SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

INSTRUCTIONS FOR CONTESTING TENTATIVE RULING IN DEPARTMENT 16/34

The tentative ruling will become the ruling of the Court unless by 4:00PM of the Court day preceding the hearing, notice is given of an intent to argue the matter. Counsel or self-represented parties must email Department 34(Dept34@contracosta.courts.ca.gov) to request argument and must specify, in detail, what provision(s) of the tentative ruling they intend to argue and why. Counsel or self-represented parties requesting argument must advise all other counsel and self-represented parties by no later than 4:00PM of their decision to argue, and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (Pursuant to Local Rule 3.43(2).)

ALL APPEARANCES TO ARGUE WILL BE IN PERSON OR BY ZOOM, PROVIDED THAT PROPER NOTIFICATION IS RECEIVED BY THE DEPARTMENT AS PER ABOVE.
Zoom link-
https://www.zoomgov.com/j/1619504895?pwd=N0V1N3JFRnJ0TEVoSDNrTGRzakF3UT09

ID: 161 950 4895
Password: 812674

Courtroom Clerk's Session

1. 9:00 AM CASE NUMBER: MSC18-01289
CASE NAME: COLVIS VS. GARAVENTA
HEARING IN RE: DISCOVERY (SET AT 1/15/25 HEARING)
FILED BY:
TENTATIVE RULING:

This matter is on in connection with the Court's consideration of a Recommendation by the appointed Discovery Referee. The Court previously granted a motion to seal certain records relating to the matters underlying the Recommendation and set the underlying discovery dispute and Recommendation thereon for hearing on February 18, 2025. See Minute Order dated January 15, 2025.

Background

Mark LeHocky (the "Discovery Referee") was duly appointed by the Court as the discovery referee in this matter. See Order July 2, 2021. The Discovery Referee issued a Report and Recommendation August 27, 2024 (the "Recommendation"). The Recommendation dealt with a motion for a protective order to

bar discovery into purported sexual abuse over six decades ago (the "Purported Abuse"). See Recommendation, p. 2, ln. 9 *et seq*. The Discovery Referee granted the motion, finding, among other things, that such matters are not relevant to the pending disputes over the family business and that such discovery constitutes a misuse of the discovery process.

Analysis

The Court has considered the Recommendation, including the recommendations therein as relates to the evidentiary objections addressed therein. See Recommendation, p. 1 *et seq*. The Court has considered the Objections to the Recommendation by plaintiff Joseph Garaventa and the supporting papers. See Objections to Discovery Referee's Report and Recommendation dated August 30, 2024. The Court has considered the Objections to Evidence by defendants dated August 2, 2024. The Discovery Referee's Recommendation does not appear to address those objections. Having considered those objections, Objection Nos. 4 through 6, 9, and 11 through 14 are SUSTAINED. All other objections are OVERRULED.

The Court adopts the reasoning and conclusions of the Discovery Referee. In addition to the grounds discussed at length by the Discovery Referee, the Court concludes and finds that even if the Purported Abuse had any marginal probative value as to the claims at issue or credibility of witnesses, as argued, such probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time and/or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evid. Code § 352. Accordingly, the Court exercises its discretion to bar discovery into such matters.

Disposition

The Court finds and orders as follows:

1. The Recommendation of the Discovery Referee is approved and adopted as the order of the Court, subject to the further findings and orders herein.
2. The moving party on the underlying motion for a protective order shall prepare the order after hearing.

Law & Motion

2. 9:00 AM CASE NUMBER: C23-00360
CASE NAME: ADRIANNE WEISS VS. MANOR CARE OF WALNUT CREEK CA, LLC
HEARING ON SUMMARY MOTION FILED BY MANOR CARE OF WALNUT CREEK CA, LLC
FILED BY:
TENTATIVE RULING:

Defendant Manor Care of Walnut Creek CA, LLC's Motion for Summary Adjudication of Issues, filed on August 23, 2024, is **denied**.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

Background

This is an Elder Abuse action. Plaintiffs are the relatives of deceased Plaintiff Adrianne Weiss (Adrianne), then an 80 year-old resident of Defendant Manor Care of Walnut Creek CA, LLC, a skilled nursing facility (the Facility). At the time of admission, Adrianne had ongoing dementia, for which she was taking blood thinners, and was a known fall risk. Plaintiffs allege that Adrianne had two unwitnessed falls in her room at the Facility— on November 25 and November 26, 2021— the latter of which resulted in injuries that allegedly caused or contributed to Adrianne's death in 2022. Plaintiffs assert the following causes of action against Defendant in their First Amended Complaint: (1) "Reckless or Willful Neglect of an Elder under the Elder Abuse and Dependent Adult Civil Protection Act", (2) Violation of the Patient Bill of Rights, and (3) Negligence. Plaintiffs allege that Defendant failed to implement necessary fall precautions for a person in Adrianne's condition. They also allege that Defendant deliberately understaffed the facility in a manner that contributed to the harm in this case.

Defendant now moves for summary adjudication of the following issues: (1) The first cause of action for elder abuse and neglect is without merit and fails to raise a triable issue of material fact, as a matter of law because "undisputed evidence shows Plaintiff[s'] cannot prove by clear and convincing evidence that Defendant acted with recklessness, oppression, fraud or malice" and (2) plaintiff is not entitled to the heightened remedies of punitive damages and attorney fees under Welf. & Inst. Code 15657 because "undisputed evidence shows Plaintiff cannot prove by clear and convincing evidence that Defendant acted with recklessness, oppression, fraud or malice."

Standard

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, [or] that there is no merit to a claim for damages. . ." (Code Civ. Proc. § 437c(f)(1).) "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Ibid*.)

A defendant moving for summary judgment or summary adjudication has met his or her burden of showing that a cause of action has no merit if he or she shows one or more elements of the cause of action cannot be established. (Code Civ. Proc. § 437c(p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense. (*Ibid*.)

In determining a motion for summary judgment, the court is "required to view the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion; doubts as to whether there are any triable issues must be resolved in favor of the opposing party; and equally conflicting evidence or inferences require denial of a summary judgment

motion." (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.) Evidence in opposition to motions for summary judgment or summary adjudication are liberally construed while the moving party's evidence is strictly construed. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

Evidentiary Matters

Plaintiffs' Request for Judicial Notice

Plaintiffs' 12/23/25 Request for Judicial Notice in Support of Plaintiffs' Opposition to Defendant's Motion is granted. Evidence Code section 452 subsection (c) permits judicial notice to be taken of official acts of the legislative, executive, or judicial departments of the United States or any state of the United States. Plaintiffs request judicial notice of the California Department of Public Health, All Facility Letter (SFL) 19-156 issued on April 9, 2019. (RJN, Ex. 1.) The California Department of Public Health is a state administrative agency. The Court is permitted to take judicial notice of this document pursuant to California Evidence Code section 452 (c).

Defendant's Request for Judicial Notice

Defendant's 1/3/25 Request for Judicial Notice is **granted**. Defendant requests judicial notice of Medicare program participation requirements governing care planning in 42 CFR § 483.21, in particular, the requirement stating, "[t]he facility must develop and implement a baseline care plan for each resident … within 48 hours of a resident's admission." (42 CFR § 483.21(a)(1).)

Defendant requests judicial notice of this regulation to support its new argument on reply that argument that the standard of care did not require Defendant to create a care plan for Adrianne at the time of admission, and to rebut Plaintiffs' expert Pamela Starkey's opinion that "a care plan, and in particular, the interventions within the care plan to address Ms. Weiss's known fall risk, needed to be created upon admission." (Reply, p. 9:11-25, citing to Starkey Decl., Ex. 5 to Plfs.' Compendium of Evidence, ¶ 38.) The Court can take judicial notice of the Medicare program participation requirements. But nothing is cited by Defendant they establish the professional standard of care in every case.

Plaintiffs' Objections to Evidence

Plaintiffs did not file written objections to evidence.

Defendant's Objections to Evidence

Defendant's 1/3/25 Objections to the Declaration of Rodrigo Giacinti, Licensed Nursing Home Administrator, are ruled on as follows:

Objection No. 1 (¶ 15:4-5) is overruled.

Objection No. 2 (¶ 18:12-14) is overruled.

Objection No. 3 (¶ 23:3-5) is overruled.

Objection No. 3 (the second one) (¶ 24:8-10) is overruled.

Objection No. 4 (¶ 27:21-23) is overruled.

Objection No. 5 (¶ 29:2) is overruled.

Objection No. 6 (¶ 29) is overruled.

Objection No. 7 (¶ 31(b)) is overruled.

Objection No. 8 (¶ 32) "The inadequate staffing prevented the staff from providing the Ms. Weiss with the care she was entitled to….") is sustained. Speculation/lack of foundation.

Defendant's 1/3/25 Objections to the Declaration of Pamela Sharkey, R.N. are ruled on as follows:

Objection No. 9 (¶ 28:17-18) is overruled.

Objection No. 10 (¶ 29:20-21 – "The admission nurse is required to initiate a care plan individualized to the care and treatment of the resident upon admission") is overruled.

Objection No. 11 (¶ 29:22-23 – "Anything less than that would constitute abuse and/or neglect") is sustained, to the extent that the declarant purports to offer a legal conclusion.

Objection No. 12 (¶ 35:15-17) is overruled.

Objection No. 13 (¶ 41:13-15) is overruled.

Objection No. 14 (¶ 42:7-15) is sustained to the extent that the declarant purports to offer a legal conclusion.

Objection No. 15 (¶ 58:23-26) is sustained to the extent that the declarant purports to offer a legal conclusion.

Objection No. 16 (¶ 71) is sustained to the extent the declarant purports provide an opinion as to causation that is lacking in foundation.

Manor Care's 1/3/25 "Objections to Plaintiffs' Responses to Defendants' Separate Statement of Undisputed Facts" are overruled. Evidentiary objections raised in a separate statement are improper in that they are required to be made in a separate document. (CRC 3.1354(b).) To the extent that

Defendant purports to object to facts in the separate statement, these objections are improper because a separate statement merely refers to evidence, and is not evidence itself. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178 n.4.)

First Cause of Action for Elder Abuse

The first cause of action is for elder abuse and neglect. The Elder Abuse Act provides "heightened remedies to a plaintiff who can prove 'by clear and convincing evidence that a defendant is liable for physical abuse ..., or neglect ..., or abandonment ...' and who can demonstrate that the defendant acted with 'recklessness, oppression, fraud, or malice in the commission of this abuse.' " (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 101-102.) In sum, in order to allege a violation of the Elder Abuse Act, Plaintiff must allege that Defendant committed (1) a physical abuse, neglect, or abandonment, and (2) in doing so acted with recklessness, oppression, fraud, or malice. To avoid summary judgment, plaintiffs must produce evidence that could, if accepted by the trier of fact, satisfy the clear and convincing standard of proof. (*Reader's Digest Ass'n v. Superior Court* (1984) 37 Cal.3d 244, 252.)

Here, “neglect” is the principal basis of the elder abuse claim. The Act defines “neglect” to mean "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57(a)(1).) As relevant herein, “neglect” includes, but is not limited to, the “[f]ailure to protect from health and safety hazards.” (Welf. & Inst. Code, § 15610.57(b)(3).)

As an initial matter, the Court notes that Defendant’s motion is not supported by an expert testimony that it did not neglect Adrianne because her care plan complied with the standard of care, even though Defendant apparently takes the position that expert testimony is required for this purpose. (See, e.g., Def.’s 1/3/25 Objections to Plaintiff’s [response to] Fact No. 10: “Whether the care plan implemented [for Adrianne] was inappropriate calls for…expert witness testimony.”)

Assuming Defendant’s moving papers are sufficient to satisfy defendant's initial burden of production under Code of Civil Procedure § 437c(p)(2), the Court finds that there are disputed issues of fact as to whether Defendant engaged in neglect within the meaning of the Elder Abuse Act. Although Defendant claims that Adrianne was not neglected because it provided certain protections for her (see, e.g., Def.’s Fact Nos. 10-13, 26, 27 and evidence cited), the Court does not find that this is sufficient to demonstrate entitlement to judgment as a matter of law. As noted, under Welfare and Institutions Code § 15610.57(b)(3), neglect includes the failure to protect from health and safety hazards. (*Samantha B. v. Aurora Vista Del Mar LLC* (2022) 77 Cal.App.5th 85, 99.) Although Defendant argues there were various protocols in place to protect Adrianne, including fall-risk interventions, the record does not clearly reflect that these measures were sufficient to protect Adrianne in her condition, that they were followed, or that they were in place when needed. (See Declaration of Plaintiffs’ expert Pamela Starkey, R.N., ¶¶ 28-35.)

Here, there is no dispute that Adrianne is an elder and that Defendant had the responsibility to meet Adrianne's basic needs. Plaintiffs present evidence in opposition to the motion that Adrianne was a known fall risk in both the January 2021 and November 2021 admission to Defendant's facility. (Plfs.' UMF No. 3.) At the November 2021 admission, RN Kaur noted "[w]orries about falling or feels unsteady when standing or walking, "[p]roblems with heart rate and/or arrhythmia" and "[c]ognitive impairment." (Plfs.' UMF No. 7.) However, no care plan was initiated at admission. (Plfs.' UMF No. 8.) Plaintiffs' expert Pamela Starkey, R.N. opines that, an individualized care plan must be created upon admission because it is only through the care plan that Certified Nursing Assistants, or CNAs, are educated on resident's needs and the level of care required to ensure safety. Based on Adrianne's medical condition, a known prior history of falls, and memory issues at admission, the standard of care would require "assist[ance] to transfer and ambulate as needed" and "reinforce[ments] need to call for assistance" as interventions in her care plan, which is the mechanism communicating the level of care to Adrianne's caregivers, including RNs and CNAs. (Starkey Decl., ¶¶ 28-35.)

The next day, both Defendant's physical therapist and RN Jiang recognized Adrianne was a fall risk. (Plfs.' UMF Nos. 9, 11 and 12.) Despite recognizing that Adrianne needed assistance, RN Jiang initiated a care plan that only required CNAs to "encourage [Adrianne] to transfer and change positions slowly." (Plfs.' UMF No. 10.) This was the level of intervention throughout the time that Adrianne was at the facility. In other words, Defendant's care plan did not require caregivers to assist Adrianne when leaving her bed or require them to encourage Adrianne to ask for assistance. Even after Adrianne's first fall on November 25, her care plan remained the same. Thus, Plaintiffs contend that whether Adrianne used or did not use the call light prior to her falls is "moot" based on Defendant's care plan for her, as Defendant did not require staff to provide, or for Adrianne to ask for, assistance when leaving her bed. Plaintiffs claim that Adrianne most likely was not trained to use the call light for assistance as she was deemed "independent" by nursing staff. (Starkey Dec ¶ 54.) Defendant should have deemed Adrianne to be "3 – EXTENSIVE ASSISTANCE" or "4 - TOTAL DEPENDENCE" at admission, when Adrianne's care plan was initiated the following day, and especially after the first fall on November 25. However, it was not until after Adrianne was transported to the Emergency Department for the second and more injurious fall that LVN Cenizal was instructed by an unknown supervisor to update Adrianne's care plan to add "Provide assist to transfer and ambulate as needed" and "Reinforce need to call for assistance". (Plfs.' UMF No. 42.)

Based on the foregoing, Plaintiffs contend that Defendant withheld services necessary to meet Adrianne's basic needs and there are triable issues as to whether Defendant committed elder abuse. The Court finds that Plaintiffs have met their burden to demonstrate the existence of triable issues of material fact (including with regard to alleged recklessness, as addressed below).

Enhanced Remedies

Defendant next argues that if the Court does not dismiss the elder abuse cause of action altogether, it can dismiss the prayer for punitive damages and attorney fees on the elder abuse cause of action, "leaving the elder abuse cause of action as a claim for negligence." (Reply, p. 1:6-8.)

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

Welfare & Institutions Code § 15657 provides that a plaintiff may recover attorney fees, costs and punitive damages, as well as pain and suffering in survival actions, if plaintiff proves by clear and convincing evidence that the defendant was liable for physical abuse, neglect, or financial abuse and that the defendant was guilty of recklessness, oppression, fraud, or malice in the commission of the abuse. (Welf. & Inst. Code, § 15657(a); see CACI No 3104.)

Plaintiffs point out that Defendant's motion focuses only on "malice", "oppression" and "fraud"; terms which require an "intentional state of mind" and cites to non-Elder Abuse Cases for its definitions. (Motion, p. 11:28.) Plaintiffs also point out that Welfare & Institution Code § 15657 also includes the term "recklessness," which is the deliberate disregard of the high degree of probability that an injury will occur. (*Delaney v. Baker* (1999) 20 Cal.4th 23; CACI 3113.)

Relying on *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, Plaintiffs contend that Defendant's practice of understaffing, along with alleged statutory and regulatory violations, are sufficient to show a triable issue of recklessness neglect. *Fenimore* held that reckless neglect may be premised on a fall where it was alleged that the subject hospital was understaffed at the time of the fall, that the understaffing caused the fall, and was part of a pattern of practice. (*Fenimore, supra,* 245 Cal.App.4th at 1349 [reversing the trial court's sustaining of defendant's demurrer without leave to amend].)

Plaintiffs' FAC contains the required allegations. (See FAC ¶¶ 28, 32-35, 41-43 and 46-47.) Defendant's motion is silent as to the understaffing allegations, so Defendant does not meet its initial burden of production in this regard. But even if Defendant had met its burden, Plaintiffs' evidence as to understaffing, liberally construed, is sufficient to raise a triable issue of fact. That is, plaintiffs present evidence that during Adrianne's residency, the facility was understaffed in violation of state regulations. Plaintiffs claim that understaffing directly correlates to patient care and the attention a resident receives, as reflected in nursing notes and deposition testimonies:

- R.N. Kaur, the admission nurse, recorded that Adrianne arrived with paramedics via gurney at 4:00 pm on November 22, 2021 in a note that was charted 6 hours later. She also failed to initiate a care plan upon admission. (Plfs.' UMF Nos. 6-8.)

- R.N. Jiang visited on the second day of Adrianne admission and created a care plan, but it lacked the required interventions to manage Ms. Weiss's significant fall risk. (Plfs.' UMF Nos. 9-10.)

- R.N. Rumpf charted at 4:25 p.m. that Adrianne was found on November 25, 2021 at 11:45 a.m., nearly 5 hours earlier. Nurse Rumpf failed to document – and does not recall – who found Adrianne on the floor. (Plfs.' UMF Nos. 21-22.)

- When Adrianne's son and daughter-in law returned Adrianne to the Facility after

an outing for Thanksgiving dinner, they and another resident were unable to contact any staff to open the locked front door and remained locked outside for 45 minutes to one hour. (Plfs.' UMF Nos. 25-29.)

・ Adrianne was noted as being found by an unidentified CNA by Kara Malone, R.N., at 5:36 a.m., in a note that Malone created at 8:37 a.m. The only evidence of the timing of Adrianne's second fall was that paramedics were contacted at 5:17 a.m. (Plfs.' UMF No. 38.)

・ LVN Cenizal, a desk nurse whose main task was to answer phone calls and had no direct patient care for the prior 10 years, was asked by an unknown supervisor to update the care plan with the appropriate level of fall risk intervention, despite never having met Adrianne. (Plfs.' UMF No. 42.)

Plaintiffs claim that due to understaffing, Defendant failed to implement a care plan that protected Adrianne from falling, such that she suffered two unwitnessed falls within 20 hours, the second of which resulted in injuries which caused or contributed to her death. (FAC, ¶ 43.) Plaintiffs further claim that based on all the totality of the evidence, the trier of fact should decide whether there has been recklessness neglect. Liberally construing Plaintiffs' evidence as the Court must, summary adjudication is denied.

Reply Arguments

Defendant asserts in reply: "This is a case about Plaintiff, an elderly woman, who was stubborn and failed to follow instructions from nursing staff, failed to use call lights as instructed, and as a result fell twice injuring herself on the second fall…. [¶] The evidence presented in Defendant's moving papers, including the separate statement of undisputed material facts and the compendium of evidence, supports the fact that Ms. Weiss, on both occasions, got out of bed on her own without using the call light, and fell. It was no fault of the staff that she fell twice. The staffing levels, or any other arguments raised by Plaintiff in the Opposition to the Motion for Summary Adjudication, were not the reasons as to why Plaintiff fell. Plaintiff got out of bed of her own volition, even after being told to use the call light for assistance." (See Reply., 1:20-2:9.)

The Court finds these arguments to be unavailing. First, as previously noted, there are triable issues of fact as to whether and when Adrianne was counseled to use her call light. Second, Defendant relies on declarations from Nurse Rumpf and EMT Vance that Adrianne's call light was "off" when they arrived, but neither declarant was the first to discover Adrianne after she fell. As a result, these declarants have no personal knowledge of how Adrianne was found or whether she activated the call light. Third, the place to specifically argue that alleged understaffing did not contribute to the injury in this case was the moving papers.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

Disposition

Based on the foregoing, the motion for summary adjudication is **denied**.

3. 9:00 AM CASE NUMBER: C23-01716
CASE NAME: DEBRAH DENOS VS. DOES 1-10
***HEARING ON MOTION IN RE: MOTION FOR RECONSIDERATION OF THIS COURTS ORDER DENYING THE MOTION TO SET ASIDE ENTRY OF DEFAULT AGAINST DEFENDANT**
FILED BY:
****TENTATIVE RULING:****

California Community Housing Agency's motion for reconsideration is denied, however, the Court has decided to reconsider the motion to set aside default sua sponte. California Community Housing Agency's motion to set aside default is **granted.** The default as to California Community Housing Agency's is ordered set aside and California Community Housing Agency shall file and serve their answer by March 5, 2025. Defense counsel is ordered to pay $6,000 in reasonable attorneys' fees and costs to Plaintiff's counsel.

Plaintiff was injured at her apartment building complex on June 22, 2023. Initially, Plaintiff sued Twin Creeks Apartment as the defendant. In the First Amended Complaint, Plaintiff sued the California Community Housing Agency (a public entity), as the owner of the property. Plaintiff served the Agency through substitute service on the Deputy Clerk of the Board of Supervisors in Kings County. Plaintiff filed her proof of service and obtained a default against the Agency on March 6, 2024. On July 15, 2024, California Community Housing filed a motion to set aside the default. At the time of filing this motion, California Community Housing argued that they were a private entity. The Court denied California Community Housing's motion to set aside the default since they were not named in the complaint as the FAC named only a public entity, not a private entity.

California Community Housing Agency ("CCHA") has filed this motion for reconsideration under Code of Civil Procedure section 1008 and alternatively under section 473(b) and asks this Court to reconsider its ruling made at the September 11th hearing on the first motion to set aside default.

Reconsideration

Code of Civil Procedure section 1008(a) allows for a motion for reconsideration of an order by a judge. The motion must be made within 10 days after service of written notice of entry of the order and "and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." (Code Civ. Proc., § 1008(a).) Section 1008(b) allows for a motion for reconsideration, which is

"a subsequent application for the same order upon new or different facts, circumstances, or law". (Code Civ. Proc., § 1008 (b).)

"Courts have construed section 1008 to require a party filing an application for reconsideration or a renewed application to show diligence with a satisfactory explanation for not having presented the new or different information earlier. [Citations.]" (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839.)

Here, the motion was filed on September 18, 2024, and notice of entry of the Court's minute order after the hearing on September 11, 2024, was filed and served on September 12, 2024. This motion is therefore timely.

CCHA argues that the new information here was that Defendants' attorneys learned on September 10, 2024, that their real client was the named defendant in this action, California Community Housing Agency. Defendants' attorneys also learned they did not represent named California Community Housing (a private entity), which is apparently a non-entity. (Motion p. 3 and Duggan dec. ¶¶16-18.) CCHA's attorney states that this was new information and it could not be provided to the Court before the September 11 hearing because it was only discovered on September 10 and the declarant was unable to attend the Court hearing due to attending a trial in another county. (Duggan dec. ¶19.)

CCHA's attorney was assigned to this case in November 2023 and did not discover that his client was actually a public entity, not a private entity, until September 10, 2024. (Duggan dec. ¶¶3, 18.) Duggan provides an explanation for this confusion, including that the insurer did not knowingly issue a policy to a public entity. But even so, the Court struggles to see how it could find that counsel acted diligently when it took him ten months to learn that his client was a public entity and confirm the correct name for his client. The Court finds that CCHA's motion shows new or different facts, but fails to show that these facts could not have been discovered earlier with due diligence.

However, the Court has inherent authority to reconsider its own orders. "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." (Code Civ. Proc., § 1008, subd. (c).) Even without a change of law, a trial court may exercise its inherent jurisdiction to reconsider an interim ruling. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097, 1107 (*Le Francois*).)" (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 237.)

"We cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling (although any such communication should never be ex parte). We agree that it should not matter whether the 'judge has an unprovoked flash of understanding in the middle of the night' [citation] or acts in response to a party's suggestion. If a court believes one of its prior interim orders

was erroneous, it should be able to correct that error no matter how it came to acquire that belief." (*Le Francois, supra,* 35 Cal.4th at 1108.)

Here, the amended motion for reconsideration by CCHA has provided additional information that shows CCHA was the properly named defendant and thus, did have standing to bring the motion to set aside the default. Given this new information, the Court finds that its prior ruling that CCHA or California Community Housing did not have standing was erroneous. The Court will consider the motion for relief from default on the merits.

Relief from Default

A motion for relief from default based upon an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect must be granted if it is made with within six months of the entry of judgment and the affidavit meets certain requirements. "Unlike the discretionary ground for relief, a motion based on attorney fault need not show diligence in seeking relief. The motion is timely if filed within six months of the entry of the default judgment or dismissal. [Citations.]" (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147.) Here, default judgment has not been entered and thus, the motion based upon attorney fault is timely.

"The general underlying purpose of section 473(b) is to promote the determination of actions on their merits. [Citation.] The additional, more specific purposes of section 473(b)'s provision for relief based on attorney fault is to 'relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.' [Citation.]" (*Even Zohar, supra,* 61 Cal.4th at 839.)

In considering the motion to set aside default, the Court has considered the parties' moving and opposition papers and declarations for both the original motion and this present motion.

Here, Duggan's declaration explains that he began representing CCHA in November 2023. In 2023, he confirmed that no service of summons had occurred in the case. (Duggan dec. ¶¶3-4.) Duggan was given a copy of the first amended complaint on January 11, 2024. (Duggan dec. ¶19, first motion for relief.) Plaintiff's counsel did not tell Duggan before seeking entry of default. (Duggan dec. ¶17, first motion for relief.) On March 21, 2024, he learned that the First Amended Complaint had been served on his client and a request for entry of default was filed on March 6, 2024. (Duggan dec. ¶6.) Duggan immediately requested that Plaintiff's counsel stipulate to set aside the default, which Plaintiff's counsel agreed to. (Duggan dec. ¶7.) It does not appear that a stipulation was given to Plaintiff's counsel. Approximately two months later, Plaintiff's counsel stated that he no longer agreed to stipulate to set aside the default. (Duggan dec. ¶11.) On July 15, 2024, Duggan filed the first motion to set aside the default. (Duggan dec. ¶13.) At that time Duggan believed his client was California Community Housing, a private entity, and not California Community Housing Agency, a public entity. (Duggan dec. ¶¶13, 15.) Duggan clearly states that it was due to his mistake,

inadvertence, surprise or neglect that he did not discover the true name of his client earlier. (Duggan dec. ¶20.) In the first motion to set aside, Duggan stated in his memorandum that he did not timely file a responsive pleading due to internal deliberations as to the efficacy of service since the service was on California Community Housing Agency, a public entity, and not on California Community Housing. (Motion filed on 7/15/24 page 2.) While the internal deliberations explanation is not included in a declaration, it is clear that when Duggan drafted the first motion to set aside default he still believed that there was a distinction between California Community Housing Agency, a public entity, and his client.

On these facts, the Court finds that the default was taken against California Community Housing Agency due to Duggan's mistake, inadvertence or neglect. Duggan was assigned this file in November 2023 and received the first amended complaint in early January 2024. Duggan apparently considered whether his client was properly served, but ultimately did nothing until after the default was taken. Thus, the facts show that the default was taken due to the attorney's conduct. Therefore, the motion to set aside default is granted. There is a proposed answer attached to the first motion to set aside default. Before filing that proposed answer, California Community Housing Agency may make changes to the answer as appropriate to adjust for their status as a public entity.

When granting a motion based on attorney mistake, the court shall require the attorney to pay reasonable compensatory legal fees and costs to the opposing party or their attorney. Plaintiff's counsel requests $14,600 in attorney fees. The Court finds that the hourly rate of $400 is reasonable, but not all the hours requested by Plaintiff are reasonable. The Court awards Plaintiff $6,000 in attorney fees (15 hours at $400/ hour) to compensate Plaintiff.

4. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY TO COMPEL RESPONSES TO FORM INTERROGATORIES, SET 1 - CONTINUED FROM 1/29/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
****TENTATIVE RULING:****

On September 24, 2024, Plaintiff Leonel Lopez Rodriguez ("Plaintiff") filed eight separate motions to compel responses to certain discovery requests propounded by Plaintiff to defendant Brycen Keith Brinkman ("Defendant Brinkman") and defendant ADA Compliance Consultants, Inc. ("ADA") (collectively, the "Motions to Compel"). The Motions to Compel were set for hearing on January 29, 2025 and January 31, 2025, as discussed further below, and later continued and consolidated for hearing on **February 19, 2025 in Department 16/34**. See Minute Order dated January 8, 2025.

Background

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

The Motions to Compel relate to eight separate discovery requests, four sets propounded to each of the two defendants, Defendant Brinkman and ADA. Collectively, these discovery requests are referred to herein as the "Discovery Requests."

Plaintiff served Defendant Brinkman with Form Interrogatories, Set One (the "Brinkman Form Interrogatories"). See Declaration of Sevan I. Movsesian filed September 24, 2024 ("Movsesian Decl. re Brinkman Form Interrogatories"), ¶2 and **Exhibit A** thereto. The Brinkman Form Interrogatories were served by email on April 16, 2024. *Id*., **Exhibit A** (Proof of Service dated April 16, 2024). A response was due on or before May 20, 2024. *Id*. at ¶2. After an initial extension of time to response, no timely responses were made by the extended due date. *Id*. at ¶¶3-4. The parties met and conferred, and an agreement was made for several further extensions of time for responses to be provided. *Id*. at ¶¶5-6. The parties' communications at the time plainly contemplated that such extensions were for responses to be made without objections. *Id*., **Exhibit B and C.** However, when responses were served on August 8, 2024, they contained objections. *Id*. at ¶7 and **Exhibit D** thereto. Thereafter, the propounding party requested, through further meet and confer efforts, responses without objections, which had been waived. *Id*. at ¶8 and **Exhibit E** thereto. No amended responses were served and this motion followed. Plaintiff's Motion to Compel Responses to Plaintiff's Form Interrogatories, Set One was filed on September 24, 2024 and set for hearing on January 29, 2025 in Department 57 of the Court.

A similar companion motions were filed by Plaintiff as to sets of Special Interrogatories, Set One, Request for Production, Set One and Request for Admissions, Set One. The motions as to those discovery requests propounded upon Defendant Brinkman were also filed September 24, 2024 and set for hearing in Department 57 of the Court. The four discovery motions relating to Defendant Brinkman are collectively referred to as the "Brinkman Discovery Motions."

In addition to these four discovery motions brought regarding the sets of discovery propounded on Defendant Brinkman, Plaintiff served ADA with a similar set of discovery requests and has brought four separate discovery motions as to the discovery propounded to ADA, including Form Interrogatories, Set One, Special Interrogatories, Set One, Request for Production, Set One, and Request for Admissions, Set One. These discovery motions are collectively referred to as the "ADA Discovery Motions." The ADA Discovery Motions were also filed September 24, 2024. They were all set for hearing on January 31, 2025 in Department 57 of the Court.

Analysis

No opposition papers have been filed. The Court was advised during recent Case Management Conference (CMC) proceedings that the parties were discussing resolution. The Court ordered the parties to prepare and file a Joint Separate Statement regarding any discovery requests that remained at issue. That Joint Separate Statement was to be filed by January 29, 2025. No such Joint Separate Statement was filed by that deadline as to any of the eight pending Motions to Compel. However, a notice was recently submitted for filing with the Court withdrawing the motions.

Disposition

The Court finds and orders as follows:

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

1. The pending Motions to Compel have been WITHDRAWN by the moving party and are ordered OFF-CALENDAR.

5. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY TO COMPEL RESPONSES TO SPECIAL INTERROGATORIES, SET 1 - CONTINUED FROM 1/29/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
TENTATIVE RULING:

SEE LINE 4 ABOVE.

6. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY TO COMPEL RESPONSES TO PLTFS REQUEST FOR PRODUCTION, SET 1 - CONTINUED FROM 1/29/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
TENTATIVE RULING:

SEE LINE 4 ABOVE.

7. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY COMPEL RESPONSES TO FORM INTERROGATORIES, SET 1 AGAINST ADA AND ATTORNEYS OF RECORD - CONTINUED FROM 1/31/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
TENTATIVE RULING:

SEE LINE 4 ABOVE.

8. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY COMPEL RESPONSES TO SPECIAL INTERROGATORIES, SET 1 AGAINST ADA AND ATTORNEYS OF RECORD - CONTINUED FROM 1/31/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
TENTATIVE RULING:

SEE LINE 4 ABOVE.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 16 / 34
JUDICIAL OFFICER: BENJAMIN REYES / LEONARD E MARQUEZ
HEARING DATE: 02/19/2025

9. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY COMPEL RESPONSES TO PLTFS REQUEST FOR PRODUCTION, SET 1 AGAINST ADA AND ATTORNEYS OF RECORD - CONTINUED FROM 1/31/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
****TENTATIVE RULING:****

SEE LINE 4 ABOVE.

10. 9:00 AM CASE NUMBER: C24-00367
CASE NAME: LEONEL LOPEZ RODRIGUEZ VS. BRYCEN BRINKMAN
***HEARING ON MOTION FOR DISCOVERY DEEM REQ FOR ADMISSIONS ADMITTED AND COMPEL RESPONSES TO REQ FOR ADMISSIONS AS TO ADA AND ATTORNEYS - CONTINUED FROM 1/31/25 AT 1/7/25 HEARING**
FILED BY: LOPEZ RODRIGUEZ, LEONEL
****TENTATIVE RULING:****

SEE LINE 4 ABOVE.