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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY OF CARLSBAD et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,

Defendant and Respondent.

B283861

(Los Angeles County
Super. Ct. No. BC545736)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

Parks & Solar, Robert J. Parks, Keith R. Solar, and Douglas W. Gillie for Plaintiffs and Appellants.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, Michael P. Cayaban and Phillip M. Hoos, Deputy Attorneys General, for Defendant and Respondent.

Plaintiffs and appellants City of Carlsbad (City) and Carlsbad Municipal Water District (District) (collectively, Carlsbad) appeal a judgment following a grant of summary judgment in favor of defendant and respondent California State Water Resources Control Board (Board) in an action for declaratory relief.

To qualify for declaratory relief under Code of Civil Procedure section 1060,¹ a plaintiff is required to show the action presents two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) Due to Carlsbad’s failure to show the existence of an actual controversy, the trial court properly granted summary judgment for the Board. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit pertains to the classification of water flowing within the Mission Basin of the San Luis Rey River in San Diego County, and whether Carlsbad’s right to appropriate that water is subject to the Board’s permitting authority.

By way of background, California law “treats surface water and groundwater under separate and distinct legal regimes.” (*North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1590 (*Gualala*).) Further, not all groundwater is regulated in the same way. The appropriate legal regime depends on whether the groundwater is classified as “subterranean streams flowing through known and definite channels” (Wat. Code, § 1200)—which falls within the Board’s

¹ All unspecified statutory references are to the Code of Civil Procedure.

permitting jurisdiction—or “percolating groundwater,” i.e., subsurface water that is not part of a subterranean stream flowing through a known and definite channel, which falls outside the Board’s jurisdiction. (*Gualala, supra*, at p. 1582, fn. 4.) The Board is authorized to determine whether a body of water is a subterranean stream or is percolating groundwater. (Wat. Code, §§ 174, 2501.)

1. *The Board’s 1938 decision, determining that groundwater in the Mission Basin constitutes a subterranean stream.*

In 1938, the Carlsbad Mutual Water Company (a predecessor in interest to the City and the District) filed an application with the California Division of Water Resources, Department of Public Works (predecessor to the Board), to divert water from the Mission Basin.

In October 1938, following a hearing, the Board determined the water flowing beneath the Mission Basin constituted a subterranean stream. Thus, the waters at issue were subject to the Board’s permitting authority, and the Board issued the requested permit to Carlsbad, placing limitations on the amount of water that could be diverted. During the period of 1938 through 1999, Carlsbad applied for and received eight extensions of time to make full and beneficial use of the water authorized under the Board’s permit.

2. *During the pendency of litigation in the San Diego County Superior Court, the Board, in a 1962 decision, reiterated that groundwater in the Mission Basin constitutes a subterranean stream.*

In 1953, the San Luis Rey Water Conservation District, along with other water users, sued the City in San Diego County

Superior Court seeking to enjoin the City's extraction and export of water from the Mission Basin (the River District Litigation). Neither the Board nor its predecessor was a party to that lawsuit. During the pendency of that lawsuit, the superior court issued two interlocutory memorandum opinions. In the second memorandum opinion, issued in November 1959, the superior court found the City did not need a permit from the Board to extract groundwater from the Mission Basin because that water is percolating groundwater, and not a subterranean stream.

As a result of that superior court memorandum opinion, and before entry of judgment in the River District Litigation, the Board called a hearing to reexamine the nature of the groundwater in the Mission Basin, because the Board's jurisdiction over underground water was limited to subterranean streams flowing through known and definite channels. The hearing was conducted in San Diego in May 1961, at which time the City, the permittee, appeared and evidence was presented.

In June 1962, the Board upheld its earlier classification of water within the Mission Basin as a subterranean stream, and concluded it "would be remiss in its responsibilities were it to disclaim jurisdiction over any of the subject permits."

Three years later, the River District Litigation was resolved by a stipulated judgment (the 1965 Stipulated Judgment), which included a declaration that Carlsbad had a prescriptive right to extract a specified quantity of water annually from the Mission Basin. The 1965 Stipulated Judgment provided that in light of the two memorandum opinions, "the parties have been able to resolve and compromise the remaining issues and upon the basis of such compromise have executed and filed herewith a stipulation for entry of a decree in the form

herein contained, *therein waving expressly the right to findings of fact, conclusions of law and any right to appeal from this judgment.*” (Italics added.)

3. *The instant litigation.*

In 2013, a half century after the Board’s 1962 decision reiterating that groundwater in the Mission Basin constitutes a subterranean stream, Carlsbad commenced this action against the Board. The operative first amended complaint, filed in February 2015, contained a single cause of action for declaratory and injunctive relief. Carlsbad sought a determination that the Mission Basin of the San Luis Rey River is a percolating groundwater basin, not a subterranean stream, and therefore is not subject to the Board’s jurisdiction or permitting authority. Alternatively, Carlsbad asserted that, even if groundwater in the Mission Basin constituted a subterranean stream subject to the Board’s permitting authority, Carlsbad possessed pre-1914 water rights entitling it to divert water without obtaining a permit from the Board.

In November 2016, the Board moved for summary judgment, or, alternatively summary adjudication. The Board’s motion was based on the ground that Carlsbad’s declaratory relief action involved case-specific challenges concerning particular water rights that are quasi-judicial in nature, and declaratory relief is only available to challenge a state agency’s quasi-legislative policy.

In its opposition, Carlsbad argued declaratory relief was proper because it was faced with conflicting binding orders from coequal branches of California government, i.e., the superior court and the Board. Further, the Board had applied an

improper “underground regulation”² in finding the Mission Basin to be a subterranean stream, and such an “overarching, quasi-legislative policy set by an administrative agency” may be challenged in a declaratory relief action. In addition, the Board had “exceeded its jurisdiction” in asserting jurisdiction over the entire Mission Basin. Carlsbad also contended it was not required to exhaust administrative remedies because California courts have concurrent jurisdiction over water rights cases, and in any event, exhaustion of administrative remedies would have been futile. Carlsbad also requested a continuance of the summary judgment hearing to enable it to conduct additional discovery.

On April 13, 2017, the matter came on for hearing. The trial court granted the Board’s motion for summary judgment. It rejected Carlsbad’s argument that it was challenging “an overarching, quasi-legislative policy set by an administrative agency” (i.e., the Board). Instead, it found that Carlsbad was asking the court “to reverse the specific 1962 decision of the [Board] regarding [Carlsbad’s] water rights with respect to a specific, defined water basin.” Because Carlsbad was challenging the Board’s decision with respect to Carlsbad’s water rights in the Mission Basin, Carlsbad’s remedy would have been a writ of mandamus, not a cause of action against the Board for declaratory relief.

² An “underground regulation” is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the Administrative Procedures Act (Gov. Code, § 11340 et seq.). (*Fisher v. State Personnel Board* (2018) 25 Cal.App.5th 1, 18.)

The trial court also rejected Carlsbad's argument that the Board had implemented an "underground policy," noting that the operative complaint did not allege that the Board had applied such a policy, and that Carlsbad's pleading challenged solely the Board's 1938 and 1962 administrative decisions relating to the Mission Basin. Further, there was nothing to show the Board had used improper criteria in reaching those decisions.

The trial court also found no merit to Carlsbad's claim of a "constitutional conflict" between the Board's 1962 order and the San Diego County Superior Court's 1965 Stipulated Judgment so as to require declaratory relief. The Board was never a party to the River District Litigation, and further, in the Stipulated Judgment, Carlsbad "expressly waived [its] rights to findings of fact by the trial court in the 1965 Judgment." Given the absence of any findings of fact by the trial court in the 1965 Stipulated Judgment, there was no "constitutional conflict" to be resolved in the instant declaratory relief action.

In addition, the trial court held Carlsbad was not entitled to declaratory relief with respect to its alleged pre-1914 water rights for lack of an actual and justiciable controversy in that regard. The court noted it was undisputed that the Board had not made a determination regarding Carlsbad's pre-1914 water rights, and absent such a determination, "there is no actual and justiciable controversy under [section] 1060 which exists at this time as to the pre-1914 water rights."

Lastly, the trial court denied Carlsbad's request for a continuance to pursue discovery to support its underground regulation claim. The court ruled that because Carlsbad had failed to submit any declaration in compliance with section 437c, subdivision (h), it had not made a proper showing of good cause

for a continuance. Moreover, any further evidence “would not make any difference [because the] ‘Underground Policy’ has no bearing on the Court’s ultimate determination on the instant motion.”

Carlsbad filed a timely notice of appeal from the judgment.

CONTENTIONS

Carlsbad contends the trial court erred: in determining that Carlsbad is not entitled to declaratory relief to resolve the actual controversy between it and the Board as to the nature of the underground water in the Mission Basin; in finding that declaratory relief is not available against a state agency unless there is a challenge to an overarching quasi-legislative policy, and in finding that Carlsbad was not challenging such a policy as set forth in an underground regulation; in ruling there was no actual controversy between Carlsbad and the Board regarding Carlsbad’s claim of pre-1914 rights; and in denying Carlsbad’s request for a continuance of the hearing on the motion for summary judgment.

DISCUSSION

1. *Carlsbad was required to challenge the Board’s determinations with respect to the classification of the groundwater in the Mission Basin by way of a timely petition for writ of administrative mandate; declaratory relief does not lie to review an administrative decision.*

Carlsbad’s complaint for declaratory relief sought a judicial determination that the Mission Basin is a percolating groundwater basin, contrary to the Board’s administrative decisions in 1938 and 1962 that the groundwater in the Mission Basin constitutes a subterranean stream within the Board’s jurisdiction.

However, “[i]t is settled that an action for declaratory relief is not appropriate to review an administrative decision.” (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249; accord, *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1466.) Rather, a specific decision or order of an administrative agency is reviewable by way of a petition for writ of administrative mandamus. (*Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1428–1429.) Further, the Water Code specifically provides for review by way of a petition for writ of mandate, stating that “[a]ny party aggrieved by any decision or order may, not later than 30 days from the date of final action by the board, file a petition for a writ of mandate for review of the decision or order.” (Wat. Code, § 1126 subd. (b).) When a remedy “has been designated by the Legislature to review an administrative action, declaratory relief is unavailable.” (*County of Los Angeles v. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 1002 [demurrer properly sustained to declaratory relief claims].)

Here, Carlsbad’s complaint for declaratory relief challenged the Board’s 1938 and 1962 decisions that the subject waters constitute a subterranean stream within the Board’s jurisdiction. Those decisions by the Board were case-specific and quasi-judicial in nature, and came after evidentiary hearings concerning the groundwater classification within the Mission Basin. Pursuant to the Water Code, Carlsbad’s remedy was to seek review by way of administrative mandamus within 30 days of those decisions.³

³ Although Water Code section 1126, providing for judicial review by administrative mandamus within 90 days of a decision by the Board, was enacted in 1996 (Stats. 1996, ch. 659, § 2), it is merely a continuation of a series of provisions dating back to

Carlsbad's current cause of action for declaratory relief cannot substitute for the statutory remedy that it failed to pursue years ago.

2. There is no actual controversy because the Board's decisions in 1938 and 1962 do not conflict with the 1965 Stipulated Judgment.

Carlsbad contends its dispute with the Board amounts to a constitutional conflict between a judgment of the San Diego County Superior Court and a decision of the Board, within the executive branch, necessitating declaratory relief. The argument is meritless because the Board's determinations in 1938 and 1962 that the underground water in the Mission Basin is a subterranean stream are not in conflict with the 1965 Stipulated Judgment.

As set forth above, the 1965 Stipulated Judgment did not address the subterranean stream/percolating water dichotomy and is silent on that issue. The 1965 Stipulated Judgment simply enjoined Carlsbad from extracting more than 2,382 acre feet of water from the Mission Basin "in any water year, except that Carlsbad may take in excess thereof if such water would otherwise flow out to the ocean." The 1965 Stipulated Judgment also provided that the parties "waiv[ed] expressly the right to findings of fact, conclusions of law and any right to appeal from this judgment." Although the second memorandum opinion by the San Diego County Superior Court, issued in 1959, stated that

1923, which similarly provided for mandamus review within 30 days of the administrative decision. (Wat. Code, former § 1360, enacted by Stats. 1943, ch. 368, p. 1620, repealed by Stats. 1996, ch. 659, § 4; Stats. 1923, ch. 86, § 2, p. 162.) Thus, at all relevant times, mandamus review was available with respect to both the 1938 and 1962 administrative decisions.

water in the Mission Basin was percolating groundwater, that factual finding and legal conclusion was eliminated by the terms of the 1965 Stipulated Judgment.

Thus, the 1965 Stipulated Judgment did not address the classification of the groundwater in the Mission Basin, and it therefore is not in conflict with the Board's classification of the groundwater as a subterranean stream.

Accordingly, there is no merit to Carlsbad's claim of an actual controversy based on a conflict between the Board's and the San Diego County Superior Court's classification of the groundwater in the Mission Basin. Absent an actual controversy, declaratory relief is not warranted.

3. No merit to Carlsbad's contention it is entitled to declaratory relief because it is challenging an underground regulation by the Board.

By way of background, the Administrative Procedures Act (Gov. Code, § 11340 et seq.) defines a regulation as "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (*Id.*, § 11342.600.) The Act requires an agency, inter alia, to give notice of the proposed adoption, amendment or repeal of a regulation (*id.*, § 11346.4, subd. (a)), and to afford interested persons the opportunity to present comments on the proposed action (*id.*, § 11346.8). Unless an agency promulgates a regulation in substantial compliance with the statutory scheme, the regulation may be declared to be without legal effect. (Gov. Code, § 11350; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.)

Carlsbad contends it is entitled to declaratory relief because it is challenging the validity of an underground regulation by the Board relating to the criteria it uses for determining whether groundwater lies within its jurisdiction. Carlsbad first made this argument below in its opposition to the Board's motion for summary judgment. Specifically, Carlsbad contended it was entitled to declaratory relief because the Board had applied an underground regulation in finding the Mission Basin was a subterranean stream based on "the presence of a hydraulic connection between the subsurface water and a surface stream"

The trial court rejected Carlsbad's argument, noting that the operative complaint failed to allege the existence or application of an underground regulation and "challenge[d] only the 1938 and 1962 administrative decisions relating to the Mission Basin." We agree. The complaint simply sought declaratory relief from the Board's decisions in 1938 and 1962 with respect to the characterization of the groundwater in the Mission Basin; the complaint did not seek declaratory relief based upon an alleged statutory violation by the Board of the Administrative Procedures Act, or assert that the Board had applied an underground regulation in deciding the matter. (Gov. Code, § 11350 [judicial declaration regarding validity of regulation].)

It is settled that the "complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond. [Citation.] Upon a motion for summary judgment, amendments to the pleadings are readily allowed. [Citation.] *If plaintiff wishes to expand the*

issues presented, it is incumbent on plaintiff to seek leave to amend the complaint either prior to the hearing on the motion for summary judgment, or at the hearing itself. [Citation.] To allow a party to expand its pleadings by way of opposition papers creates, as it would here, an unwieldy process.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258, italics added (*Laabs*).) Permitting “an issue that has not been pled to be raised in opposition to a motion for summary judgment in the absence of an amended pleading, allows nothing more than a moving target. For . . . section 437c to have procedural viability, the parties must be acting on a known or set stage.” (*Id.* at pp. 1258–1259, fn. 7.)

Here, Carlsbad belatedly argued in its opposition papers below that declaratory relief was warranted because the Board had applied an underground regulation in classifying the groundwater. However, Carlsbad failed to raise the underground regulation theory in its complaint, Carlsbad did not plead the Board had engaged in improper rulemaking in violation of the Administrative Procedures Act, and Carlsbad failed to request leave to amend in that regard. Therefore, as the trial court found, the underground regulation theory was outside the scope of the summary judgment proceeding and could not be raised in Carlsbad’s opposition papers to defeat the motion for summary judgment.

4. *No actual controversy with respect to pre-1914 water rights.*

Carlsbad argues that even if the 1938 and 1962 decisions are upheld, it has a right to declaratory relief as to its *pre-1914* water rights.⁴ In this regard, the complaint alleges that even

⁴ “California maintains a ‘dual system’ of water rights, which distinguishes between the rights of ‘riparian’ users, those who

assuming the water underlying the Mission Basin is determined to be a subterranean stream flowing through known and definite channels, an actual controversy exists as to whether Carlsbad has pre-1914 water rights, entitling it to extract water without a permit from the Board.

Carlsbad contends it is entitled to declaratory relief with respect to its claim of pre-1914 water rights because California courts have concurrent jurisdiction over water rights cases (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 451), and therefore Carlsbad was not required to first present its claim of pre-1914 water rights to the Board for determination. Carlsbad also contends that even if the doctrine of exhaustion of administrative remedies would require it to first present its claim of pre-1914 water rights to the Board, exhaustion is not required where it would be futile; Carlsbad asserts that here, presenting its claim of pre-1914 water rights to

possess water rights by virtue of owning the land by or through which flowing water passes, and ‘appropriators,’ those who hold the right to divert such water for use on noncontiguous lands. [Citation.] For historical reasons, California further subdivides appropriators into those whose water rights were established before and those after 1914. Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian users and pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their water rights. [Citation.]” (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 888–889, fns. omitted (*Millview*).)

the Board would be futile because the Board's adverse position with respect to Carlsbad's pre-1914 water rights is clear.⁵

These arguments are unavailing because, as the trial court found, there is no actual controversy with respect to Carlsbad's pre-1914 water rights. It is undisputed that the Board has never issued an order or any opinion concerning the claims of Carlsbad or Carlsbad's predecessors in interest to pre-1914 water rights in the Mission Basin. Declaratory relief does not "embrace controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.'" (*Lee v. Silveira, supra*, 6 Cal.App.5th at p. 546.) A court, presented with a request for declaratory relief, cannot "speculate

⁵ Carlsbad contends the Board announced its adverse legal position with respect to Carlsbad's pre-1914 water rights in footnote 10 of the Board's moving papers below. That footnote states: "Although not directly pertinent to this motion, the State Board notes that Plaintiffs vastly oversimplify the nature of pre-1914 water rights. To establish pre-1914 rights, a plaintiff is required to demonstrate it diverted specified amounts of water in specified locations for specified uses, *and that such use has been continuous since 1914 so as to avoid extinguishment for non-use.* (Wat Code, § 1202.)" (Italics added.) Carlsbad states that although it ceased using its pre-1914 water rights when it began purchasing imported water, no conflicting claim has been asserted that would prevent Carlsbad from resuming full use. (*Millview, supra*, 229 Cal.App.4th at pp. 900–901 [forfeiture requires not only nonuse but also the presence of a competing claim to the unused water].) However, the Board's citation to section 1202 of the Water Code, in a footnote in its moving papers, is insufficient to show that the Board has taken the position that Carlsbad lacks pre-1914 water rights, or that the Board would apply incorrect factors to evaluate the question of pre-1914 water rights.

on the resolution of an entirely hypothetical situation.” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1583.) Carlsbad’s claim with respect to its pre-1914 water rights is not ripe and thus presents no actual controversy that the trial court could adjudicate. (*Id.* at pp. 1582–1583.)

5. *No abuse of discretion in denial of Carlsbad’s request for a continuance to allow it to obtain additional discovery with respect to its underground regulation theory.*

a. *General principles.*

Section 437c, subdivision (h) provides: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.” Thus, the statute requires a good faith showing *by affidavit* that a continuance is needed to obtain facts essential to justify opposition to the motion. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 714 (*Lerma*).)

To make the requisite good faith showing, an opposing party’s declaration must show (1) the facts to be obtained are essential to opposing the motion, (2) there is reason to believe such facts may exist, and (3) the reasons why additional time is needed to obtain these facts. (*Lerma, supra*, 120 Cal.App.4th at p. 715.) The reason for this “exacting requirement” (*ibid.*) is to prevent “every unprepared party who simply files a declaration stating that unspecified essential facts may exist” (*id.* at pp. 715–

716) from using the statute “as a device to get an automatic continuance.” (*Id.* at p. 715.) “The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.” (*Id.* at p. 716.)

We review a court’s ruling on a request for a continuance of a hearing on a summary judgment motion for an abuse of discretion. (*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038.) “Notwithstanding the court’s discretion in addressing such continuance requests, ‘the interests at stake are too high to sanction the denial of a continuance without good reason.’ [Citation.] Thus, ‘[t]o mitigate summary judgment’s harshness, the statute’s drafters included a provision making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated “‘upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.’” ’” (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100–101.)

b. *Trial court acted within its discretion in finding a lack of good cause for a continuance.*

Here, as the trial court noted, Carlsbad failed to file a declaration in support of its request for a continuance; it merely included the request for a continuance in its opposing memorandum of points and authorities. Thus, there was no declaration to show (1) the additional facts to be obtained were essential to Carlsbad’s opposition, (2) there was reason to believe such facts may exist, and (3) the reason why additional time was needed to obtain those facts. (*Lerma, supra*, 120 Cal.App.4th at p. 715.) Accordingly, the trial court acted within the bounds of its

discretion in finding that Carlsbad's request for a continuance was "plainly insufficient" under section 437c, subdivision (h).

The trial court further ruled that additional evidence with respect to an alleged underground regulation would not have changed the outcome, in that Carlsbad failed to allege the underground regulation theory in its complaint and therefore that theory was beyond the scope of the issues to be addressed on summary judgment. We agree.

As discussed above, the complaint limits the issues to be addressed at the motion for summary judgment. (*Laabs, supra*, 163 Cal.App.4th at p. 1258.) Because Carlsbad failed to allege the underground regulation theory in its pleadings, and failed to request leave to amend in that regard, the underground regulation theory was outside the scope of the declaratory relief action. Therefore, the trial court acted within the bounds of its discretion in concluding that a continuance for additional discovery on that theory was not warranted.

DISPOSITION

The judgment is affirmed. The Board shall recover its costs on appeal.

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REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.