

**TYLER, et al VS. OAKDALE IRRIGATION DISTRICT, et al**  
**17CV42319**  
**PLAINTIFF'S MOTION FOR SUMMARY-JUDGMENT**

This is an action for inverse condemnation. Plaintiff alleges that defendants' mismanagement of water levels in Lake Tulloch caused a hillside failure that led to the county declaring the residence to be uninhabitable. Before the Court this day is plaintiff's motion to summarily adjudicate in its favor defendants' fourth affirmative defense based upon the statute of limitations.

*Brief Factual Background (borrowed from prior ruling)*

Defendant Tri-Dam is a cooperative venture between co-defendants Oakdale Irrigation District and the South San Joaquin Irrigation District (collectively referred to as "Tri-Dam"). Tri-Dam holds a federal license to operate and maintain a hydroelectric project between the Tulloch Dam, the Donells Dam and the Beardsley Dam, and encompassing the Tulloch Reservoir, Tulloch Penstock, Tulloch Powerhouse and Tulloch Switchyard (collectively referred to as "the Project"). Tri-Dam's license gives it general authority over what is commonly referred to as Lake Tulloch. Tri-Dam enjoys a degree of authority over conditions which are allowed to remain along the banks of the Lake, and a duty to ensure that any such conditions are consistent with the FERC license it holds (which incorporates a detailed Shoreline Management Plan) and Calaveras County Municipal Code §20.10.120.

On or about 05/27/86, plaintiff acquired ownership of APN 098-022-003, a 1.2 acre lot in a newly-released section of Tract 378 in Lake Tulloch Shores (aka The Shores of Poker Flat). Plaintiff's lot (#551) sat at the top of a steep and rocky embankment along the shore of the Lake. Plaintiff caused to be constructed thereon a 2,400 square foot residence, complete with three bedrooms and 3 bathrooms. The property was commonly referred to as 822 Bret Harte Drive, Copperopolis (hereinafter "subject property").

In or about 2005, plaintiff observed surface slippage around the supports holding the bedroom decks, and commissioned professional services to remediate the slippage. Plaintiff did not observe any damage to the residence or the foundation. Plaintiff spent roughly \$50,000 on the work.

In or about 2011, plaintiff observed additional surface slippage around the supports holding the bedroom decks, and new slippage around the supports holding up the "main" deck. Plaintiff commissioned professional services to remediate the slippage.

Plaintiff did not observe any damage to the residence or the foundation. Plaintiff spent roughly \$100,000 for this work.

On 04/04/16, a landslide occurred at the subject property, exposing support structures and leaving the residence in a precarious position.

On 03/21/17, the Calaveras County Code Compliance Unit caused to be recorded against the subject property a "red tag" notice.

On 12/03/18, plaintiff's lender commenced nonjudicial foreclosure proceedings. The property was first transferred to Fannie Mae for the reported amount of \$160,015.00, and thereafter to a third-party for the reported amount of \$300,000. According to online reports, the property has a present fair market value in excess of \$500,000. The neighbor's house, which is slightly larger but on a much smaller lot, is presently estimated to be worth \$1.3M. But for the earth failure, it may be that plaintiff's value in the subject property would have been at least in the range of \$1.1 - 1.4M.

### Evidentiary Objections

On a motion for summary adjudication, 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. Hillside, 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). None of the objections lodged, let alone the evidence sought to be excluded is material. For ease of process, the objections are overruled.

In order to knock out an opponent's affirmative defense at the summary adjudication stage, plaintiff must first make a prima facie showing sufficient to support his position (aka, burden of production) that (1) there are no triable issues of material fact relating to the affirmative defense and (2) the affirmative defense fails either because the affirmative defense cannot be established or because the affirmative defense has no bearing on the claims asserted. If plaintiff meets that burden of production, the burden then shifts to defendant to demonstrate the existence of a triable issue of material fact. See CCP §437c(f)(1); *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1160-1161; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 899-900; *Continental Insurance Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1195-1196.

The time for commencing an action for inverse condemnation depends on whether the plaintiff is seeking relief for physical damage to property (three years per CCP §338(j)), or relief for the actual taking of property (five years per CCP §318). If the property is damaged, the three-year statute of limitation applies; if the property is taken by some tangible act of possession or control, the five-year limitation on actions to recover property applies. *Bookout v. State of California* (2010) 186 Cal.App.4th 1478, 1483-1484; in accord, *Hauselt v. County of Butte* (2009) 172 Cal.App.4th 550, 564. The referenced landslide, which rendered plaintiffs' residence uninhabitable, occurred on 04/04/16. This lawsuit was filed on 04/10/17. On its face, the lawsuit was timely regardless of which theory defendants propose is the trigger (defendants now focus on the shorter three-year period). However, defendants contend that the action in fact accrued in 2005 or 2011, when plaintiff noticed "slope creep" around the support posts for the rear decking.

The three-year statute of limitations to seek remuneration for damage to private property begins to run when a reasonable person should appreciate the existence of property damage sufficient to impact market value, *and* have reason to suspect that the damage was the result of someone's negligence. See CCP § 338(j); *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 286; *Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 855-858. However, when the public entity's conduct is ongoing, and the degree of damage arguably increasing therewith, the property owner's claim "does not accrue and the statute of limitations period does not begin to run until the situation has stabilized." *Pacific Shores Property Owners Ass'n v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12, 34.

When defendants sought to summarily adjudicate this issue in their favor, this Court found there to be "obvious triable issues of fact as to when the cause of action accrued." This Court further opined that to put all triable issues to bed, "there would need to be details, and expertise, to find as a matter of law that plaintiff was on inquiry notice in 2005 or 2011 when surface slippage was first detected." The evidence presented in support of defendants' motion last year was limited to the amount of slippage (2-3 inches) and some general contentions that habitability impacts possibly existed. For inverse condemnation, there must be evidence of *damage* to, or taking away of, the property, plus facts permitting some suspicion of wrongdoing associated therewith. The evidence offered previously did not demonstrate this as a matter of law. For that reason, defendants' motion for summary adjudication was denied without prejudice – leaving the issue for trial. Or so it would seem.

Plaintiff asks this Court to find that the "triable issues" present when the defense motion was denied on 09/02/22 have now crystalized in plaintiff's favor. What changed (besides a new allegations of episodic slope creep in 2014)? Plaintiff offers evidence that the home was at all times useable prior to 2016, that the foundation beneath the home showed no evidence of failure prior to 2016, that all the repairs to the home

before 2016 had to do with the rear decking only, and that the County regularly inspected the property prior to 2016 and never concluded that the home was uninhabitable. See UMF 4-7.

The principal point of the stabilization “hard line in the sand” litmus is to permit the property owner to know the full extent of the taking for remuneration purposes. See *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 280-281 [stabilization for purposes of inverse condemnation via landslide is a question of fact]; *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, 235; in accord, *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1843 [“minor erosion damage” three years prior to landslide did not establish the trigger for coverage]. Thus, prior to 2016, there may have been a minor taking of the back deck (plaintiff alleges he spent \$100,000 to repair the deck), but that it is not the catalyst for the pending lawsuit. In other words, plaintiff effectively waived defendants’ taking of the deck but suffered a new loss with the taking of the residence. However, plaintiff offers no expertise on the subject of his free and unfettered use of the property, or that the slope creep did not show any damage to the foundation. His opinion is only entitled to so much weight on the question of whether some aspect of the slope creep stabilized prior to 2016. While it seems unlikely, plaintiff has not negated all triable issues of fact.

Motion for summary adjudication is DENIED without prejudice. The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.