Tentative Rulings for April 27, 2022
Department 502

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

21CECG02514 ***Janet Hernandez v. Maria Navarro*** **is continued to Wednesday, May 18, 2022 at 3:30 P.M. in Department 502**

21CECG02584 ***Candace Smith v. The City of Fresno*** **is continued to Wednesday, May 18, 2022 at 3:30 P.M. in Department 502**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(03)

Tentative Ruling

Re:	***Rodriguez v. Delta Airlines*** Superior Court Case No. 19CECG00453
Hearing Date:	April 27, 2022 (Dept. 502)
Motion:	Defendants Delta Airlines and SkyWest Airlines' Motion to Strike Portions of Second Amended Complaint

Tentative Ruling:

To grant defendants' motion to strike portions of the second amended complaint, as the new defendants and allegations were improperly added and are not filed in conformity with this court's July 19, 2021 order granting the motion for judgment on the pleadings. (Code Civ. Proc. § 436.) To deny leave to amend at this time. However, plaintiffs may bring a properly noticed motion to amend the complaint to substitute the new defendants in place of fictitious defendants in compliance with Code of Civil Procedure sections 473 and 474.

Explanation:

When a court sustains a demurrer or grants a motion for judgment on the pleadings with leave to amend, the plaintiff is only permitted to amend the complaint to allege facts to cure the defects noted in the court's order, not to add other facts, claims, or parties that are unrelated to the reasons for sustaining the demurrer. (*People ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 785–786; *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023; *Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329.) A plaintiff cannot simply add a new defendant after the court sustains a demurrer with leave to amend. Instead, the plaintiff must obtain leave of court under Code of Civil Procedure section 473 before adding new defendants. (*Taliaferro v. Davis* (1963) 220 Cal.App.2d 793, 795.)

In the present case, the court granted the motion for judgment on the pleadings brought by defendants Delta Airlines and SkyWest Airlines as to several of the causes of action in the first amended complaint, and only granted leave to amend as to two of the causes of action, the third cause of action under the Rehabilitation Act and the fourteenth cause of action for injunctive relief. (See Court's Order of July 19, 2021, Tentative Ruling, p. 1.) However, rather than amending those two causes of action, plaintiffs instead added two new defendants to the second amended complaint, as well as adding a number of new allegations that are unrelated to the third and fourteenth causes of action. Plaintiffs also deleted their cause of action under the Rehabilitation Act and deleted Delta and SkyWest from their injunctive relief claim, so they apparently concede that they cannot state claims against Delta or SkyWest for violation of the Rehabilitation Act or for injunctive relief.

Yet plaintiffs never sought or obtained leave to add new parties to the action, nor have they requested leave to amend the complaint under Code of Civil Procedure section 473 to add other allegations unrelated to their Rehabilitation Act and injunctive relief claims. Also, to the extent that plaintiffs seek to substitute the new defendants in place of Doe defendants, they have not complied with the procedures for substituting named defendants for fictitious defendants under Code of Civil Procedure section 474.

Since the court did not grant leave to amend other than for the purpose of alleging new facts to cure the defects in the third and fourteenth causes of action, the newly alleged facts and new defendants are not properly pled, and are not filed in conformity with the court's order on the motion for judgment on the pleadings. As a result, the court intends to grant the motion to strike them.

Plaintiffs argue in opposition that they have stated valid claims against the newly added individual defendants under Civil Code sections 52, subdivision (a) and 54.3, subdivision (a), and that defendants have not cited to any authorities that would bar them from bringing claims against the individual defendants. They also argue that their claims against the new defendants are not time-barred, as they "relate back" to the date of filing of the original complaint because the new defendants have been substituted in place of Doe defendants.

However, plaintiffs' arguments miss the point. Regardless of whether plaintiffs can allege valid claims against the new defendants under Civil Code sections 52 or 54.3 or whether their claims against the new defendants are time-barred, they have not sought or obtained leave of court to amend their complaint to add the new defendants. Just because the court granted them leave to amend in order to attempt to cure the defects in their third and fourteenth causes of action does not give plaintiffs *carte blanche* to add new defendants or other facts that are unrelated to the reasons that the court granted the motion for judgment on the pleadings. (*Taliaferro v. Davis, supra,* 220 Cal.App.2d at p. 795.)

Also, while plaintiffs contend that the claims against the new defendants are not time-barred because they "relate back" to the filing of the original complaint, plaintiffs have not complied with the rules regarding substituting named defendants in place of Doe defendants. (Code Civ. Proc. § 474.) In any event, regardless of whether the claims against the new defendants are time-barred or not, plaintiffs still have not sought or obtained leave to add them to the complaint, so they have been improperly added to the action and must be stricken.

Finally, to the extent that plaintiffs request leave to amend, they would need to bring a separate motion for leave to amend in order to add new defendants and allege other facts that are unrelated to the court's order granting the motion to strike. Plaintiffs have not brought a motion to amend or shown good cause for granting leave to add new parties or additional claims, so the court intends to deny the request for leave to amend at this time. However, the denial is without prejudice, so plaintiffs may still bring a separately noticed motion to amend if they wish to add new defendants or facts to the complaint.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/20/2022.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Blair v. City of Fresno***
Superior Court Case No. 20CECG03004

Hearing Date: April 27, 2022 (Dept. 502)

Motion: by defendant for summary judgment or in the alternative, summary adjudication

Tentative Ruling:

To grant. Defendant shall submit to this court, within ten days of service of the minute order, a proposed judgment consistent with the court's ruling.

Explanation:

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. §437c(c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) The issue to be determined by the trial court in consideration of a motion for summary judgment is whether or not any facts have been presented which give rise to a triable issue, and not to pass upon or determine the true facts in the case. (*Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 775.)

The moving party bears the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he or she carries this burden, the burden shifts to plaintiff to make a prima facie showing of the existence of a triable issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) A defendant has met his burden of showing that a cause of action has no merit if he has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (*Ibid.*) Once the defendant has met that burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (*Ibid.*)

Affidavits of the moving party must be strictly construed and those of the opponent liberally construed. (*Petersen*, *supra*, 259 Cal.App.2d at p. 775.) The opposing affidavit must be accepted as true, and need not be composed wholly of strictly evidentiary facts. (*Ibid.*) Any doubts are to be resolved against the moving party. The facts in the affidavits shall be set forth with particularity. (*Ibid.*) The movant's affidavit must state all of the requisite evidentiary facts and not merely the ultimate facts or conclusions of law or conclusions of fact. (*Ibid.*) All doubts as to the propriety of granting the motion are to be resolved in favor of the party opposing the motion. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

Defendant seeks summary judgment of plaintiff's second amended complaint for three causes of action: premises liability, negligence, and dangerous condition of public property under Government Code section 835. Defendant contends that, as a

municipality, it cannot be liable for premises liability or general negligence. Defendant further contends that plaintiff cannot meet her burden to demonstrate that defendant violated Government Code section 835 because plaintiff cannot demonstrate a dangerous condition within the meaning of the statute, or that defendant had notice of that condition.

In opposition, plaintiff submits an intent to dismiss the first cause of action, for premises liability, and the second cause of action for negligence. Therefore, only the third cause of action, for a Government Code section 835 dangerous condition remains.

Government Code section 835 provides:

> 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 either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The 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.

Thus, to establish liability, a plaintiff must show that: (1) the property was in a dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; and (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which occurred. (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1105-1106.) However, it is not necessary to prove a negligent act and notice, either will suffice. (*Curtis v. State of Cal.* (1982) 128 Cal.App.3d 668, 693.) The existence of a dangerous condition is ordinarily a question of fact, but can be decided as a matter of law if reasonable minds can come to only one conclusion. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347.)

Dangerous Condition

A dangerous condition is a condition of public property that creates a substantial risk of injury to members of the general public when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used. (Gov't Code § 830, subd. (a).) The law imposes no duty on a public entity to repair trivial defects or to maintain its property in absolutely perfect condition. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566.)

It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. (*Whiting v. National City* (1937) 9 Cal.2d 163, 165.) Minor defects are bound to exist and a municipality cannot be expected to maintain the surface of its

sidewalks free from all inequalities and from every possible obstruction to travel. (*Ibid.*) Thus, whether a condition is dangerous or defective versus merely trivial, all of the circumstances must be considered in the light of the facts of the particular case. (*Beck v. City of Palo Alto* (1957) 150 Cal.App.2d 39, 43; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 731-732.) Where reasonable minds can only reach one conclusion, that there was no substantial risk of injury, the issue is a question of law, properly resolved by summary judgment. (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092 ,1104-1105.) If, however, the court determines that sufficient evidence has been presented so that reasonable minds may differ as to whether the defect presents a substantial risk of injury, the court may not conclude that the defect is trivial as a matter of law. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 28.)

The size of the defect is only one circumstance to be considered as no court has fixed an arbitrary measurement in inches below which a defect is trivial as a matter of law and above which it becomes a question of fact whether the defect is dangerous or not. (*Beck*, *supra*, 150 Cal.App.2d at pp. 43-44.)

In reviewing the totality of the circumstances, consideration has been given to whether the walkway was broken or jagged, whether the conditions of the walkway surrounding the defect, such as debris, grease, or water, concealed the defect, whether the lighting or other conditions obstructed the view of the defect, and the plaintiff's knowledge of the location. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927; *Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74.) Thus, "the court reviews evidence regarding type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors [bearing on whether the defect presented a substantial risk of injury]. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law." (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105 [internal citations omitted].)

Defendant submits that on April 16, 2020, while plaintiff was jogging on the sidewalk in question, the lighting condition was bright with no obstructed view of the sidewalk and plaintiff was familiar with the area when she tripped over a one and one-half inch deflection. The parties stipulated, based the allegations in the Second Amended Complaint (SAC), that the height differential was one and one-half inches. However, review of the evidence submitted by plaintiff's expert, James Flynn, confirms that the height differential was one and one-quarter inches. (See Declaration of James Flynn, paragraph 3 and Exhibit B.) Sidewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held to be trivial as a matter of law. (*Huckey*, *supra*, 37 Cal.App.5th at p. 1107.) The evidence submitted, including the height differential, makes a prima facie showing that plaintiff cannot establish there was a dangerous condition under the circumstances at the time plaintiff alleged she fell. (*Id*. at p. 1107.) Thus, the burden shifts to plaintiff to raise a triable issue of material fact.

Plaintiff argues that the height differential was not trivial as a matter of law. Plaintiff submits disputed material facts as to the brightness of the lighting being mired with shadows; that such shadows in fact obscured plaintiff's view of the height differential; and that plaintiff was unfamiliar with the location. Though plaintiff further submits that "one might describe [the height differential] as a crack or a broken piece," the court,

after reviewing the submitted photos, declines to describe the condition of the sidewalk as such.

Plaintiff further submits photographs of the location as a purported recreation of the conditions on the day of the incident. (*See generally* Declaration of David Schiavon.) Schiavon states that he is a licensed private investigator retained to obtain photographs of the area in question. Schiavon concludes that the time of plaintiff's fall occurred approximately between 8:50 and 8:55 a.m. on April 16, 2020. This is consistent with plaintiff's declaration, despite plaintiff's unintentional reference to an incident date in March 2020. Schiavon thereafter noted the time of sunrise on April 16, 2020, and scheduled an inspection on April 23, 2020 to match the lighting conditions to the incident date. Schiavon observed that during the period of 8:30 to 8:50 a.m., he observed a shadow from a nearby light pole obscured the view of the raised sidewalk to a person traveling in the same direction as plaintiff when she tripped and fell. Schiavon opined that under those conditions, he, too, was unable to see the defect initially.

Defendant objects to the Schiavon declaration, and the photographs for, among other things, lack of foundation. Defendant's objections to Schiavon's declaration are sustained. Schiavon is not a percipient witness. Schiavon conducted a personal inspection of the location, and submits opinions as to what plaintiff could or could not see at the time of the incident. Schiavon lays no foundation as to his ability and experience to conclude that his observations of lighting match that of the time of the incident. Aside from trying to match the amount of time after sunrise, there is no foundation as to what Schiavon compared his findings with, nor any description by plaintiff upon which he relied concerning what she observed. Schiavon's final observation that he also could not see the defect, along with any other observations and conclusions, are disregarded as they lack foundation and are speculative.

Plaintiff's remaining argument that she was unfamiliar with the incident location is also disregarded. Plaintiff submits that she ran in the vicinity often, but always on the street, and not the sidewalk. (Declaration of Tracy Blair, ¶ 3.) However, in plaintiff's verified response to special interrogatories:

> **SPECIAL INTERROGATORY NO. 2:** How many times had YOU traveled on the sidewalk near N. Maple Ave and E. Emerald Ave. in Fresno, California, as stated in YOUR complaint, from 2015 to the present?
>
> **RESPONSE:** I do not recall exactly, but my best estimate is three [or] four times, but I usually run on the street.

(Declaration of Brian Velez, ¶ 4, and Ex. 4 thereto.)

When discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of those stern requirements applicable in a normal case are relaxed or altered in their operations. (*D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 21.) Admissions against interest have a very high credibility value, particularly when the admission is obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts. (*Id.* at p. 22.)

Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exists triable issues of fact between the parties, the admission is entitled to a kind of deference not normally accorded evidentiary allegations in affidavits. (*Ibid.*) Thus a party cannot create an issue of fact by a declaration which contradicts her prior discovery responses. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12.)

As the above verified response reflects, plaintiff conceded that while she did not recall the number of times she traveled on the sidewalk in question, she estimated three to four times. Thus, to the extent plaintiff now submits a declaration clarifying her prior response and contravening that she had never traveled on the sidewalk as stated in the SAC, her prior response to propounded discovery controls.

In sum, undisputed facts in total show that the sidewalk defect amounted to one and one-quarter inches, the lighting conditions were bright, plaintiff's view was unobstructed and she had some familiarity with the sidewalk in question. The court concludes that the sidewalk defect was not sufficiently dangerous to a reasonably careful person, and therefore is a trivial defect.[1]

Notice

Even had the court concluded that the defect was not trivial, defendant sufficiently makes a prima facie showing that it had no prior notice of the condition. A public entity has actual notice of a dangerous condition if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. (Gov't Code § 835.2, subd. (a).)

Here, defendant submits the declaration of Bret Conner. Conner declares that he has been the Street Maintenance Superintendent for the City of Fresno since 2007. In his capacity, he is familiar with the procedure for documenting complaints about incidents that occur on, among other locations, the sidewalks within city limits. The policy in place is driven by citizen reports of conditions that may require action. The City owns hundreds of miles of streets and sidewalks, and due to budgetary constraints and staffing issues, it would be virtually impossible to have an employee inspect sidewalks full-time. Conner

[1] Plaintiff further submits that defendant is per se liable because the sidewalk defect did not meet the standards of the federal Americans with Disabilities Act. However, such allegations in the SAC were confined to the first cause of action, for premises liability, which was abandoned. In any event, plaintiff relies on the declaration of James Flynn, a professional engineer who opined, after observing the incident scene approximately one week after the incident, no actual conclusions. Rather, Flynn merely reports the standards of the California Building Code, ASTM, and the Americans with Disabilities Act without reference as to how the incident site measured to those standards or how his findings demonstrate some amount of deviation from such standards. (Declaration of James E. Flynn, ¶ 6.) At best, Flynn opines that the standards apply, though it is unclear at what point in time such standards were enacted. (See *Caloroso*, *supra*, 122 Cal.App.4th at pp. 928-929 [finding that failure to indicate when codes and standards apply to existing walkways as opposed to new construction is excludable opinion of noncompliance].) Therefore, evidence of such standards is irrelevant, and plaintiff's request for judicial notice as to items 2 [ADA Standards], 3 [ANSI Standards], and 4 [ASTM Standards] is denied.

further identified methods by which reporting may occur. He stated that the response time on sidewalk repair requests is within 72 hours.

On this occasion, Conner declared that defendant was made aware of plaintiff's injury on April 22, 2020. Research revealed that no other reports or complaints or requests for repairs were made in the area of plaintiff's incident. Conner's research further revealed that no complaints of injury existed, aside from plaintiff. Thus, defendant makes a facial showing that it had no actual prior notice.

A public entity has constructive notice of a dangerous condition if the plaintiff proves that the condition has existed "for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov't Code § 835.2, subd. (b).) In determining constructive notice, the method of inspection is secondary. (*State of Cal. v. Super. Ct.* (1968) 263 Cal.App.2d 396, 400.) The primary and indispensable element is a showing that the obvious condition existed for a sufficient period of time before the accident. (*Ibid.*) In other words, evidence must be presented that the danger was obvious and that the situation had existed for any particular length of time before the accident. (*Ibid.*) Thus, although constructive notice of a defect may be imputed to a public entity that fails to have a reasonably adequate inspection system, constructive notice will not be imputed if the defect is not sufficiently obvious. (*Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 520.)

However, a defect is not obvious just because it is visible, nor is it obvious because it is nontrivial. (*Martinez*, *supra*, 71 Cal.App.5th at p. 520.) Whether a nontrivial defect is sufficiently obvious, conspicuous, and notorious that a public entity should be charged with the knowledge of the defect for its failure to discover it depends on all of the existing circumstances. (*Id.* at p. 521.) Those circumstances include (1) the location, extent and character of the use of the public property in question, looking at both its intended use for travel as well as the actual frequency of travel in the area; and (2) the magnitude of the problem of inspection, considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which the failure to inspect would give rise. (*Ibid.*)

For the same reasons as actual prior notice, defendant makes a facial showing that it had no constructive prior notice. Namely, defendant stated that no other report of incident or request for repair existed for the location in question, and that to manually inspect sidewalks for defects such as the one plaintiff tripped over was impractical and constrained by budget.

In opposition, plaintiff submits that defendant had constructive prior notice because the condition has existed for over ten years prior to the incident date, demonstrating long-continued neglect of the condition that should have been known or seen. Plaintiff submits the subpoenaed business records from Google for historical photos of the location to demonstrate both the age of the condition and the obviousness.[2]

[2] Plaintiff's request for judicial notice as to item 1 [Google, Inc.'s response to Subpoena Duces Tecum] is denied. (*See* Evid. Code § 450 et seq.) However, the court receives item 1 as writings via business records evidence. (Evid. Code § 1400 et seq.)

Plaintiff further submits deposition testimony that defendant had crews in the area of the incident every four to five months. As noted above, visibility alone does not make a defect obvious. Moreover, the crews to which plaintiff refers were instructed to report conditions that they felt created a risk to the public using the sidewalk and no reports were made.

For the above reasons, and because plaintiff indicated an intent to proceed only on the third cause of action for dangerous condition, defendant's motion for summary judgment as to plaintiff's Second Amended Complaint is granted.[3]

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/26/2022.
(Judge's initials) (Date)

[3] All other objections to submitted evidence were not material to disposition and the court makes no ruling as to those other objections. (Code Civ. Proc. § 437c, subd. (q).)