IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar
Judge: HONORABLE SUSAN GREENBERG
Department 3

400 County Center, Redwood City
Courtroom 2B

Tuesday, May 22, 2018

NOTICE TO ALL COUNSEL

Until further order of the Court, no endorsed-filed "courtesy copy" of pleadings is required to be provided to the Law and Motion Department.

IF YOU *INTEND TO APPEAR* ON ANY CASE ON THIS CALENDAR, YOU MUST DO THE FOLLOWING:

1. **YOU MUST CALL (650) 261-5019 BEFORE 4:00 P.M. TO INFORM THE COURT OF YOUR INTENT TO APPEAR.**
2. **You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308(a)(1).**

Failure to do both items 1 and 2 will result in no oral presentation.

Notifying CourtCall with your intent to appear is not an alternative to notifying the court.

All Counsel are reminded to comply with California Rule of Court 3.1110. The Court will expect all exhibits to be tabbed accordingly.

Case	Title / Nature of Case

9:00

LINE: 1

16-CIV-01825 RYAN S. FANTER VS. DAWN F. WINEINGER, ET AL.

RYAN S. FANTER	CHRISTOPHER B. DOLAN
DAWN F. WINEINGER	JAMES R. PICKER

MOTION TO COMPEL FURTHER

TENTATIVE RULING:

This motion is dropped at the request of the moving party.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00

LINE: 2

16-CIV-01825 RYAN S. FANTER VS. DAWN F. WINEINGER, ET AL.

RYAN S. FANTER	CHRISTOPHER B. DOLAN
DAWN F. WINEINGER	JAMES R. PICKER

MOTION TO COMPEL FURTHER
TENTATIVE RULING:

This motion is dropped at the request of the moving party.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00

LINE: 3

17-CIV-02970 855 MAHLER, LLC VS. BELLA'S ROOFING, ET AL.

855 MAHLER, LLC APRIL S. GLATT
BELLA'S ROOFING

MOTION FOR ORDER
TENTATIVE RULING:

Plaintiff 855 Mahler, LLC's Motion for Post-Judgment Fees and Costs is DENIED WITHOUT PREJUDICE. The Proof of Service states the moving papers were served electronically *or* by first class mail. This is improper because electronic service is not authorized. Code Civ. Proc. Sect. 685.080(b). Further, even if the Court were to assume service was made by mail, the Proof of Service states the papers were addressed to Tranh Nguyen (see also Notice of Motion, providing Notice to Tranh Nguyen). The 12-5-17 Amended Judgment is against defendants Bella's Roofing, Daniel Bella, and Thanh Nguyen.

Further, although the Court does not reach the issue here, Plaintiff's claimed entitlement to attorney's fees is unclear. If Plaintiff chooses to re-file the motion, Plaintiff should better explain how Code Civ. Proc. Sect. 1033.5(a)(10) applies. It appears from the Complaint that Plaintiff sought attorney's fees under Code of Civil Procedure section 1021.5. (See Complaint ¶ 109.) It is unclear, though, how section 1021.5 applies. Citing *Robinson Helicopter Co. Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 992, Plaintiff also appears to argue that any Plaintiff that proves fraud may recover attorney's fees incurred in enforcing a judgment, on the theory that such fees are "out-of-pocket" costs. *Robinson* does not appear to stand for that proposition. *Id*. at p. 993 ("Our holding today is narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." (italics added.)

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00

LINE: 4

17-CIV-03501 NAPEAN CAPITAL GROUP, LLC, ET AL. VS. SELECT PORTFOLIO SERVICING, INC., ET AL.

NAPEAN CAPITAL GROUP, LLC	CARLOS A. ALVAREZ
SELECT PORTFOLIO SERVICING, INC.	THOMAS A. WOODS

HEARING ON DEMURRER
TENTATIVE RULING:

Disposition. The Demurrer to Second Amended Complaint brought by defendants U.S. Bank NA, successor trustee of Bank of America, NA, successor in interest to LaSalle Bank, NA, as trustee on behalf of the WAMU Mortgage Pass-Through Certificates, Series 2007-HY7 ("U.S. Bank") and Select Portfolio Servicing, Inc. ("SPS") is disposed as follows:

1. Quiet Title—OVERRULED
2. Declaratory & Injunctive Relief—OVERRULED
3. Slander of Title—SUSTAINED WITH LEAVE TO AMEND
4. Judicial foreclosure—SUSTAINED WITH LEAVE TO AMEND

The Request for Judicial Notice brought by U.S. Bank and SPS is GRANTED.

The request for leave to amend to add new causes of action brought by Plaintiffs is DENIED WITHOUT PREJUDICE because the request is made in opposition papers rather than in formal noticed motion. In the interest of judicial efficiency, the Court has a preference for having any motion for leave to amend to add new causes of action heard before any demurrers are brought as to the Third and Fourth Causes of Action. Therefore, **an appearance by all parties is necessary to discuss scheduling**—i.e. whether any deadline for amending the Third and Fourth Causes of Action should be extended so that Plaintiffs can first file a formal noticed motion for leave to amend.

Clarification of Parties. For clarity, the Court notes at the outset that this is a case involving a mortgage lien that has been securitized. Due to the complexity of the entity names and capacities contained in the recorded history, this Court will at times merely refer herein to the bank name (i.e. WaMu, Chase, LaSalle Bank, U.S. Bank, Bank of America, etc.) even though the ownership oftentimes described in the documents is in a securitized capacity "as trustee." For example, references will be to "U.S. Bank" rather than to:

U.S. Bank NA,
successor trustee of Bank of America, NA,

successor interest to LaSalle Bank, NA,
as trustee, on behalf of the holders of the WAMU Mortgage Pass-Through Certificates, Series 2007-HY7

These simplified references are not intended to overlook or diminish the more lengthy and complex designations that appear in the allegations and in the recorded documents; they are merely for simplicity.

Request for Judicial Notice. U.S. Bank and SPS request judicial notice of documents that are either: (1) recorded in the Official Records of San Mateo County, (2) filed in either the San Mateo Superior Court or filed in the United States District Court, or (3) a reporter's transcript of official proceedings in the San Mateo Superior Court. These documents are judicially-noticeable pursuant to Evidence Code § 452.

First Cause of Action (Quiet Title). There are two general theories underlying this case:

1. **"Pay Off" Theory**—that the senior lien was "paid off" prior to the origination of the junior lien, and

2. **"Assignment" Theory**—that even if the senior lien had not been "paid off," there is an error in the recorded assignment history such that the parties who conducted the foreclosure no longer were the owners of the senior lien.

When this Court previously ruled on the demurrer brought by U.S. Bank and SPS to Plaintiffs' *First* Amended Complaint, the ruling only addressed the "pay-off" theory.

The "Assignment" Theory. Plaintiffs argue that U.S. Bank and SPS can be held liable for the chain of title issue in this case. Specifically, Plaintiffs allege there is an error in the chain of title. Chase (who obtained the loan from WaMu) initially recorded an assignment to LaSalle Bank in 2009. Years later, in 2015, Chase purported to record a "corrective" document conveying, first from itself in one capacity (as receiver for WaMu) to itself outright, then from itself outright to U.S. Bank. However, according to the recorded documents in place in 2015, the entity holding the interest was LaSalle Bank—not Chase. So, Chase could not re-assign it in 2015. Such a purported transfer is invalid. *Sciarratta v. U.S. Bank Nat'l Assoc.* (2016) 247 Cal.App.4th 552, 564; see also *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 938 ("[t]he borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security.") (emphasis added).

This issue does not appear to have been addressed in the Court's prior ruling on the demurrer to Plaintiffs' *First* Amended Complaint. In their briefing, U.S. Bank and SPS advance the argument that it is appropriate to reconsider issues that could or should have been addressed in a prior

demurrer. There is a split of authority as to whether this is always appropriate. Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group, 2017) ¶ 7:140-7:143. In navigating that split of authority, this Court finds it appropriate to focus on the underlying rationale:

> "… 'The interests of all parties are advanced by avoiding a trial and reversal for defect in pleadings. The objecting party is acting properly in raising the point at his first opportunity, by general demurrer. If the demurrer is erroneously overruled, he is acting properly in raising the point again, at his next opportunity… And, if the demurrer overruled by a different judge, the trial judge is equally free to reexamine the sufficiency of the pleading. [Citations.]"

Carlton v. Dr. Pepper Snapple Group, Inc. (2014) 228 Cal.App.4th 1200, 1210-1211 (citations omitted). As this Court did not rule on the "Assignment" Issue as to U.S. Bank and SPS, and as the allegations now make clear that there was an error in the chain of title to the deed of trust, this Court is "equally free to reexamine the sufficiency of the pleading." *Id.* As such, regardless of the new "pay-off" allegations, the demurrer to the First Cause of Action for Quiet Title cannot be sustained because of the "Assignment" Theory.

The "Pay-Off" Theory. This Court previously granted leave to amend for Plaintiff to specifically plead additional facts linking the pay-off letter to U.S. Bank and SPS. Plaintiff has amended to allege that:

> Plaintiffs are **informed and believe** that, on Plaintiff's behalf, on June 16, 2016, Key Escrow obtained (by facsimile and/or email) from SPS/US Bank, their written response, on SPS letterhead, to said demand which stated that the loan secured by the Wamu Deed of Trust was 'paid in full' (the 'SPS Payoff Letter'). Accordingly, Plaintiffs are **informed and believe** that SPS Payoff Letter, which is on SPS letterhead, was generated by SPS and transmitted by and/or on behalf of SPS/US Bank to Plaintiffs' escrow holder for the Subject Escrow, Key Escrow and this information was transmitted directly to North American and Plaintiffs. Plaintiffs are **informed and believe** that, on Plaintiffs' behalf, Key Escrow conducted further due diligence and obtained a credit report which states that the then-beneficiary of the Wamu Deed of Trust reported that as of October of 2013, the loan the secured by the Wamu Deed of Trust had "$0" (i.e. no monies) past due and that said loan was "paid" (the "Credit Report").

SAC ¶ 7 (underline in original; bold added). U.S. Bank and SPS argue that this is too vague because it is alleged on information and belief. "Where plaintiff is basing his or her allegations on hearsay or surmise, rather than personal knowledge, they should be pleaded 'on information and belief.'" Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group 2017) ¶ 6:225. "However, plaintiff may *not* allege facts 'on information and belief' where he has reason to know them directly…" such as when they are *presumptively* within his knowledge or where he

should know them constructively (such as from public record). Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group 2017) ¶ 6:230-6:232.5, citing *Thompson v. Sutton* (1942) 50 Cal.App.2d 272, 279, also citing *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802. The facts alleged here are essentially the crux of the lawsuit—whether the "pay-off" letter was, in fact, a valid letter from the lender and servicer, or whether it was a forgery by some other entity. Nothing in the facts indicates that this knowledge should be presumptively or constructively within the knowledge of Plaintiffs—which are purported junior lienholders who allegedly relied on the letter as presented to the escrow company. As such, allegations on information and belief are sufficient.

To the extent that U.S. Bank and SPS argue that their interest is "senior" to that of the junior lienholders, the Court does not find this argument applicable. There is no dispute here that, if the alleged interest under the WaMu Deed of Trust was not extinguished via a pay-off, it is the senior lien as it was recorded well before the interest of the junior lienholders. The issue raised here is not seniority—the issue is whether the lien was extinguished.

Second Cause of Action for Declaratory and Injunctive Relief. Defendants argue that the declaratory judgment cause of action is duplicative of the other claims and should thus be dismissed. However, declaratory judgment is an appropriate vehicle for determining the rights and interests between the parties - here, a junior lienholder and a senior lienholder. *Garcia v. Atmajian* (1980) 113 Cal.App.3d 516.

Injunctive relief is not a cause of action, but since it is attached here to underlying viable claims, it is a potential form of relief available.

Third Cause of Action (Slander of Title). There is some confusion with this cause of action because it is unclear *which* documents Plaintiffs are targeting as the source of the slander of title. The documents can be grouped into two categories: (1) the corrective assignment documents in 2015, and (2) the subsequent foreclosure documents (i.e. Notice of Default, etc.).

The second category of documents—i.e. the foreclosure documents—are protected because the law isolates foreclosure-related documents from slander of title claims. *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333. To do so, it creates a privilege for the mailing, publication, and delivery of documents that are statutorily-required. Civil Code § 2924(d).

The first category of documents—i.e. the corrective assignment documents—cannot be the target of a slander of title claim because they were recorded *before* the junior lienholders recorded their purported interest. This appears to be a new argument that was not previously raised or considered by this Court. Specifically, U.S. Bank and SPS are arguing that the corrective assignments were recorded in September 2015 (at which time Plaintiffs had no recorded interest in the property as they had not yet made a loan) while the junior loan was issued in mid-2016. The Court finds this new argument persuasive.

Therefore, because Plaintiffs' slander of title claim cannot target either the foreclosure documents or the corrective assignment documents, Plaintiffs have not sufficiently stated a cause of action for slander of title.

Fourth Cause of Action for Judicial Foreclosure. While it is good practice to include senior lienholders in a judicial foreclosure action, they are not "necessary" parties to a judicial foreclosure action. *Van Loben Sels v. Bunnell* (1901) 131 Cal. 489, 494. Adjudication of a junior lien will not impact a senior lien. *Sumitomo Bank v. Davis* (1992) 4 Cal.App.4th 1306, 1314-1315. For these reasons, U.S. Bank and SPS are not necessary parties for purposes of the judicial foreclosure action.

9:00

LINE: 5

17-CLJ-00126 BUSINESS ALLIANCE INSURANCE COMPANY VS. JOHN RYAN WARD, ET AL.

BUSINESS ALLIANCE INSURANCE COMPANY MARK R. MITTELMAN
JOHN RYAN WARD

MOTION TO SERVE
TENTATIVE RULING:

Plaintiff's Motion to Serve Defendant by Publication is granted.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to CRC Rule 3.1308(a)(1), adopted by Local Rule 3.10. If the tentative ruling is uncontested, moving party is directed to prepare, circulate, and submit a written order reflecting this Court's ruling verbatim for the Court's signature, consistent with the requirements of CRC Rule 3.1312. The proposed order is to be submitted directly to Judge Susan L. Greenberg, Department 3.

9:00

LINE: 6

17-CLJ-02321 EDGES ELECTRICAL GROUP, LLC VS. FEDERAL SOLUTIONS GROUP, INC., ET AL.

EDGES ELECTRICAL GROUP, LLC — GLEB FINKELMAN
FEDERAL SOLUTIONS GROUP, INC.

MOTION FOR ORDER
TENTATIVE RULING:

Counsel for moving party is directed to appear and show proof that Old Republic deposited the interpleaded funds in accordance with this Court's order, dated February 2, 2018. Upon a showing that the funds were deposited and are currently held by the Court, the motion will be granted.

9:00

LINE: 7

17-UDL-01053 WINSTON CHOW, ET AL. VS. PIZZA PANDA, LLC, ET AL.

WINSTON CHOW	ROBERT N. WEAVER
PIZZA PANDA, LLC	SOYEUN D. CHOI

MOTION TO SET ASIDE DEFAULT/JUDGMENT

TENTATIVE RULING:

Defendants PIZZA PANDA LLC; JENEFER CAURAUGH; and ADAM RIFKIN's Motion to Set Aside Default and Default Judgment is DENIED.

As a procedural matter, Defendants have failed to include "a copy of the answer or other pleading proposed to be filed" with their moving papers, and thus the motion "shall not be granted." Code Civ. Proc. § 473(b).

Substantively, Defendants fail to demonstrate that default and default judgment were entered against them as a result of their "mistake, inadvertence, surprise, or excusable neglect". Plaintiff's counsel submits a declaration stating that Defendants were provided with notice at every stage of the proceedings, including before the defaults were taken. Reviewing the Court's records, Plaintiff's request for entry of default judgment was duly served on Defendants, yet no opposition was raised.

"Forgetfulness, or intentional disregard of service are not 'mistake, inadvertence, surprise or excusable neglect' as those terms are used in this section, and they do not require the court to set aside default." *Price v. Hibbs* (1964) 225 Cal.App.2d 209, 217. "It is the duty of every defendant who desires to resist a plaintiff's action to take timely and adequate steps to avoid an undesirable judgment. He must exercise the same degree of diligence as a man of ordinary prudence usually bestows upon his important business affairs." *Beall v. Muson* (1962) 204 Cal.App.2d 396, 400.

Defendants' motion is therefore denied.

Plaintiff's request for attorney's fees and costs is GRANTED pursuant to Section 32 of the parties' Lease, attached as Exhibit B to Plaintiff's Declaration, in the amount of $2,560.00, which shall be paid within 14 calendar days of the date of this Order.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:00
LINE: 8
CIV535228 DALE WILSON VS. TYCO ELECTRONICS CORPORATION, ET AL.

DALE WILSON	CHAIM SHAUN SETAREH
TE CONNECTIVITY NETWORKS, INC.	CHERYL D. ORR

MOTION FOR SUMMARY JUDGMENT
TENTATIVE RULING:

The Motion of Defendants Tyco Electronics Corporation ("Tyco"), TE Connectivity Networks, Inc. ("TE") and David Keen ("Keen") (also collectively "Defendants") for Summary Judgment, or in the alternative, Summary Adjudication, to the Complaint of Plaintiff Dale Wilson ("Plaintiff"), is ruled on as follows:

(1) The motion by TE is DROPPED as moot. Plaintiff's request for dismissal of TE from this action was entered on November 22, 2016.

(2) The motion to the First Cause of Action for Age Discrimination against Tyco is GRANTED. Tyco raises five issues in support of its motion to this claim, which are identified as Issue nos. 1-5 in Defendants' Notice of Motion.

For Issue nos. 1-3, Tyco meets its burden here of presenting evidence that Plaintiff cannot establish: (1) he was performing satisfactorily at the time of his termination (Issue no. 1), and (2) there is a causal connection between Plaintiff's age and his termination (Issue no. 2). (See Defendants' Undisputed Material Facts nos. 6-8, 10-14.) Tyco also shows it had a legitimate, non-discriminatory reason for terminating P (Issue no. 3). (See Defendants' Undisputed Material Facts nos. 6-8, 10-14.) Plaintiff's immediate supervisor, Ron Green ("Green"), gave Plaintiff a "below expectations" rating on the behavior section of his annual performance review on September 17, 2012. (See Defendants' Undisputed Material Facts no. 6-7.) Thereafter, Green decided to terminate Plaintiff for inappropriate behavior in light of three incidents, for which Plaintiff received two prior written warnings. (See Defendants' Undisputed Material Facts nos. 8, 10-14.) Tyco therefore meets its burden as to Issue Nos. 1, 2 and 3.

For Issue no. 4 (lack of evidence regarding pretext) and no. 5 (no pretext because Plaintiff was not replaced by a younger employee), this is not a part of Tyco's burden on summary judgment. On summary judgment, if an employer provides evidence establishing a legitimate, non-discriminatory reason for the adverse employment action, the employee must then offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. California Dept. Social Services* (1997) 57

Cal.App.4th 997, 1004-1005.) Thus, the motion as to Issue nos. 4 and 5 is DENIED.

Accordingly, the burden shifts to Plaintiff to raise a triable issue of material fact as to Issue nos. 1, 2 and 3. In opposition, Plaintiff claims that Dave Keen ("Keen"), a manufacturing floor supervisor who was not Plaintiff's supervisor, told Plaintiff that Alan Lanzel ("Lanzel"), a 27-year old manufacturing floor supervisor, described Plaintiff as a "dinosaur." (See Plaintiff's Additional Facts nos. 43, 44; see also Plaintiff's Depo., 49:16-17.) Also, Plaintiff, who had not received a written reprimand in roughly 37 years of employment, was written up three times in a short period (April 10, 2013; July 18, 2013; September 19, 2013) after Lanzel became the manufacturing floor supervisor at the end of 2012. (See Defendants' Undisputed Material Facts nos. 8, 12, 14; Plaintiff's Additional Facts no. 45.) In August 2013, a co-worker, BJ, told Plaintiff that Keen tried to bait Plaintiff by calling BJ on his cell phone while BJ was in a meeting with Plaintiff so Plaintiff could be written up. (Plaintiff's Additional Fact no. 46.) Plaintiff speculated that Lanzel put Keen up to it. (Plaintiff's Depo., p.20.)

This evidence is insufficient to raise a triable issue of material fact as to a causal connection between age discrimination and Plaintiff's termination. Plaintiff admits that Keen never made any comments about Plaintiff's age, other than telling Plaintiff about the dinosaur comment made by Lanzel. (See Defendants' Undisputed Material Fact no. 22; Plaintiff's Response to Fact no. 22.) Plaintiff also testified that the only person he believed discriminated against him based on his age was Lanzel. (Plaintiff's Depo., p.199:24-200:3.) Further, Plaintiff had no idea who was involved in the decision to terminate his employment. (Plaintiff's Depo., 199:21-23.) The evidence shows that Plaintiff's performance reviews, the written warnings leading up to Plaintiff's termination and the decision to terminate Plaintiff's employment were made by Green. (See Defendants' Undisputed Material Facts nos. 5-8, 10-14; see Plaintiff's Response to Fact nos. 5-8, 10-14.) Green decided to terminate Plaintiff, after consulting with Human Resources, because of Plaintiff's inappropriate behavior. (See Green Decl.) At the time of Plaintiff's termination, Green was 50 years old. (Green Decl.¶ 7.) Thus, no evidence has been presented to raise a triable issue of material fact as to a causal connection between claimed age discrimination by Lanzel and Green's decision to terminate Plaintiff's employment.

Plaintiff also fails to present sufficient evidence to raise a triable issue as to whether Plaintiff's termination was a pretext for age discrimination. Plaintiff argues that "[a]n age-based remark not made directly in the context of an employment decision or uttered by a non-decision-make may be relevant, circumstantial evidence of discrimination." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 539.) A stray remark alone however, may not create a triable issue of age discrimination. (*Id.* at 541.) When combined with other evidence of pretext though, an otherwise stray remark may create an ensemble that is sufficient to defeat summary judgment. (*Id.* at 542.) Here, Plaintiff identifies the dinosaur remark made by Lanzel, but has not identified any other evidence sufficient to raise a triable issue as to pretext.

(3) The motion to the First Cause of Action for Age Discrimination and Second Cause of Action for Wrongful Termination in Violation of Public Policy against Keen is GRANTED. (See Defendants' Notice of Motion, Issue nos. 6, 12.) Supervisors may not be sued individually under FEHA for discriminatory acts or for wrongful discharge in violation of public policy. (*Reno v. Baird* (1998) 18 Cal.4th 640.) Plaintiff concedes that these claims necessitate that Keen be an

employer to be held liable for them. (See Plaintiff's Opposition, p.12:27-28.)

(4) The motion to the First Cause of Action for Harassment against Tyco and Keen is GRANTED. Defendants raise four issues in support of its motion to this claim, which are identified as Issue nos. 7-10 in Defendants' Notice of Motion.

In contrast to discrimination and wrongful termination, a supervisor may be held individually liable for harassment. (See *Reno v. Baird* (1998) 18 Cal.4th 640, 647.)

To establish a prima facie case for harassment based on age, plaintiff must establish: (1) he was "subjected to verbal or physical conduct" because of his age, (2) "the conduct was unwelcome," and (3) "the conduct was sufficiently severe or pervasive to alter the conditions of [plaintiff's] employment and create an abusive working environment." (*Juell v. Forest Pharmaceuticals, Inc.* (E.D. Cal. 2006) 456 F.Supp.2d 1141, 1157.)

Defendants assert that Plaintiff cannot establish any conduct by Defendants that was sufficient severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive working environment. (See Defendants' Notice of Motion, Issue nos. 7, 9.) Acts of harassment cannot be occasional, isolated, sporadic or trivial, but rather plaintiff must show a concerted pattern of harassment of a repeated, routine of a generalized nature. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465.) The "severe or pervasive" standard is not a mathematically precise test, and several factors are to be considered, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22-23.) The plaintiff "must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee." (*Aguilar v. Avis Rent A Car Sys. Inc.* (2006) 21 Cal. 4th 121,130-131.)

Plaintiff testified that the alleged harassment includes: (1) BJ told Plaintiff that Keen called BJ twice during a meeting led by Plaintiff to try and get a rise out of Plaintiff (Plaintiff's Depo., pp. 16:14-24; 19:16-20:29); (2) Keen said that Plaintiff lied about sending an email when Plaintiff refused to provide Keen a copy of the email that Plaintiff claimed he sent (Plaintiff's Depo., pp.200:22-201:11; (3) Keen avoided Plaintiff and his phone calls, which Plaintiff felt was because Keen was upset that Plaintiff interrupted a Wii game Keen was playing with Lanzel (Plaintiff's Depo. p.68:16-25); and (4) Keen would respond to Plaintiff with a grunting sound and not provide an intelligent response (Plaintiff's Depo., p.71:19-23). (DUMF no. 21.) These claimed acts are not frequent or discriminatory though, are not physically threatening or humiliation, and do not support conduct that would have interfered with a reasonable employee's work performance and seriously affected the psychological well-being of a reasonable employee. Thus, Defendants meet their burden of showing that Plaintiff cannot establish sufficient severe or pervasive conduct to alter the conditions of Plaintiff's employment and create an abusive working environment.

In opposition, Plaintiff responds that in addition to the incident in which Keen called BJ during a

meeting to bait Plaintiff into an outburst (PAF no. 46), the harassing conduct is: (1) Lanzel in conversations to Keen and Perry Peterson ("Peterson"), another supervisor, described Plaintiff as a dinosaur (PAF no. 44),(2) Plaintiff was written up three times in quick succession after Lanzel became the managing floor supervisor (PAF no. 45), and (3) Lanzel observed at least in part the incident in which P was given a written warning for raising his voice while speaking to a co-worker (PAF no. 50).

Plaintiff's evidence is insufficient to raise a triable issue of material fact as to whether Defendants' conduct was sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive working environment. "[T]he ordinary tribulations of the workplace, such as the sporadic use of abusive language,[age]-related jokes, and occasional teasing" is not actionable harassment." (*Etter, supra* at 464.) Mere rude, inappropriate, and offensive behavior is not enough to prove harassment. (*Mokler v. County of Orange* (2007) 157 Cal. App. 4th 121,145.) Rather, harassment is proven when the workplace is "permeated with 'discriminatory intimidation, ridicule and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" (*Id.*) Even if Lanzel's dinosaur remarks were age-related and rude, offensive and inappropriate, these remarks were not made directly to Plaintiff and are not enough to support a workplace permeated with discriminatory intimidation, ridicule and insult. Further, Plaintiff speculates that because he was written up three times in six months after Lanzel became a supervisor that these write ups must be attributable to Lanzel, but there is no evidence showing that Lanzel was connected to the written warnings and termination that came from Green. Plaintiff also fails to present sufficient evidence to raise a triable issue of fact as to severe or pervasive conduct by Keen.

Since the court grants Defendants' motion to the harassment claim based on Issue nos. 7 and 9, the court does not reach Defendants' remaining issues as to this claim. (See Defendants' Notice of Motion, Issue nos. 8 and 10.)

(5) The motion to the Second Cause of Action for Wrongful Termination in Violation of Public Policy against Tyco is GRANTED. (See Defendants' Notice of Motion, Issue no. 11.)

"To prevail on a claim for wrongful termination in violation of public policy, a plaintiff must show that (1) the plaintiff was employed by the defendant, (2) the defendant discharged the plaintiff, (3) a violation of public policy was a motivating reason for the discharge, and (4) the discharge harmed the plaintiff." (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1343.)

Defendants argue that this claim for wrongful termination of public policy fails against Tyco because Plaintiff's age discrimination claim fails. (See *Le Bourgeois v. Fireplace Mfg., Inc.* (1998) 68 Cal.App.4th 1049, 1060, fn.14 (holding that where there is no evidence of a violation of FEHA, a cause of action for wrongful termination in violation of public policy cannot stand).) In other words, Plaintiff cannot establish the element that a violation of public policy, i.e. age discrimination, was a motivating reason for Plaintiff's discharge. Defendants rely on the same evidence as with the First Cause of Action to meet their burden as to this claim. (See Defendants' Undisputed Material Fact nos. 5-15.)

In opposition, Plaintiff claims that FEHA's age discrimination remedies are not exclusive, and do not bar a tort claim for wrongful discharge in violation of the public policy against age discrimination, citing to *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885. (See Plaintiff's Response to Fact no. 31.) Plaintiff seems to misunderstand Defendant's argument though. Defendants are not arguing that Plaintiff cannot bring a wrongful termination claim based on age discrimination, but rather that this wrongful termination claim fails for the same reasons as Plaintiff's age discrimination claim. Plaintiff fails to raise a triable issue of material fact as to this claim.

(6) The motion to the Third Cause of Action for Intentional Infliction of Emotional Distress against Tyco and Keen is GRANTED. Defendants raise five issues in support of its motion to this claim, which are identified as Issue nos. 13-17 in Defendants' Notice of Motion.

Defendants first argue that this claim is preempted by the workers' compensation exclusivity rule. (See Defendants' Notice of Motion, Issue no. 13.) However, a claim for intentional infliction of emotional distress is not barred by the workers' compensation exclusive remedy provision where it is based on discrimination or harassment. (See *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1492; see also *Fisher v. San Pedro Hospital* (1989) 214 Cal.App.3d 590, 618.)

Defendants also argue that Plaintiff cannot establish he was subjected to any extreme or outrageous conduct by Defendants. Conduct is extreme and outrageous when it exceeds all bounds of decency usually tolerated by a decent society, and is of a nature which is especially calculated to cause, and does cause, mental distress. (*Fisher, supra*, 214 Cal.App.3d at 617.) Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. (*Id.*) Here, similar to the reasons discussed above granting this motion to Plaintiff's claims for discrimination and harassment, Defendants' evidence supports that Plaintiff cannot establish such extreme or outrageous conduct by Keen or Tyco. (See Defendants' Undisputed Material Facts nos. 16, 17, 21, 22.) Plaintiffs' evidence in opposition that Lanzel called Plaintiff a dinosaur to Keen and Peterson is insufficient to raise a triable issue of material fact that Defendants subjected Plaintiff to extreme and outrageous conduct. (See Plaintiff's Additional Fact no. 44.) Also, to the extent that Plaintiff is claiming he was written up three times in quick succession after Lanzel became a supervisor (Plaintiff's Additional Fact no. 45), this evidence is also insufficient to raise a triable issue as to extreme and outrageous conduct by Defendants because Green is the one who wrote up Plaintiff and made the decision to terminate Plaintiff. Plaintiff presents no evidence that Lanzel or Keen were involved in the decisions to write up Plaintiff or terminate him.

Since the court grants Defendants' motion to this claim based on Issue nos. 14 and 16, the court does not reach Defendants' remaining issues as to this claim. (See Defendants' Notice of Motion, Issue nos. 15 and 17.)

(7) Accordingly, Defendants' Motion for Summary Judgment is GRANTED. Because the motion is granted as to all causes of action in the Complaint, Defendants' motion to the claims for

punitive damages is moot. (See Issue nos. 18, 19 and 20.)

(8) Defendants' Evidentiary Objections are OVERRULED based on failure to comply to comply with California Rules of Court Rule 3.1354. Rule 3.1354 provides for objections to be made to evidence, not to statements in an opposition. Further, such evidentiary objections are required to be in either of the two formats set forth in Rule 3.1354. As indicated in Defendants' header, Defendants' objections are not to evidence, but instead are "OBJECTIONS TO FACTUAL STATEMENTS IN THE BRIEF NOT SUPPORTED BY THE EVIDENCE CITED." (See Defendants' Evidentiary Objections, p.2:5-6.)

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

9:01

LINE: 9

17-CIV-04008 YOSHIKO YAMADA VS. WILLOW/GRAND NORTH CONDOMINIUM ASSOCIATION, ET AL.

YOSHIKO YAMADA	STEVEN C. WILLIAMS
WILLOW/GRAND NORTH CONDOMINIUM ASSOCIATION	EMILY D. BERGSTROM

HEARING ON DEMURRER
TENTATIVE RULING:

This matter is continued to June 12, 2018 at 9 am in the Law and Motion Department pursuant to Stipulation and Order signed 5-18-18.

If the tentative ruling is uncontested, it shall become the order of the Court, pursuant to Rule 3.1308(a)(1), adopted by Local Rule 3.10, effective immediately, and no formal order pursuant to Rule 3.1312 or any other notice is required as the tentative ruling affords sufficient notice to the parties.

POSTED: 3:00 PM