Tentative Rulings for July 23, 2024
Department 503

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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

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

22CECG02501 ***Dr. Ian Johnson, M.D. v. Renaissance Surgery*** **is continued to Thursday, July 25, 2024, at 3:30 p.m. in Department 503**

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Tentative Rulings for Department 503

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(03)

Tentative Ruling

Re: ***Higgins v. Gooch***
Case No. 20CECG2931

Hearing Date: July 23, 2024 (Dept. 503)

Motion: Defendant Elite Restaurant Group's Motion to Dismiss

Defendant Elite Restaurant Group and Mimi's North's Demurrer to Second Amended Complaint

Defendant Le Duff America's Demurrer to Second Amended Complaint

Tentative Ruling:

To deny defendant Elite Restaurant Group's motion to dismiss plaintiffs' complaint.

To sustain the demurrers of defendants Elite, Mimi's North, and Le Duff for failure to state facts sufficient to constitute a cause of action, with leave to amend. Plaintiffs shall serve and file their third amended complaint within ten days of the date of service of this order. All new allegations shall be in **boldface**.

To deny Le Duff's motion for its attorney's fees and costs, as premature and unsupported by statutory or contract language.

Explanation:

Elite's Motion to Dismiss: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." (Code Civ. Proc., § 583.210, subd. (a).)

"Section 583.210 applies to a defendant sued by a fictitious name from the time the complaint is filed *and to a defendant added by amendment of the complaint from the time the amendment is made*." (Legislative Committee Comments to Code Civ. Proc., § 583.210, citations omitted, italics added.)

"Dismissal is mandatory as to a party who has not been served with summons within three years from the commencement of the action unless the case comes within one of the exceptions expressly stated in the statute or implied, as the case law has interpreted it. The appearance of some parties within the three year period does not preclude dismissal of other parties who have not been served." (*Elling Corp. v. Superior Court* (1975) 48 Cal.App.3d 89, 93, citations omitted.) However, "[t]he case law does distinguish between parties named in the original complaint and parties added by amendment later. If a new party is added later, the action commences as to him on the date of the amendment." (*Id.* at p. 94, citation omitted.)

"It is established that, as to a party named in the original complaint, the action commences for purposes of section 581[now section 583.210] on the date of the filing of the complaint. The same rule is appropriate where the defendant was named in the original complaint by fictitious name. On the other hand, *when a new party is added to the action, the action commences as to him on the date of the order adding him as a party or on the date of filing of the pleading naming him as a new party*." (*Warren v. Atchison, T. & S. F. Ry. Co.* (1971) 19 Cal.App.3d 24, 38, citations omitted, italics added.)

Here, plaintiffs did not add Elite as a defendant to the action until the second amended complaint was filed on December 21, 2023. Thus, the action did not "commence" as to Elite until December 21, 2023. As a result, plaintiffs had to serve Elite with the summons and complaint within three years of December 21, 2023. They actually served Elite on December 22, 2023, only one day after Elite was added to the action. As a result, plaintiffs did not violate the three-year service rule under section 583.210.

In its motion, Elite cites to *Higgins v. Superior Court* (2017) 15 Cal.App.5th 973 for the proposition that the relation back doctrine does not prevent dismissal of the action against it for failure to serve it within three years. In *Higgins*, the Court of Appeal rejected the plaintiff's argument that, "because the filing of the third amended complaint in which she identified Higgins as Doe 2 relates back to the filing of the original complaint, the service of the summons and third amended complaint also relates back to the filing of the original complaint. The relation-back doctrine applicable to a fictitiously named defendant and the requirement that a plaintiff serve the summons and complaint within three years are independent concepts. Thus, even where the filing of an amended complaint on a Doe defendant relates back to the filing of an original complaint, the plaintiff must nonetheless identify and serve a Doe defendant with a summons and complaint within three years of the commencement of the action." (*Id.* at p. 982, citations omitted.)

Here, however, plaintiffs are not relying on the relation-back doctrine to show that it served Elite as of the filing of the original complaint. Instead, they rely on the fact that the action was not "commenced" against Elite until it was added to the action as a defendant upon the filing of the second amended complaint. Since plaintiffs served Elite within three years of commencing the action against Elite, the action was timely served and is not subject to being dismissed under section 583.210. As a result, the court intends to deny the motion to dismiss Elite from the action under section 583.210.

Demurrers: Plaintiffs have alleged claims under FEHA for sexual harassment, sex discrimination, retaliation, and failure to prevent harassment, as well as claims under Labor Code section 1102.5, Labor Code sections 6310 and 6311, failure to provide adequate meal and rest breaks under Labor Code sections 226.7 and 512, violation of Labor Code section 1198.5, violation of Civil Code section 52.1, aka the Bane Act, adverse action in violation of public policy, and loss of consortium. The plaintiffs' causes of action have statutes of limitations of one to three years. (Govt. Code, § 12960, subd. (f)(B): one-year statute after issuance of right to sue letter for claims under FEHA; three years for Labor Code claims; three years for Bane Act claim; two years for adverse action in violation of public policy; two years for loss of consortium.)

Here, however, plaintiffs did not file their first amended complaint adding Le Duff and Mimi's North as defendants until June 20, 2023, more than three years after Ms. Higgins resigned from her employment at SWH Mimi's Café in October of 2019, and over

two years after plaintiffs received a right to sue letter from the DFEH on August 10, 2020. Plaintiffs did not file their second amended complaint adding Elite Restaurant Group as a defendant until December 21, 2023, over four years after she resigned from Mimi's and more than three years after they received a right to sue letter from the DFEH. Thus, plaintiffs' claims against defendants Le Duff, Elite, and Mimi's North are time-barred unless they relate back to the filing of the original complaint.

Under Code of Civil Procedure section 474, "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, … and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly…" (Code Civ. Proc., § 474.)

Thus, "[a] plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a Doe defendant, and that time limit prescribed by the applicable statute of limitations is extended as to the unknown defendant." (*Munoz v. Purdy* (1979) 91 Cal.App.3d 942, 946.) "When the complaint is amended to substitute the true name of the defendant for the fictional name, the defendant is regarded as a party from the commencement of the suit, provided the complaint has not been amended to seek relief on a different theory based on a general set of facts other than those set out in the original complaint." *(Ibid*, citations omitted.) "The statute (§ 474) must be liberally construed to enable a plaintiff to avoid the bar on the statute of limitations where he is ignorant of the identity of the defendant." (*Ibid,* citations omitted.)

"Where a complaint sets forth, or attempts to set forth, a cause of action against a defendant designated by fictitious name and his true name is thereafter discovered and substituted by amendment, he is considered a party to the action from its commencement so that the statute of limitations stops running as of the date of the earlier pleading." (*Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, 599, citations omitted.) "The modern rule with respect to actions involving parties designated by their true names in the original complaint is that, where an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the same general set of facts." (*Id.* at p. 600, citations omitted.)

"Decisional authority has evolved a liberal rule in permitting plaintiffs to amend pleadings and to substitute named defendants for charged fictitious defendants without incurring the bar of the statute of limitations; this is so in order that cases may be fairly decided on their merits." (*Ingram v. Superior Court* (1979) 98 Cal.App.3d 483, 491, citations omitted.) However, "[w]hile we recognize the Supreme Court's liberal attitude toward allowing amendments of pleadings to avoid the harsh result imposed by a statute of limitations, that attitude is not unfettered by reasonable requirements. Some discipline in pleading is still essential to the efficient processing of litigation… [I]n the case of substitution of a named defendant for a fictitiously named and charged defendant, great liberality is allowed. However, a party may only avail himself of the use of naming Doe defendants as parties when the true facts and identities are genuinely unknown to the plaintiff…. The straightforward rule is that amendment after the statute of limitations has run will not be permitted when the result is the addition of a party who, up to the time of the proposed amendment, was neither a named nor a fictitiously designated party to the proceeding." (*Id.* at pp. 491–492, citations omitted.)

In the present case, plaintiffs contend that their claims against the newly added defendants are not time-barred because they relate back to the date when the complaint was originally filed. They also contend that they have not added any new legal theories against the new defendants, and their claims are based on the same set of facts alleged in the original complaint. Therefore, they conclude that the relation-back doctrine applies here and prevents their claims from being barred by the statutes of limitation.

However, plaintiffs' argument ignores the fact that they did not add the new defendants to the action by substituting them in place of Doe defendants in accordance with the procedure under section 474. Instead, they sought leave to amend the complaint under section 473, which does not provide a procedure for substituting the named defendants in the place of fictitiously named defendants. Since plaintiffs did not comply with the Doe substitution procedure under section 474, and instead simply amended the complaint to add the new defendants, they cannot use the relation-back doctrine to prevent the running of the statute of limitations. "The straightforward rule is that amendment after the statute of limitations has run will not be permitted when the result is the addition of a party who, up to the time of the proposed amendment, was neither a named nor a fictitiously designated party to the proceeding." (*Ingram, supra*, at pp. 491-492.) Therefore, plaintiffs' claims against the newly named defendants are time-barred and fail to state a valid cause of action against them.

Still, some courts have treated the failure to substitute a new defendant in place of a fictitiously named defendant as a mere procedural defect that can be cured by amendment. They have also been lenient in permitting rectification of the defect. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176–177.) Indeed, some courts have held that it was an abuse of discretion for the trial court to deny leave to amend where the only problem was that the plaintiff failed to substitute the proper defendant in place of a fictitiously named defendant where the actual defendant's identity was unknown to the plaintiff and the complaint would otherwise state a valid claim against the defendant. (*Streicher v. Tommy's Electric Co*. (1985) 164 Cal.App.3d 876, 884-885.) Other courts may require strict compliance with the procedures of section 474 and refuse to allow the plaintiff to cure the defect. (*Woo, supra*, at p. 177.)

Here, the court intends to grant leave to amend, as plaintiffs can cure the defect in their pleadings by simply substituting Elite, Mimi's North, and Le Duff in place of the existing Doe defendants rather than adding them as new defendants. It appears that plaintiffs were genuinely ignorant of the existence of Elite, Mimi's North, and Le Duff and their ownership of Mimi's Café until after the original complaint was filed. Plaintiffs have also stated facts that support their claims against Elite, Mimi's North, and Le Duff based on their alleged ownership of Mimi's Cafe, their alleged employment of plaintiff, or their liability as successors to SWH Mimi's Café. It appears that plaintiffs' failure to substitute the new defendants in place of the Does was a simple oversight, and it would be unduly harsh to deny leave to amend add them under the procedure set forth in section 474. Indeed, some courts have found that it is an abuse of discretion to deny leave to amend under similar circumstances. (*Streicher v. Tommy's Electric Co., supra*, 164 Cal.App.3d at pp. 884-885.) Therefore, the court intends to grant leave to amend the complaint to add Elite, Mimi's North, and Le Duff in place of the existing Doe defendants. This will allow the claims against the newly added defendants to relate back to the filing of the original complaint, which will prevent the statute of limitations from barring plaintiffs' claims.

Defendants also demur to the first through fourth cause of action under FEHA on the ground that plaintiffs failed to name them in their administrative complaint to the DFEH (now the California Civil Rights Department or CRD). Thus, defendants contend that plaintiffs' FEHA claims are barred as they failed to exhaust their administrative remedies as to them before filing their complaint.

"Under California law 'an employee must exhaust the ... administrative remedy' provided by the Fair Employment and Housing Act, by filing an administrative complaint with the California Department of Fair Employment and Housing (DFEH) (Gov. Code, § 12960; cf. id., §§ 12901, 12925, subd. (b)) and obtaining the DFEH's notice of right to sue (*id*., § 12965, subd. (b)), 'before bringing suit on a cause of action under the act or seeking the relief provided therein ....' … We have recognized, in the context of the Fair Employment and Housing Act, that '[t]he failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect,' and thus that failure to exhaust administrative remedies is a ground for a defense summary judgment." (*Martin v. Lockheed Missiles & Space Co*. (1994) 29 Cal.App.4th 1718, 1724, some citations omitted.)

The employee must file their administrative complaint alleging sexual discrimination within three years of the date of the occurrence of the unlawful practice. (Gov. Code, § 12960, subd. (e)(3).) However, the time to file an administrative complaint is extended "[f]or a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer." (Gov. Code, § 12960, subd. (e)(6)(B).)

Also, "[t]he department may amend an open complaint of discrimination to: (3) cure technical defects or omissions, including correcting a case number, address, *or name of a party*; (4) *add new* bases*, respondents*, or complainants after the expiration of the one-year statute of limitations where the amendment either relates back to the same material facts set forth in the original complaint, or the original complaint contains language that specifically references or identifies the bases, respondents, or complainants to be added." (Cal. Code Regs., tit. 2, § 10022(a)(3)(4), paragraph breaks omitted, italics added.)

"[W]here a plaintiff fails to name a defendant in either the body or caption of a DFEH complaint, the plaintiff has failed to exhaust his administrative remedy against that defendant." (*Clark v. Superior Court* (2021) 62 Cal.App.5th 289, 302, citations omitted.) "To allow a complainant to sue individuals in a state court action on a FEHA cause of action without having brought them within the scope of the comprehensive administrative process by naming them as perpetrators of discrimination at the outset would undermine the purposes of the fair employment statute. The Legislature certainly did not intend that the administrative process should be circumvented by allowing a civil lawsuit under the FEHA against individuals who allegedly discriminated but who were not mentioned in the administrative charge." (*Cole v. Antelope Valley Union High School Dist*. (1996) 47 Cal.App.4th 1505, 1514.) "Similarly, in *Alexander*, the court found no basis 'to carve an equitable exception out of mandatory statutory language where an unnamed defendant receives actual notice of a FEHA complaint,' because the purposes of the exhaustion doctrine would not be served by the creation of such an exception." (*Clark*

v. *Superior Court*, *supra*, 62 Cal.App.5th at p. 303, quoting *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 251.)

On the other hand, if the body of the complaint contains sufficient information to provide a basis for an investigation into the employee's claim of discrimination against an employer, even if the defendant is not named in the caption of the complaint, courts have found that the plaintiff exhausted administrative remedies against that defendant. (*Clark, supra*, at p. 304, citing *Martin v. Fisher* (1992) 11 Cal.App.4th 118, 122.)

For example, in *Saavedra v. Orange County Consolidated Transportation etc. Agency* (1992) 11 Cal.App.4th 824, the Court of Appeal found that plaintiff had exhausted her administrative remedies against her former supervisor even though she had not named him specifically in the administrative complaint, and only described him as "the individual who demoted [her] for nonperformance." (*Id*. at p. 827.) "Winterbottom was the only individual identified in the administrative complaint. He was the only person with whom Saavedra dealt. His actions were those of CTSA. He was put on notice and had an opportunity to pursue a 'voluntary settlement had he so desired.'" (*Saavedra, supra*, 11 Cal.App.4th at p. 827.)

Likewise, in *Clark v. Superior Court, supra*, the Court of Appeal held that the plaintiff had exhausted her administrative remedies as to the defendant employer, ALSC, even though she did not use ALSC's legal name in the DFEH complaint. (*Id*. at pp. 305-306.) "The caption of Clark's DFEH Complaint named 'Oasis Surgery Center LLC,' and 'Oasis Surgery Center, LP' as respondents —names that are very similar to ALSC's actual fictitious business name, 'Oasis Surgery Center.' Further, no reasonable person could think that Clark intended to identify an entity *other* that ALSC as a respondent, since the body of Clark's DFEH Complaint named her managers, supervisors, coworkers, job title, and period of employment at ALSC. Thus, any administrative investigation into Clark's DFEH Complaint would have certainly identified ALSC as an intended respondent, particularly since DFEH is mandated to 'liberally construe all complaints to effectuate the purpose of the laws the department enforces ....'" (*Ibid*, citations omitted.) "Moreover, because any administrative investigation into Clark's DFEH Complaint would have revealed ALSC as an intended respondent, Clark's DFEH Complaint also fully served the purpose of the FEHA administrative exhaustion doctrine, i.e., to give the administrative agency an opportunity to investigate and conciliate the claim." (*Clark v. Superior Court* (2021) 62 Cal.App.5th 289, 305–306, citations omitted.)

The *Clark* court also extended the holding of *Saavedra* to hold that the plaintiff may exhaust administrative remedies against a partnership or corporate defendant not identified by name in the administrative complaint, as long as they are capable of being identified through an investigation based on the allegations in the body of the complaint. (*Id*. at p. 307.) "The reasoning in *Saavedra* would seem to apply with equal force where the employer is a partnership or a corporate entity, rather than an individual; as long as the DFEH complaint *identifies* the complainant's employer as having discriminated against complainant, we see no basis for precluding the complainant from bringing a lawsuit against that employer even if the employer is not *referred to by its proper legal name* in the DFEH complaint. This is particularly true since there is no textual basis for treating *persons* and *employers* differently for purposes of FEHA's exhaustion requirement." (*Ibid*., italics in original.) *Clark* also noted that federal cases have found that the exhaustion requirement was met despite failure to name the defendant by its

correct name in the administrative complaint, as long as an investigation would have revealed the defendant's involvement. (*Id*. at p. 308.)

In addition, the *Clark* court noted that California law allows the substitution of the defendant by its proper name where the original complaint misnamed the defendant and thus avoid the running of the statute of limitations. (*Id*. at p. 308-309.) "Similarly, in this case, while Clark misnamed her employer in her DFEH Complaint, using a variant of its fictitious business name rather than the employer's legal name, in both the administrative proceeding and in this lawsuit, Clark was charging a single entity, her former employer, with alleged discrimination. Clark's error in misnaming ALSC in her DFEH Complaint should not result in the dismissal of her lawsuit, just as such an error would not have resulted in the dismissal of her case if she had made the same error in drafting her complaint in this action." (*Id.* at p. 309.)

Here, plaintiff Tiffany Higgins filed an administrative complaint with the DFEH on August 10, 2020, which named SWH Mimi's Café as her employer. (Brockley decl., Exhibit B.) The complaint did not name Elite, Mimi's North, or Le Duff as her employer, or as persons liable for the discrimination and harassment committed against her. (*Ibid*.) However, on February 23, 2024, plaintiffs filed an amended complaint with the CRD which named Elite, Mimi's North, and Le Duff as her employers. (Exhibit 7 to Lubin decl.) She also filed her first and second amended complaints in Superior Court naming Elite, Mimi's North, and Le Duff as defendants.

It appears that, under the reasoning of *Clark* and *Saavedra*, plaintiffs' initial complaint to the DFEH was sufficient to exhaust her administrative remedies. Plaintiffs' complaint named SWH Mimi's as her employer, and it contained enough facts to show that she was asserting claims against her employer for sexual harassment, discrimination, retaliation and failure to prevent harassment and discrimination against her employer. It was only years later that plaintiff learned that Le Duff, Elite, and Mimi's North were also her employers, or successors to SWH Mimi's. She then added Le Duff, Elite, and Mimi's North to her CRD complaint and her civil action. While plaintiff did not name Elite, Mimi's North or Le Duff in her original DFEH complaint, she made it clear in her complaint that she was alleging claims for sexual harassment, discrimination, and retaliation against her employer. An investigation into plaintiffs' allegations would presumably have revealed the involvement of Le Duff, Elite, and Mimi's North as owners, employers or successors in interest to plaintiff's employers. Just as plaintiff can amend her complaint to substitute in the correctly named defendants in place of Doe defendants, she can amend her CRD complaint to add the correct names of her employers and other persons or entities that are liable for the alleged harassment, discrimination, and retaliation. (*Clark, supra*, at pp. 305-309.) Therefore, the fact that plaintiff did not name Elite, Mimi's North, or Le Duff as employers in the initial complaint to the DFEH does not bar plaintiffs from bringing their civil action against the defendants here.

As a result, the court will not sustain the demurrers for failure to exhaust administrative remedies. While the court does intend to sustain the demurrers for failure to state a cause of action because the new defendants were not properly substituted into the case in place of the Doe defendants, that defect can be cured by amendment, as discussed above. Therefore, the court intends to sustain the demurrers of Elite, Mimi's North, and Le Duff, with leave to amend.

Le Duff's Motion for Fees and Costs: Finally, the court intends to deny Le Duff's request for its attorney's fees and costs. Le Duff's request for fees and costs is premature, as it has not been dismissed from the case or otherwise established that it is the "prevailing party" for the purpose of fees and costs. Le Duff also has not cited to any statute or contractual language that would support its request for fees here. Therefore, Le Duff has not shown that it is entitled to an award of fees and costs at this time.

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

Tentative Ruling
Issued By: jyh on 7/22/24.
(Judge's initials) (Date)