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ANGELIKI A. KANAVOU

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

ANGELIKI A. KANAVOU, an individual

Plaintiff,

vs.

CHAPMAN UNIVERSITY, a California corporation, and DOES 1-25, inclusive,

Defendants.

CASE NO. 30-2016-00840960-CU-CO-CJC

PLAINTIFF ANGELIKI A. KANAVOU'S MEMORANDUM IN OPPOSITION TO DEFENDANT CHAPMAN UNIVERSITY'S APPLICATION TO SHORTEN TIME FOR HEARING; OPPOSITION TO DEFENDANTS' MOTION TO AMEND ITS ANSWER TO PLAINTIFF'S COMPLAINT

Hearing Date:	June 13, 2017
Time:	9 a.m.
Judge:	Hon. Gregory H. Lewis
Dept.:	C26
Action Filed:	March 15, 2016
Trial Date:	July 10, 2017
Reservation:	Ex-parte

I. SUMMARY

Plaintiff Angeliki A. Kanavou opposes Defendant Chapman University's last-minute attempt to amend its Answer, on the eve of trial, to include newly raised affirmative defenses. At this juncture in the litigation, less than one month before trial, it is unduly and unfairly prejudicial to the Plaintiff to spring brand new defense theories and facts upon the Plaintiff. Moreover, these defenses are without merit, because the contract and the contractual term that the Defendants have suddenly "discovered" are inapplicable in this case. The contract that Defendants now want to introduce covers completely different subject matter than the contract under which Plaintiff has brought suit, and therefore Defendants' newly proffered contract has no bearing on this case.

II. ARGUMENT

1. Granting Defendants' leave to amend at the final hour would be unduly and unfairly prejudicial to the Plaintiff, because Defendants seek to inject new facts, issues and legal theories into the case without good justification.

"The allowance of amendments … have been allowed with great *liberality,* and no abuse of discretion is shown, **unless** by permitting the amendment new and substantially different issues are introduced in the case or **the rights of the adverse party prejudiced**." *Trafton v. Youngblood,* 69 Cal. 2d 17, 31, (1968). [Emphasis and italics added.]

Not surprisingly here, Defendants focus on the "liberality" part of the equation, while downplaying the "prejudice" part. Correspondingly, Defendants don't state the rule for prejudice or analyze it beyond conclusory statements claiming no prejudice.

Garcia v. Roberts offers a framework for analyzing untimely amendments to pleadings:

(1) whether facts or legal theories are being changed and

(2) whether the opposing party will be prejudiced by the proposed amendment.

"Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses." *Garcia v. Roberts,* 173 Cal. App. 4th 900, 910 (2009). *Garcia* involved a request to amend *during* trial, but the same framework can be applied to a request to amend on the eve of trial, as is the case here. As the court summed up, "the basic rule applicable to amendments to conform to proof is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded." *Id.* [Citations omitted.]

In this case, Defendants seek to amend in order to add new legal theories AND new factual elements – i.e., the March 28, 2013 contract between the Plaintiff and Defendants, entitled "Faculty Agreement for Full-Time Non-Tenure Track Terminal Year Appointment." However, the 2013 contract is not the contract upon which the Plaintiff brought this action. Her claims do not arise from that contract. Rather, Plaintiff brought her claims under the parties' March, 31, 2011 contract, entitled "Faculty Agreement for Full-Time Tenure-Track Appointment." Accordingly, this contract was attached to the Plaintiff's original complaint. The Plaintiff never alleged breach of her 2013 "Terminal Year" contract, nor did she amend her complaint to include the Terminal Year contract. Thus, Defendants' attempted final-hour amendment is not "based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded." (*Id.)*

At the outset, Defendants' proposed amendments fail the test.

2. Granting Defendants' leave to amend after the close of discovery would be unduly and unfairly prejudicial to the Plaintiff.

The *Garcia* court noted that "depriving [a party] of the opportunity to obtain discovery on that issue" is an important factor in analyzing prejudice. That case involved a lease-option contract. The prospective purchaser sued the sellers for breach of an oral contract, but the purchaser later sought to amend her complaint to allege breach of written contract. However, during the course of litigation, the plaintiff in that case consistently denied the existence of any agreement other than the alleged oral loan agreement. In reliance on plaintiff's consistent claims, defendants only prepared to defend the alleged oral agreement and conducted their discovery accordingly. *Id.* at 908.

"In support of their argument regarding prejudice, defendants further contend that as a result of plaintiff's deposition testimony and in reliance thereon, they did not pursue further discovery from plaintiff to defend a potential claim under the lease-option agreement, such as asking plaintiff at his deposition … what specific terms (if any) were breached by defendants, and whether the written lease-option agreement was intended to replace the oral agreement." *Id.* at 911.

Garcia is closely analogous with the case at hand (although the moving parties are reversed). Here, at the deposition of Defendants' agent, Daniele Struppa, Plaintiff introduced a copy of the 2011 Tenure Track contract – and only that contract. Plaintiff and Defendant discussed this contract at length. Struppa Dep. 37-42; 127-131. Neither Struppa nor his counsel ever attempted to assert the applicability of the Terminal Year contract. Similarly, at the Plaintiff's deposition, Defendants did not produce the Terminal Year contract as an exhibit or attempt to assert its applicability. Furthermore, in its motion for summary judgment, Defendants did not include the Terminal Year contract as the basis for any of its contracts defense theories. Throughout this litigation – for more

than a year – Defendants have had every opportunity to bring up the Terminal Year contract and assert it. But they have not, until now.

Discovery in this case has long since closed. The trial was originally scheduled for April 17, and discovery closed March 18, 2017. Trial is now scheduled to begin July 10. The Plaintiff is making her final preparations. Like the defendants in *Garcia*, the Plaintiff here has no opportunity to pursue discovery or depose Defendants regarding the Terminal Year contract or test the Defendants' theories. And like the defendants in *Garcia*, the Plaintiff here would be substantially prejudiced by the denial of her discovery if Defendants are allowed to suddenly change the game at this juncture.

3. The 2013 'Terminal Year' contract between the Plaintiff and Defendants has not been the subject of contention heretofore because it is irrelevant to this case.

The first of Defendants' new substantive defense theories is novation. "Novation is made …by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." Cal. Civ. Code § 1531. Whether new agreement amounts to novation is question of intent. *O'Reilly v. Johnson*, Cal.App.2d 729 (1949). Intent of parties at time of creation of contended new obligation is controlling factor as to whether a new obligation has been substituted for an existing one. *Aetna Cas. & Sur. Co. of Hartford, Conn., v. Bettens*, 111 F.Supp. 111 (S.D.Cal.1953).

To begin with, the two contracts in question cover very different subject matter and involve different duties and obligations. This is reflected in the titles of the two documents. The contract under which this case was brought is entitled "Faculty Agreement for Full-Time Tenure-Track Appointment." Defendants' come-lately contract is entitled "Faculty Agreement for Full-Time Non-Tenure Track Terminal Year Appointment." The first contract sets forth a six-year term for a tenure-track faculty member, whereas the second contract is merely a short-term contract for two

teaching semesters. The first contract contains the key duty/condition of "scholarship or creative activity" (i.e., "publish or perish"), whereas the second contract contains no such duty and is basically the description of a temporary teaching job. Indeed, it is the first contract's duty/condition of scholarship that Defendants' primarily justified their decision to terminate Plaintiff's employment (and impose forfeiture upon her). This is where Plaintiff's cause of action arises.

Defendants now discover an integration clause in the Terminal Year contract, which states, "This Agreement supersedes any and all prior agreements, either oral or in writing, between the parties with respect to the employment of Faculty Member by the University." Baez Decl., Exh.1., ¶ 9. At most, this clause would apply to some prior Terminal Year contract, and not a long-term Tenure Track contract – with all of the associated duties and provisions.

More importantly, the intent of the Terminal Year contract may be found in a clause that the Plaintiff herself inserted above paragraph 9: "Nothing in this agreement waives any rights I may have concerning the decision to terminate my tenure track employment." *Id.* The Plaintiff labeled this as paragraph 12. Additionally, above this inserted text, the Plaintiff crossed out four paragraphs that purport to waive her right to a civil trial. Plaintiff's intent is clear: She is reserving her rights to bring a claim under her Tenure Track contract – and she waives none of her rights under it.

As for the Defendants' intent, the fact that they only now bring up the Terminal Year contract most obviously indicates that they had no intent to be bound by that contract beyond its subject matter – a short term teaching contract.

Defendants' last-ditch attempt to cancel out Plaintiff's Tenure Track contract – and extinguish her claims under it – by pasting in a boilerplate integration clause from the Terminal Year contract is illogical and counter to the intent of the contracting parties. There is no syllogism between these two contracts. Most importantly, the Plaintiff made her intent clear, in her own

words, in the Terminal Year Contract. No waiver of rights. Based on this plainly expressed intent, there can be no mutual rescission, no accord and satisfaction, no novation or any of the Defendants' other newfound theories.

4. Defendants' claim of 'inadvertent' omission of affirmative defenses relating to the Terminal Year contract is not plausible.

The Terminal Year contract has been known to the parties since they signed it, and it has been known to the parties' counsel since this litigation began. Nonetheless, Defendants' counsel chose not to produce this contract or discuss it with the Plaintiff at her deposition; Defendants' counsel made no attempt to interject the Terminal Year contract into the deposition of Daniele Struppa, and they did not assert or argue it in their motion for summary judgment.

Defendants now claim "the foregoing affirmative defenses were inadvertently absent from the answer." Def.'s Mem, 4. This statement seems to suggest that by some scrivener's error, these defenses were omitted from Defendants' Answer; but otherwise, the Defendants have always been affirmatively defending based on the Terminal Year contract. Following this chain of inferences, the newly proposed amendments merely catch up with the existing state of affairs. Alternately, if Defendants weren't affirmatively defending on these bases, they were meaning to do that. … But somehow, during the past 15 months of litigation, and with constant reminders, they didn't get around to it, until now.

The "inadvertence" assertion does not hold water. At this point, any inadvertence in Defense counsel's handling of this case should be an issue between counsel and their clients, not this court. But instead, Defendants' now seek a free pass from the court, excusing themselves, and prejudicing the Plaintiff.

Therefore, the Plaintiff respectfully asks this court to deny the Defendants' motion.

Dated: June 12, 2017

By: 

Bruce T. Murray

Attorney for Plaintiff, Angeliki A. Kanavou