SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 11/12/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV1903799

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: RON BAKER

PLAINTIFF: KOFI OPONG-MENSAH vs. DEFENDANT: MARIN COMMUNITY COLLEGE DISTRICT, ET AL	

NATURE OF PROCEEDINGS: MOTION – OTHER: RELIEF FROM SETTLEMENT AND ALL CLAIMS

RULING

Plaintiff Kofi Opong-Mensah's motion for relief from settlement is **DENIED.**

Factual and Procedural Background

Plaintiff filed his Complaint against Marin Community College District ("the District") on October 4, 2019, asserting causes of action for discrimination in violation of FEHA, retaliation in violation of FEHA, violation of the California Equal Pay Act, and intentional infliction of emotional distress. Plaintiff filed a First Amended Complaint on January 10, 2020, eliminating his claim for violation of the California Equal Pay Act and adding a claim for unequal pay in violation of FEHA and three new individual defendants. Plaintiff filed a Second Amended Complaint on June 10, 2020, eliminating the unequal pay cause of action. Plaintiff thereafter dismissed the three individual defendants with prejudice. The District filed a motion for judgment on the pleadings as to the First Cause of Action for discrimination, which was granted with leave to amend. On June 4, 2021, Plaintiff filed a Third Amended Complaint asserting causes of action for discrimination and retaliation in violation of FEHA. On August 2, 2023, Plaintiff filed a Fourth Amended Complaint asserting the same two causes of action. On November 13, 2023, the Court granted the District's motion for summary adjudication on the retaliation claim, leaving only Plaintiffs claim for national origin, age and race discrimination.

On July 19, 2024, the parties and their counsel participated in a mandatory settlement conference with panelist Benjamin Graves. After reaching an agreement to settle, the parties signed a settlement agreement and then appeared before this Court. The Court asked the parties if they understood and agreed to the terms, and if they had an opportunity to discuss the agreement with counsel, and the parties both answered that they did. The court signed orders dismissing this case and Case No. CV0002967 with prejudice pursuant to paragraph 5 of the agreement and an

order requiring Plaintiff to obtain a pre-filing order pursuant to paragraph 8a. (Reply Declaration of Kofi Opong-Mensah ("Reply Decl."), Exhs. 1 and 3.) On August 19, 2024, the Court entered an order amending and modifying the prefiling order to reflect the terms of the written agreement.

Plaintiff now moves for relief from the settlement agreement.

Standard

"'[A] valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence, is decisive of the rights of the parties thereto and operates as a bar to the reopening of the original controversy.'" (*Folsom v. Butte County Ass'n of Governments* (1982) 32 Cal.3d 668, 677 [citation omitted].)

"A settlement may be set aside under [Code of Civil Procedure] § 473 where special circumstances exist rendering its enforcement unjust: e.g., where the agreement was entered into through excusable mistake or neglect as to essential facts, or 'surprise' results from a *change in the underlying conditions* that could not have been anticipated." (Edmon & Karnow, California Practice Guide: Civil Procedure Before Trial (The Rutter Group June 2024 Update) § 12:995 [citing *Roth v. Morton's Chefs Services, Inc.* (1985) 173 Cal.App.3d 380] [emphasis in original].)

Discussion

Plaintiff argues that he revoked the settlement agreement in correspondence to the District's attorney on July 23 and 26, 2024 and August 8, 2024. In this correspondence, Plaintiff stated he was revoking the agreement under paragraphs 13, 14 and 17 of the agreement. Plaintiff also argues the recitals in the agreement contain two incorrect dates as to when certain pleadings were filed, the prefiling order was not included as an exhibit to the agreement he signed, and he was drowsy and disoriented and felt under duress when he signed the agreement.

Plaintiff could not unilaterally "revoke" the agreement in his correspondence because the agreement had already been accepted and signed by the parties. There is nothing in paragraphs 13 or 17 that allow Plaintiff to revoke the agreement. While Plaintiff could revoke his agreement as to the release of ADEA claim within 7 days under paragraph 14, the agreement allowed the District to accept this limited revocation while maintaining the enforceability of the rest of the agreement: "If **OPONG-MENSAH** revokes the release of the ADEA claims under this **AGREEMENT**, the **DISTRICT** will have the option to . . . continue to accept the **AGREEMENT**, accepting that there is no release of the ADEA claims . . . ." (Reply Decl., Exh. 3, ¶14.) The District chose to do this. (Declaration of Kathleen Darmagnac, ¶7 and Exh. F.)

Plaintiff has not shown fraud, undue influence, excusable mistake or neglect as to essential facts, or surprise due to a change in underlying conditions that could not have been anticipated. The incorrect dates are not material terms of the agreement; rather, they are provided merely as background information. The fact that the prefiling order itself was not attached as an exhibit to the settlement agreement when it was signed also does not support Plaintiff's request, as the order is clearly described in paragraph 8a of the agreement: "Pre-Filing Court Order. **OPONG-**

MENSAH further agrees that he will not be permitted to file any further lawsuit to assert any **RELEASED CLAIMS** or other claims against the **DISTRICT** or any **RELEASED PARTIES** without first seeking a court order for permission to do so in accordance with Exhibit 'A' hereto." [1] Plaintiff thus knew about and agreed to entry of an order consistent with this paragraph. Indeed, the amended order by the Court tracks this very language: "Kofi Opong-Mensah is barred from **filing any further lawsuit** against **MARIN COMMUNITY COLLEGE DISTRICT OR ANY CURRENT OR FORMER EMPLOYEE OR BOARD MEMBER OF MARIN COMMUNITY COLLEGE DISTRICT** without first obtaining a prior pre-filing order from the Court granting him permission to file." Finally, Plaintiff's vague claims of drowsiness and disorientation are insufficient to set aside the agreement. The transcript of the court proceedings reflects that Plaintiff never raised this issue at the time and that he clearly responded to the Court's questions about his agreement and understanding of the terms of the agreement. (Reply Decl., Exh. 1.) Plaintiff's motion is therefore denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for November, 2024 is as follows:
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov

[1] The settlement agreement defines the "**DISTRICT**" as "**MARIN COMMUNITY COLLEGE DISTRICT**" and the "**RELEASED PARTIES**" as "the **DISTRICT** as well as any other present or further employees, Board members . . . of the **DISTRICT** . . . ."

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 11/12/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2201120

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: RON BAKER

PLAINTIFF: KERRY HURLEY vs. DEFENDANT: LASERAWAY MEDICAL GROUP, INC.	

NATURE OF PROCEEDINGS: MOTION – OTHER: APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT

RULING

The unopposed motion of Plaintiffs for approval of its global resolution of consolidated actions through its Private Attorney General Act settlement with Defendant is **GRANTED.** (Lab. Code, § 2699(l)(2).)

No objection or opposition to the settlement has been received. The Court has reviewed the settlement terms, the proposed releases, and the request for fees and costs, plan for administration and distribution, and LWDA and individual payments. The Court finds the settlement is fair and reasonable and adequate in terms of the statute's purposes. Accordingly, consistent with the standards articulated in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 75-77, the Court approves the settlement.

Absent objection, the Court will sign the proposed orders submitted by Plaintiffs.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 11/12/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2300468

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: RON BAKER

PLAINTIFF: ANDRES VEGA, ET AL and DEFENDANT: ANTONI LUIS ROCHA, ET AL	

NATURE OF PROCEEDINGS: MOTION – PROTECTIVE ORDER; DISCOVERY FACILITATOR PROGRAM

RULING

In order to assist in the facilitation process, these motions are **continued to November 26, 2024 at 1:30 pm in Courtroom A.**

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for November, 2024 is as follows:
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 11/12/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0002063

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: RON BAKER

PLAINTIFF: GLENN AXWORTHY and DEFENDANT: ROGER LA VOIE, ET AL	

NATURE OF PROCEEDINGS: DEMURRER

RULING

The unopposed demurrer of Defendant New Broadway, LLC (erroneously sued as MAC's at 19 Broadway) (hereinafter referred to as "Defendant") to Plaintiff's latest complaint[1] is **SUSTAINED** without leave to amend.

Discussion

Plaintiff brings this action against Roger La Voie ("La Voie")[2] for taking his car without permission. The incident allegedly happened while both Plaintiff and La Voie were at a nightclub in Fairfax owned by Defendant. Plaintiff alleges that unbeknownst to him, La Voie took the keycard to his Tesla while they were both in the bar. La Voie then drove off, although Plaintiff found him and ended up in a physical altercation with him.

Plaintiff previously named Defendant, the owner of the nightclub, in multiple causes of action. However, after Defendant's first demurrer was sustained, Plaintiff filed an amended complaint asserting a single cause of action against Defendant for negligence. Defendant once again demurs contending Plaintiff has failed to state a claim and is uncertain. (Code Civ. Proc. § 430.10, subd. (e) and (f).)

Remarkably, for the second time Plaintiff has failed to timely file an opposition or response to the demurrer. As the Court noted in connection with the previous demurrer, a failure to oppose may be deemed a consent to the granting of the motion. (Cal. Rules of Court, rule 8.54, subd. (c).) Failure to oppose a motion may also lead to the presumption that [plaintiff] has no

[1] The operative amended complaint was filed on September 9, 2024. Although it is entitled "First Amended Complaint," it is really Plaintiff's second amended complaint, having previously filed a "Verified First Amended Complaint" on July 30, 2024.

[2] Plaintiff provides different spellings for this defendant in the complaint.

meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489, disapproved of by *Garcia v. McCutchen* (1997) 16 Cal.4th 469, on other grounds.) Once again Defendant's demurrer is sustained on this basis.

Defendant's demurrer is also well taken on the merits. The Court previously sustained a demurrer to the negligence cause of action because Plaintiff had not adequately pled a "duty" on the part of Defendant. In his amended complaint, Plaintiff alleges that Defendant has a duty based on the "special relationship" between a bar and its customer and that Defendant therefore had a duty to protect him "from foreseeable harm that can arise from the criminal or negligent acts of other patrons, when the bar's staff is aware of such acts." (Complaint, ¶ 54.)

It is certainly correct that a bar proprietor owes a duty to its patrons to take " 'reasonable steps to secure common areas against foreseeable criminal acts of third parties that [were] likely to occur in the absence of such precautionary measures.' [Citation omitted.]" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 244.) The amended complaint, however, does not sufficiently allege facts that would establish that the harm complained of – the alleged taking of Plaintiff's car by La Voie in the parking lot – was the foreseeable result of some negligent act or omission on the part of the bar. Nor does he allege facts (as opposed to conclusions) that Defendant could have prevented the harm through reasonable efforts.

Plaintiff says he was unaware that La Voie had taken his keycard but "this is the only plausible explanation for how the Defendant gained entry to the vehicle." (Complaint, ¶ 12.) Later after Plaintiff recovered his vehicle, he alleges that the bartender "informed him that she had observed Defendant Le Voie [sic] leaning against him and reaching into his left jacket pocket, where the keycard was located." (Complaint, ¶ 16.) From this Plaintiff alleges "[i]f [bartender] had taken appropriate action when she saw La Voie's suspicious behavior, the ensuing chain of events could have been prevented." (Complaint, ¶ 66.) The Court finds these conclusory allegations plainly insufficient to hold Defendant responsible for the subsequent alleged unauthorized use of Plaintiff's car and resulting altercation. The demurrer is therefore sustained.

This is Plaintiff's second opportunity to state a viable claim against Defendant and he has again failed to do so. Plaintiff did not file an opposition or response to the demurrer and therefore has not established that he can plead further facts to state a viable claim. Accordingly, Defendant's demurrer is sustained without leave to amend.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 11/12/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0003282

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: RON BAKER

PLAINTIFF: IVAN KARASEU vs. DEFENDANT: GOLDEN GATE HOME IMPROVEMENT, INC., ET AL	

NATURE OF PROCEEDINGS: DEMURRER – TO COMPLAINT

RULING

The demurrer of defendant Golden Gate Home Improvement, Inc. to the complaint of plaintiff Ivan Karaseu is **SUSTAINED with leave to amend.**

Discussion

First Cause of Action – Disability Discrimination

"The elements of a disparate treatment disability discrimination claim are that the plaintiff (1) suffered from a disability or was regarded as suffering from a disability, (2) could perform the essential duties of a job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability." (*Glynn* v. *Superior Court* (2019) 42 Cal.App.5th 47, 53, fn. 1, citation omitted.) Because Plaintiff's claim is based on the Fair Employment and Housing Act (FEHA), he must specifically plead each requirement. (*Fisher* v. *San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 604.)

Plaintiff fails to allege specific facts showing he was qualified to perform the essential duties of the job at all times, including when he was terminated. He additionally fails to allege specific facts showing what accommodation he requested and Defendant agreed to. Assuming Plaintiff is able to cure these pleading deficiencies, the allegations will be sufficient to show that the termination was an adverse employment action based upon his disability.

Defendant cites *Gomez* v. *American Bldg. Maintenance* (1996) 940 F.Supp. 255 for the proposition that Plaintiff must allege facts showing that a reasonable accommodation was possible. Unlike the circumstances in that case, this case is not at the prima facie showing stage. Further, the prima facie elements as set forth in *Zamora* v. *Security Industry Specialists, Inc.* (2021) 71 Cal.App.5th 1, 31 do not include such a requirement.

Second Cause of Action – Failure to Provide Reasonable Accommodation

"To establish a failure to accommodate claim, [plaintiff] must show (1) [he or] she has a disability covered by FEHA; (2) [he or] she can perform the essential functions of the position; and (3) [defendant] failed to reasonably accommodate [his or] her disability. ..." (*Brown* v. *Los Angeles Unified School District* (2021) 60 Cal.App.5th 1092, 1107.)

As with the previous cause of action, Plaintiff fails to allege specific facts as to what accommodation he requested and Defendant agreed to. Additionally, he fails to allege specific facts showing how Defendant failed to honor the accommodation it had agreed to.

Contrary to Defendant's argument, Plaintiff alleges in this cause of action that he was able to perform the essential functions of the job with reasonable accommodation.

Defendant cites *Nadaf-Rahrov* v. *Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974-975, in support of its argument that "Plaintiff must also show that a reasonable accommodation is possible." That case involved an appeal of an order granting summary judgment; it is not a pleading case.

Third Cause of Action – Failure to Engage in the Interactive Process

Defendant again cites *Nadaf-Rahrov* for the proposition that Plaintiff must plead facts showing that a reasonable accommodation was possible. As already discussed, *Nadaf-Rahrov* is not a pleading case. The court also notes that there is a split of authority as to whether an employee has the burden of showing the availability of a reasonable accommodation. (See California Practice Guide: Employment Litigation (TRG 2024) §§ 9:2347.1-9:2347.3.) Even if the court follows the line of cases which hold that a plaintiff must show that a reasonable accommodation was possible, the plaintiff need not identify that accommodation in his or her pleading. (*Nealy* v. *City of Santa Monica* (2015) 234 Cal.App.4th 359, 379.)

Defendant argues that Plaintiff's allegations indicate it engaged in a good faith interactive process to accommodate Plaintiff's injury for 19 months before it was determined an accommodation was no longer an option." The allegations show (in conclusory and not specific fashion, which Plaintiff needs to make more specific as already discussed) that there was some interactive process initially when Plaintiff requested reasonable accommodations and Defendant accepted Plaintiff's restrictions and request for accommodation. However, Defendant did not honor the accommodations. In *Kaur* v. *Foster Poultry Farms LLC* (2022) 83 Cal.App.5th 320, 347-348, the court wrote:

> "The employee must initiate the process unless his or her disability and the resulting limitations are obvious. Once initiated, the employer has a *continuous obligation* to engage in the interactive process in good faith." "Both the employer and employee have the obligation 'to keep communications open' and neither has 'a right to obstruct the process.' 'Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information that is available, or more accessible, to one party.'"

> "The fact that an employer *took some steps to work with an employee* to identify reasonable accommodations does not absolve the employer of liability… If the employer is responsible for a later breakdown in the process, it may be held liable."
>
> "'Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith.'"

(Citations and brackets omitted.) Plaintiff's allegations show that Defendant was responsible for the breakdown. Although it told Plaintiff there was nothing it could do and that it could not accommodate him, this does not make it true.

Fourth Cause of Action – Retaliation

"To establish a prima facie case of retaliation under FEHA, 'a plaintiff must show "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action."' …" (*Nealy, supra*, 234 Cal.App.4th at 380.)

As already discussed, Plaintiff's allegations are not sufficiently specific with respect to his request for accommodation. Additionally, Plaintiff's allegations indicate he engaged in protected activity in addition to requesting accommodations. (¶54.) To the extent he did so, he needs to offer specific facts. The same is true for his allegation that he suffered personnel "actions." (¶55.)

Fifth Cause of Action – Failure to Prevent/Remedy Discrimination and Harassment

Plaintiff alleges no facts showing that he was harassed or "treated less favorably because of his disability." Further, as already discussed, he needs to amend his discrimination and retaliation causes of action. In *Miller* v. *California Department of Corrections and Rehabilitation* (2024) 105 Cal.App.5th 261, the court wrote:

> …"[A]n actionable claim…is dependent on a claim of actual discrimination: 'Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented.'" Thus, "where…a plaintiff cannot establish a claim for discrimination, the employer as a matter of law cannot be held responsible for failing to prevent same: 'There's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen…'"(Citations and brackets omitted.) "…[R]etaliation is a form of discrimination. …" (*Taylor* v. *City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240, overturned on other grounds by *Jones* v. *Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173-1174.)

Sixth Cause of Action – Violation of Labor Code Section 1102.5

Plaintiff has not alleged specific facts to show how he was forced to work in violation of his accommodations and restrictions.

Defendant's argument that Plaintiff has not identified a statute or regulation that would be violated if Plaintiff participated in the activity is based upon subdivision (c) of section 1102.5. Plaintiff brings this action under subdivision (b).

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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