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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LYDIA ORTIZ HAGBERG, Plaintiff and Appellant, v. CALIFORNIA FEDERAL BANK FSB, Defendant and Respondent.	B146368 (Los Angeles County Super. Ct. No. BC216052)

APPEAL from the judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Vakili & Leus, Sa'id Vakili; Peter A. Zablotsky; and Honey Kessler Amado for Plaintiff and Appellant.

Yocca Patch & Yocca, Mark W. Yocca, Paul Kim; Haight, Brown & Bonesteel and Jules S. Zeman for Defendant and Respondent.

* * * * * *

Appellant Lydia Hagberg appeals from a judgment entered after the trial court granted summary judgment in favor of respondent California Federal Bank FSB on the basis that the Civil Code section 47, subdivision (b)[1] privilege applied to bar her complaint. Although we greatly sympathize with appellant because of the humiliating ordeal she experienced, case law and public policy dictate that the channels to the police be kept open through the expedient of absolute privilege. Accordingly, we affirm.

CONTENTIONS

Appellant contends that: (1) the section 47, subdivision (b) privilege does not apply to a cause of action alleging racial discrimination in violation of the Unruh Civil Rights Act (§ 51 et seq.); (2) the section 47, subdivision (b) privilege does not shield respondent from liability for violating the Unruh Civil Rights Act simply because a police report is involved; (3) section 47, subdivision (b) extends a qualified, not absolute, privilege to those who file police reports; and (4) the Annunzio-Wylie Anti-Money Laundering Act does not confer immunity upon respondent.

FACTS AND PROCEDURAL BACKGROUND

On September 9, 1999, appellant, a dental assistant, filed a first amended complaint against respondent and Primerica Financial Services (PFS)[2] for damages for: (1) violation of section 51; (2) violation of section 52.1; (3) false arrest/false imprisonment; (4) slander; (5) invasion of privacy; (6) intentional infliction of emotional distress; and (7) negligence. Appellant alleged that on May 7, 1999, she attempted to cash a check issued by Smith Barney in the amount of $985.60 at respondent's bank branch in Pasadena, where she had opened a "VIP Direct Deposit" account several months earlier. The teller requested approval to cash the check from her supervisor, who

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[1] All subsequent code section references are to the Civil Code unless otherwise noted.

[2] PFS and appellant entered into a settlement agreement, and PFS is not a party to this appeal.

summoned the police on the belief that the check was counterfeit. Two Pasadena police officers approached appellant, took her purse, ordered her to spread her legs, and handcuffed her. An employee of respondent told appellant that she looked like a criminal. After searching and questioning appellant, the police contacted PFS, a division of Smith Barney, which confirmed that the check was good. The police then released her. The incident lasted 20 minutes.

In her deposition, appellant testified that the teller was Hispanic, and that Ms. Nolene Showalter, the supervisor, was Caucasian. While appellant was waiting for her check to be approved, the police came up behind her and lightly pulled her back from the counter. When a second police officer patted her down and spread her legs apart, appellant looked questioningly at the teller. The teller said appellant looked like a criminal. No one employed by respondent mentioned appellant's race or stated that they had called the police because she was Hispanic. Her belief that she was discriminated against because of race was based on the following: the bank was not in a Hispanic community; she had a direct deposit account at the bank; she had identification; and she was dressed professionally in dental scrubs.

According to the declaration of Ms. Nolene Showalter, assistant bank manager, the teller assisting appellant requested approval from Ms. Showalter to cash the check. Ms. Showalter believed that the check looked counterfeit because the microcoding line appeared fuzzy and unclear, some printing appeared smudged, and part of the address line was missing. She called Smith Barney, reaching "Gary," a representative with PFS. After she described the check, the account number, and the name of the payee on the check, the representative indicated the check was counterfeit. Ms. Showalter telephoned respondent's corporate security office and spoke to regional security manager Gary Wood, who told Ms. Showalter to call the police. Ms. Showalter called the Pasadena Police Department, and while she was on the telephone, received a call back from Mr. Wood who told her to cancel the call to the police. When Ms. Showalter told the police dispatcher, who was still on the telephone, that she was canceling the call, the dispatcher informed her that the police had already arrived at the branch. Ms. Showalter looked up

and saw police officers walking toward appellant. Ms. Showalter walked over to the teller window, reached over the desk to catch their attention, and told the police that she had cancelled the call. The police, however, proceeded with the investigation and detained appellant.

The transcribed conversation between Ms. Showalter and the Pasadena police dispatcher shows that when asked what race appellant was, Ms. Showalter identified her as "White -- well, maybe Hispanic; kind of reddish hair, short."

A transcription of the conversation between Ms. Showalter and Mr. Gary Valadez of PFS indicates that he told her that the funds in appellant's account did not cover the amount of the check, and that it was possible that the check was counterfeit. The conversation ended as follows. "Gary Valadez: May I speak with her? [¶] CFB Rep: Is this possible this is a counterfeit check, or no? It's just an odd-looking check, which is why I'm calling. [¶] Gary Valadez: One moment. [¶] (Pause.) [¶] CFB Rep: Okay. [¶] Gary Valadez: Yep. [¶] CFB Rep: Yes? [¶] Gary Valadez: Uh-huh. [¶] CFB Rep: Okay. I appreciate it. [¶] Gary Valadez: Okay. [¶] CFB Rep: Thank you."

A transcription of the conversation between Gary Wood and "Bobbie" of PFS, which occurred while Ms. Showalter was still on the telephone with the police dispatcher, shows Mr. Wood stating that before he authorized any arrest, he wanted to verify the information previously given by PFS that the check was counterfeit. Bobbie indicated that the check had been issued to appellant and mailed to her via overnight express.

A transcription of a conversation between appellant and "Cecelia" of PFS, which took place immediately after the handcuffing incident, shows that Cecelia reviewed Gary Valadez's notes of the telephone call between him and Ms. Showalter. The notes indicated that he told Ms. Showalter that there were no funds in the account, and that after Ms. Showalter hung up, he noticed there was a redeemable amount out of the account. Cecelia advised appellant that it appeared that Ms. Showalter hung up before Mr. Valadez had an opportunity to go into the history of the account.

A conversation between George Lazar, an employee of respondent, with Jeannette Valasquez from PFS took place after the handcuffing incident. The transcription shows

that when she was questioned as to why Mr. Valadez informed Ms. Showalter that the check was counterfeit, Ms. Valasquez stated: "I don't know, sir, why; because he noticed the account but it just states -- he probably most likely looking into another account or wasn't looking good enough. He just saw the account value as zero value -- [¶] . . . [¶] -- and stated from there that no, that check isn't good." Mr. Lazar indicated that he was upset that a customer had been humiliated and wrongfully accused of trying to pass a counterfeit check, characterizing the incident as a "very bad thing." He also described the check as looking like a Xerox copy, or as having been printed from a color laser printer.

Respondent filed a motion for summary judgment on July 27, 2000.

On August 24, 2000, the trial court granted respondent's motion for summary judgment. This appeal followed.

DISCUSSION

1. Standard of Review

Summary judgment is granted if all the submitted papers show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that an affirmative defense to that cause of action exists. (Code Civ. Proc., § 437c, subd. (n); see *Rowe* v. *Superior Court* (1993) 15 Cal.App.4th 1711, 1724.) Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (o).) The plaintiff must set forth specific facts showing that a triable issue of material fact exists. (*Ibid*.)

In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. (*Chevron U.S.A., Inc.* v. *Superior Court* (1992) 4 Cal.App.4th 544, 548.) We must determine whether the facts, as shown by the parties, give rise to a triable issue of material fact. (*Walker* v. *Blue Cross of*

California (1992) 4 Cal.App.4th 985, 990.) In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. (*Ibid.*)

2. Whether the section 47, subdivision (b) privilege bars appellant's causes of action alleging racial discrimination in violation of the Unruh Civil Rights Act

According to section 47: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . ." *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216 (*Silberg*), viewed as a landmark case, holds that the privilege is absolute, and applies broadly to bar all tort actions, except for malicious prosecution, which are based upon a protected communication.

In *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 494-495 (*Beroiz*), Division Four of this District addressed the issue of whether the absolute privilege of section 47, subdivision (b) shields testimony or statements to officials conducting criminal investigations. Division Four recognized that there is a split among California appellate courts on this issue, with the majority of California cases following *Williams v. Taylor* (1982) 129 Cal.App.3d 745 (*Williams*), which concluded that the absolute privilege shielded the report to the police by a president of a car dealership on what he believed to be criminal activity conducted by a discharged employee.[3] (See, e.g., *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502-1505 [absolute privilege of section 47, subdivision (b) applied where hotel management called police upon being informed by a maid that a customer was seen brandishing a gun]; *Passman v. Torkan*

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[3] We note that while the California Supreme Court denied review in *Beroiz*, it has granted review in *Balser v. Wells Fargo Bank, N.A.* (Sept. 20, 2001, B144933) [nonpub.opn.] review granted Dec. 17, 2001, S101833, where Division Three of this District held that the absolute privilege of section 47, subdivision (b) barred the plaintiff's

(1995) 34 Cal.App.4th 607, 616-620 [letter by party to district attorney's office recommending investigation and prosecution of opposing party subject to absolute privilege of section 47, subdivision (b)]; *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 112 [company's communication to police accusing terminated employee of threat of violence protected by absolute privilege of section 47, subdivision (b) even if the report was made in bad faith]; *Cote v. Henderson* (1990) 218 Cal.App.3d 796, 806 [report of rape to police was absolutely privileged under section 47, subdivision (b)]; *Kim v. Walker* (1989) 208 Cal.App.3d 375, 383 [attorney's communications to plaintiff's parole agent were absolutely privileged]; *Johnson v. Symantec Corp.* (N.D. Cal. 1999) 58 F.Supp.2d 1107, 1113 [police reports were absolutely privileged under section 47, subdivision (b)(3)]; *Forro Precision, Inc. v. Intern Business Machine* (9th Cir. 1982) 673 F.2d 1045, 1056 [communications by IBM officials to police were absolutely privileged].)

The only case to conclude that reports of criminal activity to the police are subject to the qualified, rather than absolute privilege, *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476 (*Fenelon*), has not been followed, and has been roundly criticized by cases following *Williams* on the basis that "the constitutional and procedural safeguards governing California's judicial system undermine the concern that applying the absolute privilege to police reports endangers the rights of the reported wrongdoer." (*Beroiz, supra,* 84 Cal.App.4th at pp. 495-496.) While the *Fenelon* court feared abuse of the absolute privilege, the *Williams* court recognized the importance of communication between citizens and the police, and that effective investigation requires an open channel of communication that would not be possible if a qualified privilege applied instead. (*Williams, supra,* 129 Cal.App.3d at pp. 753-754.)

Appellant's citation to *Devis v. Bank of America* (1998) 65 Cal.App.4th 1002, 1008 (*Devis*) for the proposition that a qualified, rather than absolute, privilege should

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complaint for damages resulting from his arrest by police after the plaintiff, a landlord, attempted to cash a check given to him by a commercial tenant.

apply, is unconvincing. In *Devis,* a bank had been informed by a customer, Patrick McKinney, that it was not to honor checks presented by a David Davis. When David Devis (not Davis) came to the bank to cash a check written by Mr. McKinney, he was arrested and jailed, but later released after Mr. McKinney learned that Devis had been wrongfully arrested. While Division Five of this District purported to follow the *Williams* rule of absolute privilege, it added in dictum that "the privilege applies only if the erroneous report to the police is made in good faith. (*Turner v. Mellon* (1953) 41 Cal.2d 45, 48; *Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941.) The distinction is not critical here, however, since appellants have not alleged that the Bank acted without good faith." (*Devis, supra,* 65 Cal.App.4th at p. 1008.)

Devis does not control here. The *Beroiz* court concluded that the *Devis* decision did not affect the *Beroiz* court's holding that police reports are subject to the absolute privilege. In stating that no California cases have followed *Fenelon*, the *Beroiz* court noted that *Devis's* suggestion of a qualified privilege was dictum and that the cases cited in *Devis* predated *Silberg* "in which our Supreme Court indicated the broad scope of the absolute privilege [citation], and thus [the cases] are not persuasive on the issue before us." (*Beroiz, supra,* 84 Cal.App.4th at pp. 495-496, fn. 6.) Similarly, *Johnson v. Symantec Corp., supra,* 58 F.Supp.2d at page 1110, footnote 4, characterized the pertinent passage in the *Devis* opinion as dictum and confusing in that it actually followed *Fenelon* although it professed to follow *Williams*. We thus dispense with a large portion of appellant's brief devoted to the proposition that persons filing a police report are subject to a qualified, rather than absolute, immunity.

Under the foregoing authorities, we conclude that Ms. Showalter's communication to the police of her suspicion that appellant was attempting to pass a counterfeit check was subject to the absolute privilege of section 47, subdivision (b). Moreover, victims of improper reports to the police are not without protection. As noted in *Hunsucker v. Sunnyvale Hilton Inn, supra,* 23 Cal.App.4th at page 1504, "both the California and United States Constitutions, as well as various statutes, [fn. omitted] provide safeguards for those detained by police to ensure that their rights are not abrogated. This protection

applies regardless of whether the absolute privilege of section 47 applies to the citizen who originally made the report to the police." Thus, Penal Code section 148.5, subdivision (a) provides that "[e]very person who reports to any peace officer . . . that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor."

Appellant, however, claims that her action is predicated on the Unruh Civil Rights Act, embodied in section 51 et seq.,[4] and that therefore, section 47, subdivision (b), is inapplicable. We disagree. First, the privilege of section 47, subdivision (b) applies to both statutory and common law causes of action. (*Ribas v. Clark* (1985) 38 Cal.3d 355, 365.) Second, where the plaintiff alleges a violation of statute based on the communicative act protected by section 47, subdivision (b), his or her causes of action are barred. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1203.) In the context of an unfair competition claim, our Supreme Court stated: "To permit the same communicative acts to be the subject of an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity. If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b)." (*Ibid.*)

Appellant here has claimed violations of sections 51 and 52.1 based on the communications made by respondent's employees to the police, which are subject to the protection of section 47, subdivision (b). In appellant's complaint, she alleged that respondent contacted the police, wrongfully accused appellant of criminal behavior, and

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4 Under section 51, subdivision (b), all persons, no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments. Section 52.1, subdivision (a) prohibits the interference by threats, intimidation, or coercion, of any individual's exercise or enjoyment of rights secured by the Constitution or laws of the United States, or the Constitution or laws of the state.

requested that appellant be detained and/or held in handcuffs, thereby violating section 52.1. She also attempted to allege a violation of section 51, by contending that respondent "has an informal policy of singling out persons because of race and/or national origin as inherently suspicious, i.e., engaging in the informal practice of racial profiling of bank customers." On appeal, she claims that her complaint is not defeated by the communication privilege because she has alleged that respondent has a policy of singling out Hispanic patrons, which cannot be considered a publication under section 47. Yet, when winnowed down to its essentials, appellant's true complaint lies in the communication made to the police. Regardless of the reasons why respondent was motivated to call the police, the fact remains that it was that communication to the police that set in motion the chain of events causing her to be handcuffed, searched and questioned. It was that privileged communication which gave rise to the causes of action she alleged in her complaint. Thus, the reasoning expressed in *Rubin v. Green, supra,* 4 Cal.4th at page 1203, clearly applies here, where appellant has sought to allege a different label, i.e., violation of the Unruh Civil Rights Act, for pleading a grievance arising from the protected communication.

Appellant's citation to a depublished case[5] cannot assist her cause; nor can she rely on *Begier v. Strom* (1996) 46 Cal.App.4th 877, 885 for the proposition that section 51 overrides the section 47, subdivision (b) privilege. In that case, unlike here, the Legislature specifically enacted an exception to the immunity statute to protect those who report child molestation. (*Begier v. Strom, supra,* at p. 883.) Hence, the Penal Code states: "Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect known to be false or with

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[5] *Randall v. Scovis* (Mar. 5, 2001) D036508, opinion ordered nonpublished (June 13, 2001).

reckless disregard of the truth or falsity of the report is liable for any damages caused." (Pen. Code, § 11172, subd. (a).)

Finally, appellant's citation to cases in which the absolute immunity of section 47, subdivision (b) was held inapplicable does not assist her. *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 402-406 held that the litigation privilege does not protect a negligent expert witness from a malpractice suit sounding in contract and tort by the party who hired the witness. The court distinguished cases in which the section 47 privilege was found to have shielded experts who were hired by an opposing party or hired jointly by adverse parties. Thus, the policy of freedom of access to the courts and encouragement of witness to testify would not be furthered by protecting the negligent expert. (*Mattco Forge, Inc. v. Arthur Young & Co., supra,* at p. 404.) In the instant case, freedom of communication to the police is a policy which the Legislature and courts have seen fit to encourage.

Cutter v. Brownbridge (1986) 183 Cal.App.3d 836, 841-848 (*Cutter*), also cited by appellant, held that the constitutional right of privacy overrides the privilege of section 47, subdivision (b) where a psychotherapist volunteered information concerning a patient to the patient's litigation opponent in contravention of Evidence Code section 1015, which requires a psychotherapist to assert the patient's privilege against disclosure of confidential communications. The holding in *Cutter*, however, has met with disapproval. The court, in *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303, footnote 1, rejected the plaintiff's argument that her statutory and constitutional right to privacy trumps the litigation privilege, stating: "Plaintiff's heavy reliance on [*Cutter*] is unconvincing. *Cutter* not only predates *Silberg*, but its analysis, which 'weighs' a plaintiff's constitutional right to privacy against the interests promoted by the litigation privilege [citation], clearly conflicts with the absolute nature of the privilege as subsequently stated by the state Supreme Court."

In *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 317-320 (*ITT*), relied upon by appellant, an employee executed an express confidentiality agreement, yet later testified as an expert witness against his former employer. The court

held that the litigation privilege is inapplicable to an employee's voluntary disclosures made for compensation, rather than for the purposes of litigation, recognizing that by signing a nondisclosure agreement, the employee undertook an obligation similar to the psychotherapist's statutory duty set forth in *Cutter*. That is, a contractual duty required the party asserting the litigation privilege to refrain from testifying. Even aside from the fact that *ITT* predates *Silberg* and relies heavily on *Cutter*, *ITT* does not assist appellant. The Unruh Civil Rights Act does not preclude respondent from communicating with the police, and appellant's argument to the contrary must fail. Nor do we see anything in the Unruh Civil Rights Act to indicate that it was enacted as an exception to the communication privilege.

Appellant does not convince us that her complaint is anything other than an attempt to plead around the section 47, subdivision (b) privilege. Since we have concluded that appellant's attempt to bypass the absolute privilege of section 47, subdivision (b) fails, we need not address her argument that the only defenses to sections 51 and 52.1 are in the nature of business interests that further a public policy.

3. Whether the section 47, subdivision (b) privilege shields respondent from liability from the other torts alleged

Appellant also devotes a portion of her brief to the argument that by maliciously filing a false police report because appellant is Hispanic, respondent committed false imprisonment, slander, invasion of privacy, intentional infliction of emotional distress, and negligence. However, as previously mentioned, the section 47, subdivision (b) privilege applies to all causes of action that arise out of the protected communication, except for malicious prosecution. (*Rubin v. Green, supra,* 4 Cal.4th at p. 1194; *Ribas v. Clark, supra,* 38 Cal.3d at p. 364 [invasion of privacy]; *Jeffrey M. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345, 361 [negligent and intentional infliction of emotional distress]; *Imig v. Ferrar* (1977) 70 Cal.App.3d 48, 57 [slander]; *Devis, supra,* 65 Cal.App.4th at p. 1008 [negligence]; *Hunsucker v. Sunnyvale Hilton Inn, supra,* 23 Cal.App.4th at pp. 1502-1505 [false imprisonment].)

4. The Annunzio-Wylie Anti-Money Laundering Act

Respondent's motion for summary judgment included the argument that it had complete immunity from liability for reporting any possible violations of law under 31 United States Code section 5318(g)(3), the Annunzio-Wylie Anti-Money Laundering Act. Since the trial court based its ruling only on the section 47, subdivision (b) privilege, and did not address the federal immunity argument, we decline both appellant's and respondent's invitation to explore federal immunity implications.

5. Whether the trial court abused its discretion in denying appellant's request to continue the motion for summary judgment

Appellant states that the trial court did not grant her request to continue her opposition to the summary judgment motion because she needed more time for discovery, but it is unclear whether she presents the denial of her request as an issue for appeal.

In any event, we conclude that the trial court did not abuse its discretion. The record shows that on August 7, 2001, appellant made an ex parte application for an order shortening time for her motions to compel discovery for July 10, 2000, arguing that she needed to take the depositions of respondent's employees to oppose the summary judgment motion. At the hearing, respondent argued that absolute immunity rendered further discovery by appellant irrelevant, and to conserve both parties' financial resources, the depositions of respondent's employees should not go forward until after the summary judgment motion was heard.

The trial court denied the ex parte application and ruled that any showing for additional discovery should be made in appellant's opposition to the motion for summary judgment. Appellant did not submit a declaration regarding the necessity for additional discovery with her opposition to the motion for summary judgment, but filed a supplemental opposition, with a declaration attached, two days prior to the hearing. In that declaration, appellant's counsel stated appellant's ability to conduct discovery was essential to oppose the motion, and that respondent thwarted her ability to engage in

meaningful discovery including preventing appellant from taking depositions, because appellant agreed to give her deposition prior to deposing respondent's employees. However, in making a request for a continuance under Code of Civil Procedure section 437c, subdivision (h), appellant must show facts essential to justify opposition to a summary judgment may exist. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated." (*Ibid*.) Appellant did not do so.

We conclude that the trial court did not abuse its discretion in denying appellant's request for a continuance.

DISPOSITION

The judgment is affirmed. Respondent shall receive costs on appeal.

NOT FOR PUBLICATION.

________________________, Acting P.J.
NOTT

We concur:

____________________, J.
DOI TODD

____________________, J.
ASHMANN-GERST