UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FRANKIE ANTOINE,

Plaintiff,

v.

CAPITOL DEL GRANDE 2, INC., et al.,

Defendants.

Case No. 17-CV-00542-LHK

ORDER RE: PUNITIVE DAMAGES; BIFURCATION; JOINT LIABILITY

On April 18, 2018, the Court requested briefing from the parties "regarding (1) the availability of punitive damages, and (2) whether DGDG Management and Capitol Chevrolet are liable as an integrated enterprise or a joint employer, or on an alter ego theory." ECF No. 79 at 6.

On April 23, 2018, Plaintiff filed his opening brief. ECF No. 83. On April 27, 2018, Defendants filed their opposition. ECF No. 87. On April 30, 2018, Plaintiff filed his reply. ECF No. 96. Having reviewed the parties' briefing, the case law, and the record in this case, the Court finds as follows: (1) Plaintiff may pursue his claim for punitive damages at trial; (2) bifurcation of the trial is not required; (3) Defendants have waived a "good faith" defense; (4) Plaintiff cannot pursue an integrated enterprise theory of joint liability; (5) Plaintiff cannot pursue an alter ego theory of joint liability; (6) Plaintiff can pursue a joint employer theory of joint liability. The Court

now turns to the substance of the parties' briefing.

First, the Court finds that Plaintiff is entitled to claim punitive damages. As Plaintiff points out, Defendants do not dispute that punitive damages are available, but rather assert that Plaintiff has not presented enough evidence to justify awarding them. That is a question for the jury, and will therefore be resolved at trial.

Second, the Court finds bifurcating evidence of financial condition from the liability phase of trial is not require and therefore will not bifurcate the trial. All issues, including liability for compensatory damages, liability for punitive damages, and the appropriate amount (if any) of compensatory and punitive damages will be argued during trial. This will include any admissible evidence of the assets of DGDG Management, LCC ("DGDG") and Defendant DGDG 4, LLC ("Capitol Chevrolet").

Defendants have previously argued that bifurcation is required, relying on the statement in California Civil Code Section 3295(d) that "on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294." However, the Court is not required to apply Section 3295(d). The Ninth Circuit has affirmed a district court's decision not to apply Section 3295(d) where the district court concluded that "bifurcation was a procedural issue and this was a diversity jurisdiction case" and that federal law controlled. *Hayes v. Arthur Young & Co.*, 34 F.3d 1072, *7 (9th Cir. 1994) (Unpub. Disp.). Therefore, the district court "exercised its discretion under Fed. R. Civ. P. 42(b) to permit the jury to hear evidence of [the defendant's] net worth and income before the start of its deliberations." *Id.* Specifically, the Ninth Circuit held that the district court (1) did not err in applying Federal Rule of Civil Procedure 42 instead of Section 3295(d), and (2) did not abuse its discretion under Rule 42(b) by "permit[ting] the jury to hear evidence of [the defendant's] net worth and income before the start of its deliberations." *Id.* Thus, the Court will follow the same approach that the Ninth Circuit affirmed in *Hayes*. *See Ohio Six Ltd. v. Motel 6 Operating L.P.*, 2013 WL 12125747, at *4 (C.D. Cal. Aug. 7, 2013) (citing *Hayes*

in support of decision not to bifurcate damages and liability).[1]

Third, the Court finds that Defendants have waived their "good faith" affirmative defense to punitive damages. The Court has repeatedly explained that affirmative defenses not pleaded in the answer are waived. *See Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005) ("Under the Federal Rules of Civil Procedure, a party, with limited exceptions, is required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived."). Defendants did not plead this defense in the answer. Indeed, Defendants did not even raise this defense in their motions in limine. Defendants have therefore waived the good faith affirmative defense. The Court also finds that Plaintiff would be prejudiced if Defendants were allowed to pursue this defense, given that Defendants waited until the eleventh hour to raise it.

Fourth, the Court finds that Plaintiff cannot show that DGDG is jointly liable with Capitol Chevrolet under an integrated enterprise theory. Thus, Plaintiff may not argue this theory at trial. To qualify as an "employer" under Title VII, an employer must have at least 15 employees. *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 928–29 (9th Cir. 2003). The integrated enterprise test allows plaintiffs with Title VII claims against employers who fall under the 15 employee threshold to "assert that the employer is so interconnected with another employer that the two form an integrated enterprise, and that collectively this enterprise meets the 15–employee minimum standard." *Id.* at 929. The integrated enterprise test therefore "does not determine joint liability … , but instead determines whether a defendant can meet the statutory criteria of an 'employer' for Title VII applicability." *Id.*; *Nowick v. Gammell*, 351 F. Supp. 2d 1025, 1034 (D. Haw. 2004) (reaching same conclusion). Defendants do not dispute that Capitol Chevrolet "employs at least 15 employees. Because this places [Capitol Chevrolet] within Title VII's statutory coverage as an

[1] This case differs from *Hayes* in that the Court is hearing Plaintiff's state law claim under supplemental jurisdiction rather than diversity jurisdiction. However, that distinction does not change the ultimate result: "Under the *Erie* doctrine, federal law governs the procedural aspects of summary judgment in a diversity case, a doctrine that has been extended to cases in which a federal court exercises supplemental jurisdiction over a state law claims." *Ortiz v. Georgia Pac.*, 973 F. Supp. 2d 1162, 1171 (E.D. Cal. 2013) (internal citations omitted).

'employer,' the integrated enterprise test is inapplicable." *Anderson*, 336 F.3d at 929; *see Rhodes v. Sutter Health*, 949 F. Supp. 2d 997, 1007–08 (E.D. Cal. 2013) (finding integrated enterprise test inapplicable to FEHA claims that do not involve a corporate parent and its subsidiary).

Fifth, the Court finds that Plaintiff cannot show that DGDG is jointly liable with Capitol Chevrolet under an alter ego theory. Thus, Plaintiff may not argue this theory at trial. To establish that Capitol Chevrolet is an alter ego of DGDG, Plaintiff must show: "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." *Horton v. NeoStrata Co. Inc.*, 2017 WL 932178, at *5 (S.D. Cal. Mar. 8, 2017) (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)) (alterations in original).

Plaintiff has not satisfied the second requirement. Plaintiff nowhere contends a fraud has or will occur, leaving "injustice" as the only option. "California courts generally require some evidence of bad faith conduct on the part of defendants before concluding that an inequitable result justifies an alter ego finding." *Smith v. Simmons*, 638 F. Supp. 2d 1180, 1192 (E.D. Cal. 2009), *aff'd*, 409 F. App'x 88 (9th Cir. 2010). Plaintiff nowhere alleges that Defendants have exhibited bad faith. Plaintiff's only argument for "injustice" is that a jury may award less in punitive damages if they only consider Capitol Chevrolet's assets. Plaintiff cites no authority for the proposition that a plaintiff's desire for a larger recovery shows bad faith on the defendant's part. *Cf. Orosa v. Therakos, Inc.*, 2011 WL 3667485, at *7 (N.D. Cal. Aug. 22, 2011) ("Moreover, the mere allegation that Therakos is undercapitalized is not enough to imply an unjust result."). The Court therefore rejects Plaintiff's argument.

Sixth, the Court finds that Plaintiff may be able to show that DGDG is jointly liable with Capitol Chevrolet under a joint employer theory. *Huse v. Auburn Honda*, 2005 WL 1398521, at *3 (E.D. Cal. June 10, 2005) (noting that Title VII and FEHA cases permit joint liability if two entities can be considered joint employers); *Savin v. City & Cty. of San Francisco*, 2017 WL 2686546, at *6 (N.D. Cal. June 22, 2017) ("Courts have recognized joint employment in the context of FEHA and its federal counterpart, Title VII."). Thus, Plaintiff may argue this theory at

trial. *See Ling Nan Zheng v. Liberty Apparel Co. Inc.*, 617 F.3d 182, 185 (2d Cir. 2010) (noting that "in the context of a jury trial, the question whether a defendant is a plaintiff's joint employer is a mixed question of law and fact" that is "'especially well-suited for jury determination." (citation omitted)). Defendants actively contend that this theory is applicable, and Plaintiff does not suggest otherwise.

IT IS SO ORDERED.

Dated: May 3, 2018

LUCY H. KOH
United States District Judge