

FOSTER v. IRBC2 PROPERTIES LLC, et al

21CV45573

**CONTINUED HEARINGS ON DEMURRERS,
MOTION TO EXPUNGE, AND MOTION TO CONTINUE**

This is a claimed wrongful foreclosure case commenced by plaintiff after the recording of a Trustee's Deed Upon Sale following a nonjudicial foreclosure sale. Plaintiff generally contends that the foreclosing parties had no legal authority to conduct the foreclosure sale because their putative interest in the property was based on void instruments. As this Court observed in relation to the earlier ruling on demurrer (entered 07/22/22), the right to challenge assignments set forth in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, was limited to post-foreclosure, and only for pre-foreclosure assignments void ab initio. (See also *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279.) Since the operative pleading was deficient, and the related Notice of Lis pendens defective, the previous cloud was ordered expunged. Plaintiff has since filed a First Amended Complaint and recorded a new Notice of Lis Pendens.

Plaintiff's motion to continue the hearing on defendant's motion to expunge is MOOT, and deemed off-calendar. Plaintiff has already had the benefit of that motion with several continuances (and as it happens, yet another one).

The defense motion to expunge, and the three demurrers on calendar, are STAYED. It is an interesting question whether a motion to expunge a *lis pendens* qualifies as an action taken *against* the debtor for purposes of the automatic bankruptcy stay, especially when the debtor's only present interest in the property is theoretical/equitable. (See 11 USC §362(a)(1) and (c).) However, since plaintiff has at least a theory of liability, and since very few courts have had occasion to consider (let alone decide) whether the remedy for a *Yvanova* violation is limited to monetary relief, or if the plaintiff can actually get the property back, this Court must first defer to the bankruptcy court for whether the issues are ready for resolution here in the state court.

Status conference regarding status of the new bankruptcy petition is set for December 7, 2022, at 1:30 p.m. in Department 4. If the new bankruptcy petition is resolved prior thereto, defendants are invited to notify this Court and seek by way of ex parte application an order lifting the stay and rescheduling the hearing on the motion to expunge and demurrers.

The Clerk shall provide notice of this Ruling to the parties forthwith. No CCP §1019.5 or CRC 3.1312 order shall be required.

BIGGS v. DEANGELIS, et al

21CV45738

DEFENDANT'S MOTION TO STAY

This is a personal injury action, arising out of a rear-end automobile accident along a public stretch of Baldwin Street in Rancho Calaveras, CA, on 10/31/19. Despite there being adequate service on only one of the two named defendants (see ROA entry 04/13/22), both of the defendants have answered. Before the Court this day is a motion by one of those defendants – Donovan – to stay the action pursuant to the Servicemembers Civil Relief Act. Plaintiff objects.

Pursuant to 50 USC §3932, any civil litigant currently serving in the military is entitled to a stay of the action “for a period of not less than 90 days” upon a showing (1) that the servicemember’s “duty requirements materially affect the servicemember's ability to appear,” and (2) that “military leave is not authorized for the servicemember at the time.” The first element can be established by “a letter or other communication” from a person with knowledge of said restriction (usually the servicemember). The second element regarding permissive leave can only be established by “a letter or other communication from the servicemember’s commanding officer.” The purpose of §3932 is to temporarily suspend judicial proceedings to prevent those in service to the nation from being disadvantaged in the legal process. The statute is to be liberally construed in favor of servicemembers. Thus, if both elements are met, or if the evidence that is presented demonstrates without doubt that the servicemember is unable to be physically present for scheduled hearings, the initial (minimum) 90-day stay becomes mandatory. (See *In re Amber M.* (2010) 184 Cal.App.4th 1223, 1230-1231 [trial court abused its discretion when it denied incomplete application for stay since evidence was clear that servicemember was unable to attend and no prejudice to the opposing side was shown]; in accord, *In re A.R.* (2009) 170 Cal.App.4th 733,742; *George P. v. Superior Court* (2005) 127 Cal.App.4th 216, 223-224 [distinguishing between mandatory first 90-day stay, and discretion stays thereafter].)

As set forth in defendant’s declaration: (1) he is a currently enlisted and active-duty member of the U.S. Army; (2) he is stationed well beyond the reach of this Court (in Fairbanks, Alaska); (3) he has limited access to defense counsel; and (4) he is unable to fully participate in the defense of the case. (See Deangelis Declaration, Paragraphs 2-5.) As set forth in defense counsel’s declaration, communication has been challenging. (See Leonard Declaration, Paragraph 4.) Not expressly stated, but evident from the information, is that being in Alaska makes it impossible to physically appear at any future substantive hearing in the action.

Plaintiff correctly points out that defendant's application is defective in that there is no letter or other communication from defendant's commanding officer addressing the options for leave. Defendant does not address this requirement in his reply papers, and simply doubles down on the concept that his spotty cell service and general enlistment make it hard to interact with counsel, or deal with the case on its merits.

The request for a stay is granted despite this shortcoming in complying with statutory requirements, but only pursuant to this Court's inherent powers under CCP §128(a)(3) (see *Avant! Corp v. Superior Court* (2000) 79 Cal.App.4th 876, 884.) The request pursuant to §3932 is denied without prejudice. Defendant is free to bring a renewed motion to stay under §3932 but must provide the required letter from a commanding officer regarding options for leave. One of the reasons this Court feels that a stay under §128 is warranted is to ameliorate the problem created by defense counsel in filing an answer on defendant's behalf when defendant was never properly served. Counsel waived the service defect on defendant's behalf, likely without defendant's express consent and apparently without knowledge of defendant's enlistment.

The case is stayed only as to defendant Donovan, and only for a period of 120 days (effective immediately).

The Clerk shall provide notice of this Ruling to the parties forthwith. No CCP §1019.5 or CRC 3.1312 order shall be required.

KAISER v. ATKINS et al

21CV44871

**DEFENDANT'S APPLICATION
FOR PRELIMINARY INJUNCTION**

This is a civil dispute between former romantic partners involving unfulfilled promises and comingled assets. The operative pleading contains two causes of action: partition of real and personal property; and breach of oral contract to repay personal loans. The action has been pending for over two years, and is presently scheduled for trial on 11/16/22. The parties have attempted to resolve their differences without resort to judicial intervention, and in fact brokered a settlement agreement regarding the second (breach of oral contract) cause of action (though issues with that settlement apparently persist). There is apparently an agreement to buy out or sell the property, which is presently alleged to be under consensual forbearance from a nonjudicial foreclosure sale.

Before the Court this day is the specially-set hearing on plaintiff's application for a preliminary injunction to presumably halt the nonjudicial foreclosure sale potentially taking place soon. Although this Court granted a temporary restraining order on 09/20/22, the court file does not reflect any proof of service on U.S. Bank, N.A. Rushmore Loan Management Services, or any other entity responsible for the alleged nonjudicial foreclosure. In addition, since the filing of the ex parte request, the landscape has changed: there is in place a forbearance agreement through the date of trial. Since California does not permit dual tracking, this forbearance agreement – provided that the parties comply therewith – provides the necessary breathing room for plaintiff and defendant to list the property for sale. Moreover, the application for preliminary injunction does not include any legal basis by which this Court can stop Rushmore from foreclosing on the property if the forbearance agreement is breached. To the extent plaintiff can show that the equity she receives from a foreclosure sale was less than what she would have realized going to market, her recourse is against defendant, not Rushmore. Application for preliminary injunction DENIED without prejudice. The TRO is vacated.

The Clerk shall provide notice of this Ruling to the parties forthwith. No CCP §1019.5 or CRC 3.1312 order shall be required.

SANCHEZ et al v. SIMPSON et al

21CV46351

**PLAINTIFFS' APPLICATION
FOR PRELIMINARY INJUNCTION**

This is a civil action stemming from an poorly conceived real estate transaction between friends, neighbors, and distant cousins. The plaintiffs – elderly and/or infirm – sold their residence to defendants for \$356,000, but obtained no cash in the deal. Instead, plaintiffs agreed to pay all escrow fees and carry back the entire purchase price (minus \$1,000) as a promissory note bearing 3% interest. Based on the amortization schedule provided by escrow, plaintiffs were not due to be paid in full until after two of three plaintiffs have reached the age of 107. Plaintiffs allege in their Complaint that many of the terms “understood” by the parties did not make it into the Residential Purchase Agreement actually signed by the parties, such as defendants’ obligation to secure financing to pay off the promissory note in due course. There are also issues surrounding plaintiffs’ access to the property to retrieve personal effects left behind after the close of escrow.

Before the Court is plaintiffs’ application for a preliminary injunction. Based on the initial papers, this Court issued in plaintiffs’ favor a TRO, barring defendants from (1) selling the property, (2) selling or otherwise disposing of plaintiffs’ personal effects left at the property, and/or (3) altering the property without plaintiffs’ consent. The hearing on the preliminary injunction was set for today, with a schedule for both sides to submit additional briefing, pleadings, or documents; nothing further was filed by any party.

A preliminary injunction is an equitable remedy designed to preserve the existing status quo until the dispute between the parties can be finally resolved on the merits. 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.)

Looking first to the Fifth Cause of Action for Conversion, conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the

defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort, meaning that the foundation of the action rests neither in the knowledge nor the intent of the defendant. Questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. (*Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1404-1405; *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281.) It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. (*Spates v. Dameron Hospital Assn.* (2003) 114 Cal.App.4th 208, 221.) Plaintiffs claim a conversion based upon defendants' refusal to permit them access to retrieve personal items left behind during the elongated move out process. Plaintiffs presented as Exhibit 4 a "partial list" of those items.

Since a preliminary injunction can only issue to preserve the status quo, it is necessary to first clarify what the "status quo" in this case really is. 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.) As set forth in the partially verified complaint (plaintiff Antone does not verify the exhibits, only the 15-page complaint) and unauthenticated exhibits in the court record, on 05/03/22 the parties entered into a contract to sell the residence. In Paragraph III, the parties made plain that "there shall be no personal property included in this Agreement or included in the purchase of the real property." The parties further made explicit that "all removeable items from the real property, i.e. non-fixtures, shall be retained by the seller at closing." [Emphasis added.] Thus, the status quo was that plaintiffs were to retain the ownership interest in all personal items existing at the property on the date escrow closed, which cuts against any claim that items left behind were purposefully abandoned in favor of defendants. To the extent defendants are refusing to recognize plaintiffs' ownership interest, that amounts to conversion.

As for the balance of the claims set forth in the operative pleading, plaintiffs have not presented sufficient evidence from which to establish a likelihood of prevailing on the merits. That is a not to say that plaintiffs will not win at day's end, but just that the evidence presented to date leaves too many questions unanswered. For example, the written agreement provides that if defendants cannot secure a VA loan on the property to pay off the note, the plaintiffs would agree to carry the note until such time as the "property is rehabilitated for VA funding." (See Page 6.) Although this particular aspect of the agreement is unusual, if defendants have been making their monthly payments on the note, and made an effort to secure funding, plaintiffs have not shown fraud or breach of contract – at least not on the evidence presented here. Unconscionability is not a standalone cause of action. (See *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 980.) Constructive trust is not a standalone cause of action. (See *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 362.)

The application for preliminary injunction is GRANTED as to the provision in the TRO regarding personal property (Paragraph A). Defendants are hereby ordered not to sell, donate, move, secret, convert, or dispose of in any way plaintiffs' personal items left at the real property following the close of escrow, some of which (but not all) are identified in Exhibit 4 to the complaint (incorporated herein by reference). Since defendants have no potential ownership therein, no bond shall be required of plaintiffs. In light of estimates set forth in Exhibit 4, and there being no challenge to that evidence, this Court sets defendants' counterbond at \$50,000. The balance of the application for preliminary injunction, relating to the real property, is denied without prejudice.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiffs shall forthwith prepare the CCP §1019.5 and CRC 3.1312 order, but should delays occur, the ruling is immediately effective without further order of this Court.