

Tentative Rulings for April 23, 2009
Departments 97A, 97B, 97C & 97D

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).)

- 06CECG01604 *Hughes v. Kushner* (Dept. 97D)
- 06CECG03977 *Coletti & Hunter v. Chris Yakligian* (Dept. 97B)
- 07CECG04094 *Maxwell Voshall v. Community Regional Medical Center*
(Dept. 97D)
- 07CECG04060 *Jose Gallegos v. NCRC Inc.* (Dept. 97A)
- 08CECG03705 *Saif Hussein v. Irene Hernandez* (Dept. 97A)
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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

- 08CECG03738 *JMS Realtors v. George Milasich* (Dept. 97D) is
continued to April 28, 2009.
- 08CECG01827 *Kahn v. The Amergence Group, Inc. et al.* (Dept. 97B) is
continued to April 30, 2009 in Dept. 97B.
- 08CECG03270 *Anthony Rivera v. PG&E Corporation* (Dept. 97C) is
being continued to April 30, 2009 in Dept. 97A
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(Tentative Rulings begin at the next page)

(20)

Tentative Ruling

Re: ***Planamento v. Saint Agnes Medical Center***
Superior Court Case No. 06CECG02583

Hearing Date: **April 23, 2009 (Dept. 97A)**

Motion: (1) Saint Agnes Medical Center's Motion for Summary Judgment Against Intervenor Beverly Giannopoulos only;
(2) John Roper, M.D.'s Motion for Summary Judgment against Plaintiff Joyce Planamento and Intervenor Beverly Giannopoulos

Tentative Ruling:

To grant Saint Agnes Medical Center's motion for summary judgment against Beverly Giannopoulos only. To grant John Roper, M.D.'s motion for summary judgment against Joyce Planamento and Intervenor Beverly Giannopoulos. Dr. Roper and Saint Agnes are directed to submit to this court, within 5 days of service of the minute order, proposed judgments consistent with the court's summary judgment order.

Explanation:

This is a medical malpractice action. On 8/4/06 plaintiff Joyce Planamento filed a pro per complaint for medical negligence against Saint Agnes Medical Center. On 6/26/07 Beverly Giannopoulos filed a complaint in intervention. By the complaint in intervention, Giannopoulos joined in the complaint filed by Planamento.

The complaint alleges that plaintiffs' mother, Dorothy Mae Martell, underwent a colonoscopy at Saint Agnes. During the procedure, her bowel was perforated. Due to the negligent conduct of Saint Agnes and its personnel in connection with this incident, Martell died the next day, 8/4/05.

Both defendants' motions are granted as to Giannopoulos on the ground that her claims against both defendants are barred by the statute of limitations.

The gravamen of the complaint is actually a claim for wrongful death based on medical malpractice. There is a single cause of action for general negligence. CCP § 340.5 sets forth the statute of limitations as three years from the date of injury or one year after the plaintiff discovers or should have discovered the injury, whichever occurs first. "Injury" means the death of decedent. (*Larcher v. Wanless* (1976) 18 Cal.3d 646, 659.) And for wrongful death actions, the statute begins to run on the date the decedent died. (*Walton*

v. Southern Pac. Co. (1935) 8 Cal.App.2d 290, 304 [construing predecessor statute].)

The one-year statute clearly applies, as decedent's death was an obvious and discoverable injury. But Giannopoulos filed her suit on 6/27/07, nearly two years after the death. Giannopoulos knew that decedent passed on 8/4/05, as she was at decedent's bedside. And on that day Giannopoulos suspected that decedent's death resulted from some wrongdoing. (Saint Agnes UMF 4, Roper UMF 14, 15.) Saint Agnes has met its burden of showing that the one-year statute of limitations began running on 8/4/05.

Giannopoulos' claim does not relate back to Planamento's complaint filed on 8/4/06. In wrongful death actions, each heir is regarded as having a personal and separate cause of action against which the statute of limitations will run. (*Andersen v. Barton Mem'l Hosp.* (1985) 166 Cal.App.3d 678, 681; see also *Washington v. Nelson* (1979) 100 Cal.App.3d 47, 52.) A complaint in intervention, like any other complaint, is subject to an affirmative defense based on an applicable statute of limitations. (*Anderson, supra.*)

Accordingly, the relation back doctrine does not apply, and both defendants' motion for summary judgment must be granted because Giannopoulos' complaint, filed 22 months after the decedent's death, is untimely.

Dr. Roper's motion is also granted on the ground that his care and treatment of decedent was within the standard of care.

"California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence."
(*Munro v. Regents of Univ. Of Calif.* (1989) 215 Cal.App.3d 977, 984-85.)

With the expert testimony of David Freeto, M.D., Dr. Roper has made a prima facie showing the care and treatment he provided to the decedent was at all times within the applicable standard of care. (Freeto Dec. ¶¶ 3-17.) Dr. Freeto qualifies as an expert. (Freeto Dec. ¶ 1, Exh. A.) This is sufficient to negate plaintiffs' claim of professional negligence (see *Munro, supra*). The burden therefore shifts to plaintiffs to show the existence of a triable issue of material fact. (CCP § 437c(p)(2).)

Plaintiffs have not filed any opposition, nor submitted any expert evidence contradicting the expert declaration presented by Dr. Roper. Accordingly, his motion for summary judgment should be granted.

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Tentative Ruling

Re: **Valley Network Solutions, Inc. v. City of Coalinga**
Superior Court Case No. 08CECG03309

Hearing Date: **April 23, 2009 (Dept. 97D)**

Motion: Motion to Dismiss

Tentative Ruling:

To deny. (CCP § 581(f)(2).) To direct the court clerk to correct the mailing address for plaintiff's counsel to: Daniel K. Martin, 2014 Tulare Street, Suite 618, Fresno, CA 93721.

Explanation:

On 1/7/09 the court sustained defendant's demurrer to plaintiff's complaint, granting granted 10 days' leave to amend. The order was mail served on 1/14/09 by the clerk on counsel for both parties. Plaintiff did not file an amended complaint until 2/10/09, having learned for the first time of the court's ruling on 2/9/09 after defendant filed an application for judgment of dismissal. (Martin Dec. ¶ 3.) However, it has come to the court's attention that it has not been using the complete address for plaintiff's counsel in mailing out notices and orders, omitting the suite number.

CCP § 581(f)(2) authorizes dismissal where, after a demurrer is sustained with leave to amend, plaintiff fails to amend within the permitted time. Dismissal is discretionary, and may be denied where the plaintiff furnishes a sufficient excuse for delay in amending. (*Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 948.)

In this case, since the address to which the court mailed the ruling on the demurrer was sent to an incomplete address, and plaintiff's counsel represents that he did not find out about the order granting 10 days' leave to amend until defendants' counsel filed an application for dismissal, the court will exercise its discretion to deny the motion to dismiss.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(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: DRF on 4-22-09
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: ***Shanahan v. Vance Aircraft, et al.***
Superior Court Case No.: 06CECG03664

Hearing Date: April 23, 2009 (**Dept. 97D**)

Motions: Motion by Plaintiffs to quash deposition subpoena

Tentative Ruling:

To deny. To award sanctions of \$675.00, payable by plaintiffs' counsel.

Explanation:

Plaintiffs argue that the deposition of their grandfather, who is also executor of their father's estate, cannot go forward because defendants failed to serve a Notice to Consumer. Plaintiffs' motion fails for several reasons, the first of which is that the motion to quash is not served on the deponent (nor was the opposition).

Plaintiffs' position is that as their grandfather serves as executor, and as the deposition subpoena called for production of certain documents related to income to their father's estate, as well as financial information regarding their own inheritance, their grandfather therefore functions as a witness for which they are entitled to notice of his deposition as consumers as well as parties. Plaintiffs argue that since the Estate was empowered to make or seek loans, their grandfather is like a trust company. Under Code of Civil Procedure section 1985.3, a trust company is a witness who has been deemed by the Legislature to hold personal records of a consumer, and for which a document demand requires notice to the consumer whose documents are sought.

Plaintiffs' position is not supported by the plain language of the statute, and is opposed by the case authority cited, *Sasson v. Katash* (1983) 146 Cal. App. 3d 119. In that case, a party subpoenaed bank records concerning leases of another party a short period before trial, without giving consumer notice,. The trial court excluded use of the records at trial due to the violation of Code of Civil Procedure section 1985.3. The subpoenaing party appealed, arguing that the statute was only intended to affect records one would normally associate with the business of the witnesses listed in the statute; for a bank, that would be checking accounts and such, not lease agreements.

The Court of Appeal upheld the trial court, declining to amend the statute to add language delineating categories of records. Here, plaintiffs request that this Court amend the statute, to add to the types of witnesses chosen by the Legislature so as to bring their grandfather into the fold. The Court also declines that invitation.

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Tentative Ruling

Re: ***Shanahan v. Vance Aircraft et al.***
Superior Court Case No.: 06CECG03664

Hearing Date: April 23, 2009 (**Dept. 97D**)

Motion: By defendants Robert Vance and Vance Aircraft Salvage for Summary Judgment or Summary Adjudication.

Tentative Ruling:

To deny the motion in its entirety.

Explanation:

1. Liability of Robert Vance

The declaration of Mr. Vance establishes that he is personally knowledgeable about the day to day operations of Vance Aircraft Inc. and Vance Aircraft Salvage (“Vance Salvage”). The lease between the two companies (Ex. D to plaintiffs’ evidence) establishes that Mr. Vance signed it as president of Vance Aircraft, and then against as President of Vance Salvage. Mr. Vance testified that he also functions as the custodian of records for each company. The evidence shows that Mr. Vance has never leased a Vance Salvage airplane to any one or any company but his own Vance Aircraft. The unavoidable inference from this is that Robert Vance’s knowledge as a principal of Vance Aircraft must be the same as his knowledge as principal of Vance Salvage, and that Robert Vance is the person in control and possession of the aircraft.

The declaration of plaintiffs’ expert, Sitz, establishes that the procedures ordered by Robert Vance for this aircraft may be found by the trier of fact to be so far below the standard of care as to “greatly increase” the risk. The testimony of Pilot Eric Ristrim (Ex. A to Flashing Decl. Filed 4/1/2009) is that the salvaged aircraft used by Robert Vance experienced considerable trouble, including a catastrophic engine failure on the plane in question. Ristrim had experienced engine failure on another aircraft he flew for Mr. Vance’s companies, and he knew of two other pilots who also experienced engine failure on those airplanes. Mr. Ristrim also testified he received his paycheck from Vance Salvage. (*Id.* at 19:18-22.)

Labor Code section 3601 previously permitted liability on the part of a co-employee where that person had behaved in reckless disregard for the co-workers’ safety. “Willful” includes reckless disregard for another’s safety. *Oxford v. Signal Oil & Gas Co.* (5th Dist. 1970) 12 Cal. App. 3d 403, 410: “It is true that Labor Code section 3601 does not preclude an action for damages for injuries caused by a fellow employee's alleged reckless disregard for the injured person's safety.” However, that section was changed to further limit liability unless the co-

employee was willfully physically aggressive or was intoxicated. Mr. Vance cannot be liable in his capacity as an employee of Vance Aircraft.

But there remains the issue of whether or not Mr. Vance maybe liable as an employee of Vance Salvage, an entirety different company. The testimony provided for this motion from Mr. Sitz and Mr. Ristrim establishes triable issues of fact as to whether Mr. Vance, as a principal of Vance Salvage, acted with reckless disregard for the safety of the pilots, including Mr. Shanahan. No summary judgment or summary adjudication is permitted.

2. Failure to Pled Federal Preemption as a Defense.

Defendants contend that 5 Witkin, California Procedure, “Pleading,” sections 1101 through 1107, lists all defenses to tort actions. It does not. For example, “truth” is not listed, although it is an affirmative defense to a defamation action. Nor is the statute of limitations set forth. Defendants make this argument because they omitted their federal preemption defense from their answer. The substance of what constitutes “new matter,” and therefore must be pled as an affirmative defense, is discussed in that same volume in section 1081 on page 514. A defense of federal preemption fits the description of “new matter.” See also *Apollo Capital Fund LLC v. Roth Capital Partners* (2007) LLC, 158 Cal. App. 4th 226, 251 discussing such an argument as an “affirmative defense.”

Weil & Brown, Civil Procedure Before Trial, section 10:18.6, notes that an issue not raised by a denial of the facts setting forth allegedly liability in the complaint is “new matter” and therefore must be raised as an affirmative defense. Defendants’ assertion that Weil & Brown affirmatively state that opposition waives the defense is contrary to what the treatise actually says -- that opposition “might” be taken as waiver, but than in any case, “summary judgments [cannot be] based on claims or defenses not pleaded . . . the pleading [must] minimally advise the opposing party of the nature of the defense . . .” It is quoting *FPI Development v. Nakashima* (1991) 231 Cal. App. 3d 367, 385.

The answer of defendants in this case does not advise of a federal preemption defense. But an amendment would not provide a basis for summary judgment or adjudication here in any case.

3. No Federal Preemption Exists

Defendants assert that Vance Salvage cannot be liable due to the immunity granted by 49 USC section 44112. Defendants assert that this is part of the General Aviation Revitalization Act of 1994” or “GARA” for short. It is not. GARA came into being in 1994 as part of Public Law 103-298. But 49 USC section 44112 came into being as part of Public Law 103-272. At the preface of 103 P.L. 272, Congress advised that the purpose of the enactment was “to revise, codify, and enact **without substantive change** certain general and permanent law

related to transportation . . .” (Emph. added.) GARA has no application to the matter before the Court.

The use of such language by Congress, to the effect that it is not making any substantive change, means that the prior version of a statute and case law regarding it remain valid. See, e.g., *United States v. Rossetti Bros., Inc.* (2nd Cir. 1982) 671 F.2d 718, 720 with reference to 97 P.L. 449. See also *United States v. Bhutani* (7th Cir. 2001) 266 F.3d 661, 666 et seq. While there is authority to the contrary (see *United States v. Faygo Beverages, Inc.* (6th Cir. 1984) 733 F.2d 1168 – following the “plain meaning” rule), this Court finds that the better rule is to honor the express statement of intent set forth by Congress.

The predecessor to 49 USC section 44112 was 49 USC section 1404. An interpretation of that statute is found in *Rogers v. Ray Gardner Flying Service, Inc.* (5th Cir. 1970) 435 F.2d 1389, 1394, which held “That section excludes certain persons from liability for injuries *on the surface of the earth*. On its face it was enacted to facilitate financing of the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof.” (Emph. in original.) The actual wording of section 1404 was also set out in the case:

“No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss.”

As to a contention that section 1404 was intended to pre-empt the usual state tort remedies, the Court has this to say: “Tort law has historically been left to the states. We reiterate our disbelief, in the absence of clearer evidence, that Congress would undertake to alter the tort laws of numbers of states in such oblique fashion.” (*Id.*)

The death in that case was not from an object falling from the plane or to a person on the ground or in a lake. The death was of the persons inside the plane while it was in flight, due to its crashing, as happened with Mr. Shanahan here.

49 USC section 44112 still limits the death for which no liability may attach as a death “on land or water,” although “the surface of the earth” was dropped. But as 103 P.L. 272 makes clear that there was no intent to effect any substantive change to 49 USC section 1404, and as Congress would be presumed to be aware of case law interpreting the old section when it gave a new number to it,¹ the argument that it was intended to effect a very substantive change in the liability of owner/lessors for deaths of those traveling in airplanes is contrary to federal law interpreting congressional intent where Congress has expressly stated it did not intend any substantive change.

The 9th Circuit has also found that the argument that there was a complete preemption of state tort law for aircraft owners to be unfounded. See *Charas v. Twa* (9th Cir. 1998) 160 F.3d 1259. It relied on 49 USC section 40120, and its predecessor, 49 USC section 1506, to find that Congress did not intend to preempt state tort law. Those sections are the “savings” clause, “saving” state law from preemption. California law notes the same. See *Nachsin v. De La Bretonne* (1970) 17 Cal. App. 3d 637, which cites the *Rogers* case, and holding that California tort law applies in a situation such as this, under former 49 USC section 1404.

This means that the argument advanced by Vance Salvage as to its immunity from liability fails, and therefore the motion fails as to it. 49 USC section 44112, like its predecessor 49 USC section 1404, does not preempt California tort law as to the liability of an owner/lessor of an aircraft to those who were traveling inside it when it crashed.

3. Liability under California Tort Law

Here, the argument of defendants is that they had nothing to do with the aircraft, that same was in the sole possession and control of Vance Aircraft, Inc. A triable issue of fact as such claim is shown by the testimony of Mr. Ristrim, noted above, that he flew the plane in question as well as others for Mr. Vance, in the same capacity as did decedent, but was paid by Vance Salvage. There is also the fact that Robert Vance, as principal of both companies and in charge of their daily operations and documents, knew of the maintenance and repair procedures, or lack of same, with regard to the salvaged aircraft.

His personal knowledge cannot be separated as known only to one company or the other, just as his possession and control of the aircraft cannot be separated between the two companies. This is not the common situation with a lessor/leasee, where the lessee leaves with the property, and its condition is

¹ “The Legislature is presumed to know the existing law and have in mind its previous enactments when legislating on a particular subject.” *Unzueta v. Ocean View School Dist.* (1992) 6 Cal. App. 4th 1689, 1697. The same presumption applies to Congress: “[T]he canon of statutory interpretation that Congress is presumed to be aware of existing case law pertinent to the legislation it enacts.” *Shaw v. Aurgroup. Fin. Credit Union* (6th Cir. 2009) 552 F. 3d 447, 454.

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Tentative Ruling

Re: ***Ahumada, et al. v. Allbritten Plumbing, Heating and Air Conditioning Service, Inc, et al.***
Superior Court Case No. 05 CECG 03270

Hearing Date: Thurs., April 23, 2009 (**Dept. 97C**)

Motion: Defendants' Motions to Compel Responses

Tentative Ruling:

To GRANT the motion to compel. (Code Civ. Proc. §§ 2030.290, 2031.300.) Within 10 days, Plaintiffs Joealex Aguado, Raymond Ahumada, Jr. and Rico Saldivar shall serve initial responses, without further objection, to Request for Production of Documents, Set One, and shall produce all documents in their possession or under their control responsive to the requests for production, and Plaintiff Joealex Aguado shall serve initial responses, without further objection, to Form Interrogatories – Employment, Set One and Special Interrogatories, Set One. Objections are not waived.

To impose monetary sanctions in the amount of \$ 1,810.00 in favor of Defendants and against Plaintiff's counsel Dean B. Gordon only. Mr. Gordon shall pay Defendants within 30 days of service of the minute order by the clerk. (Code Civ. Proc. §§ 2023.010, 2023.030, subd. (a), 2033.280, subd. (c).)

For future discovery motions, the parties shall set and file a separate motion for each discovery device and for each party.

Explanation:

On December 18, 2008, Defendants served their Form Interrogatories - General, Set One, Form Interrogatories – Employment, Set One, Special Interrogatories, Set One and Request for Production of Documents, Set One, on Plaintiffs Aguado, Ahumada and Saldivar. (Motion to Compel, Fulgham Decl., ¶ 4.) On February 23, 2009, Plaintiffs served their unverified responses. (*Id.*, at ¶ 7.) Accordingly, an order compelling Plaintiffs to provide initial responses, without further objections, is warranted. (Code Civ. Proc. §§ 2030.290, subd. (a), 2031.300, subd. (a).)

To the extent Defendants request that the court rule on Plaintiffs' objections, it is evident that the parties have not adequately met and conferred. The court declines to rule on the objections. Should the parties be unable to resolve their differences, the parties shall file a *joint* separate statement with any new discovery motion.

(23)

Tentative Ruling

Re: ***Agajanian Vineyards, Inc. v. Martin & Weyrich Winery, LLC, et al.***
Superior Court Case No. 08 CECG 02607

Hearing Date: Thursday, April 23, 2009 (**Dept. 97C**)

Motion: Plaintiff's Default Prove-Up

Tentative Ruling:

To DENY without prejudice.

Explanation:

The Court denies the Plaintiff's request for a court judgment without prejudice for the following reasons:

- The Plaintiff has failed to file a request for court judgment on mandatory Judicial Council form CIV-100.
- In the Plaintiff's proposed judgment, the Plaintiff seeks \$235,205.97 in damages. However, Code of Civil Procedure § 585 clearly states that the Court has no power to award a default judgment for more than the amount prayed for in the Plaintiff's complaint. Thus, as Plaintiff's complaint prayed for \$199,240.46, the amount of damages that Plaintiff can recover in a default judgment is limited to that amount.
- While the Plaintiff has submitted the declaration of Gary Agajanian in support of its request for court judgment, Agajanian's declaration, along with the attached exhibits, fails to prove-up \$199,240.46 in damages. Agajanian's declaration is not properly verified in accordance with Code of Civil Procedure § 2015.5.
- Agajanian's declaration fails to provide a clear and detailed description of how the damages sought by Plaintiff were calculated.
- The Statement of Defendant's Account, attached to Agajanian's declaration as Exhibit E, fails to clearly demonstrate how the damages sought by Plaintiff were calculated. There are several issues with the information provided in Exhibit E:

Tentative Ruling

Re: ***Lazalde v. Montijo***
Superior Court Case No. 08 CECG 03740

Hearing Date: Thurs., April 23, 2009 (**Dept. 97 D**)

Motion: Defendant's Demurrer to the Complaint.

Tentative Ruling:

To SUSTAIN the demurrer in part and OVERRULE in part, WITH LEAVE TO AMEND. Plaintiff shall have 10 calendar days' leave within which to file a First Amended Complaint which cures the defects noted below in items 1 and 2. Any new allegations therein shall appear in **boldface** type. Time shall run from the clerk's service of the minute order.

Explanation:

First, Defendant argues that the court has no jurisdiction over this action because he resides in Tulare County and the contract was made in Tulare County. This appears to be a venue argument and as such is not a proper subject of a demurrer. OVERRULED.

Second, Defendant argues that the Complaint is uncertain in several respects.

1. Plaintiff argues correctly that the Complaint at paragraph 10 (a) is uncertain as it does not pray for specific amount of damages. SUSTAINED WITH LEAVE TO AMEND.
2. Plaintiff argues correctly that the pages of the Complaint are not properly numbered. SUSTAINED WITH LEAVE TO AMEND.

The demurrer is OVERRULED on all other grounds raised by Defendant.

3. Numbers of Does are not specified. OVERRULED. The caption specifies names DOES 1 –100.
4. Plaintiff fails to attach documentation which supports her cause of action. OVERRULED. Plaintiff is not required to attach a copy of the contract. She may simply plead the material terms thereof.
5. Plaintiff fails to indicate the code section the order is subject to. OVERRULED. Defendant fails to explain what order he is referring to.

6. The summons lists Ben Montijo as an individual with dbas. But the Complaint lists both Ben and Margaret as individuals with dbas. OVERRULED. Defendant fails to adequately explain this argument.
7. Plaintiff names businesses that never existed, such as Newspaper Marketing. OVERRULED. When ruling on a demurrer the court must assume the truth of the facts alleged in the Complaint. At the demurrer stage, the court does not examine or weigh evidence.

Pursuant to CRC 3.1312(a) and CCP 1019.5 (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: DRF on 4-22-09.
(Judge's initials) (Date)

(19) **Tentative Ruling**
Re: ***Fritz v. Family Healthcare Network***
 Superior Court Case No.: 07 CECG 02972

Hearing Date: April 23, 2009 (**Dept. 97c**)

Motion: By defendants for summary judgment, or in the alternative,
 summary adjudication.

Tentative Ruling:

To deny in its entirety.

Explanation:

1. Disputed Material Facts

The Court has reviewed the first 48 of the facts stated by defendants to be material to a determination of their motion. As the Court has found that there are triable issues as to defendants' Facts Nos. 8, 11, 15, 20, 22, 24, 25, 26, 28, 31, 33, 34, 35, 36, 38, 39, 40, 42, 47, and 48, and as those are repeated for each cause of action at issue in the complaint, there is no reason to continue through all 600 plus of the facts presented. The existence of these triable issues of fact also means that the Court would, if incorporation of the prior 3000 plus facts for the first attempt at summary judgment was permissible, not need to proceed further through those facts.

The Court notes that it did not review Exhibit 72 for more than a few pages, as same is a very thick collection of papers which are referenced in full where mentioned in defendants' separate statement. A best guess by the Court as to what evidence in that exhibit might be the pages at issue is not a basis for judgment under Code of Civil Procedure section 437c. In reply, defendants submitted still more evidence, evidence which was not featured in their original separate statement, and which therefore cannot be considered. Later offered, "corrected" evidence is not permitted. *Haney v. Aramark Uniform Services, Inc.* (5th Dist., 2004) 121 Cal. App. 4th 623, 636 - 638 (*rev. denied*); *Mills v. Forestex Co.* (5th Dist. 2003) 108 Cal. App. 4th 625, 640-641; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal. App. 4th 1224, 1244.

Fact No. 8 is disputed by defendants' Fact No. 9. Fact No. 11 is disputed by defendants' Fact No. 12. Fact No. 15, that Dr. Fritz received a "full" medical release to return to work in September of 2005 is disputed by Exhibit 12 to defendants' exhibits, which shows an 8/12/2005 email from Fritz stating he was approved to return on 9/22/2005 for administrative duties, part time, and resumption of full duties in December. Foster conveyed this to all employees in an 8/26/2005 email. Exhibit 41 shows that a year later, Fritz' heart doctor found he still suffered from some level of disability due to his heart surgery.

Fact No. 20, that Fritz had to claim he was “completely” disabled in order to obtain state disability benefits is disputed by Exhibit 33, a claim form asking the doctor if the Fritz was incapable of performing his or her customary or regular work. Such a form cannot be used as a basis for contending “complete” disability in a disability discrimination case, because it does not necessarily flow the inability to do work is an inability **with** a reasonable accommodation. See *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382 and *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935. Federal law holds the same with regard to ADA claims. See *Fredenburg v. Contra Costa County Dep’t of Health Servs.* (9th Cir. 1999) 172 F.3d 1176.

Fact No. 22 is disputed by the evidence offered, in that it shows only that Foster opined that leave was exhausted, not that this was true or that Fritz believed it to be true. Fact No. 24, that Fritz had a “minor” eye surgery and that he was on leave until the end of 2006, is disputed by the physician’s certification his condition was “serious” – Exhibit 38 to defendants’ exhibits. Exhibit 68 at 356:1 – 357:23 is evidence that the surgery for the retinal tear left Fritz with blurred vision, and that this was the reason for the leave. There is also an issue as to when the leave ended, at the end of 2006 or on January 4, 2007, see Exhibit 37.

Fact No. 25 is disputed by the evidence offered in its support. Cited Exhibit 31 is a letter from FHN stating that reasonable accommodations for disability will be discussed only after the doctor returned to work, but did note that the doctor had already tried to “express [his] need for accommodations” for “disability.” Fritz also noted accommodations he needed in his claim with the state employment commission.

Fact No. 26, that Fritz did not request an accommodation when he returned to work on 1/4/2007 and did not have any other alleged disability when he worked at FHN is disputed by the fact that Fritz continued to have energy and strength problems after his heart surgery, as documented in Defendants’ Exhibit 41 (records from the heart doctor). Exhibit 69 at 478:5-24 contains testimony about continuing disability after heart surgery. Further, when he returned on 1/4/2007, he was ordered out by Foster upon threat of arrest, which precluded any request. Lastly, Fritz was placed on hypertension medication due to stress which resulted in leave. See Exhibit 69, 445:1-22, and the Yepiz deposition appended to plaintiff’s counsel’s declaration.

Fact No. 28, that Fritz did not return to work as promised on New Year’s Day is disputed by evidence that he was told to return 2-4 days later, see Exhibit 37. The evidence offered by Foster that the heart condition created no disability (paragraph 33 of his declaration) is disputed by the medical records found at Exhibit 41, and Exhibit 69, 445:1-22, concerning the hypertension medication addition.

Fact No. 31, that Fritz concealed prior employers or employment termination conditions from defendants, is disputed by the offer of one such “employer” as a reference. See 2/9/2005 email to Foster, with bates page number FHN_000 as part of Ex. 72. See also Ex. 67, 34:15-25 and Ex. 70 at 530:12-17 and 536:15-21. Whether or not Fritz was an employee rather than an independent contractor is also a question. “We must strictly construe the moving party's evidence, and liberally construe the opposing party's evidence, with any doubt as to the granting of the motion being resolved in favor of the opposing party.” *CDF Firefighters v. Maldonado* (5th Dist. 2008) 158 Cal. App. 4th 1226, 1236-1237.

Fact No. 33 is disputed because there is no specific citation to evidence supporting it, merely a reference to a declaration which then incorporates all 72 exhibits, as well as the Exhibit No. 72, discussed above. The Court is not inclined to review the some 2000 pages of evidence produced to determine if there is support this fact, and the Court is not required to do so. *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal. App. 4th 1234, 1248. Another of defendants’ exhibits referenced is No. 71, part of Dr. Fritz’ deposition. The pages cited are those wherein defense counsel improperly posed contention interrogatory-type questions to plaintiff at his deposition, to which plaintiff’s counsel properly objected on the basis that the questions called for legal conclusions. That objection is sustained, pursuant to *Rifkind v. Superior Court* (1994) 22 Cal. App. 4th 1255, 1259, and none of the portions of Ex. 71 wherein such questions are asked can be admitted for this motion. Facts Nos. 34, 35, and 39 are also in dispute for this reason.

Fact No. 36 is disputed due to the evidence of reports by Fritz of the discrimination and retaliation he felt he was suffering. See Exhibits 12, 28, and 49, the last with a cover letter of September, 2006. See also Ex. 68 at 236:18 – 237:4. Fact No. 38 is disputed because there is no evidence of what might constitute “confidential” materials. The employee handbook, defendants’ exhibit 60, lists personnel files as confidential (paragraph 9001), but the Court could not locate any other description of such materials, and defendants provided no more specific information. An employee may be disciplined for disclosing or using confidential information without authorization (paragraph 8009), but is not required to return any at the exit interview where ID cards and keys must be returned (paragraph 802). The employment contract (Defendants’ Exhibit 3) states on bates-stamped page FHN_000060 that the VP agrees to a non-competition clause because he or she will have access to trade secrets, patient information, and “other confidential information” about how FHN does business. But this paragraph does not require the VP to return any documents at the termination of employment.

The materials referenced as confidential for this fact are found in Exhibit 56. They consist of billable visits reports and overall compilations of hours worked by various personnel. There is nothing showing that Fritz took any personnel records or that the records he did take were confidential. A trade secret must be

shown by evidence of "(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 208,² *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal. App. 3d 1327, 1345. As FHN has not provided any basis on which to find the billable visit records to be trade secrets, this fact is disputed.

Fact No. 40 is disputed, because the evidence offered primarily consists of evidence by Foster of Foster's own state of mind. The exhibits, however, show that there could be another motivation found by a jury, creating a triable issue of fact as to the basis for termination. The happy relationship between FHN (Foster) and Fritz appears to have gone south shortly after it was discovered that Fritz was "damaged goods" in terms of his heart condition. Contrast Defendants' Ex. 1 with their Exs. 11 and 12. A jury could review these materials and find that FHN let Fritz work at home, then abruptly reversed that decision and cut off his paycheck when a financial dispute arose. That same evidence shows that Foster refused to discuss reasonable accommodations prior to getting the financial end settled, and supports Fritz' argument that he was coerced during his disability into an agreement that the pay already given (and some earned, for the partial work days) would be recovered by FHN through a denial of future leave or vacation. Those same materials give rise to a possible inference that Foster's actions forced Fritz to return to work early, whereupon he was given extra duties despite his weakened state, including added clinical duties.

The evidence also shows that while Fritz managed garner a favorable evaluation from Foster on 2/28/2006 (Ex. 13), he was told less than 8 weeks later that he was doing a bad job after what a jury could believe was a concerted effort by Foster to solicit unfavorable information from Fritz' subordinates, including one who was angry at Fritz for not being given an appointment she wanted. (Exs. 14, 15, 17, and Ex. 71 at 1021:7-1023:24.) Fritz' original hiring materials said he was to do clinical work 40% of the time (Defendants' Ex. 1). But on 4/13/2006, his was excoriated by Foster for not spending 50% of this time doing direct dental care. Foster also suddenly questioned Fritz' religious beliefs, demanding proof of them so Foster can ascertain if Foster thinks Fritz should be taking off early on Friday. (Ex. 16.) Foster then ordered him to give dentists more working time, which Fritz claimed he could not due because of the lack of sufficient non-dentist staff. (Ex. 68 at 263: 1-11, Ex. 69 at 502:2 - 504:20, Ex. 71 at 924:1-3.) By July, Fritz is being denigrated for using email for administration rather than driving out for a face to face meeting, as well as failing to spend enough time in the office on personal dental care. (Defendants' Exs. 22, 23, 24, and 27.)

² This case was cited by the California Supreme Court on the trade secret issue in 2004. See *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal. 4th 1029, 1039.

Fritz made a claim for discrimination against him due to his heart surgery in 9/2006, contending that the harassment forced him to take stress leave. (Defendants' Exhibit 30.) He was told by FHN's HR department that the company will discuss accommodations for his disability and religion only after he returned to work. (Defendants' Ex. 31.) Foster personally confirmed that such a discussion would occur only when Fritz returned from stress leave. (Defendants' Ex. 35.) But when Fritz did return, he was threatened by Foster with arrest if he did not leave. (Defendants' Ex. 59, and Yepiz deposition offered by plaintiff.)

The termination letter authored by Foster avers Fritz was fired for not working enough in patient care, not telling FHN that FHN paid him salary while he working at home, a misuse of relocation funds which was pre-approved by FHN, use of credit card while on leave, and an IRS garnishment. Viewing the evidence offered most favorably to plaintiff, as required for this motion, a jury could find that FHN was aware of and pre-approved the move with knowledge of the address from which Fritz was relocating and the new address. (Defendants' Ex. 9 and Ex. 71 at 912:10-16.)

A jury could also determine that there is no reason that FHN would not be aware of money it itself was paying out. The credit card use issue is befuddled by the fact that FHN could be found to have owed Fritz money, in the form of pay for work not compensated while he recovering from his heart surgery and professional dues that FHN agreed it would pay but did not, as plaintiff contends. (Defendants' Exs. 70 at 686:21 – 687:16, Ex. 71 at 895:5-18.) There is also the evidence that Fritz had his percentage of hours doing patient care increased to 50%, while being denied the staff and office resources to permit the increased hours desired by other dentists and the increased hours demanded of him. (Ex. 69 at 502:2 - 504:20, Ex. 71 at 924:1-3.)

Code of Civil Procedure section 437c(e) states that a jurist may deny a motion for summary judgment "where a material fact is an individual's state of mind, or lack thereof, and the fact is sought to be established by the individual's affirmation thereof." Fact No. 40 falls within the scope of that section. Given the conflicting evidence as to Foster's state of mind, the question of motivation for terminating Fritz is one which the jury needs to decide.

Defendants' Fact No. 42 – Defendants' contention that Fritz did not submit a grievance through required channels is also disputed by the evidence. The employee handbook (Exhibit 60 to defendants' evidence) discusses such procedures on the bates stamped page 7015. It does not require that a grievance be submitted on a particular form. Submission of the problem to the supervisor (Foster for Fritz) is the first step, and the very last step is submission of the problem to the CEO (also Foster).

There are several communications by Fritz to Foster on his heart condition, and unfavorable responses back by Foster. See Defendants' Exs. 10, 11, 12, 16, 19, 23, 27, 51 (after which Fritz complained to the DEFH, which subjected him to more unpleasant communications from FHN – see Defendants' Exs. 30, 31, 33, 35, and 36). Fritz also talked to the HR department. Defendants' Ex. 68 at 236:18 – 237:4, Ex. 71, at 796:21 – 797:7.

Defendants' Fact No.47 is disputed by the evidence provided, which does not state when time taken off for religious reasons need be "made up" by day or time of day.

Defendants' Fact No. 48 is disputed, in that the inference raised thereby, that Foster gave Fritz the ability to meet expectations with regard to direct patient care, is contradictory to the evidence that Fritz was not given sufficient non-dental staff or facilities to provide the other dentists with required hours for patient care, and use of them for his own hours would violate the requirement he increase the time scheduled for those other dentists. (Ex. 68 at 263: 1-11, Ex. 69 at 502:2 - 504:20, , Ex. 71 at 924:1-3.)

2. Summary Judgment.

a. Disability Discrimination

"It is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one. If the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one . . . An employee whose disability is not apparent is therefore obliged to tender a specific request for a necessary accommodation." *Spitzer v. Good Guys* (2000) 80 Cal. App. 4th 1376, 1384. "The employee bears the burden of giving the employer notice of the disability. This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations . . ." (*Id.* at 1385, citations omitted.)

Here, the evidence shows that Fritz made several requests for an accommodation for his heart condition, but was rebuffed by Foster who refused to discuss same until a financial dispute was resolved, and until after Fritz returned to work. Certain levels of disability existed throughout his employment after that, and for different reasons, but a jury could conclude that any report of same was met with hostility and/or a written refusal to participate in that interactive process required. Deferral is not participation. The evidence can also be viewed, depending on who the jury believes and what weight it gives to different bits of evidence, as showing increasing hostility and demands, perhaps impossible demands, coupled with contrived complaints, geared towards getting rid of plaintiff after his first health problems, and increasing as he suffered more issues, some allegedly caused by work itself.

b. Religious Discrimination

No problem appears with the time taken off for religious observance for a long period after plaintiff was hired. But once the alleged push to oust him commenced in spring of 2006, other dentists are permitted to complain about his time off for such purposes without correction (as seen in the evidence presented), and the employer suddenly demands “proof” of the religion and its requirements. Then the absences previously unmentioned become a major point in lists of grievances made by FHN’s director, and continue once plaintiff complains about it as discrimination. FHN’s HR director supports the claim of discrimination as well.

FHN contends that its communications with Fritz were universally respectful and intended only to encourage him to meet his job expectations. The evidence provided does not establish there is no issue of fact on this front, and there is evidence adduced by plaintiff that Dr. Foster reacted with hostility (including termination threats) to religious expressions as “non-professional.” A witness (an HR officer at FHN) also testified that Dr. Foster would sanitize his written write-up to omit clear attacks on religious express made verbally. See Ex. B to McClellan Decl, Yepiz Depo., at 40:1 – 42:12; 48:22 – 49:6. That same employee opined that Fritz’ treatment and termination were due to Fritz’ religious beliefs. (*Id.* at 121:1-7.)

This is an issue which requires weighing of the parties’ conflicting evidence, a function reserved to a jury. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.” *American Airlines v. Sheppard* (2002) 96 Cal. App. 4th 1017, 1049.

c. Retaliation

If a worker shows was engaged in a protected activity, and he suffered an adverse job action, and that circumstantial evidence exists to show the two are connected, he has a jury case. *Flait v. North American Watch Corp.* (1992) 3 Cal. App. 4th 467, 478: An employee “is not required to submit direct evidence of [the employer’s] intent so long as improper motive can be inferred from circumstantial evidence.”

Fritz’ reports of discrimination in 9/2006 were met with further refusals to even discuss accommodation for disability, and, when the employee returned, threats of incarceration and use of allegedly bogus grounds for termination. The evidence is also sufficient to raise a triable issue of fact as to retaliation.

d. Judicial Estoppel

This ground for summary judgment is based on Fritz applying for and receiving state disability benefits, with evidence of a form stating that Fritz was disabled from doing his job. Such a form cannot be used as a basis for summary judgment in a disability discrimination case, because it does not necessarily flow from an inability to do work that there is also an inability to do the work **with** a reasonable accommodation. See *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382 and *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935.

Federal law holds the same with regard to ADA claims. See *Fredenburg v. Contra Costa County Dep't of Health Servs.* (9th Cir. 1999) 172 F.3d 1176. As the evidence could support a finding that Foster and FHN refused to participate in discussion of potential accommodations, there can be no finding of judicial estoppel. The Court also notes that the evidence offered relates to the stress claim, for stress Fritz alleges was caused by unlawful discrimination. This raises an additional inference that had the hostility claimed stopped, there would be no disability.

e. "Unclean Hands" or the After-Acquired Evidence Doctrine

"As a general rule, application of the unclean hands doctrine remains primarily a question of fact." *Mattco Forge v. Arthur Young* (1992) 5 Cal. App. 4th 392, 407; see also *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal. App. 2d 675, 727.

This has been characterized as a "last ditch" defense. *Avco Corp. v. PPG Industries* (D. Mass. 1994) 867 F. Supp. 84, 87. It does not apply where the party asserting the defense has violated public policy, such as by disability or religious discrimination, or retaliation. "Equity does not deny relief on the ground of plaintiff's unclean hands when to do so would be harmful to the public interest. *De Burgh v. De Burgh* (1952) 39 Cal. 2d 858, 867. The doctrine of refusing aid to a litigant with "unclean hands" has no application where ". . . the failure to restrain an act because the parties are in pari delicto would result in permitting an act declared by statute to be void or against public policy." *Page v. Bakersfield Uniform & Towel Supply* (1966) 239 Cal. App. 2d 762, 767.

Defendants' reliance on the case of *Camp v. Jeffer, Mangels et al.* (1995) 35 Cal. App. 4th 620 is unfounded. That Court found that the peculiar situation before it required departure from prior cases, because there happened to be public policy in favor of terminating the employees. They had lied about prior felony convictions on their applications, and the employer worked for the Federal Resolution Trust Corporation, which itself required no employees of a contractor could be felons. With competing public policy considerations, the usual bar on the unclean hands defense did not apply. Defendants have raised no such competing public policy here.

Camp noted the usual rule was found in *Cooper v. Rykoff-Sexton* (1994) 24 Cal. App. 4th 614. In that case, the employee had lied about being fired from two prior jobs. "Although resume fraud is a serious social problem, so is termination of employment in violation of antidiscrimination laws or in breach of contract. . . . where an employer has fired a worker in violation of a statutory ban on discrimination in the workplace, the purpose and effect of the antidiscrimination statutes are unacceptably undermined by a principle that would allow a fact that played no part in the firing decision to bar any recovery." (*Id.* at 619.)

Accord another case cited by FHN, *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, where the employee was found to be an unlawful alien. However, the Court there refused to allow the employer to avoid the sexual harassment claim on that basis, as there was testimony from the employee that the employer regularly and knowingly hired unlawful immigrants.

"Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims . . . The prospect of a defendant's thorough inquiry into the details of a plaintiff's pre and post-hiring conduct . . . may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless. Placed in context of the general pervasiveness of resume fraud and employee misconduct, the likely consequence of the widespread exploitation of after-acquired evidence will be underenforcement of [antidiscrimination statutes], and consequently underdeterrence of discriminatory employment practices."

(*Id.* at 849-850, citations omitted.)

The evidence and the arguments do not demonstrate any competing public policy interests supporting termination, and summary judgment is not possible on this basis. The evidence of credit card use, pay during the heart surgery recovery, relocation payment, all were long known to the employer before termination. The issue of plaintiff reporting prior "employment" rather than independent contractor work, is also unsettled, especially as plaintiff did provide the name of a reference for whom he had done such work (but who was also omitted from the resume).

f. Breach of Contract

Every contract has a covenant of good faith and fair dealing. "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Communale v. Traders & General Ins. Co.* (1958) 50 Cal. 2d 654, 658.

Where an employer claims at at-will contract permitting it discretion to terminate at any time, it still must exercise that discretion in good faith. Breaching public policy against religious or disability discrimination, or in retaliation for reports of same, would be a breach of the contract, because of the covenant. The evidence shows triable issues on the exercise of discretion, and the public policy violations issues. An unlawful exercise of discretion in the context of a contract is a breach of the covenant of good faith and fair dealing, just like any other unreasonable exercise of discretion in a contract setting. *Lazar v. Hertz Corporation* (1983) 143 Cal. App. 3d 128, 141; *Perdue v. Crocker National Bank* (1985) 38 Cal. 3d 913, 923.

g. Foster Individual Liability

The complaint makes no mention of alter ego, which would entitle FHN to judgment on the pleadings on causes of action where such allegation would be necessary. However, since FHN raises this question only as to the 4th and 5th causes of action, it does not furnish a basis for a summary determination. And as to the tort claims, i.e., discrimination, one is liable for one's own tortiously wrongful conduct. See California Civil Code section 2343.

"If a tortious act has been committed by an agent acting under the authority of his principal, the fact that the principal becomes liable does not of course exonerate the agent from liability." *Bayuk v. Edson* (1965) 236 Cal. App. 2d 309, 319; citing *Perkins v. Vauth* (1912) 163 Cal. 782, 787. "It is of course, the general rule that an agent is personally liable for his own tortious acts committed in the course and scope of his agency or even at the direction of his principal." *Pescosolido v. Maddock* (1985) 172 Cal. App. 3d 230.

h. Avoidable Consequences Defense

This too fails due to the fact the jury could view the evidence as establishing a refusal by Foster to permit discussion of accommodations for disability, his hostility to use of leave for it, and his use of coercive techniques to end it, ending in termination. There too is the evidence regarding Foster's setting of standards which plaintiffs urges could not be met due to lack of staff or office space for patient care. If the jury believes plaintiff, then it is difficult to see what plaintiff could have done to avoid his fate.

3. Summary Adjudication

No summary adjudication can be granted unless there was specific notice of the exact issue presented in the notice of motion. California Rules of Court, Rule 3.1350(b); *Maryland Casualty Co. v. Reeder* (1990) 221 Cal. App. 3d 961, 974, fnt. 4. 75 days' notice of such issue is required. *McMahon v. Superior Court* (2003) 106 Cal. App. 4th 112. See also *Regan Roofing v. Superior Court* (1994) 24 Cal. App. 4th 425 (rev. denied), reversing a grant of summary adjudication

because the notice of motion in an insurance dispute asked for a ruling that there was no duty to indemnify or defend under the policy. The Court of Appeal held that this meant unless **both** the duty to defend **and** the duty to indemnify were demonstrated by the insurer to require no trial of any material fact, the motion could not be granted.

“As we have noted some of the Maryland policies do not have a broad form endorsement. Under our holding in *Maryland Casualty Co. v. Imperial Contracting Co.*, *supra*, 212 Cal.App.3d 712, 723-724, those policies would not provide coverage for damage to work performed by or on behalf of the developers or contractors. However, in its notice of motion Maryland did not identify the coverage provided by particular policies as discrete issues on which it was seeking summary adjudication. Thus we do not have the power to direct the trial court to enter an order in Maryland's favor as to the coverage provided by particular policies.”

Maryland Casualty Co. v. Reeder (1990) 221 Cal. App. 3d 961, 974, fnt. 4.

“It is elemental that a notice of motion must state in writing the 'grounds upon which it will be made.' [Citations.] Only the ground specified in the notice of motion may be considered by the trial court. [Citations.] This rule has been held to be especially true in the case of motions for summary adjudication of issues.” *Gonzales v. Superior Court* (1987) 189 Cal. App. 3d 1542, 1545. In that case, trial court made rulings that certain factual issues were adjudicated, without there being any such issue noticed for adjudication.

“The trial court's order adjudicated against petitioner certain subissues not specifically targeted by the motion for summary adjudication. By its petition, which we have determined to have been timely filed, petitioner prays for an order vacating this summary adjudication. We conclude that the court abused its discretion in adjudicating issues not specified in the motion.” *Homestead Savings v. Superior Court* (1986) 179 Cal. App. 3d 494. 496.

“If a party desires adjudication of particular issues or subissues, that party must make its intentions clear in the motion. It is no doubt tempting for a trial court to 'adjudicate' subissues it considered during examination of an issue presented by the moving party. In many cases, the trial court's analysis of the subissue may be correct and the defending party may have put forth all available evidence and argument on the subissue. But neither the moving party nor the court can be certain that the defending party has fully defended the subissue. Any gain in efficiency the court might make by adjudicating subissues not targeted by the motion is outweighed by the unfairness to the defending party who has not been properly notified of the danger of such a ruling.” (*Id.* at 498.)

Here, Issues Nos. 1 through 5 give notice that summary adjudication of each cause of action sought on the basis that there is a "lack of proof *and* defendants' defenses." Thus, summary adjudication is not possible unless defendants demonstrate that there is no triable issue of fact as to lack of evidence and each one of their 129 affirmative defenses.

The affirmative defense listed in paragraph 12 is a contention that an employment contract may be terminated at will. That defense fails, as it is unlawful to terminate employment because of the employee's religious beliefs or a disabling condition, or in retaliation for making a complaint about perceived discrimination due to those criteria (even where there was no discrimination in the first place). See *Flait v. North American Watch Corp.*, *supra*, 3 Cal. App. 4th 467, 478, listing the means of proving wrongful action by the employer.

There is no ability to terminate at will where the motivation for the termination is proscribed by law. The Court in *Cole v. Fair Oaks Fire Prot. Dist.* (1987) 43 Cal. 3d 148 ruled that certain kinds of conduct proscribed by statute are outside of the normal employer-employee relationship, because they are violations of public policy. Such conduct as permits an action for termination in violation of public policy was provided as an example. See *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1103,³ referring to *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654. The Supreme Court discussed *Gantt* in *Fermino v. Fedco* (1994) 7 Cal. 4th 701, 714, affirming that "an animus that violates the fundamental public policy of this state . . . cannot under any reasonable viewpoint be considered a normal part of the employment relationship."

Those cases also hold that an employer is unable to raise the bar of the otherwise exclusive workers compensation remedy in such a situation. The affirmative defense found at paragraph 20 of defendants' answer claims the Workers Compensation Act, and the exclusive remedy thereunder, as a bar. The Court does not need to analyze any more of the 129 defenses, or the failure of proof issue, because summary adjudication as noticed is requires a finding as to all, not some. However, the Court also notes that the disputed facts, which are repeated for each of the causes of action as material to the resolution thereof, also requires denial of summary adjudication.

This is also true for the sixth issue, a request to adjudicate the punitive damages claim. Reviewing the evidence most favorably to plaintiff, a reasonable jury could conclude that the bases for terminating Fritz were fraudulently asserted, such as the contention FHN was misled about its payment of relocation expenses, that FHN did not know it was writing Fritz paychecks, and that Fritz had the ability to both schedule dentists for more patient time while also refusing them time so that he could meet the demands that he also increase his patient time.

³ Overruled to the extent the case held that regulations were not sufficient tethered to legislative announcements of public policy in *Green v. Ralee Eng. Co.* (1998) 19 Cal. 4th 66, 80, *frnt.* 6.

Tentative Ruling

Re: ***Horne v. Banner Candy Manufacturing Co.***
Superior Court Case No. 07CECG03208

Hearing Date: April 23, 2009 (Dept. 97B)

Motion: By plaintiff for default judgment

Tentative Ruling:

To continue the hearing on this motion to June 30, 2009 so that defendant can be served by the clerk with a copy of the November 18, 2008 and January 22, 2009 orders compelling response to discovery and imposing terminating sanctions. If defendant does not retain counsel and move to set aside the default prior to the continued hearing date, then the court will grant the requested judgment as amended below.

Explanation:

It appears from the court's records that while the November 18, 2008 order directed the clerk to serve a copy of the order on both Mr. Georgeson and the corporate defendant, only Mr. Georgeson was served. And while Mr. Georgeson had re-submitted his notice of withdrawal as directed in the November 18, 2008 order by the time of the hearing on the motion for terminating sanctions, it appears that the order granting terminating sanctions was again served only by Mr. Georgeson.

Thus unless plaintiff's counsel can show that he served a copy of those orders on defendant, the court will err on the side of caution and continue the hearing on this request for default judgment until June 30, 2009 so that the clerk can re-serve the two prior orders on the defendant at its New York address.

If defendant does not retain counsel and move to set aside the default entered on January 22, 2009 before the date of the continued hearing, then the court will grant the requested default judgment at that time.

Plaintiff's evidence is sufficient to show that defendant owes \$26,150 in principal for the two shipments of raisins received shipped on June 25, 2004 and August 2, 2004. He is also entitled to recover all costs reasonably necessary for the prosecution of this action. However that would not include the \$40 filing fee for the motion to strike, and that portion of the cost memo will be disallowed.

And the calculation of interest in ¶15 of Mr. Antablin's declaration appears to be in error in that the principal amount on the first shipment was \$13,080, not

