed partial payment in January of 2022 and repeatedly telling Defendant to wait on paying the outstanding balance, (2) Defendant justifiably relied on Plaintiff's abandonment of the payment deadline and thus she is estopped from enforcing it, (3) Defendant has unconditionally tendered full payment of the note, which Plaintiff refuses to accept.

In support, Defendant submits the following evidence, which is essentially undisputed:

- Text communications between the parties in 2021 and 2022 whereby Plaintiff expresses her willingness and/or desire to accept payment on the note later in the future or upon Defendant's receipt of her inheritance from probate. In response to Defendant's inquiries about paying off her debt, Plaintiff wrote "ok but don't worry about it" and "its best to hold off paying me since the stocks went down so much. Like 30%. But it's up to you." (Defendant's Decl. Exhibits 4, 5, 15, 16.)

- In January of 2022, the parties agreed for Plaintiff to withdraw $131,363.00 from the parties' joint bank account to purchase her house. Half ($65,681.50) of the withdrawn funds belonged to Defendant and its transfer to Plaintiff was to be a partial payment on the Note. (Defendant's Decl. Exhibits 4, 5, 6.)
- On November 2, 2022, Plaintiff texted Defendant demanding payment of $210,000.00 on the Note. Since Defendant was instructed not to contact Plaintiff, she unsuccessfully solicited assistance of Plaintiff's trust attorney in arranging for payment. (Defendant's Decl. Exhibits 7, 8, 9.)
- On December 17, 2022, Defendant mailed a check to Plaintiff in the amount of $139,318.50 as payment on the remaining balance of the note along with a letter explaining her calculations and the bank's record of previously transferred $131,363.00 from their joint account. Plaintiff rejected the certified mail envelope containing the check. (Defendant's Decl. Exhibits 10, 12.)
- On January 4, 2023, Defendant accepted delivery of Plaintiff's check. However, the bank rejected the check due to Defendant's improperly placed notations. (Defendant's Decl. Exhibit 13.)
- On February 3, 2023, a new check was delivered to Plaintiff's attorney. After lengthy discussions, on February 28, 2023, Plaintiff refused to accept the funds and stated her intent to Plaintiff's check. (Defendant's Decl. Exhibit 14, PUMF, ¶ 59.)

Like any other contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they are made. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 767, p. 694.) "Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59.) Waiver must be shown by clear and convincing evidence.

Here, it is undisputed that (1) Defendant signed a promissory note for the benefit of Plaintiff in the total amount of $205,000.00 with no interest, (2) Plaintiff withdrew $65,681.50 of Defendant's funds, from their joint account, for her sole use, (3) Plaintiff admits that she waived the deadline for the payment on the Note, (4) from November 2, 2022 until February 28, 2023, Defendant attempted to

fully pay the remaining Note balance ($139,318.50), but Plaintiff rejected her payments. On this record, Defendant has met her burden of showing Plaintiff's inability to establish the breach element of her claim. Therefore, the burden shifts to Plaintiff to establish a triable issue of material fact.

Plaintiff contends: (1) a Bank of America certificate of deposit, in the name of her father and their stepmother (Ms. Frederick) matured days after her father's death on August 24, 2020, for the amount of $133,000.00, (2) Ms. Frederick gave this fund exclusively to Plaintiff, (3) the parties had an oral agreement to distribute their father's assets equally between them, (4) pursuant to this oral agreement, she deposited the $133,000.00 into a Bank of America joint account with the Defendant, (5) Defendant breached their oral agreement in 2022 when she refused to share the funds she had received from Ms. Frederick's Merrill Lynch account, (6) Plaintiff, consequently rescinded gifting one half of the $133,000.00 to Defendant and it no longer should be considered a partial payment or credit toward the Note amount, and (7) Defendant has breached the promissory note by refusing to make a full payment of $205,000.00.

The crux of Plaintiff's opposition is Defendant's breach of an oral agreement to equally distribute their father's assets among themselves. This is a new legal theory that was neither pleaded nor referenced in the operative complaint. The complaint alleges:

- "… Alejandra [Plaintiff], Gabriela [Defendant], and Rafael [the parties' brother], along with their stepmother Nancy Frederick ("Nancy"), entered into the Trust Allocation Agreement ("Agreement") on December 1, 2020." (Complaint, ¶ 4.)
- "Alejandra specifically relied upon the representation that Gabriela would make timely payment of the $205,000 in the next six months when she agreed to assign her 1/3 interest in the Property to Gabriela." (Complaint, ¶ 7.)
- "Gabriela executed a promissory note requiring payment within six months 'or upon sale of the property.'" (Complaint, ¶ 8.)
- "The written AGREEMENT was entered into between Defendant and Plaintiff." (Complaint, ¶ 13.)

- "Defendant has not fulfilled her duties and conditions under the Agreement. Specifically, the Agreement required that Defendant pay to Plaintiff $205,000 by May 1, 2021. By failing to make timely payment, Defendant failed to adhere to the Agreement." (Complaint, ¶ 15.)
- "As a direct and proximate result of Defendant's breach, Plaintiff has suffered harm in the amount of $205,000. (Complaint, ¶ 16.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues and to frame the outer measure of materiality in a summary judgment proceeding. . . . Accordingly, the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493, (italics in original, internal quotation marks removed); see also *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444, ["The pleadings... set the boundaries of the issues to be resolved at summary judgment"] (internal quotation marks omitted).) Applying this principle here, if Plaintiff wished to invoke breach of their oral agreement as the premise for her refusal to credit Defendant for the $65,681.50, she should have pleaded this theory by at least referencing the existence of this oral agreement in her complaint. Plaintiff did not do so, and she may not use the opposition papers to "create issues outside the pleadings". (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292, 332)

Even assuming Plaintiff had properly pleaded a breach of their alleged oral agreement, she has failed to demonstrate a triable issue of fact exists as to this claim. Plaintiff's opposition and submitted evidence demonstrate that Ms. Frederick was the sole beneficiary of the Merrill Lynch account, which was not part of her husband's assets or probate. (Mr. Barnhorst Decl. ¶ 7, Opposition pp. 5-7, [PUMF, ¶¶ 86, 87, 90.) Accordingly, Defendant's refusal to share the proceeds of this account with Plaintiff would not tantamount to a breach of the terms of their oral agreement as presented by the Plaintiff.

Based on the foregoing, the Court finds that Plaintiff fails to meet her burden of establishing a triable issue of fact. Defendant's motion for summary judgment is therefore GRANTED.

B. Fraud and Misrepresentation

On May 3, 2024, Plaintiff dismissed her second cause of action for fraud and misrepresentation against the Defendant. Therefore, Defendant's motion is now moot as to this claim.

C. Recission

A party to a contract may rescind the contract if the consent of the party rescinding was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds. (Civ. Code § 1689.)

Plaintiff's rescission claim is based on the allegation that "the Agreement [the Trust Allocation Agreement] was obtained through the fraud and misrepresentation of Defendant and therefore may be rescinded." (Complaint, ¶ 23.) However, Plaintiff now contends a triable issue of fact exists as to her rescission of the Trust Allocation Agreement because Defendant denies the existence of an oral agreement between them to share their father's estate equally.

The Court is not persuaded. As discussed above, Plaintiff may not use the opposition papers to create new legal theories and issues outside the pleadings. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292, 332) Furthermore, Plaintiff submits no evidence establishing that her consent to the Agreement was obtained through mistake, duress, fraud, or undue influence. Based on the foregoing and considering Plaintiff's dismissal of her fraud cause of action, this claim cannot form the legal basis for rescinding the Trust Allocation Agreement, and summary judgment is therefore GRANTED.

D. Declaratory Relief

"'[T]he propriety of the application of [summary judgment to] declaratory relief lies in the trial court's function to render such a judgment when only legal issues are presented for its determination.'" When summary judgment is appropriate, the court should decree only that plaintiffs are not entitled to the declarations in their favor. Thus, in a declaratory relief action, the defendant's burden is to establish that the plaintiff is not entitled to a declaration in its favor. It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief." (*Gafcon, Inc. v. Ponser & Associates* (2002) 98 Cal.App.4th 1388, 1401-1402)

As to the declaratory relief cause of action, the Complaint pleads: (1) "the agreements entered into herein were done so as the result of fraud, misrepresentation and deceit on the part of Defendant," and (2) "Plaintiff seeks judicial determination that the Grant Deed was executed due to the Fraud of Gabriela, that the Grant Deed is therefore null and void" allowing Plaintiff to retain a 1/3 interest in the Property. (Complaint ¶¶ 25, 26.) Plaintiff argues that irrespective of her allegations premising her claim on fraud, she is entitled to a declaration from this Court determining her rights and responsibilities concerning Defendant and her denial of their oral agreement.

As noted above, Plaintiff's fraud premise for the sought-after declaration has been dismissed and she cannot use her new legal theory to create a new foundation or ground. Therefore, Defendant's motion for summary judgment of the Plaintiff's claim for declaratory relief is GRANTED. Plaintiff is not entitled to a declaratory order finding the existence of the oral agreement and/or rescission of the Trust Allocation Agreement and the Grand Deed.

Calendar line 9
Case Name: *Najib Opeyany v. Redwood Electric Group, Inc. et al.*
Case No.: 23CV413383

Before the Court is defendants' Redwood Electric Group, Inc. and Jerry Little's (collectively, "Defendants") demurrer and motion to strike portions of Plaintiff Najib Opeyany's Second Amended Complaint ("SAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from Redwood Electric Group, Inc.'s ("Redwood Electric") alleged wrongful termination of Plaintiff's employment. According to the SAC, Plaintiff is a general electrician of Afghan origin and the Muslim faith. (SAC, ¶¶ 12-13.) Plaintiff was hired in February 2021 and fired three months later in April 2021, at the age of 44. (SAC, ¶¶ 12-14.) In October 2021, Plaintiff was dispatched by his union to work for Redwood Electric, but he was not hired. (SAC, ¶ 14.)

During his employment, Plaintiff's foreman, Jerry Little ("Little"), inappropriately commented on Plaintiff's origin and/or religion on one occasion. (SAC, ¶ 15.) Plaintiff was frightened and reported the incident to his superintendent, Ricardo. (*Ibid*.) Ricardo was dismissive and became hostile towards Plaintiff and began reprimanding him for complaining about Little's comment. (*Ibid*.) Thereafter, Little apologized and Plaintiff was informed that Little would not approach or speak to Plaintiff again. (*Ibid*.)

A few days later, Little approached Plaintiff and made an additional comment about Plaintiff's origin and/or religion. (SAC, ¶ 15.) Plaintiff complained to Ricardo and asked to be transferred to another worksite, and he was subsequently transferred. (*Ibid*.)

Upon arriving at the new job site, an employee told Plaintiff that Redwood Electric looked down on older employees and another employee stated that the company got rid of people with grey hair first. (SAC, ¶ 15.) At this new jobsite, Plaintiff was shunned and excluded by his coworkers and was often assigned low level tasks for which he was overqualified. (*Ibid*.)

In April 2021, Plaintiff was assigned a task that required the use of personal protective equipment ("PPE"), but he was told that none was available. (SAC, ¶ 15.) As a result, Plaintiff developed tinnitus. (*Ibid*.) Plaintiff's age and his complaints about the PPE resulted in him being

openly mocked in front of workers for a simple error. (*Ibid.*) Soon after, Plaintiff was told his services were not needed but was told he was re-hirable. (SAC, ¶ 16.)

In October 2021, Plaintiff's union dispatched him back to Redwood Electric. (SAC, ¶ 17.) Plaintiff filled out the paperwork but was approached by two employees who told him his services were not needed. (*Ibid*.) It is very uncommon for a union member to be dispatched and then immediately told to leave. (*Ibid*.)

Plaintiff filed his complaint on March 28, 2023, and subsequently amended it on August 15, 2023. On January 23, 2024, the undersigned Court sustained a demurrer to the entirety of Plaintiff's first amended complaint. Plaintiff has since amended his pleading and on February 13, 2024, he filed his SAC asserting:

1) Discrimination [against Redwood Electric];
2) Hostile Work Environment [against all Defendants];
3) Retaliation in Violation of FEHA [against Redwood Electric];
4) Failure to Prevent Discrimination, Harassment, and Retaliation [against Redwood Electric];
5) Whistleblower Retaliation [against Redwood Electric];
6) Violation of Labor Code § 6310 [against Redwood Electric];
7) Negligent Hiring, Supervision, and Retention [against Redwood Electric];
8) Wrongful Termination in Violation of Public Policy [against Redwood Electric]; and
9) Intentional Infliction of Emotional Distress [against all Defendants].

On March 18, 2024, Defendants filed a demurrer and motion to strike portions of the SAC. Plaintiff opposes both motions.

II. Demurrer

A. Legal Standard

The court treats a "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *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.)

B. First Cause of Action: Discrimination in Violation of the Fair Employment and Housing Act ("FEHA")

Under FEHA, it is unlawful for an employer, because of a protected classification, to discriminate against an employee "in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) "To establish a prima facie case of discrimination under FEHA, a plaintiff must show they were a member of a protected class; they were qualified for the position or were performing competently in the position they held; they suffered an adverse employment action, such as termination, demotion, or denial of an available job; and some other circumstances suggested discriminatory motive." (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 397, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

Defendants argue Plaintiff fails to allege: (1) facts suggesting a discriminatory motive for his termination and (2) facts suggesting a causal link between any classification and his termination.

1. Discriminatory Motive

"[A] cause of action for intentional discrimination would be incomplete without allegations of a discriminatory motive." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 886, citing *Guz*, *supra*, 24 Cal.4th at p. 355.) The SAC alleges foreman Little made two comments to Plaintiff, Plaintiff's supervisor made an excuse for Little's behavior, and Plaintiff felt frightened and intimidated. (SAC, ¶ 15(a), (b), (c).) However, the SAC also alleges that Little was called in, apologized to Plaintiff, and that his supervisor informed him that Little would not be speaking to him anymore. (*Ibid*.) Further, after the second comment was made by Little, Plaintiff reported it to his supervisor and, upon Plaintiff's request, he was transferred to a different worksite. (*Ibid*.)

At this new worksite, Plaintiff was told by other employees that Redwood Electric was hostile towards older employees and he was required to work without PPE. (SAC, ¶ 15(d), (e).) Plaintiff complained about the lack of PPE. (SAC, ¶ 15(e).) Plaintiff alleges he was mocked by his co-workers and then was suddenly told that his services were not needed but that he was re-hirable. (SAC, ¶ 16.) Plaintiff was not given the opportunity to return to work at Redwood Electric. (SAC, ¶ 17.)

The Court does not find these allegations sufficient on their own or to create an inference that Redwood Electric had a discriminatory motive when ending Plaintiff's employment or not rehiring

him for work. The pleading fails to allege Plaintiff was terminated due to his national origin/religion—Plaintiff requested a worksite transfer and was transferred. Plaintiff also fails to allege he was terminated due to his age; rather, there are allegations that Plaintiff's coworkers made comments about hostility towards older employees or getting rid of people with grey hair first. However, no comments were directed at Plaintiff's age. These allegations are insufficient on their own or to draw an inference that Redwood Electric had a discriminatory motive when terminating Plaintiff. Thus, the demurrer may be sustained on this basis.

2. Causal Link

"As noted, section 12940(a) prohibits an employer from taking an employment action against a person 'because of' the person's race, sex, disability, sexual orientation, or other protected characteristic. The phrase 'because of' means there must be a causal link between the employer's consideration of a protected characteristic and the action taken by the employer." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215.) "[M]ere discriminatory thoughts or stray remarks are not sufficient to establish liability under the FEHA." (*Id.* at p. 225.)

Here, the SAC alleges two comments made by Plaintiff's foreman about his origin/religion. However, there are no specific facts pled to establish that Plaintiff's origin/religion or age caused him to be terminated. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604 [FEHA claims must be pled with specificity][superseded by statute on other grounds as stated in *Beltran v. Hard Rock Hotel Licensing, Inc.* (2023) 97 Cal.App.5th 865, 880].) Allegations that Plaintiff believed that he was terminated because of his protected categories is insufficient to allege causation. (See SAC, ¶ 17.) Accordingly, the demurrer may also be sustained on this basis.

Plaintiff has already amended the complaint and provides no information to support that further amendment could cure these fundamental defects. Accordingly, Defendant's demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Second Cause of Action: Hostile Work Environment in Violation of the FEHA

To establish a claim for hostile work environment, Plaintiff must allege (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his protected class; (4) the harassment unreasonably interfered with his work performance by creating an

intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment. (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 (*Ortiz*).) "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" (*Harris v. Forklift Systems* (1993) 510 U.S. 17, 25 (*Harris*), conc. opn. of Ginsburg, J.; Gov. Code, § 12923, subd. (a) [endorsing Justice Ginsburg's concurring opinion].)

Defendants argue 1) the alleged conduct was not frequent or pervasive and fails to support an objectively or subjectively hostile environment; and 2) the alleged conduct did not unreasonably interfere with Plaintiff's work performance.

"'An employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their protected status.'" (*Ortiz, supra,* 37 Cal.App.5th at p. 582.) "'[H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with an undermine the victim's personal sense of well-being.'" (*Ibid*.) "'A single incident of harassing conduct is sufficient . . . if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive work environment.'" (*Ibid*.) However, several cases have held that isolated incidents, even if highly reprehensible, may be insufficient as a matter of law to establish that the harasser's conduct was severe or pervasive enough to alter the work environment. (See *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 926; *Serri v. Santa Clara Univ.*, (2014) 226 Cal.App.4th 830 [rejecting FEHA claim]; *Aguilar v. Avis Rent A Car System, Inc.*

(1999) 21 Cal.4th 121, 129-130 ["[N]ot every utterance of racial slur in the workplace violates the FEHA"].)

In this case, Plaintiff alleges Little made two comments about his origin and/or religion which caused Plaintiff to feel offended, frightened, and intimidated, and Ricardo excused Little's behavior. (SAC, ¶ 15(a).) Plaintiff also alleges he was mocked after requesting PPE; however, these allegations are unrelated to Plaintiff's protected categories. While the Court sympathizes with Plaintiff's situation, it does not find these allegations to be sufficiently severe or pervasive. Moreover, Plaintiff still does not allege how these comments unreasonably interfered with the performance of his job.

Plaintiff has already amended the complaint and provides no information to support that further amendment could cure these defects. Accordingly, Defendant's demurrer to the second cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

D. Third Cause of Action: Retaliation in Violation of the FEHA

"To establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a protected activity, (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 878-879 [internal quotations omitted].) "An adverse employment action, which is a critical component of a retaliation claim, requires a substantial adverse change in the terms and conditions of the plaintiff's employment." (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063.) "A mere offensive utterance or … a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of the FEHA." (*Ibid.* [internal citations and quotations omitted].)

Defendants argue Plaintiff fails to allege that he was retaliated against for engaging in a protected activity. Here, the SAC alleges comments were made about Plaintiff's origin and/or religion, he reported those comments, he requested to be transferred and then was subsequently transferred to another worksite. While at that new worksite, comments related to his age were made. However, as Defendants note, Plaintiff does not allege that he reported these age-related comments or that he engaged in a protected activity related to them. Finally, Plaintiff also alleges that he was terminated

because of his comments related to PPE because he was mocked by his coworkers when he made a simple mistake and then was told he was not needed anymore and was terminated. These allegations are unrelated to Plaintiff's protected categories. The Court finds these allegations insufficient to state a causal connection between Plaintiff's protected activity and his termination.

Plaintiff has already amended the complaint and provides no information to support that further amendment could cure these fundamental defects. Accordingly, Defendant's demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

E. Fourth Cause of Action: Failure to Prevent Discrimination, Harassment, and Retaliation in Violation of the FEHA

"The FEHA makes it a separate unlawful employment practice for an employer to 'fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.'" (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040, quoting Gov. Code, § 12940, subd. (k).) To prevail on such a claim, a plaintiff must establish: 1) he was subjected to discrimination, harassment, or retaliation; 2) the defendant failed to take all reasonable steps to prevent discrimination, harassment, or retaliation; and 3) the defendant's failure caused the plaintiff to suffer injury, damage, loss, or harm. (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31.)

The fourth cause of action is derivative of Plaintiff's first three causes of action, for which the Court sustained Defendants' demurrer. Accordingly, the demurrer to the fourth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

F. Fifth Cause of Action: Violation of Labor Code § 1102.5: Whistleblower Retaliation

Labor Code section 1102.5 provides whistleblower protections to employees who disclose wrongdoing. The California Supreme Court recently clarified that Labor Code section 1102.6, and not the decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims. (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712.) To support a claim for whistleblower retaliation, Plaintiff must show "by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee." (*Ibid.*) In another recent case, the Supreme Court of California held that under Section 1102.5, the word

"disclosure" also means to "make [something] openly known" or "open [something up] to general knowledge." (*People ex rel. Garcia-Brewer v. Kolla's, Inc.* (2023) 308 Cal.Rptr.3d 388, 393.) Section 1102.5 also protects disclosures made to "another employee who has the authority to investigate or correct the violation." (*Ibid.*)

In connection with Defendants' prior demurrer, the Court previously held that Plaintiff's allegations were conclusory, and that he failed to allege what violations occurred, who Plaintiff reported the violations to, and how his reporting is linked to termination of his employment. While Plaintiff now alleges what violations occurred and that he reported these violations to his foreman, Dave (SAC, ¶ 15(e)), the allegations of the SAC are still insufficient to establish a connection between Plaintiff's reporting and his termination. Accordingly, Defendants' demurrer to the fifth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

G. Sixth Cause of Action: Violation of Labor Code § 6310

Labor Code section 6310, subdivision (a)(1) states, in relevant part: "No Person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: (1) Made any oral or written complaint to . . . their employer, or their representative." (Lab. Code, § 6310, subd. (a)(1).) Labor Code section 6310 is meant to address issues of physical safety and working conditions – the purview of the California Occupational Safety and Health Administration. (See e.g., *Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 485.)

Defendants argue there are no facts to connect Plaintiff's complaint about PPE to Plaintiff's termination. (Demurrer, p. 23:1-2.) The Court finds this argument persuasive. Further, Plaintiff's speculative and conclusory allegations that he "believed [his termination] was in retaliation for his prior complaints as well as because of his religion, race, ancestry, color, national origin, and age" are insufficient to state a cause of action for violation of Labor Code section 6310. Accordingly, Defendants' demurrer to the sixth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

H. Seventh Cause of Action: Negligent Hiring, Supervision, and Retention

A cause of action for negligent hiring, supervision, or retention of an employee requires: (1) the employer hired the employee; (2) the employee was/became unfit or incompetent to perform the work for which he was hired; (3) the employer knew or should have known the employee was/became

unfit or incompetent and that this unfitness or incompetence created a particular risk to others; (4) the employee's unfitness or incompetence harmed plaintiff; and (5) the employer's negligence in hiring/supervising/retaining the employee was a substantial factor in causing plaintiff's harm. (CACI No. 426; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1213-1214.)

As the Court previously explained in its order on the prior demurrer, the SAC lacks allegations to state a cause of action for negligent hiring, supervision, or retention. Defendant notes the SAC is devoid of allegations that Redwood Electric knew or should have known that Little had a propensity to discriminate or harass anyone before hiring him or that he had ever harassed or discriminated against others. Further, there are no allegations that Little became unfit or incompetent to perform the work for which he was hired. Plaintiff does not address these specific deficiencies in his opposition. (See e.g., *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Therefore, Defendants' demurrer to the seventh cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

I. Eighth Cause of Action: Wrongful Termination of Employment in Violation of Public Policy

To establish a wrongful termination of employment in violation of public policy, an employee must show the employer violated a policy that is "(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894.)

In this case, the SAC alleges Redwood Electric violated "various fundamental public policies underlying state law. These actions were in violation of, but not limited to, the FEHA, the California Constitution, Government Code section 12900, et seq., and California Labor Code sections 1102.5 and 6310." (SAC, ¶ 74.)

As the Court noted in its prior January 23, 2024 Order, this allegation is insufficient to state a claim for wrongful termination in violation of public policy. Thus, Defendants' demurrer to the eighth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

J. Intentional Infliction of Emotional Distress ("IIED")

"The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 593 [superseded by statute on other grounds].)

As Defendants note, the SAC does not state facts to allege an actionable violation of FEHA or that Defendants' conduct was outrageous beyond the bounds of human decency. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80 ["personnel management decisions" cannot support a claim for IIED even if undertaken with discriminatory motive].)

The Court finds Plaintiff fails to allege Defendants engaged in extreme and outrageous conduct. Little made two comments directed at Plaintiff and was required to apologize to Plaintiff; Redwood Electric thereafter transferred Plaintiff to a new worksite on his request; at this worksite other employees made comments about age, but they were not directed at Plaintiff; finally, Plaintiff's new foreman stated that they did not have PPE to use. These allegations do not rise to the level of outrageousness needed to survive a demurrer.

Accordingly, Defendants' demurrer to the ninth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

K. Leave to Amend

The pleading party "bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, the party "must show in what manner [it] can amend [its] complaint and how that amendment will change the legal effect of [its] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The party "must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all

required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44.)

Here, the Court has already afforded Plaintiff an opportunity to amend, and he has been unable to state valid claims to overcome a pleading challenge on demurrer. Further, while Plaintiff requests the Court grant him leave to amend, he has not explained how any further amendments will change the legal effect of his pleading. As such, leave to amend is DENIED. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case.'"].)

III. Motion to Strike

Defendants move to strike several portions of the SAC. As explained above, the demurrer is sustained in its entirety and therefore, the motion to strike is MOOT.