TORMEY et al v. JENNINGS et al

22CV46038

PLAINTIFFS' MOTIONS re (1) DEMURRER TO ANSWER, (2) STRIKE ANSWER and (3) PRELIMINARY INJUNCTION

This is a quiet title action involving an easement for ingress and egress between adjoining parcels APN 012-004-005 and APN 012-004-019, which plaintiffs describe as an easement of necessity given the remoteness of the cabin thereon and the loss of an access bridge previously available to plaintiffs. Before the Court is plaintiffs' demurrer to the operative answer, a motion to strike the operative answer, and an application for a preliminary injunction to bar defendants from "blocking" plaintiffs' use of the disputed easement (and to affirmatively remove barriers to that access.)

Pertinent Background

In June of 1965, Charles and Cleo Stoddard split a parcel they owned by deeding parts of it away as follows:

- Parcel 1: to Jim and Dorryl Stoddard (grantors' son and daughter-in-law), the northwest quarter of the northeast quarter of Section 17, Township 6 North, Range 13 East, along with "an easement for ingress and egress over the existing road" in the northwest quarter of the northeast quarter of Section 17, T6N, R13E. This parcel contains 1.55 acres and is almost a perfect rectangle. This parcel does not appear to have a legal street address, instead commonly being referred to as 00 Woodhouse Mine Road. The APN for this property is 012-004-005.

- Parcel 2: to George and Margaret Moreira, the northwest quarter of the northeast quarter of Section 17, Township 6 North, Range 13 East, along with "an easement for ingress and egress over existing road across the remaining lands of the grantors" in the northeast quarter Section 17, T6N, R13E. This 2.19 acre parcel is rectangular with a legal street address of 2491 Woodhouse Mine Road. The APN for this property is 012-004-004.

Parcel 1 and Parcel 2 both are landlocked. The parties do not state clearly what other parcels Charles and Cleo owned in 1965 when they carved out Parcel 1 and Parcel 2, making it difficult to determine with precision what "existing road" the grantors were intending to create an easement upon. However, it does appear that Charles and Cleo owned most of the northeast quarter of Section 17 (see deed from Woodhouse Mining Company to Charles and Cleo covering 19 acres), including APN 012-004-019 (an 8.61-acre parcel bearing a legal street address of 2499 Woodhouse Mine Road, hereinafter "Parcel 3").

In or about 1970, Jim and Dorryl Stoddard built a cabin on Parcel 1. Although the closest roadway to Parcel 1 is Quail Lane (directly to the east, cutting across APN 012-004-007), Dorryl advises that they always used a dirt path going south from Parcel 1 into Parcel 3, backtracking over a bridge (she does not state which bridge), and then down a dirt road the neighbors call Jim's Tree Road, which thereafter connects via a formal easement between APN 012-004-018 and APN 012-004-020 to Woodhouse Mine Road. A 1976 survey authorized by Cleo as part of the county's new parcel map suggests that the "easement" referenced in the 1965 deeds might run due south between Parcels 1 and 2, down the western edge of Parcel 3, and running right between APN 012-004-018 and APN 012-004-020 to Woodhouse Mine Road. If this interpretation is correct, it would include the bigger bridge, although there is no reference to a bridge in the easement. On the other hand, it is possible that the "existing roadway" referred to in the 1965 deed for Parcel 1 was in fact the dirt road to the east of the cabin which cuts directly through the center of Parcel 3 (which might explain the different verbiage used by the grantors in the 1965 deeds). Defendants concede that the deed for Parcel 3 contains some verbiage regarding an easement favoring Parcels 1 and 2; however, neither side has provided this Court with a copy of the Parcel 3 deed, which is indispensable at this juncture.

In 2019, the "bigger" bridge connecting the linear easement was damaged beyond repair. The interested parties (Dorryl with Parcel 1, Gloria with Parcel 2, and defendants with Parcel 3) discussed various options for *repairing* the bridge, but in the interim defendants granted Gloria and Dorryl permission to cut onto Parcel 3 and use the smaller bridge to gain access to Jim's Tree Road. It was a small detour, but a very necessary one for anyone accessing Parcels 1 or 2. Defendants describe this as temporary permission based on a long-standing friendship with these neighbors. Plaintiffs contend that the damaged bridge is not the "only" part of the "easement" because it is actually on Parcel 2, and Dorryl was free to use the connector to either the damaged bridge or the smaller bridge. Neither of the 1965 deeds described any easement requiring use of a bridge, only a roadway, which further begs the question where to site the easement.

In mid-2021, Dorryl decided it was time to sell Parcel 1. Defendants were giving "first crack" at buying the parcel (defendant had just purchased Parcel 2 from Gloria), but were unwilling to pay what Dorryl opined as the fair market value. Since the "easement bridge" was out of commission at the time, and the only access to Parcel 2 was the "smaller bridge" sitting behind a lockable gate, making arriving at a FMV for this deeply landlocked parcel a bit of guesswork.

On or about 12/16/21, plaintiffs Peter Tormey and Michael Kasin – along with nonparties Catherine Tormey and Patricia Kasin – entered into a Residential Purchase Agreement with Dorryl to acquire Parcel 1 for $144,000 despite being "aware of current access dispute with neighbor." (See Addendum 1.)

At present, Parcel 2 and Parcel 3 are owned by defendants (in addition to other parcels to the north). Defendants do not believe the deeded easement for Parcel 1 covers the "southern bridge" at all, and that the only legal access to Parcel 2 is via an undescribed route to the now-damaged bridge. Defendants explain that part of the problem is security and safety from others (not plaintiffs), requiring defendants to keep the gate on the path to the "southern bridge" locked (passable with an access code). Plaintiffs contend that defendants' decision to block access to the only useable bridge is one made from spite when they failed to buy Parcel 1. Given the dynamics and history, there may be something to this concern.

Defendants' Answer

Plaintiffs have demurred to defendants' answer to the complaint, filed 01/05/23, and filed a motion to strike – both of which are based on the same arguments; those arguments fail.

The document filed by defendants on 01/05/23 is admittedly not the traditional "answer" one might expect were defendants represented by counsel. However, so long as the document filed is signed by both defendants, and includes at least a denial of all or some of the material allegations in the complaint, the document is sufficient. (See CCP §431.30(b); *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248.) So long as the document provides sufficient notice of a refusal to concede, the precise form it takes is not dispositive. (See, e.g., CCP §187 ["any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code"]; Civil Code §3528 ["the law respects form less than substance"]; in accord, *Brown v. Wells Fargo Bank, NA* (2012) 204 Cal.App.4th 1353, 1356 [it is the substance, rather than the label, which controls]; *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 359 ["rules of pleading are conveniences to promote justice and not to impede or warp it']; *Vallera v. Vallera* (1944) 64 Cal.App.2d 266, 272 ["form is subordinated to substance in pleading and practice in civil cases"].) The document herein contains a rather explicit denial of all allegations in the Complaint (see page 3), and provides a factual predicate for those denials. Although the document should not be treated as raising new matters via affirmative defenses, it does not appear to this Court that defendants are seeking to raise new matter affirmative defenses in any event. (See CCP §431.30; *Advantac Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627; *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1805.) The **demurrer** to the document, based on a failure to state (CCP §430.20), is **OVERRULED**. All of the material allegations have been sufficiently denied. (See CCP §§ 431.10, 431.20.)

As for the motion to strike, plaintiffs are correct that an answer must conform to the rules applicable to pleadings generally (ie, CRC 2.100-2.119), and that the document filed does not comport with quite a few of those rules. However, taking the step of striking a pleading simply because it is not drawn in conformity with formatting rules can be an abuse of discretion. Besides, while the court clerk is free to reject a paper for

filing because of formatting issues (see CRC 2.118(a)), the trial court is equally entitled to permit non-conforming papers for good cause (see CRCX 2.118(c)). Since defendants took the extra step of setting aside a previous default, and have filed a "response" to the application for preliminary injunction, there is sufficient good cause to allow the imperfect "Answer" to remain – otherwise, the order striking would only give defendants additional time to refile. The **motion to strike is DENIED**.

Injunctive Relief

A preliminary injunction is an equitable remedy designed to preserve the existing status quo until the dispute between the parties can be resolved on the merits. The status quo is defined as to the last actual peaceable, uncontested status which preceded the pending controversy. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1052; *People v. iMERGENT, Inc.* (2009) 170 Cal.App.4th 333, 343.) Preliminary injunctions are generally available to avoid waste (CCP §526(a)(2)), to keep a party from violating the rights of another (CCP §526(a)(3)), and whenever sufficient grounds exist pursuant to caselaw (CCP §527(a)), such as when the applicant has demonstrated a likelihood of prevailing on the merits and yet is likely to suffer in the interim irreparable harm which cannot be adequately addressed with money. Courts refer to this as a sliding scale of considerations – how likely the party is to win versus how much harm it will suffer awaiting its day in court. (See *White v. Davis* (2003) 30 Cal.4th 528, 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678; *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 551; *Amgen Inc. v. Health Care Services* (2020) 47 Cal.App.5th 716, 731; *Jamison v. Department of Transp.* (2016) 4 Cal.App.5th 356, 361.) Plaintiff is seeking an injunction based upon the sliding scale of considerations (§527(a)).

The operative pleading herein is the Verified Complaint filed on 05/24/22. It contains causes of action for: (1) quiet title; (2) prescriptive easement; (3) tortious interference with contractual relations; (4) intentional interference with economic advantage; (5) unfair competition; and (6) declaratory relief.

In order to state a viable cause of action for quiet title, a complaint must be verified and include: (a) a description of the property that is the subject of the action; (b) the title of the plaintiff as to which a determination under this chapter is sought and the basis of the title; (c) the adverse claims to the title of the plaintiff against which a determination is sought; (d) the date as of which the determination is sought; and (e) a prayer for the determination of the title of the plaintiff against the adverse claims. (CCP §761.020.) As noted, this Court cannot tell from the papers filed where the express easement lies, if anywhere. This cause of action is, at present, a coin toss. This Court is also struggling to see from the paperwork the access to either bridge and the photos aid very little.

Plaintiffs' claim for prescriptive easement does not fare much better. A prescriptive easement gives a right, less than ownership, to a specific use or activity on the property of another. (*Darr v. Lone Star Industries* (1979) 94 Cal.App.3d 895, 901.) To establish the elements of a prescriptive easement, plaintiffs must establish by clear and

convincing evidence that they have made specific and definable use of some portion of defendant's property (see CRC 3.1151) for at least five years which was (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the landowner; and (4) under claim of right. (*Husain v. California Pacific Bank* (2021) 61 Cal.App.5th 717, 725-726; *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032.) The concept of hostility is synonymous with adversity, and is loosely defined as use without any express or implied recognition of the owner's property rights, or in defiance of the owner's property rights. Stated another way, whether the use is hostile or is merely a matter of neighborly accommodation is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties. (*Husain* at 726; *McBride* at 1181; *Aaron v. Dunham* (2006) 137 Cal.App.4th 1244, 1252 [adverse use means that the claimant's use was made without the explicit or implicit permission of the landowner.]) Here, the evidence is that any use Dorryl made of the "other" bridge was with the consent of defendants.

Plaintiffs have not demonstrated a probability of success on their third cause of action for interference with contract. To prevail on this kind of claim, plaintiffs must present some evidence in support of the following essential elements: (1) a valid, and enforceable, contract between plaintiff and some third party; (2) defendants' actual knowledge of the contract and its material terms; (3) defendants' intentional acts designed to induce a breach or disruption of that relationship; (4) actual breach or disruption; and (5) economic harm proximately caused thereby. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55; *Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 51; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238.) In addition, when the third-party is free to cancel the contract at will, the plaintiff must also present evidence to show that defendants' conduct was in some way independently wrongful. (See *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152; *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1003-1105.) Since plaintiffs did in fact acquire Parcel 1, and did so (as they claim) at a discount, this cause of action fails on its face.

Plaintiffs have not demonstrated a probability of success on their fourth cause of action for intentional interference with economic advantage. In order to adequately state this cause of action, plaintiffs must present evidence showing (1) an economic relationship between the plaintiff and some third party, with a reasonable probability of future economic benefit or advantage to the plaintiff; (2) defendant's actual knowledge of that relationship; (3) defendant's intentional and independently wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused thereby. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512; *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005.) Although plaintiffs claim that they "could have" rented the property if they had had access to it in time to do all the heavy lifting required to make it habitable, plaintiffs concede they were well-aware of the easement/access issues before getting into escrow, and could have easily avoided all this by finding another property for

investment. There is also no evidence showing that the property can be rented at this time but for the easement/access issue.

Plaintiffs have not demonstrated a probability of success on their fifth cause of action for unfair practices. California's Unfair Competition Act statute (B&P Code §17200 et seq) prohibits any unlawful, unfair or fraudulent business act or practice. Plaintiff do not allege that defendants' use of a locked gate on their own property is unlawful or fraudulent, which leaves only the fairness prong. Although courts still struggle with whether the fairness prong must be viewed from the perspective of a consumer, the fact remains that defendants have asserted easement and access concerns long before plaintiffs decided to buy the property, and to the extent defendant may be right, they are entitled to protect their own property.

As for the sixth cause of action for declaratory relief, this is where the scales tip toward plaintiffs. Pursuant to CCP §1060, "any person interested under a written instrument or who desires a declaration of his or her rights or duties in respect to, in, over or upon property," may seek a judicial declaration of those rights. Although this cause of action is ordinarily subsumed by other direct claims (such as quiet title and prescriptive easement), this Court could entertain a declaration regarding a theory plaintiffs neglected to raise, to wit: an easement by necessity. As explained by our Supreme Court in *Murphy v. Burch* (2009) 46 Cal.4th 157 (at 162-164):

> "An easement by necessity arises from an implied grant or implied reservation in certain circumstances when a property owner (the grantor) conveys to another (the grantee) one out of two or more adjoining parcels of the grantor's property. When there is no express provision for access, and the parcel conveyed is either landlocked entirely by the parcels retained by the grantor or landlocked partly by the grantor's retained land and partly by the land of others, the grantee may claim an implied grant of a right-of-way of necessity over the land retained by the grantor … Easements by necessity originated in the common law and are the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. The rationale driving this presumption is that the demands of our society prevent any man-made efforts to hold land in perpetual idleness as would result if it were cut off from all access by being completely surrounded by lands privately owned. Hence, easements by necessity are grounded in the public policy that property should not be rendered unfit for occupancy or successful cultivation because access to the property is lacking.
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> "In California, the easement arises by implication based on the inferred intent of the parties to the property conveyance, as determined from the terms of the relevant instrument and the circumstances surrounding the transaction. Two circumstances are indispensable to the implication and must be shown: (1) a strict necessity for the claimed right-of-way, as when the claimant's property is

> landlocked; and (2) the dominant and servient tenements were under common ownership at the time of the conveyance giving rise to the necessity. To satisfy the strict-necessity requirement, the party claiming the easement must demonstrate it is strictly necessary for access to the alleged dominant tenement. No easement will be implied where there is another possible means of access, even if that access is shown to be inconvenient, difficult, or costly. Moreover, such an easement continues only as long as the need for it exists. Thus, if adequate alternative access becomes available, the easement terminates because it no longer serves to promote the underlying public policy considerations. To meet the common-ownership requirement, the party seeking the easement must establish that the lands composing the alleged dominant and servient estates were once under common ownership and that a conveyance by the common owner gave rise to the necessity for a right-of-way."

Since defendants appear to concede that they have blocked the only access to Parcel 1, and both sides appear to concede that the Parcel 1 and Parcel were under common ownership, deeded to others with an intention of creating access by easement, it appears to this Court that a declaration of rights could be made on this basis. (See *Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 214; *McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1169.)

Plaintiffs are entitled to the gate code. **A preliminary injunction shall issue** to maintain the status quo, which this Court concludes is access to the property through the gate. Plaintiffs can open the gate, and then close it behind them every time. In terms of how to access Parcel 1 using a rickety bridge, that will have to be plaintiffs' concern. Given the obvious risk of damage to the bridge, and defendants' concerns about damage to the property and occupants if the gate is left open, plaintiffs shall be required to post a bond (CCP §529) in the amount of $25,000 prior to receiving the gate code. (See *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 555; *Top Cat Productions, Inc. v. Michael's Los Feliz* (2002) 102 Cal.App.4th 474, 478; *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10.)

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiffs are ordered to serve and file a proposed order consistent with CRC 3.1150 and this Ruling.

GOLD CREEK ESTATES v. VALLEY SPRINGS GOLD CREEK

17CV42103 (Related to 20CV44819)

DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

This is a construction defect case. Before the Court is a defense motion for summary adjudication. Defendants generally contend that plaintiff's claims are time-barred. Despite the mountain of papers filed, the issues herein are fairly basic.

Pertinent Background

In or about 1986, the Board of Supervisors approved a tentative map for the development of a 385-home master-planned gated residential community off Highway 26 in Valley Springs, CA. Phase 1 was to include 130 homes along Cosgrove Creek, as well as the common area with a clubhouse, tennis courts and a swimming pool. Phase 2 was to include 82 additional homes. Phase 3 was to include another 171 homes. Eventually Phases 1 and 2 were combined into a single Phase, but with designations Unit 1 and Unit 2.

In 1997, Ryan Voorhees incorporated CRV Enterprises (hereinafter "CRV") for the stated purpose of engaging in real estate development (see Statement of Information). Ryan was identified in later filings as the President, CEO, CFO and agent for service of process.

In 2002, CRV acquired the rights to develop the aforementioned residential project.

In 2003, Ryan Voorhees incorporated Valley Springs Gold Creek, Inc. (hereinafter "VSGC"), for the stated purpose of home building (see Statement of Information). Ryan was identified in later filings as the President, CEO, CFO and agent for service of process.

On 04/15/03, CRV transferred via grant deed its rights and title in the project to Ryan Voorhees individually, who then transferred everything to VSGC.

In 2004, Ryan Voorhees incorporated Gold Creek Estates Owners Association for the purpose of managing a common interest development. Later that same year he incorporated Old Golden Oaks, LLC, for the purpose of real estate development. Ryan is listed as the sole member of the LLC (which eventually came to develop Phase 3 of the development).

On 02/17/06, Ryan – on behalf of VSGC – caused to be recorded a Notice of Completion.

On 02/22/06, Ryan – on behalf of VSGC – caused to be recorded a Grant and Transfer of Water and Wastewater Systems to the Calaveras County Water District. The filing included a copy of CCWD's Certificate of Acceptance for Phase 1, Unit 2.

In a letter dated 08/13/07, to Ryan/VSGC, the Calaveras County Water District confirmed that "the installation of the water and wastewater facilities for the Gold Creek Estates was nearing completion," but Ryan was still responsible for punch list items, securing necessary easements, and completing a final inspection and walk-through.

In 2010, Ryan dissolved CRV.

In 2018, Ryan dissolved VSGC. That same year, Ryan incorporated Gold Creek Homes & Development LLC, separately in Nevada and Texas (the latter later terminated). Also that same year, Ryan incorporated Gold Creek Homes & Development dba Gold Creek Homes & Development LLC, in Texas. This entity is active.

Summary Adjudication

The operative pleading herein is the Fourth Amended Complaint, filed 06/09/22. That pleading now includes the following causes of action:

- 1st COA: Violation of the Right to Repair Act
- 3rd COA: Breach of Written Contract
- 4th COA: Fraud (concealment)
- 5th COA: Negligence (nondisclosure)
- 6th COA: Fraud (misrepresentation)

Defendants have moved for summary adjudication on each claim, contending that each cause of action is time-barred by Civil Code §§ 337(a), 337.15, and/or 941. Defendants separately ask this Court to summarily adjudicate as time-barred fifty-five (55) *specific parcels* within the Gold Creek Estates community because those homes were actually sold more than 10 years prior (suggesting that a homeowner buying into a common interest development is not entitled to enjoy future common areas). Defendants' invitation to carve up the causes of action for homes sold during the first phase of development is unwarranted since the issues relate to common areas that all members have a right to enjoy. As a result, the primary right as pursued by the HOA for all residents is plainly indivisible. (See, *e.g., Blue Mountain Enterprises, LLC v. Owen* (2022) 74 Cal.App.5th 537, 549-550; *Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257; *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 96-97; *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323-324.) As it turns out, the inability to carve up causes of

action based on peculiar member interests inures to defendants' benefit on the breach of contract cause of action.

- Evidentiary Objections

On a motion for summary judgment, the trial court must consider all of the evidence submitted by the parties except that to which objections have been made and sustained. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 281.) A party who wishes to exclude evidence from consideration must "quote or set forth the objectionable statement or material [and] state the grounds for each objection to that statement." (CRC 3.1354(b).) It is incumbent upon the party objecting to make clear the specific ground of the objection, and not rely on boilerplate generalities. (See *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 764.) Assuming objections are made in the proper format, the trial court need only rule on those evidentiary objections that it deems material to the disposition of the motion. (CCP §437c(q).) In this instance, only defendants filed formal objections (a total of 35). Several of those objections appear to be lodged for less than meritorious reasons. For example, defendants take issue with how the 08/13/07 letter was presented, and yet Ryan himself refers to the letter. Other objections relate to all the evidence of Ryan defrauding people by cutting corners here and there. These would be "irrelevant" had the motion stayed true to limitations/repose, but since defendants themselves argued in the reply papers that the evidence of willfulness and concealment were inadequate, Ryan's history of wrongdoing (objections 2-8 and 26-33) became relevant. Defendants' objections to the Lewandowski declarations are really directed at the weight to be afforded his opinions rather than the admissibility of those opinions as those opinions are not "irrelevant" given that defendants are claiming they substantially completed the improvement work based largely on inferences. The balance of the objections are simply immaterial and thus irrelevant to the current analysis and are therefore overruled in the context of this ruling.

- Breach of Contract

The scope of the breach of contract cause of action is arguably uncertain, given the general references to a variety of different documents which purportedly bind defendants to perform services in a particular fashion. It is not clear if this cause of action includes claims actually belonging directly to the HOA (Civil Code §5980), or if this is entirely representative of individual members. Since defendants do not challenge standing, it may not matter; however, it is worth noting that representative standing requires a certain degree of commonality that is not immediately apparent in the context of a contract (or even fraud) claim, and certainly can be argued that contract (and fraud) claims are private, unique, and impact members differently. (See, e.g., *United Farmers Agents Assn. v. Farmers Group* (2019) 32 Cal.App.5th 478, 491; *Market Lofts Community Assn. v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 932; *Property Owners of Whispering Palms v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 795.)

When the HOA represents all individual members in a representative capacity, and the members acquiescence thereto, everyone must stand in the same shoes. This is important because some homeowners – and by extension the HOA – were actually suspicious of breach as far back as February of 2011 (more than five years before the action was commenced) when the HOA Board authorized the Civil Code §6000 *Anderson* letter. This letter was prepared by a law firm and sent to the Voorhees defendants via certified mail on 03/02/11. The letter began, in bold, that it was a *Notice of Commencement of Legal Proceedings* under the Right to Repair Act and other statutes. It described drainage and hardscape issues involving Lots 50-74 and A-C. The letter hinted at invasive testing and further evaluation. Although the letter stated it was a "settlement communication" – and §6000(l) provides that "all defect lists and demands, communications, negotiations, and settlement offers made in the course of the prelitigation dispute resolution process provided by this section shall be inadmissible" – the letter cannot serve as both a statutorily-required prefiling notice to commence prelitigation efforts *and* a privileged communication. (See Civil Code §934 and Evidence Code §1122(a)(3).) Furthermore, the key evidence is provided by witnesses, not the writing itself. (See Buecher and Voorhees declarations.)

Although the "fix" was suspect (digging a trench to redirect water), a breach of contract action must be commenced within four years of when the claimant suffers an actionable wrong as a result of a breach. The Anderson letter disclosed plaintiff's suspicion of wrongdoing and actionable harm associated therewith. Any claim associated with drainage issues would have accrued at that time. This claim was commenced late.

Plaintiff's reliance on *Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, is unavailing since in that case an isolated report by a single member was insufficient to bind the entire HOA/community. The case at bar is just the opposite of *Creekridge*, and far more similar to *Landale–Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1404-1405. Although the Anderson letter involved only a small section of the common areas, this is precisely why the members run a risk when they authorize the HOA to run a representative action on their behalf – if some are barred, all are barred. **Defendants are entitled to summary adjudication in their favor on the third cause of action for breach of contract.**

- Right to Repair

Pursuant to Civil Code §941(a), "no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion." This is a statute of repose, codifying a Legislative intent to provide contractors with peace of mind knowing there is a firm date after which they cannot be sued. The 10-year window to file does not apply to developers who remain in actual possession of, or control over, the subject improvement. (Civil Code §941(c).) In addition, the 10-year period can be tolled for up to 100 days after alternative dispute resolution efforts are exhausted. (See Civil Code §927.) Both sides agree that plaintiff's service of a "Right to Repair" notice on 05/26/16

was effective to serve as mark (Civil Code §910(a)) for this claim. Thus, the question is whether the Voorhees Defendants had substantially completed, or recorded a valid notice of completion for, the "improvement" at issue prior to 05/26/06.

Applying §941(a) to any fact pattern requires a determination of (1) what is "the improvement" to which the time-period applies, (2) what constitutes substantial completion thereof, and (3) what is required for a notice of completion of that improvement to be "valid."

What is meant by the term "improvement"? Although the term is supposed to be interpreted broadly to give contractors their needed peace of mind, the term is not defined within the Right to Repair Act but is defined in a few other statutes. (See, e.g., Civil Code §§ 8042, 8050; Govt. Code §66419(a).) Caselaw defining "the improvement" stems mostly from the original construction defect statutes (namely Civil Code §337.15), which is not exactly apples to apples since §337.15 ties the 10-year filing window to "the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement," which implies that "the improvement" is the entire project but that a discrete 10-year filing window applies for each separate sub-contractor. As explained by the Court of Appeal in *Estuary Owners Association v. Shell Oil Company* (2017) 13 Cal.App.5th 899 (at 913): "The critical point is completion of the improvement, or aspect of the improvement, for which a given defendant is responsible. The period of repose commences when the specific improvement alleged to be defective is substantially complete even if it is part of a larger development that is completed later, and, as to a particular subcontractor, upon completion of that subcontractor's work, not the total development of which it is part." (See, *e.g.*, *Nelson v. Gorian & Associates, Inc.* (1998) 61 Cal.App.4th 93, 97-99 [10-year filing window for claims against developer triggered after completing grading work since developer was only selling vacant buildable lots]; *A&B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 356-357 [10-year filing window for claims against sub-contractor triggered after sub-contractor completed work, despite additional corrective work thereafter]; *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772-773 [10-year filing window is triggered differently depending on whether defendant is sub-contractor versus the overall developer].)

Although defining "the improvement" is fairly easy when the issue involves performance by a sub-contractor with a precise scope of work, defining "the improvement" is challenging when it is the developer asking for the benefit of repose over discrete portions of the overall project, even though the developer has not left the site. Voorhhees was not selling vacant buildable lots (*Nelson*) or doing specific sub-contract work (*A&B Painting, Liptak*). When the Voorhees defendants secured the rights to develop Good Creek Estates, it was to produce a completed community with homes available for sale directly to the end-use consumer and common areas available for the enjoyment of all the residents – not to simply build out a competent wastewater system. In the end, it is not absolutely critical to this motion to determine if the wastewater work

should be carved out for its own separate 10-year filing window because there are triable issues of fact as to (1) whether Voorhees substantially completed that work prior to 05/26/06, and (2) whether the 02/17/06 notice of completion was valid.

The date of substantial completion is an objective fact about the state of construction of the improvement, to be determined by the trier of fact based on competent evidence concerning the actual state of construction of the improvement. (See *Hensel Phelps Construction Co. v. Superior Court* (2020) 44 Cal.App.5th 595, 613-614; in accord, *State Farm General Insurance Company v. Oetiker, Inc.* (2020) 58 Cal.App.5th 940, 954.) Defendants contend that the water and wastewater system was substantially complete in or around February of 2006 – which corresponds to when VSGC recorded a Notice of Completion, delivered the water and wastewater systems to CCWD, and received CCWD's certificate of Acceptance. However, on the other hand, CCWD sent a letter to defendants in August of 2007, identifying additional work needed for the water and wastewater facilities, including punch list items, securing necessary easements, and completing a final inspection. This letter alone is strong evidence that the improvement was not substantially completed. (In accord, Civil Code §337.15(g).) Although the defense expert (Stout) opines that defendants could not have completed Unit 2 without first completing Unit 1, and that CCWD would not have accepted the wastewater system without the entire infrastructure being completed, plaintiff's expert (Lewandowski) points out that those opinions are devoid of any foundational truth, and further points out that Unit 1 has no storm drain system at all, Unit 1 was in fact completed after Unit 2, the golf cart path is missing needed curbs, the drainage system near Gold King Drive is defective, and completion of that portion of the wastewater system for unit 2 bears no relationship at all to the balance of the infrastructure. While it appears to this Court that plaintiff may well have the better of the argument, that is a factual matter and the jury will have to make that determination.

The same evidence defendants rely upon to show substantial compliance also permits a finding that the improvement was complete. (See Civil Code §8180; in accord, Schwetz v. Minnerly (1990) 220 Cal.App.3d 296, 302 [10-year window triggered when notice of completion filed for first building, even though several more phases anticipated].) However, §941(a) specifically calls for a "valid" notice of completion. The concept of validity is not elaborated upon in the Legislative history of §941, but it requires no meaningful stretch to surmise that the Legislature was aware of, and concerned with, contractors filing such notices prematurely in an effort to short-cut the work. (See, *e.g., Fontana Paving, Inc. v. Hedley Brothers, Inc.* (1995) 38 Cal.App.4th 146, 154-156.) Thus, reference is made to Civil Code §8182, addressing the requirements for such notices, including: (1) the name and address of the owner, contractor and construction lender; (2) a description of the site; (3) proof of delivery/posting to the HOA; (4) date of completion and (5) a general statement of the work provided pursuant to sub-contracts. (*Id*; see also Civil Code §§ 8102, 8106, 8119.) The Notice of Completion here specifically relates to Unit 2, not Unit 1. The transfer to CCWD also involves only Unit 2. Finally, CCWD's acceptance pertains only to Unit 2, and only to the water and

wastewater facilities and associated easements. Nothing about that acceptance even hints at other aspects of the infrastructure.

It is plain to this Court that triable issues of fact permeate the question of whether the statute of repose lapsed. There are triable issues of fact regarding the scope of the "improvement" attributable to moving parties, and whether any material portion of the project was completed more than 10 years prior to filing. Since §941 is designed to give a contractor who leaves a project peace of mind to know that the clock will start running, the statute hardly applies to defendants here who stuck around long after the initial wastewater infrastructure subpart was finished. In fact, Voorhees and his entities remained involved with the Gold Creek Estates development project until just recently. Based on the aforementioned findings, it is not necessary for this Court to make any findings regarding the "exception" to the 10-year filling window during the time that the Voorhees defendants continued to possession/control parts of the common areas after the CCWD acceptance of the wastewater facility. **Summary adjudication is DENIED as to the first cause of action.**

- Tort Claims (4th, 5th 6th)

Defendants first contend that the time period for filing the three "fraud" claims is controlled by Civil Code §941(a) based upon the "gravamen" test. As this Court already observed (when overruling a demurrer), the Right to Repair Act does not displace "any action for fraud, personal injury, or violation of a statute." (Civil Code §943.) The California Supreme Court has made plain that the Right to Repair Act "leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249; *State Farm General Ins. Co. v. Oetiker, Inc.* (2020) 58 Cal.App.5th 940, 952-953; *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55, 71-72.) These are not part of the Act because the Act was designed solely to permit lawsuits when there is only property loss (abrogating *Aas v. Superior Court* (2000) 24 Cal.4th 627). Tort claims already had their own basis for damages, and did not require the Act for redress. Of course, if the statute of repose in §941 did apply to these causes of action, the same triable issues would apply.

Defendants next contend that the time period for filing the three "fraud" claims is controlled by Civil Code §337.15. Our Supreme Court also has made plain that the 10-year repose in §337.15 "does not apply to suits based on willful misconduct or fraudulent concealment." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 373.) Two years later, the Court of Appeal doubled down on the willful misconduct aspect, holding that "defendants may not successfully assert the 10–year limitations period set out in section 337.15 as a defense if the trier of fact determines that (1) there was willful misconduct involved in the construction of plaintiffs' homes, (2) such willful misconduct resulted in the alleged latent construction defects and (3) such willful misconduct was committed by the defendants." (*Acosta v. Glenfed Development Corp.* (2005) 128 Cal.App.4th 1278, 1286.) Based on these holdings, it should be clear that claims

alleging concealment, misrepresentation and nondisclosure (all forms of fraud) are not subject to the outside 10-year statute of repose. (See Civil Code §337.15(f).) Even if they were, this Court has already identified triable issues left to resolve regarding "substantial completion of the development or improvement" (§337.15(a)) for many of the same reasons impacting the first cause of action (see §337.15(g)). (Defendants contend that the exception only applies to "concealment" as distinguished from nondisclosure or misrepresentation. There is no Legislative history supporting a conclusion that the statutory reference to "concealment" was purposefully designed to exclude fraud-based claims for failing to disclose or disclosing inaccurately. There is little logic for treating these forms of fraud differently, given that the idea is to remove a reward to the contractor. Regardless, that issue need not be resolved at this time.)

In their reply papers, defendants assert (for the first time) that the "fraud" claims are not adequately supported since there is no evidence to show that the Voorhees defendants had any reason to suspect the allegedly defective work performed by them and their selected sub-contractors was defective at the time. There is a fair bit of evidence showing that the Voorhees defendants took a myriad of "short-cuts" but fraud is a tall order here. Nevertheless, defendants' motion was not based on a substantive failure to support the claims, and it is too late in the day to put that issue on this table. (See CCP §1010; CRC 3.1110(a); *Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1277; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241; *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) The question of factual adequacy is not relevant to the question of timeliness of the claim, and since plaintiff describes the construction defects as willful and a species of fraud, that is sufficient for present purposes. **Defendants' motion for summary adjudication is DENIED as to the 4th, 5th, and 6th causes of action.**

The Clerk shall provide notice of this Ruling to the parties forthwith. Moving defendants are ordered to serve and file a proposed order consistent with CRC 3.1150 and this Ruling.