GONZALEZ V. COUNTY OF LOS ANGELES
20STCV35594
November 4, 2021

ORDER ON MOTIONS

The nature and history of this dispute was summarized in the April 15, 2021 Order on Demurrer. Trial is set for November 15, 2021.

Now pending are two motions: (1) plaintiff's Motion for Summary Adjudication and (2) defendant's Motion for Summary Judgment/Adjudication.

As our appellate courts have often held, summary judgment and summary adjudication are not disfavored remedies. *E.g., 501 East 51st St. Long Beach LLC v. Kookmin Best Ins. Co.*, 47 Cal. App. 5th 924, 937 (2020). Instead, it is "a particularly suitable means to test the sufficiency of [a party's] case." *Id.* A party opposing a summary judgment or adjudication motion must "set forth specific facts showing that triable issues of material fact exist." *Id.* at 936.

On the other hand, summary judgment jurisprudence has exacting procedural requirements. "Specific facts" must be shown in the opposing separate statement. *Collins v. Hertz Corp.*, 144 Cal. App. 4th 64, 72 (2006). The California Rules of Court provide clear guidance on the preparation of a proper opposing separate statement. *See* CRC 3.1350(e), (f) and (h). The opposing party is required to indicate if a fact is disputed and, if it is, to state the opposing fact with a citation to admissible evidence. The rules do not permit a fact to be "disputed in part." Arguments and objections in a separate statement are not proper and are ineffective in raising triable issues. *Page v. MiraCosta Community College Dist.*, 180 Cal. App. 4th 471, 479, n. 2 (2009); *Collins, supra* at 73.

Next, a plaintiff's complaint "limits the issues to be addressed in a defendant's motion for summary judgment." *Alvis v. County of Ventura,* 178 Cal. App. 4th 536, 548 (2009). A plaintiff who wants to expand on the issues must seek leave to amend the complaint. *Id.*

Lastly, a party seeking to continue a summary judgment motion must comply with the "exacting requirements" of CCP 437c(h). *See Lerma v. County of Orange*, 120 Cal. App. 4th 709, 715 (2004). "The statute cannot be employed as a device to get an automatic continuance by every unprepared party." *Id. Accord, 501 East 51st St., supra* at 938-39 (continuance denied where supporting declaration was "very general").

1. PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION IS GRANTED.

Defendant filed an Answer to the operative Second Amended Complaint (SAC) on April 30, 2021. The Answer pled 25 affirmative defenses. Plaintiff then propounded Form Interrogatories which included #216.1, asking defendant for the facts and witnesses in support of each affirmative defense. On June 9, 2021, defendant served its responses, but only as to seven affirmative defenses: 1, 4, 9, 14, 15, 19 and 23. After a meet and confer, defendant served supplemental responses on July 23, 2021 and only as to the same seven affirmative defenses.

Plaintiff's Motion for Summary Adjudication ("MSA") seeks dismissal of defendant's affirmative defenses 2, 3, 5-8, 10-13, 16-18, 20-22 and 24 because defendant has admitted it has no evidence in support. Plaintiff primarily relies on *Union Bank v. Superior Court*, 31 Cal. App. 4th 573, 593 (1995). In that case, the Court of Appeal held that defendant's motion for summary judgment was well-taken because plaintiff's interrogatory responses were factually devoid and plaintiff's separate statement failed to raise triable issues of fact.

Defendant's opposition brief responds that plaintiff should have filed a discovery motion or taken depositions instead of filing this MSA. But this argument ignores the holding of *Union Bank* and is otherwise unavailing. Defendant next argues that its responses to Form Interrogatory 216.1 were sufficient. The Court disagrees. Defendant's responses and supplemental responses ignored all but seven affirmative defenses.

Defendant's opposition brief provides a substantive argument only as to affirmative defense 18, *i.e.*, "no adverse employment action." At oral argument, defendant's attorney referred to defendant's Opposing Separate Statement ("OSS") which she asserted provided additional evidence raising a triable issue.

Defendant's OSS ## 72-134 do provide evidence raising triable issues as to affirmative defense 18. However, defendant's OSS fails to raise triable issues as to defendant's affirmative defenses 2, 3, 5-8, 10-13, 16 and 17 where defendant simply (and repetitively) cites to Hashmall Declaration Exhibits 7, 9 and 10. Ex. 7 is defendant's Answer, which has no evidentiary value. Ex. 9 is defendant's aforementioned and deficient initial interrogatory responses. Ex. 10 consists of the deficient supplement responses. Finally, defendant's OSS completely ignores affirmative defenses 20-22.

On this record, plaintiff's MSA is granted as to defendant's affirmative defenses 2, 3, 5-8,

10-13, 16, 17 and 20-22, and otherwise denied.[1]

2. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION IS GRANTED.

As a result of this Court's April 15, 2021 ruling, only three claims in the SAC remain: (1) FEHA retaliation (third cause of action); (2) FEHA failure to prevent retaliation (fourth cause of action) and (3) unlawful retaliation under the Labor Code (fifth cause of action). Further, the factual dispute has been limited to "plaintiff's claim that he reported a fight between two deputies and was thereafter subjected to retaliation."

Defendant's Motion for Summary Judgment/Adjudication ("MSJ") argues that plaintiff did not engage in protected activity and he was not subject to adverse employment actions. Defendant also argues that there is no causal link between plaintiff's reporting of the fight and any claimed adverse employment action. Lastly, defendant argues that plaintiff's damages are mere speculation. In support of the MSJ, defendant has provided a Compendium of Evidence and the required Separate Statement ("SS").

Plaintiff's opposition brief first asks for a continuance. Regarding the issue of "protected activity," no argument is made as to the third and fourth causes of action, only as to the fifth cause of action. Plaintiff then argues that he suffered adverse employment actions. Next, plaintiff claims there is an inferential causal link between his report of the fight and the loss of a trainee. The opposition claims that plaintiff "has damages and he is not required to prove them."

With his opposition, plaintiff provides an Index of Evidence and an Opposition Separate Statement ("OSS"). However, the OSS is largely improper because it is replete with argument and objections. *E.g.*, OSS 3, 4, 9, 13, 19 and 20. Plaintiff then offers over 100 "Additional Material Facts in Dispute" ("AMF").

Defendant has filed a reply brief and has lodged Objections to plaintiff's evidence. These Objections are largely well-taken and sustained in an Order signed and filed this date. Defendant

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[1] Gonzalez' Evidentiary Objections to the Evidence in the County's Separate Statement are non-compliant and overruled. Objections are not to be made to a responsive separate statement but to the opposing party's evidence in the format set forth in CRC 3.1354(b). Further, general objections to exhibit numbers are insufficient. "It is not the court's duty to rummage through the papers to construct or resuscitate [a party's] case." *Collins v. Hertz Corp.*, 144 Cal. App. 4th 64, 75 (2006).

also filed a Response to plaintiff's AMF.[2]

Starting with the Separate Statements, the SS is organized to deal first with general background facts and then it lists material facts as to the issues on which defendant seeks summary adjudication. Plaintiff's OSS does not dispute many of these facts or does so improperly by argument and/or objections.

Next, plaintiff's 100 plus AMF fail to raise material issues of fact for several reasons. First, they go far beyond the issues specified in the Court's April 15, 2021 Order and instead recite an argumentative narrative, one sentence at a time, of a case which plaintiff does not now have.

On the other hand, plaintiff's opposition brief (at pp. 11 and 16) acknowledges the April 15, 2021 Order and alleges that plaintiff suffered only three specific adverse employment actions: (1) being forced out of his FTO position; (2) being denied a trainee and (3) being relegated to the junior position of Assistant Filing Deputy. As a result, many of the 100 plus AMF are also improper because they try to raise triable issues which are not *truly material* to these specific claims. *See Nazir, supra.* For example, AMF 127-140, 176-180, 191, 192, 194, 226, 227 deal with so-called "coveted positions," and other deputies, but this is not part of plaintiff's case because the opposition brief fails to present any legal argument in this regard. *See, e.g., Tun v. Wells Fargo Dealer Services, Inc.*, 5 Cal. App. 5th 309, 329 (2016) (a party abandons a claim which is unsupported by pertinent or intelligible legal argument).[3]

AMF 198, 199 and 228 refer to statements allegedly made by the Sheriff. But once again, the opposition brief fails to argue that these are adverse employment actions or otherwise present any cognizable legal analysis. AMF 200-216 and 231 purport to show the background of plaintiff's witness Olmsted, some of his activities going back to 2010 and some of his opinions.

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[2] At the hearing, plaintiff's counsel objected to defendant's Response to the AMF, citing *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243 (2009). In *dicta,* the Court of Appeal observed that there is "no provision in the statute" for a reply separate statement. On the other hand, there is no prohibition either. In any event, plaintiff's AMF fail to raise material issues of fact as set forth herein.

[3] The Statement of Facts in plaintiff's opposition brief also mentions plaintiff being passed over for Watch Deputy. Once again, no legal argument is submitted. All plaintiff says is that this was a violation of "County policy" and "LASD protocol," without specifying or analyzing the policy or protocol at issue.

These "facts" are nowhere addressed in plaintiff's opposition brief and thus are not material to plaintiff's remaining claims.

Finally, most of defendant's evidentiary objections have been sustained, rendering many of the AMF without support.

Turning back to plaintiff's opposition brief, the request for a continuance is denied. The very sparse and general September 29, 2021 declaration of attorney Wells fails to meet the "exacting requirements" of CCP 437c(h).

Because the opposition brief fails to directly address defendant's "protected activity" argument on the third and fourth causes of action, this is a concession that a key element of these claims cannot be met. *See, e.g., Pinero v. Specialty Rests*, 130 Cal. App. 4th 635, 639 (2005) (plaintiff making a FEHA retaliation claim must show he was engaged in protected activity); *Featherstone v. S. Cal. Permanente Med. Grp*, 10 Cal. App. 5th 1150, 1166 (2017) (where FEHA retaliation claim fails, the failure to prevent claim also fails). [4] Summary adjudication is granted on this issue.

At oral argument, plaintiff's counsel attempted to argue a new theory, that the protected activity was that plaintiff reported a crime, *i.e.*, the battery of a deputy. But this request was not in the opposition brief and is otherwise untimely. Plaintiff long ago locked himself into his protected activities which are specified in paragraph 99 of the SAC, and they do not include the report of a crime. It is not proper for plaintiff to seek oral leave to amend months after the MSJ is filed and on the eve of trial. And, as noted above, a plaintiff's case is limited to the allegations in the SAC.

Summary adjudication of the third and fourth causes of action is also appropriate because plaintiff was not subject to an adverse employment action. First, defendant has admitted under oath that he remains a FTO and that he has not applied for nor been denied a promotion since he reported the fight.

Next, there is no material factual dispute regarding the "trainee issue." The admissible evidence shows that, as of January 2020, plaintiff no longer had a trainee. Plaintiff admits in his deposition that he did not immediately get a new trainee because "no trainees were coming

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[4] Apparently recognizing the weakness of his position, plaintiff's opposition suggests that the Court should revisit the April 15, 2021 Order by reinstating his "associational disability discrimination claims." This request is untimely and substantively unpersuasive.

through." Plaintiff also testified that he told Master FTO Romero that "it's fine; I could use the break." Romero states in his declaration that he told plaintiff "that when he was ready to train again, he should come back [and plaintiff] said he would." SS 68. Plaintiff's OSS 68 contains argument which is disregarded. OSS 68 then cites to paragraphs 9, 10 and 15-17 of plaintiff's declaration of July 28, 2021. But these paragraphs do not contradict Romero's statements. Nor do pages 21-22 of plaintiff's deposition contradict Romero's declaration.

Plaintiff focuses on a short window of time in February 2020. On February 13, 2020, plaintiff says he selected a new trainee. Plaintiff then claims that the trainee was "taken from him" on February 19, 2020. Plaintiff argues that this was an adverse action because he would have received a 5.5% bonus for the time he had a trainee. However, there is no evidence that the unidentified trainee ever worked with plaintiff and plaintiff does not provide evidence that he was deprived of bonus pay for six days. Instead, plaintiff seems to argue that this trainee would have started with him on some unspecified date in the future.

This argument is speculative to say the least. The thin evidence before the Court is that plaintiff once had a trainee for around two months and there are times when no trainees are available. Plaintiff fails to produce any other evidence about the trainee program. Thus, it is unknown whether trainees immediately start when assigned or whether they may be assigned for fewer or more than two months. Plaintiff presents no evidence that the unidentified trainee would have started with him before he agreed to transfer to the Detective Bureau in March or April 2020.

Plaintiff then shifts gears and says that, on March 11, 2020, he was forced to sign a document relinquishing his position as FTO. Plaintiff does not provide the document but defendant does as Ex. 9 to Hashmall's Declaration. However, Ex. 9 does not show that plaintiff lost his FTO position. Instead, it says that plaintiff no longer wants a trainee because of family obligations. This of course is consistent with the facts pled in the SAC where plaintiff admits that in early 2020 he was taking off 3-5 days a month to care for his daughter. Nor has plaintiff offered any testimony denying that he was taking days off in order to attend to family matters.[5]

Regardless, plaintiff's version of the events surrounding the preparation of Ex. 9 is immaterial to the real disputes in this case. Nothing about Ex. 9 and its preparation provides any help for plaintiff's vague claim that the loss of a trainee at some future date for an unknown time period is an adverse employment action.

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[5] Plaintiff's witness Waldie states that it is a "demotion" for an FTO to lose a trainee. But this vague comment does not say how or why it is a demotion. Nor does Waldie say anything about loss of pay or other damages.

Nor was it an adverse employment action when plaintiff was transferred to the Detective Bureau as Assistant Filing Deputy. First, plaintiff admitted in his June 9, 2021 deposition (p. 109) that he agreed to this transfer and it was to the Detective Bureau:

Q: Why did you accept it?

A: To take – get me away from the line, from the station.

Q: When did you start with the Detectives Bureau?

A: I – again, I believe it was either April or May or March or April, around there.[6]

Plaintiff's July 28, 2021 declaration (par 19) suggests that he was not really transferred to the Detective Bureau. But plaintiff may not contradict his deposition testimony by proffering different testimony in a later declaration. *See D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 22 (1974).

Plaintiff has no direct evidence of a causal link between any theoretical protected activity and his alleged loss of a trainee. *See, e.g., Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 70 (2000) (plaintiff must have evidence that employer was aware that plaintiff had engaged in the protected activity). Deputies Romero and Barragan were plaintiffs supervisors and are the actors who allegedly took adverse actions against plaintiff. But these deputies deny under oath that they were aware of plaintiff's complaint.

Plaintiff chose not to take the depositions of Romero and Barragan and he has not supplied any other witness testimony or exhibit contradicting their testimony. Instead, plaintiff argues that his evidence is circumstantial because he lost his trainee some eight days after he made his anonymous complaint. While not pled in the SAC, plaintiff's counsel has advanced a so-called "cat's paw" theory of liability.

The Court of Appeal has recently spoken on the causation requirement in the face of a "cat's paw" argument by a plaintiff. In *Choochagi v. Barracuda Networks, Inc.*, 60 Cal. App. 5th 444, 460-461 (2020), the trial court granted summary adjudication against a plaintiff who had no

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[6] Waldie's contrary belief that an Assistant Filing Deputy is not in the Detective Bureau does not raise a *material* issue of fact because, as noted, plaintiff wanted the new assignment. *See also* plaintiff's September 29, 2021 declaration, par. 9.

direct evidence that defendant's decision makers knew of plaintiff's HR complaint. On appeal, plaintiff argued that there was sufficient evidence that the animus of his supervisor "permeated" the decision making process "such that retaliatory animus could not be excluded." In affirming the trial court, the Court of Appeal found the cat's paw theory inapplicable where the decision makers had independent knowledge and firsthand information about plaintiff's actions. Thus, even though the decision makers may have had some additional unfavorable evidence about plaintiff, that was not a *but for* cause of plaintiff's termination.

So too here. Even if some inference could be drawn about the timing of the decision to pause plaintiff's training responsibilities, the declarations of Romero and Barragan clearly show that they knew of plaintiff's personal issues and his desire to take some time off. They agreed to accommodate plaintiff and did not ask him to relinquish his FTO status. In other words, there is no "but for" causal link between plaintiff's report of the fight and his claimed loss of a trainee.

Defendant's final argument is that plaintiff is seeking millions of dollars in damages, but has no evidence in support. Defendant provides evidence that plaintiff still receives his full salary and benefits. Defendant argues that settled law requires that a plaintiff's damages must be predicated on something more than mere possibilities. *See, e.g., Regaldo v. Callaghan*, 3 Cal. App. 5th 582, 602 (2016) ("damages which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery").

Plaintiff's opposition says that plaintiff has damages "and he is not required to prove them" at this point. Plaintiff is incorrect as a matter of law. Once a defendant moving for summary judgment presents evidence that a plaintiff cannot meet an element of his claim, the burden shifts to the plaintiff to produce at least some non-speculative evidence in response. *See Guz v. Bechtel National, Inc.*, 24 Cal. 4th 352, 357 (2000).

Plaintiff attempts to show economic damages by referencing OSS 36, 80 and 126, each of which refers to plaintiff's June 9, 2021 deposition and his July 28, 2021 declaration. The deposition portions cited show only that plaintiff briefly had a trainee in 2019 which then gave him a 5.5% bonus. Plaintiff's declaration at par. 15 makes the vague statement that on February 19, 2020 a different trainee was "taken away from me."

But, as noted above, no additional evidence has been submitted by plaintiff. To repeat, there is no evidence that plaintiff supervised a new trainee for six days and was not given bonus pay. And, since there is no evidence that the new trainee ever worked with plaintiff, the question becomes when would that occur and for how long would that assignment last. Again, plaintiff presents no evidence. Thus, plaintiff's economic "damages" are speculative, remote, contingent

and merely possible.

Plaintiff's opposition does not even suggest that he has non-economic damages, let alone cite any evidence in support of such a claim.

For each and all of these additional reasons, defendant is entitled to summary adjudication on the third and fourth causes of action.

Defendant also moves for summary adjudication on the fifth cause of action which alleges unlawful retaliation under the Labor Code. Defendant's arguments here mirror those made for the other causes of action. Plaintiff's opposition brief also makes similar arguments, but adds that the protected activity for this claim was plaintiff's report of the crime of battery. In reply, defendant argues that this is a "new theory."

Defendant is incorrect. The SAC, par. 119, references specific Penal Code provisions as a predicate for plaintiff's alleged protected activities. And, since there is no factual dispute about plaintiff's report of the fight/battery, plaintiff meets the first element of this retaliation claim.

On the other hand, the Court's conclusions that there are no material issues of disputed fact as to adverse employment actions, causation and damages apply with equal force on this remaining cause of action. Thus, defendant is also entitled to summary adjudication of this claim.

3. SANCTIONS

At the Case Management Conference on March 16, 2021, the parties agreed to mediate so the Court ordered mediation and set a return date of September 8, 2021. The return date was later extended to September 21, 2021.

At the hearing on September 21, defendant's attorney Hashmall stated that plaintiff had unilaterally cancelled the mediation. The transcript from that hearing shows that plaintiff's counsel Wells responded that plaintiff had gone to Mexico and had "made every effort he could to attend the mediation either by phone or by Zoom." Wells continued: "Several days beforehand, my client informed me that it was going to be difficult for him to attend the mediation." Wells then stated: "I was as surprised as the rest of us that he was not going to be able to attend." The Court then set an OSC re Sanctions for October 15, 2021 and ordered plaintiff and Wells to submit declarations.

Plaintiff did not provide copies of the required declarations prior to the October 15

hearing. Plaintiff was again ordered to do so and defense counsel was given one week to respond. The issue of sanctions was deemed submitted.

The Court has now read and considered the declarations from the parties. Plaintiff's October 5, 2021 declaration contradicts the statements made by Wells on September 21, 2021. Plaintiff states: "when I left for Mexico, I did not know that I would be needed at a mediation on September 10, 2021, *because my attorneys did not tell me about it.*"

Attorney Wells failed to provide a declaration, in violation of the Court's order.[7] Plaintiff's other attorney Romero submitted a non responsive declaration. Romero's declaration consists of summary of what he thinks this case is about and a diatribe about some of the Court's rulings. Romero does not even attempt to justify his cancellation of the mediation. Instead he makes the odd comment: "I do not consent to be sanctioned, nor do I consent to Deputy Gonzalez being sanctioned."

Defendant's attorney Hashmall provides a declaration and exhibits which show that, on September 7, 2021, Romero confirmed the mediation for September 10. As a result, defendant paid ADR Services a non-refundable $2,000 for its share of the fees. Hashmall then states that, on September 8, 2021, Romero's office called to postpone the mediation. As a result, ADR Services cancelled the mediation.

On this record, the Court finds that defendant relied on the representations of plaintiff's attorneys that the mediation would take place on September 10. Defendant then paid a non-refundable fee of $2,000. Plaintiff's attorneys either did or did not advise plaintiff of the mediation date. Regardless, the September 10 mediation was cancelled by plaintiff's counsel and through no fault of defendant. Defendant is entitled to sanctions against plaintiff and his attorneys, jointly and severally, in the amount of $2,000.

Accordingly, good cause having been shown,

IT IS ORDERED that plaintiff's Motion for Summary Adjudication is granted as set forth above.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is Granted and plaintiff's case is dismissed with prejudice, except that the Court retains jurisdiction to

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[7] As the Court observed on September 21, 2021, "a party cannot pick and choose which orders they wish to follow."

enforce the order re sanctions.

IT IS FURTHER ORDERED that sanctions in the amount of $2,000 are imposed against plaintiff and his attorneys, jointly and severally. An OSC re Payment of Sanctions is set for December 9, 2021 at 8:30 a.m.

Notice by defendant.

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Judge, WILLIAM F. FAHEY