Tentative Rulings for December 16, 2021
Department 503

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.

19CECG04621 ***Martin v. Atwal*** **is continued to Thursday, January 6, 2022, at 3:30 p.m. in Department 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(34)

Tentative Ruling

Re: ***Castro v. Regents of the University of California***
Superior Court Case No. 20CECG01429

Hearing Date: December 16, 2021 (Dept. 503)

Motion: By Defendant for Summary Judgment

Tentative Ruling:

To grant defendant Regents of the University of California's motion for summary judgment as to the entire complaint. (Code Civ. Proc., § 437c.) Defendant shall submit a judgment consistent with the terms of this order within 10 days of service of the order.

Explanation:

"'Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713, quoting Code Civ. Proc., § 437c, subd. (c).) To prevail on a motion for summary judgment, it is the defendant's burden to prove there is a complete defense or that the plaintiff cannot establish one or more elements of each of his causes of action. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) To show that the plaintiff cannot establish his claims, the defendant may either (1) affirmatively negate one or more elements of each claim, or (2) by relying on the plaintiff's inadequate discovery responses, show that the plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 855.)

Additionally, '"[w]hile a plaintiff who has pleaded several causes of action based on the same set of facts need sustain its burden of proof only on one of the theories in order to prevail at trial, a defendant who seeks a summary judgment must define all of the theories alleged in the complaint and challenge each factually.'" (*Lopez*, *supra*, 45 Cal.App.4th 705, 714, quoting, *Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 55, abrogated on another point in *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1103.)

The ultimate burden of persuasion rests on the defendant, as the moving party. The initial burden of production is on the defendant to show by a preponderance of the evidence, that it is more likely than not that a given element cannot be established or that a given defense can be established. (*Aguilar*, *supra*, 25 Cal.4th at 850.) If defendant carries this initial burden of production, the burden of production shifts to the plaintiff to show that a triable issue of material fact exists. The plaintiff does this if he can show, by a preponderance of the evidence, that it is more likely than not that a given element can be established or that a given defense cannot be established. (*Aguilar*, *supra*, 25 Cal.4th at 850, 852.)

In determining whether the plaintiff has met his burden of production, the court must evaluate the plaintiff's evidence independently. That is, the court may not weigh

the plaintiff's evidence or inferences against the defendant's, as if the court were sitting as a trier of fact. If the plaintiff meets his burden, then the court must deny summary judgment, even if the defendants have presented conflicting evidence. If the plaintiff meets his burden, a reasonable trier of fact could find for the plaintiff and a triable issue of fact does exist for the jury to consider. (*Aguilar, supra,* 25 Cal.4th at 856-857.)

In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Lastly, "[f]ailure to file opposition including a separate statement of disputed material facts by not less than 14 days prior to the motion 'may constitute a sufficient ground, in the court's discretion, for granting the motion.'" (*Cravens v. State Bd. of Education* (1997) 52 Cal.App.4th 253, 257, quoting Code Civ. Proc., § 437c(c).)

Summary Judgment Requiring Expert Opinion

Where a summary judgment motion is supported by an expert opinion, "the opposing party's burden is to produce competent expert opinion declarations to the contrary." (Weil & Brown, Civil Procedure Before Trial (TRG 2021), ¶ 10:205.5, citing *Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 Cal.App.4th 1480, 1487.) Considering the liberal construction allowed to the party opposing a summary judgment motion, "a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion need not be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial." (*Garrett v. Howmedica Osteonics Corporation* (2013) 214 Cal.App.4th 173, 189.) Ultimately, where the party moving for summary judgment rests on expert opinion, the opposing party can only defeat the motion by presenting "conflicting expert evidence." (*Hanson v. Goode* (1999) 76 Cal.App.4th 601, 606-607.)

Additionally, the court does not weigh competing expert testimony. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 39, overruled on other grounds in *Perry v. Bakewell Hawthrone, LLC* (2017) 2 Cal.5th 536, 543.) Essentially, "the court cannot disregard [an expert] opinion solely because other, more qualified experts opine to the contrary." (Weil & Brown, Civil Procedure Before Trial (TRG 2021) 10:272, citing *Mann*, *supra*, 38 Cal.3d at 39.)

Generally, "[t]he qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175 citing *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476; cf. Evid. Code, § 802.) Essentially, "the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (Evid. Code, §§ 801, subd. (b), 802; *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-772.) This is consistent with the traditional principle that an expert opinion, founded entirely on incompetent matter, can be

rejected. (*Young v. Bates Valve Bag Corp*. (1942) 52 Cal.App.2d 86, 96; *County of Los Angeles v. King* (1972) 22 Cal.App.3d 916, 923.)

The trial court, however, must not weigh the probative value of the expert opinion. (*Sargon*, *supra*, 55 Cal.4th at 772; *Garrett v. Howmedica Osteonics Corporation* (2013) 214 Cal.App.4th 173, 186.) Accordingly, the court determines whether the expert is sufficiently qualified to proffer his or her opinion. (*Salasguevara v. Wyeth Labrotories, Inc.* (1990) 222 Cal.App.3d 379, 386 [evidence failed to show whether expert based his opinion on his training, experience or skill].) Similarly, an expert opinion based on medical records not before the court does not support summary judgment. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743, see also *Petrou v. South Coast Emergency Group* (2004) 119 Cal.App.4th 1090, 1095 [an expert, though possessing 20 years of actual experience, but only six months of experience as measured by the date of trial, was unqualified to render an opinion under the 5 year "substantial professional experience" requirement of Health and Safety Code section 1799.110, subdivision (c).)

Medical Malpractice

> The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage.

(*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305, citing *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

In this case, Dr. Andrew Spitzer, a board certified orthopedic surgeon with extensive experience, relied upon plaintiff's medical records and various discovery items to opine that Dr. Baysal, in his academic appointment with defendant, neither breached the applicable standard of care, nor caused injury to the decedent. (UMF Nos. 5, 6 10; Spitzer Decl., ¶¶ 10, 11.) Dr. Spitzer's opinion is sufficient to shift the burden as to the existence of a triable issue to plaintiff. Plaintiff, however, neither filed an opposition nor an opposing statement of material facts, thus tacitly affirming the merits of defendant's motion. (*Cravens v. State Bd. of Education* (1997) 52 Cal.App.4th 253, 257.)

Therefore, the motion for summary judgment is granted.

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: KAG on 12/10/2021 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Herrera, et al. v. Falcon Private Security, Inc., et al.***
Superior Court Case No. 20CECG03491

Hearing Date: December 16, 2021 (Dept. 503)

Motions: Defendant Falcon Private Security, Inc.'s Motions for Order Deeming Requests to Admit Truth of Facts Against Plaintiff Tiernan Deedon and to Compel Plaintiff Tiernan Deedon's Responses to (1) Form Interrogatories—General; (2) Form Interrogatories—Employment Law; (3) Special Interrogatories; and (4) Request for Production of Documents; and Request for Monetary Sanctions

Tentative Ruling:

To grant and to award monetary sanctions in the total amount of $407.50 against plaintiff Tiernan Deedon, and plaintiff's attorney Justin B. Toobi, jointly and severally, payable within 20 days of the date of this order, with the time to run from the service of this minute order by the clerk.

Plaintiff shall serve verified responses without objections, to defendant Falcon Private Security, Inc.'s Form Interrogatories—General, Set One; Form Interrogatories—Employment Law, Set One; Special Interrogatories, Set One; and Request for Production of Documents, Set One, no later than 10 court days from the date of this order, with the time to run from the service of this minute order by the clerk.

The matters specified in defendant Falcon Private Security, Inc.'s Request for Admissions, Set One, are deemed admitted, unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure section 2033.220.

Explanation:

Interrogatories and Document Production

Plaintiff had ample time to respond to the discovery propounded by defendant, even after obtaining new counsel, and he has not done so. Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and work product protection. (Code Civ. Proc., §§ 2030.290, subd. (a), 2031.300, subd. (a); see *Leach v. Sup.Ct. (Markum)* (1980) 111 Cal.App.3d 902, 905–906.)

Requests for Admissions

Failure to timely respond to requests for admission results in a waiver of all objections to the requests. (Code Civ. Proc., § 2033.280, subd. (a).) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.)

"The law governing the consequences for failing to respond to requests for admission may be the most unforgiving in civil procedure. There is no relief under [Code of Civil Procedure] section 473. The defaulting party is limited to the remedies available in [Code of Civil Procedure Section 2033.280] . . . ." (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 394–395, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

But the court may relieve the party who fails to file a timely response if, before entry of the order deeming the requested matters admitted, the party in default (1) moves for relief from waiver and shows that the failure to serve a timely response was due to "mistake, inadvertence or excusable neglect;" and (2) serves a response in "substantial compliance" with Code of Civil Procedure section 2033.220 (Code Civ. Proc., § 2033.280, subd. (a)-(c); see also *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.) "If the party manages to serve its responses before the hearing, the court has no discretion but to deny the motion . . . . [¶] Everything, in short, depends on submitting responses prior to the hearing." (*Demyer v. Costa Mesa Mobile Homes Estates* (1995) 36 Cal.App.4th 393, 395-396.)

Monetary Sanctions

Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2030.290, subd. (c) [Interrogatories], 2031.300, subd. (c) [Document demands].) No opposition was filed, so no facts were presented to warrant finding sanctions unjust. The sanction amount awarded disallows the time for responding to opposition and for appearing at the hearing, as this proved unnecessary. The court also notes that the moving papers filed against plaintiff Tiernan Deedon are, in essence, identical to those filed against plaintiff David Herrera, which was scheduled for hearing on December 09, 2021. The court finds it reasonable to allow 0.5 hours for preparation of these simple discovery motions at the hourly rate of $215, provided by counsel and $300 for the cost of filing these motions. Therefore, the total amount of sanctions awarded against plaintiff is $407.50.

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: KAG on 12/10/2021 .
(Judge's initials) (Date)

(36) **Tentative Ruling**

Re: ***Silva v. Sok Tes***
Superior Court Case No. 16CECG03921

Hearing Date: December 16, 2021 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. The Court intends to sign the proposed orders. No appearances necessary.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (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: KAG on 12/10/2021 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***California Statewide Communities Development Authority v. Nancy M. Wright***
Superior Court Case No. 19CECG01332

Hearing Date: December 16, 2021 (Dept. 503)

Application: Default Judgment to Order Judicial Foreclosure

Tentative Ruling:

To deny the request for default judgment. To strike the entry of default pursuant to Code of Civil Procedure section 436. To grant plaintiff leave to file a second amended complaint, as discussed *infra*. The second amended complaint is to be filed within 30 days of the clerk's service of the minute order.

Explanation:

Background

Plaintiff is a joint powers authority organized and existing under the Commission of the California Statewide Communities Development Authority. Defendant is the owner in fee simple of the residential property located at 2286 East Sierra Avenue, in Fresno, California. Plaintiff and defendant allegedly contracted for the loan of monies to secure improvements to defendant's home through the PACE clean energy program via CaliforniaFIRST. Defendant allegedly agreed to the placement of special assessment liens on her property to secure her indebtedness. The liens were added to defendant's property tax assessments.

The liens went unpaid and plaintiff now seeks to foreclose on the liens pursuant to section 5898.30 of the Improvement Act of 1911 (Division 7 of the Streets and Highways Code of California) and section 8830(a) of the Improvement Bond Act of 1915 (Division 10 of the Streets and Highways Code of California) using judicial foreclosure. The liens total $2,024.68, plus penalties of $202.46 and redemption interest of $1,032.58. Plaintiff secured a CLTA litigation guarantee through Stewart Title Guaranty Company establishing that defendant is unmarried and owns the property in fee simple. According to Zillow, the property is valued at $361,900.

Procedural History and Entry of Default

On April 18, 2019, plaintiff filed an unverified complaint seeking judicial foreclosure pursuant to the assessment lien on the property. The complaint was personally served on defendant via a process server. (See Proof of Service, Judicial Council Form POS-101, filed May 14, 2019.)

On August 5, 2019, Plaintiff filed an unverified first amended complaint. The first amended complaint was served on defendant by first class mail.[1] (See Proof of Service attached to First Amended Complaint, filed on August 5, 2019; Proof of Service, Judicial Council Form POS-040, filed October 2, 2019.)

On September 26, 2019, plaintiff filed a request for entry of default. The request was denied on the ground that no proof of service was filed for the first amended complaint. (See Request for Entry of Default, filed September 26, 2019.) On October 2, 2109, plaintiff filed a proof of service on Judicial Council Form POS-404, and another request for entry of default. The request was denied based on a defective proof of service. The proof of service was not on the required Judicial Council Form POS-101. (See Request for Entry of Default, filed October 2, 2019.)

On December 4, 2019, plaintiff filed a second proof of service of the first amended complaint on plaintiff via personal service on October 9, 2019, and a second request for entry of default. Default was entered on December 4, 2019, despite the fact that the proof of service was not on the required Judicial Council Form, but on a custom drafted form.

The use of the Judicial Council Form is mandated by Code of Civil Procedure section 417.10, subdivision (f). Accordingly, the entry of default is stricken. (Code Civ. Proc., § 436.)

First Amended Complaint and Request for Court Judgment

Even assuming a proper proof of service had been filed, there are nonetheless insurmountable defects in the instant application for default judgment. The first amended complaint is not well pleaded. There are few facts regarding how defendant came to be indebted to plaintiff. There is a mention of the CaliforniaFIRST Program. (See First Amended Complaint, ¶ 9.) But, there are no facts alleged regarding the nature of defendant's involvement with this program. In addition, there are no contracts attached to the first amended complaint. Few facts were presented to the Court in support of finding that defendant is liable on a debt and that plaintiff properly assessed the lien prior to attachment.

In addition, with respect to plaintiff's request for attorney's fees and costs associated with foreclose, it is premature. The property has not been foreclosed upon at this time.

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[1] An amendment making substantive changes in the complaint must be personally served on any defendant who has not appeared in the action. And, if that defendant's default has already been entered, service of the amended complaint "opens" the default—entitling it to plead to the amended complaint. (*Engebretson & Co., Inc. v. Harrison* (1981) 125 Cal.App.3d 436, 442-443.) A comparison of the original complaint with the first amended complaint reveals changes as to the table set forth in paragraph 14 of the original complaint. The original complaint incorrectly states the delinquent fiscal year is 2015/2016 when, in fact, it is 2016/2017. This is a substantive change requiring personal service of the first amended complaint. (See *Engebretson & Co., Inc.*, *supra*, 125 Cal.App.3d 436.)

Most significantly, Streets and Highways Code section 8834 states:

> The foreclosure action shall be brought in the name of the city or a trustee employed on behalf of the bondholders pursuant to Section 8830, and may be brought at any time prior to the expiration of four years subsequent to the last maturity of the principal of bonds secured by the assessment or reassessment. The complaint may be brief and include substantially only the following allegations with reference to the assessment or reassessment sought to be collected:
>
> (a) That, on a date stated, the legislative body passed its resolution ordering certain work to be done, without describing the same.
>
> (b) If the assessment was levied pursuant to the Improvement Act of 1911 (Division 7 (commencing with Section 5000)), <u>that work was done pursuant to the resolution</u>.
>
> (c) That an assessment <u>to pay the cost of the work</u> was duly made and was authorized to be collected, but remained unpaid on a stated date.
>
> (d) That certain property (describing it) was assessed or reassessed a stated amount and that bonds upon the security of the assessment or reassessment were duly issued under this division, giving the date or dates of the bonds, their interest rate or rates, and the number of years the last maturity of the bonds were to run, but it is not necessary to state the amount, number, denomination, or other terms of the bonds.
>
> (e) That, on a date stated, a certain sum came due against the described property on the assessment or reassessment and had not been paid and that the legislative body, or a trustee acting on behalf of the bondholders, had ordered the action to foreclose.

(Emphasis added.)

The first amended complaint does not allege that the work was done. Accordingly, it does not comply with the requirements of Streets and Highways Code section 8834, subdivisions (b) and (c). In addition, the letters sent by Donna Segura, Assessment Consultant for David Taussig & Associates (plaintiff's consultant) do not explain in "plain English" why a special assessment was added to plaintiff's property tax assessment. Ultimately, the evidence presented to the Court in support of the judgment does not state who performed the window installation work, whether the work was finished, whether it was performed in a professional manner, whether the contractor asked defendant to pay it directly, etc. Nothing involving the underlying home improvement has been presented to the Court. Yet, this is the transaction that led to the imposition of the special assessment.

It is the court's responsibility to act as a "gatekeeper," ensuring that only the appropriate claims get through and that the judgment is not inconsistent with or in excess of the complaint. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868; *Fasuyi v.*

Permatex, Inc. (2008) 167 Cal.App.4th 681, 691; *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1013.) Therefore, it is erroneous to grant a default judgment where the complaint fails to state a cause of action. (*Rose* v. *Lawton* (1963) 215 Cal.App.2d 18, 19-20; *Williams* v. *Foss* (1924) 69 Cal. App. 705, 707-708.) If the complaint fails to state a cause of action or the allegations do not support the demand for relief, the plaintiff is not entitled to relief. (See *Vasey v. California Dance Co*. (1977) 70 Cal.App.3d 742, 749 [defendant who fails to answer admits only facts which are well pleaded].)

Here, the first amended complaint fails to state a cause of action. The Court grants plaintiff leave to amend to file a second amended complaint, without the need for filing a motion for leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (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: KAG on 12/14/2021 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Hans v. State of California Hospital – Coalinga***
Superior Court Case No. 21CECG01482

Hearing Date: December 16, 2021 (Dept. 503)

Motion: California Department of State Hospital's Demurrer to Complaint

Tentative Ruling:

To sustain defendant California Department of State Hospital's demurrer, with leave to amend, except that leave to amend is not granted to state a petition for a writ of mandate. Plaintiff is granted twenty (20) days, running from the date of service of the minute order by the clerk, to file and serve a first amended complaint.

Explanation:

Complaint

In a Judicial Council form complaint, plaintiff appears to allege two causes of action against defendant: (1) workplace discrimination/wrongful termination and (2) negligence.[2] The allegations in support of the complaint are set forth in attachments to the complaint, specifically an undated letter from plaintiff to the court (which plaintiff refers to as his "declaration") and various other correspondence from government entitles. Plaintiff alleges the following facts: In April 2019, he was employed by defendant as a pre-licensed psychiatric technician (PT); in May 2019, he received a PT license with a probationary status; prior to July 2019, he was approved by defendant in writing on an agreement form to be employed as a licensed PT with probationary status; in July 2019, plaintiff was interviewed for the position but was ultimately not selected because he had a probationary license. (See Complaint, Ex. A.)

On August 1, 2019, plaintiff appealed the decision to the State Personnel Board (SPB) as a "Merit Issue Complaint" (MIC). While awaiting the hearing with the SPB, plaintiff applied two more times with defendant, on August 27, 2019, and July 22, 2020, for the same job, and was denied both times for the same reason. The crux of the appeal to the SPB was that defendant arbitrarily restricted the number of individuals it would hire with a PT license with probationary status, such as plaintiff, to two, despite having no written policy on the same. (Complaint, Ex. A, August 02, 2019 SPB letter; August 27, 2019 denial letter by defendant; July 22, 2020 denial letter by defendant; October 9, 2020 SPB letter with attached determination.)

On October 9, 2020, the SPB issued a determination on the MIC. Citing Title 2 of the California Code of Regulations, section 51.2 and 66.1, the SPB noted that MICs are

[2] The complaint itself utilizes the Judicial Council form complaint for breach of contract, but there is no breach of contract alleged.

claims that the State Civil Service Act, Board regulation, and/or policy has been violated by a State agency. The SPB concluded that there was no evidence of discrepancies in documentation on the individuals who were hired to the two PT vacancies; there was no evidence that defendant was in violation of a law or regulation in not selecting plaintiff for the vacancies; the individuals who were hired to the vacancies were not on probationary status; and defendant is allowed to limit the number of individuals it chooses to hire with a status of probationary license, which is not a violation of any law or regulation. Based on those findings, the SPB denied plaintiff's appeal. (Complaint, Ex. A, October 9, 2020 SPB letter with attached determination.)

Additionally attached to the complaint is a Charge of Discrimination, filed with the federal Equal Employment Opportunity Commission (EEOC). The charge was filed on March 22, 2021, and, on March 24, 2021, the EEOC issued a Dismissal and Notice of Rights. (Complaint, Ex. A, Charge of Discrimination, Dismissal and Notice of Rights.)

On May 21, 2021, plaintiff filed the present action, seeking to "appeal the Superior Court to analyze the whole situation before finalizing the case." (Complaint, Ex. A, p. 2.)

Demurrer

Defendant filed the instant demurrer to the complaint on several grounds: plaintiff is barred by res judicata; plaintiff is barred by collateral estoppel; plaintiff has failed to exhaust his judicial remedies; plaintiff's claims are barred by governmental immunity; and the complaint fails to state a claim.

In determining a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) The court may also consider matters subject to judicial notice. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 29.)[3] On demurrer, the court must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) The courts of this state have long since departed from holding a plaintiff strictly to the form of the action he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. (*Ibid.*)

Res Judicata (Claim Preclusion)

Defendant argues that plaintiff's complaint is barred by the doctrine of res judicata. Res judicata is an umbrella term for both claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823.) Claim preclusion acts to bar claims that were advanced in a previous suit involving the same parties. (*Ibid.*) Issue

[3] Defendant's Request for Judicial Notice is granted as to Exhibit A, to the extent such documents exist, not for the truth of their factual findings. (*E.g., Steed v. Dept. of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.) Defendant's Request for Judicial Notice is denied as to Exhibit B, which was not attached. The court notes that a determination issued by the SPB with the same case number and date of issue is attached to the complaint in any event.

preclusion, also called collateral estoppel, bars relitigating issues that were argued and decided in the first suit. (*Ibid.*)

Claim preclusion arises if a second suit involves: (1) the same cause of action, (2) between the same parties, and (3) after a final judgment on the merits in the first suit. (*Id.* at p. 824.) Claim preclusion bars relitigation of the claim altogether. (*Ibid.*)

The instant complaint seeks, among other things, redress for workplace discrimination, and, based on the EEOC charge, for retaliation. The SPB determination, on the other hand, concludes that defendant did not violate any rule or regulation by not hiring plaintiff. The SPB determination does not address workplace discrimination or retaliation, except as to conclude that defendant has discretion to limit the number of individuals it chooses to hire with the status of probationary license. Defendant argues that claim preclusion applies because plaintiff alleges identical claims, that defendant's decision not to hire plaintiff was somehow unlawful.

Title 2 of the California Code of Regulations, section 66.1, defines an MIC as a complaint that the State Civil Service Act or Board regulation or policy has been violated by a state agency. (2 Cal. Code Regs., tit. 2, § 66.1, subd. (a).) An MIC explicitly excludes appeals of actions provided for elsewhere in the law. (*Ibid.*) Thus, the SPB determination, absent some indication to the contrary, does not reach claims of discrimination, which are protected under the Fair Employment and Housing Act (FEHA) by a different executive body. (Gov. Code, § 19200 et seq.) This is consistent with the legislative history of FEHA, which was designed to afford both the remedies of the Civil Service Act and FEHA. (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 434-435.) The doctrine of res judicata does not act as a complete bar to a FEHA action when an employee seeks review through an alternative administrative remedy available. (*George v. Cal. Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1483-1484.) Claims of employment discrimination can be raised with the SPB, DFEH, or both. (*Ruiz v. Dept. of Corrections* (2000) 77 Cal.App.4th 891, 900.) An employee complaining before the SPB is asserting a private right, while the application to the DFEH is a testing a public right. (*State Personnel Board*, *supra*, 39 Cal.3d at p. 444.) The employee's choice to assert the former does not bar litigation of the latter. (*Ibid.*)

Here, the California Code of Regulations excludes the conclusion that the MIC filed with the SPB by plaintiff amounts to the same cause of action between the same parties after a final judgment on the merits. Likewise, to the extent that the complaint rests on discrimination or retaliation, such claims do not facially appear to be addressed in the SPB determination. Thus, to the extent that the complaint states a cause of action for discrimination or retaliation as indicated in the Charge of Discrimination, such claims are not precluded. However, as defendant correctly notes, plaintiff has not properly stated a cause for discrimination or retaliation.

Collateral Estoppel (Issue Preclusion)

Issue preclusion arises: (1) after final adjudication, (2) of an identical issue, (3) actually litigated and necessarily decided in the first suit, and (4) asserted against one who was a party in the first suit or one in privity with that party. (*Lucido v. Sup. Ct.* (1990) 51 Cal.3d 335, 341.) Where an administrative remedy is sought, and an adverse finding

found, the failure to have that finding set aside through the judicial review process will cause the adverse finding to be binding on discrimination claims under FEHA. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76.) The party asserting issue preclusion bears the burden of establishing these requirements. (*Lucido*, *supra*, 51 Cal.3d at p. 341.)

To ascertain whether an agency acted in a judicial capacity in satisfaction of the "actually litigated" requirement, courts look for factors indicating that the administrative proceedings and determination possessed a judicial character, including impartiality, and the ability to call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral or written argument. (*People v. Sims* (1982) 32 Cal.3d 468, 479-480.) Formal adherence to the rules of evidence is not required. (*Id.* at p. 480.)

As discussed above, there is no clear indication that the SPB determination addressed identical issues. Neither does defendant identify what specific issues were precluded by the SPB determination. Further, there is no indication that the discrimination or retaliation issues were actually litigated.[4]

Exhaustion of Judicial Remedies

Defendant further argues that plaintiff failed to exhaust judicial remedies. As noted above, the failure to have an adverse finding set aside through the judicial review process will cause the adverse finding to be binding on discrimination claims under FEHA. (*Johnson*, *supra*, 24 Cal.4th at p. 76.) Defendant is correct that, to the extent plaintiff seeks to appeal the administrative finding, such time has passed. (Gov. Code, § 19630 [stating that "any petition for a writ challenging a decision of the board shall be filed within six months of the date of the final decision of the board"].) Here, the SPB determination is dated October 9, 2020. Thus, to the extent that the May 21, 2021 complaint seeks to petition for a writ of mandate, such petition is untimely.

However, as discussed above, there is no clear indication that the SPB determination addressed the issues of discrimination or retaliation. Although plaintiff's intentions are unclear from the complaint, the inclusion of the EEOC Charge of Discrimination with the complaint supports the possibility that the complaint seeks to state a claim under facts and law outside of the scope of the SPB determination.

Governmental Immunity

Defendant argues that plaintiff's tort claims are barred by state sovereignty under the Government Claims Act. (Gov. Code, §§ 815, 900 et seq.) The Government Claims Act requires, for all claims of money or damages against local public entities, a presentation of a claim. (Gov. Code, § 905.) The categories listed under section 905 of the Government Code are not exhaustive of the types of claims that are exempt. (*Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 868-869.) The notice of claims provisions do not apply to an action which seeks principally injunctive relief for employment

[4] Rather, the California Code of Regulations indicates that MICs are subject only to an investigative review, which specifically denies the use of witnesses, and empowers the Investigative Officer to determine what documents to review. (Cal. Code Regs. Title 2, § 55.1, subd. (b); *see id.* §§ 53.2, 66.1.)

discrimination. (*Id.* at p. 869.) An action under FEHA is basically nonpecuniary, the claims for damages and backpay being incidental to the claim for injunctive relief. (*Ibid.*) Therefore, FEHA actions are generally not subject to the claims presentation requirements of the Government Claims Act. (*See id.* at p. 870.)

Here, plaintiff alleges compliance with all statutory requirements. (See Complaint, p. 2, ¶ 5.) The court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy*, *supra*, 44 Cal.4th at p. 883.) To the extent the complaint states a cause of action, FEHA actions are not subject to the Government Claims Act.

Failure to State a Claim

As discussed above, the court finds that the complaint does not clearly state a cause of action, despite the facts alleged. To the extent the complaint seeks to petition a writ of mandate of the SPB determination, the demurrer is sustained without leave to amend. On all other grounds, the demurrer is sustained, with leave to amend. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549 [finding that great liberality should be exercised in permitting a plaintiff to amend the complaint where the defect can be cured by amendment].)

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: KAG on 12/15/2021 .
(Judge's initials) (Date)