GOLD CREEK ESTATES v. VALLEY SPRINGS GOLD CREEK

17CV42103

DEMURRER AND MOTION TO STRIKE

This is a construction defect action involving allegations of negligent design and implementation of common areas within a subdivision complex. Before the Court is a demurrer and motion to strike by the Voorhees Defendants. **The demurrer is SUSTAINED in part, and OVERRULED in part. The motion to strike is MOOT. Plaintiff shall have 20 days leave to file and serve a Fourth Amended Complaint containing no more than eight (8) causes of action and spanning no more than 20 pages.**

CCP §430.41

In late 2015, Governor Brown signed S.B. 383 into law with the goal of reducing litigation abuses and time-wasting. While the legislation lacks the teeth necessary to make a serious dent in the litigation issues it sought to eradicate (see *Dumas v. Los Angeles County Board of Supervisors* (2020) 45 Cal.App.5th 348 at 355, and *Olson v. Hornbrook Community Services District* (2019) 33 Cal.App.4th 502 at 515), the legislation supplements the lawyers' obligation to litigate ethically (see CRPC Rules 3.1(a), 3.2, 3.4(f), 8.4(d). It is for this reason that trial courts continue to insist on compliance.

CCP §430.41(a) requires that a demurring party "meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer," and file a declaration under penalty of perjury stating "the means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer." Here, according to defense counsel, it was his opinion that meeting and conferring would serve no purpose, and thus he elected to skip the requirement altogether. (See Ahmad Decl Para 5.) This approach is troubling, not just because this Court has a lawyer openly thumbing his nose at a statute, but because a vagary in the statute seems to suggest that this Court is powerless to do anything. Not so. Although CCP §430.41(a)(4) provides that an "insufficient" meet and confer "shall not be grounds to overrule or sustain" the demurrer, nothing in that subsection obligates a trial court to reach the merits of the demurrer when the demurring party elects to completely disregard an express condition precedent to its filing. Like other conditions precedent (motion fee, notice, memorandum), the failure to satisfy a condition precedent could result in an order striking the papers. Since the same requirement, and defect, exists with the motion to strike (CCP §435.5), that pleading could also be stricken.

Nevertheless, this Court elects to reach the merits. [However, the Court notes that any future cavalier conduct by counsel likely will result in the Court imposing sanctions pursuant to CCP Section 177.5.]

Right to Repair Act

Plaintiff contends that defendants waived the question of preemption at least as to the Eighth cause of action by failing to raise it during the last demurrer round, and are not permitted to raise it against vis-à-vis the Fifth cause of action since this Court already overruled the

previous demurrer. Although CCP §430.41(b) generally prohibits a party from demurring on a ground which could have been raised earlier, plaintiff seems to forget that the earlier iteration of the Eighth cause of action was titled "intentional/negligent nondisclosure" and *intentional* nondisclosure is clearly outside the reach of the Act. (See, *e,g., Belasco v. Wells* (2015) 234 Cal.App.4th 409, 424.) CCP §430.41(b) does not directly foreclose a second demurrer to the Firth cause of action, or a first demurrer to the refashioned Eighth cause of action. (See *Goncharov v. Uber Technologies, Inc.* (2018) 19 Cal.App.5th 1157, 1166; *Carlton v. Dr. Pepper Snapple Group, Inc.* (2014) 228 Cal.App.4th 1200, 1211.)

The Right to Repair Act effectively preempts all common law torts associated with construction defect except personal injuries, statutory violations and "fraud-based claims." (Civil Code §§896, 931, 943; *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 256, 259; *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.) Defendants contend that the Fifth (fiduciary duty) and Eighth (negligent nondisclosure) causes of action are displaced (aka preempted) by the Right to Repair Act. Defendants are mistaken. Breach of fiduciary duty and negligent nondisclosure are one and the same, and both are anchored in a form of constructive fraud for which actual intent to deceive is not required. (See *Michel v. Larry Moore & Associates Realtors* (2007) 156 Cal.App.4th 756, 762-763; *Golden Gate Way, LLC v. Enercon Services, Inc.*, Wl5407517 at *18 (N.D. Cal 2021).) Since both contentions are "fraud-based claims," they fall outside the reach of the Act.

Demurrers to the **Fifth** (fiduciary duty) and **Eighth** (negligent nondisclosure) causes of action as preempted by the Right to Repair Act are **OVERRULED**.

Fraud-Based Particularity

Causes of action that are fraud-based (meaning liability is based on what defendant said, or did not say) must be plead with particularity, including how, when, where, to whom, and by what means the representations were made (or not made), and in the case of an entity, the communicator's authority to bind the entity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Morgan v. AT & T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1261–1262.)

Defendants contend that plaintiff has still not provided sufficient facts to support the essential element of scienter attendant for the Second (concealment), Third (misrepresentation), Fourth (misrepresentation), Fifth (fiduciary duty), Eighth (nondisclosure), and Ninth (nondisclosure) causes of action. This contention could, in theory, go on forever, since it would be very hard for plaintiff to reach into defendants' subconscious and plead facts regarding "knowledge" without the benefit of having completed discovery. That is precisely why less specificity is required "when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.) In other words, so long as the plaintiff alleges with particularity all elements within its own knowledge, general allegations may suffice for those elements in which "the facts lie more in the knowledge of the" defendant. (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 838.) This "exception" is most often applied in the context of scienter, and is the only basis upon which defendants demur to these claims. Having reviewed the operative pleading, which is admittedly longer than need be, this Court finds that plaintiff has alleged

enough information to sufficiently acquaint defendants with how they are to meet the challenge of scienter. The balance is within their own knowledge, and subject to discovery.

Demurrer to the **Second** (concealment), **Third** (misrepresentation), Fourth (misrepresentation), **Fifth** (fiduciary duty), **Eighth** (nondisclosure), and **Ninth** (nondisclosure) causes of action for failure to plead enough facts is **OVERRULED**.

Duplication

Finally, defendants contend that there are subsets of "duplicate" claims that ought to be thinned out to make the pleadings more manageable. There is no express authority for sustaining a demurrer to a cause of action just because it is virtually identical to another cause of action. (See CCP §430.10; in accord, *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897.) Nevertheless, a number of recent appellate decisions have found that dismissing redundant causes of action on demurrer is appropriate and a good example of trial court management. (See *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 692; *Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 290.) This Court agrees.

The **Second** cause of action for fraudulent concealment and the **Ninth** cause of action for intentional nondisclosure (if there is such a cause of action) involve the same primary right, the same transgression (remaining silent when the law requires speech), and the same alleged harm. The demurrer to these causes of action on the grounds of redundancy is **SUSTAINED** with 20 days leave to amend as a single cause of action.

The **Fifth** cause of action for breach of fiduciary duty and the **Eighth** cause of action for negligent nondisclosure involve the same primary right, the same transgression (neglecting to speak when the client is relying on you), and the same alleged harm. The demurrer to these causes of action on the grounds of redundancy is **SUSTAINED** with 20 days leave to amend as a single cause of action.

CRC 2.112

Pursuant to CRC 2.112, each separate cause of action must specifically state the party to whom it is directed. Throughout the operative pleadings, plaintiff has employed a naming system that creates marked confusion. For example, plaintiff generally alleges that Voorhees is the de facto alter ego of Valley Springs Gold Creek, but renames Valley Springs Gold Creek as "Declarant" and renames both Vorhees and Valley Springs Gold Coast as "Developer" (see Para 45) and/or "Contractor" (see Para 47). Voorhees is also identified as the alter ego of Declarant, which is redundant. The first cause of action is alleged to run against Developer, Declarant, Contractor – which basically names Valley Springs Gold Coast (among others) three times and Voorhees twice. Plaintiff defines the group "Developer defendants" to include four of the named defendants (see Para 45), but then apparently amends the definition to cover only two of them (see Para 84). As it presently stands, Voorhees is known by at least four different designations in this pleading. This Court could go on and on identifying the areas of confusion, but suffice it to say there is no reason to force defendants, this Court, or the ultimate trier of fact to lay bread crumbs down at each turn in this self-created labyrinth just to find a way out. A complaint must include "a statement of the facts constituting the cause of action, in ordinary and concise language." (CCP §425.10(a)(1).) The third amended complaint is too wordy and obtuse. **On uncertainty grounds, the demurrer to the whole of the pleading is SUSTAINED.**

The Clerk shall provide notice of this Ruling to the parties forthwith. Voorhees Defendants to prepare a formal Order for their respective motions pursuant to CRC 3.1312 in conformity with this ruling.

LARSON v. MARK TWAIN MEDICAL CENTER

19CV44062

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This is a wage/hour dispute involving alleged rounding and rest/meal deficiencies suffered by those in the employ of Mark Twain Medical Center. Before the Court is the continued hearing on plaintiff's motion to certify a proposed class. Both sides have submitted requests for this Court to consider "new case authority" on the topic. This Court has obliged, though none of the new cases changes this Court's analysis. **The motion for class certification is GRANTED in part and DENIED in part.**

Class Certification Basics

A plaintiff advocating for class treatment must establish by admissible evidence an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. A class is ascertainable when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible, and that is sufficient to allow a member of the class to identify himself or herself as having a right to recover. In other words, a class is ascertainable if it is relatively easy to see who is in the class, and who has viable claims. A community of interest exists if there are predominant common question of law or fact which will impact all class members, the proposed class representative has similar individual claims to the class, and the proposed class representative and counsel will adequately represent the class. Regarding predominance, the ultimate question is whether defendant's liability can be determined by facts common to all members of the class, and not by litigating numerous or substantial questions affecting the class members' individual rights. (See *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980-986; *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 28-29; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)

Application Here

Plaintiff Lorraine Larson worked full-time as a patient access specialist at the Mark Twain Medical Center. The bulk of her time was spent in an office, on a telephone, working to resolve billing issues between patients and insurance companies. According to plaintiff, she was the only employee handling inpatient billing and insurance concerns, which meant she was frequently unable to take a meal or rest break with any predictability. Plaintiff's last day worked was 12/05/17. She was ostensibly terminated for allegedly accessing her daughter's medical records. She challenged her termination through a union grievance forum, and reached a settlement for a modest cash payment in exchange for a release of her claims.

Plaintiff filed suit here alleging wage/hour violations. At the heart of her complaint is defendant's policy of rounding time entries to nearest 15-minute interval for every aspect of the workday, even though the written policy provides that rounding is only for payroll purposes. According to plaintiff, rounding is also used for payroll and micro-managing employee meal periods and rest breaks.

Defendant's written time-keeping policy provides in pertinent part as follows:

> "It is every employee's responsibility to ensure that time is reported and recorded accurately and honestly. This means reporting only the true and actual number of hours worked … Non-exempt employees are to record start and stop times at their scheduled shift times. Employees should record their start time no earlier than seven (7) minutes before the scheduled shift start and record their stop time no later than seven (7) minutes after the scheduled shift stop … Employee clockings are rounded to the nearest 15-minute increment. Time clock rounding is for payroll calculation purposes only. All employees are expected to clock IN and OUT on time as scheduled."

Defendant's original meal period policy provides in pertinent part as follows:

> "The 30-minute meal period shall include from the time the employee clocks out to the time the employee clocks back in. Employees are to clock out and in and return to their workstation within their meal period. Employees are to take their meal period away from their workstation."

Later versions of the meal policy clarified that the employees were to receive "uninterrupted meal periods of at least 30 minutes," but reaffirmed that employees should not spend their meal periods at their desk or work station. Although the newer policies provide that "employees are required to clock out and back in for their duty-free meal periods," there is no grace period provided between the end of the meal period and the start of the work period. This becomes material, according to plaintiff, when juxtaposed with defendant's tardiness policy. Defendant defines tardiness as "anytime an employee clocks in after the start of their shift, arrives late to the workstation, and/or is not ready to work at the beginning of the assigned shift." Since the tardiness policy looks to the actual punch time (without rounding), plaintiff contends that it is impossible to enjoy a 30-minute window uninterrupted, and then immediately be at your work station clocked in on time.

Plaintiff also takes issue the rest period policy, which provides in pertinent part as follows:

> "All employees are allowed a 15-minute rest period for each four hours worked. The 15-minute rest period shall include the time needed to go from and return to the employee's workstation."

However, since "employees do not clock out for rest periods, which are always paid," it is not clear how the rest periods are being impacted.

Plaintiff proposes a number of sub-classes for certification:

- Class 1 (Rounding Class): All California-based hourly employees employed by Defendants during the time period from May 8, 2015 to the present to whom Defendants paid based on their rounded rather than actual hours worked;

- Class 2 (Meal Break Class): All California-based hourly employees who worked shifts over six (6) hours to ten (10) hours who were employed by Defendants during the time period from May 8, 2015 to the present to whom Defendants did not provide a meal break (or a one hour payment for any violations);

- Class 3 (Missed Rest Period Class): All California-based hourly employees employed by Defendants during the time period from May 8, 2015 to the present to whom Defendants did not provide a rest period (or a one-hour payment for any violations);

- Class 4 (Failure To Timely Pay Wages Class): All California-based hourly employees employed by Defendants during the time period from May 8, 2016 to the present to whom Defendants failed to timely pay all wages due upon separation from employment from Defendants; and

- Class 5 (17200 Class): All California-based hourly employees employed by Defendants during the time period from May 8, 2015 to the present who were subjected to Defendants' unlawful, unfair or fraudulent business acts or practices in the form of Labor Code and Wage Order violations regarding rounding, meal and rest period violations, and payment of final wages.

An employer in California is entitled to round its employees' work time if the rounding is done in a fair and neutral manner that does not result, over a period in time, in the failure to properly compensate employees for all the time they have actually worked. An employer's rounding policy or practice is fair if on average, it favors neither overpayment nor underpayment; but such a policy is unacceptable if it systematically undercompensates employees because in practice is only rounds down. In general, an employer can round to the nearest 15-minute interval so long as doing so does not, over a period of time, failure to compensate the employees properly. (See *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 847; *David v. Queen of the Valley Medical Center* (2020) 51 Cal.App.5th 653, 664; *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1020-1021; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907.) Defendant's written policies are neutral. However, the "tardiness rule" is a problem in two particulars.

First, at the start of every workday: An employee must clock in *before* their start time to avoid being tardy. A conscientious employee might clock in 2-3 minutes early just to make sure they do not run afoul of the tardiness rule. Since employees have to be at their work station when they clock in, the conscientious employee is always at their station a few minutes early. The rounding policy eliminates those 2-3 minutes, even though the employee is basically working. Although the rounding policy is technically neutral because an employee is paid the same whether they clock in 3 minutes late or 3 minutes early, employees do not dare clock in three minutes late because of the tardiness rule. Thus, in practice, employees regularly gift a few minutes each shift just to avoid getting in trouble.

Second, at the close of every meal period: Although the employees are entitled to uninterrupted meal periods, those meal periods must take place somewhere other than their work station. At the end of that 30 minutes, they have to travel back to their work station and clock back in. The old version of the meal policy was clear that the return trip and clocking in had to occur "within" the 30 minutes (an obvious violation). The new version does not expressly state that clock in and return must occur within the 30 minutes, but fails to provide any grace period between the end of the meal period and the restart of work. Without a grace period, the employee invariably must cut into their own meal period to allow enough time to travel back to their station and clock in. The rounding policy will always show a 30-minute meal period, but in reality that period will have to be a few minutes less than that in order to avoid tardiness.

Defendant could easily cure this by simply amending the tardiness policy to define tardiness as anything over 10 minutes, but that is not the current protocol. (See *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1253 (reserved on other grounds) ["the grace period policy means that if the clock shows the employee clocked in before the end of the six-minute grace period, the employee is not considered tardy"].) Nevertheless, defendant contends that the evidence does not support the theory because many employees routinely clocked in late – but merits are only a small part of the certification equation. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As applied, the tardiness policy *should* guarantee that rounding will only be pro-employer – even if some employees are happy being tardy – which makes this case different than *AHMC*. Moreover, the rounding policy as applied to the tardiness rule offends the principal behind the uninterrupted meal period, as expressed by our high court in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 68-69:

> "small rounding errors can amount to a significant infringement on an employee's right to a 30-minute meal period … Shortening or delaying a meal period by even a few minutes may exacerbate risks associated with stress or fatigue, especially for workers who are on their feet most of the day or who perform manual labor or repetitive tasks. Further, within a 30-minute timeframe, a few minutes can make a significant difference when it comes to eating an unhurried meal, scheduling a doctor's appointment, giving instructions to a babysitter, refreshing oneself with a cup of coffee, or simply resting before going back to work."

In conclusion, **plaintiff has demonstrated ascertainability (the class members are easy to identify), numerosity (there are more than 250 employees similarly-situated), superiority (given the *de minimus* amount of each claim), adequacy (class counsel is experienced and motivated), and commonality with regard to the question of rounding causing employees to lose time overall, and employees cutting short their 30-minute meal period**. However, there is nothing shown to support a rest break violation, nor is there any mechanism to address when the meal period was taken given the countless variables associated with persons working in the health care field. As such, the **following classes can be certified**:

- **Class 1 (All Employees)**: All California-based hourly employees employed by Dignity health at the Mark Twain Medical Center facilities between May 8, 2015, and the present whose hours worked was subject to a rounding policy;

- **Class 2 (Employees Entitled to Meal Period)**: All California-based hourly employees employed by Dignity health at the Mark Twain Medical Center facilities between May 8, 2015, and the present who worked shifts that were at least six (6) hours in length and who did not receive a 30-minute uninterrupted meal period.

There is no need to certify a class of employee entitled to waiting time penalties because the waiting time theory is based on rounding, and that class is identical to the class of employees paid hourly. In other words, there is no sub-set of employees who were underpaid but not entitled to waiting time, and no sub-set of employees entitled to waiting time who were paid accurately. There is also no need to certify a §17200 class since there is no sub-set of employees who would be entitled to injunctive or restitutionary relief separate from being underpaid.

The final concern this Court has is with plaintiff's typicality. As previously noted, the plaintiff here has a pre-existing adversarial relationship with the defendant, having lost her job for allegedly accessing her own daughter's medical records. Plaintiff accepted what appears on its face to be a rather "nuisance" amount in settlement ($10,000) and all she really gained was the privilege of resigning rather than being fired. This might aid somewhat in future job prospects, but it seems to this Court that plaintiff must harbor a degree of disdain toward defendant that potentially clouds her judgment as the class representative. There is also an incentive of her part to negotiate for herself a higher enhancement to offset the settlement she received. There is the reality that plaintiff is not like her co-workers who work on the floor. Plaintiff had an office with a door, and could close that door whenever she wanted to take a break. She could eat at her desk – which is not ideal – but which removes the "tardy" element from her clocking in. Finally, there is the issue of her release agreement. Although plaintiff makes a strong argument for viewing the release agreement in a narrow light, the reality is that a court will have to embark on the ultimate analysis of whether her release agreement is narrow or broad – and what that means in terms of any recovery (even an enhancement). Plaintiff offers no good reason for obligating the parties to litigate the question of her release on the class members' dime, and no reason to believe that plaintiff's focus will be 100% on the class claims. **Plaintiff is not typical of the class members.** (See, *e.g., Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1091; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1307; *Watkins v. Wachovia Corp.* (2009) 172 Cal.App.4th 1576, 1592; *In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1297; *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 664.)

All of the objections lodged in conjunction with the motion are OVERRULED. The vast majority either go to the weight (rather than the admissibility) of the evidence, or are directed at items this Court does not consider material. The class is certified as indicated herein. **Plaintiff shall have 30 days leave to substitute a typical class representative.**

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff to prepare a formal Order pursuant to CRC 3.1312 in conformity with this ruling.

This is one of three wrongful foreclosure cases filed by plaintiff in an attempt to regain ownership of a home he lost in foreclosure. Plaintiff does not deny borrowing almost a half-million dollars, and not paying it back. Plaintiff does not deny that the lender could assign that unpaid note to someone else, and that a deed with the right of foreclosure would follow. Plaintiff simply contends that in the exact moment these foreclosure proceedings commenced, the wrong entity was calling the shots (see Opp.Brf. 10:25).

Before the Court are brought by all the parties who have generally appeared in the action demurrers to the operative First Amended Complaint:

(1) **Henry and Julie Martinez**, the putative BFPs who currently own the subject property. They have demurred to the Third (wrongful foreclosure), Fourth (cancellation of instruments), Fifth (slander of title) and Seventh (quiet title) causes of action;
(2) **DLJ Mortgage Capital**, the ostensible lender on plaintiff's original loan has demurred to the entire complaint on res judicata grounds, as well as the First (intentional misrepresentation), Second (fraudulent concealment) and Sixth (unfair practices) causes of action;
(3) **MERS and U.S. Bank**, as the beneficiary and trustee, respectively, have demurred to the First (intentional misrepresentation), Second (fraudulent concealment), Third (wrongful foreclosure), Fourth (cancellation of instruments), Fifth (slander of title), Sixth (unfair practices), Seventh (quiet title), and Ninth (elder abuse) causes of action.

The only party not demurring is LoanCity, which is not participating at all in this action. Although plaintiff makes repeated references to LoanCity admissions as evidence of wrongdoing against the others, deemed admitted RFAs are only binding against LoanCity – not the other defendants. (CCP §2033.410.) In that vein, the "admissions" of wrongdoing remain unsupported contentions/conclusions entitled to no weight against the others. (See, *e.g., Victaulic Co v. American Home Assurance Co.* (2018) 20 Cal.App.5th 948, 971-973; *Gonsalves v. Li* (2015) 232 Cal.App.4th 1406, 1411-1416.)

Pertinent Background

The salient facts can be succinctly set forth follows:

> On or about 02/17/06, non-party Lemke Construction Inc. gave plaintiff John Lemke (hereinafter "plaintiff") a grant deed to APN 061-065-001, more commonly known as 110 Bridlewood Lane, Copperopolis (hereinafter "subject property"). A few days later, plaintiff borrowed $455,000.00 from LoanCity. The loan was memorialized by a written promissory note, and secured with a deed of trust to the subject property.
>
> On or about 10/24/21, MERS assigned its beneficial interest in plaintiff's promissory note to U.S. Bank. U.S. Bank retained Wells Fargo to service the loan, and

presumably authorized Wells Fargo to substitute NDEx West as trustee (in place of Sterling Title Company).

On or about 05/13/12, NDEx West – as successor trustee – commenced foreclosure proceedings after plaintiff fell $36,886.15 in arrears (with a balance still owning close to $447,000.00. Despite Notice of Default and Notice of Trustee's Sale, plaintiff did not tender the arrears or otherwise cure the deficiency.

On or about 08/27/12, the subject property was sold at auction for $380,000.00 to U.S. Bank, which forgave the balance of the debt as a credit bid. The Trustee's Deed Upon Sale was recorded a few days later, on 08/31/12.

On or about 09/28/12, the new owner (U.S. Bank) filed an unlawful detainer action against plaintiff (see 12UD10594). Judgment was entered in favor of U.S. Bank, and possession secured by early February of 2013. Two months later, the property was sold to Henry and Julie Martinez for $390,000.00.

Also on or about 09/28/12, plaintiff filed a wrongful foreclosure case in federal district court against LoanCity, Wells Fargo, U.S. Bank and MERS (see 1:12-cv-01596-AWI). While a defense motion to dismiss was under submission, plaintiff secured a voluntary dismissal of the entire action, without prejudice. (Based on the timing, it appears the federal lawsuit was prosecuted for the singular purpose of delaying the UD action.)

On or about 06/25/13, plaintiff filed a second wrongful foreclosure lawsuit – this time in state court (see 13CV39159) – against Wells Fargo, LoanCity, MERS and U.S. Bank. This Court granted a motion to expunge plaintiff's *lis pendens*, and sustained *without* leave to amend the demurrer to the whole of the First Amended Complaint therein. Plaintiff appealed only the ruling on demurrer, and only that aspect of the court order denying plaintiff's request for leave to amend. The Third DCA affirmed the judgment (see C079415). No action was required of the remittitur, resulting in finality.

On or about 06/15/21, plaintiff filed the pending wrongful foreclosure lawsuit, his third involving these defendants and the subject property. The operative iteration is the First Amended Complaint, which includes nine (9) causes of action.

According to plaintiff, LoanCity funded plaintiff's loan with money obtained from co-defendant DLJ Mortgage (an out-of-state lender), and failed to disclose this fact to plaintiff before he accepted the $455,000.00. Plaintiff does not allege any facts to show that the origin of the money was of any consequence, or that he was in any position to actually cure his arrears had he been apprised of the true source of the loan funds. In addition, LoanCity had no duty to tell plaintiff about this alleged funding. (See *Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 872-873; in accord, *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 928-931; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206.) Plaintiff separately contends– despite express authority in the deed of trust allowing MERS to assign the note to others – that LoanCity and MERS actually had a secret agreement barring MERS from doing just that. Plaintiff contends that this is relevant since the only reason U.S. Bank was able to effectuate the foreclosure sale was based upon an assignment from MERS. Since plaintiff gave LoanCity the right to assign the note, MERS was free to do what it did. (See *Sheen* at 935 ["if borrowers have agreed that lenders may freely assign loans, borrowers are not thereafter entitled to choose if, when, to whom, and to what extent lenders may assign rights to those loans. In particular, borrowers do not choose who may

subsequently service their loans, and thus who will be the entities with which they will interact in any loan modification attempt."]) Plaintiff does not explain how any of this caused him harm or invalidates the sale to Henry and Julie Martinez, who by all accounts are innocent BFPs caught up in plaintiff's litigation. (See Civil Code §2924(c); Vasquez v. LBS Financial Credit Union (2020) 52 Cal.App.5th 97, 107; *Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 521; *Melendrez v. D&I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1253-1254.)

Request for Judicial Notice

Both sides request judicial notice of various documents. Asking a court to take judicial notice of a document is asking the court to take judicial notice of its existence and – to the extent it is not subject to dispute – the significance or legal effect of its existence, if any. Taking judicial notice of a document does not equate with any determination regarding the truth of its contents or accepting a particular interpretation of its meaning. (See *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753-754.) With that caveat, and overruling plaintiff's unfounded objections, the requests to take judicial notice are GRANTED.

Res Judicata and Collateral Estoppel

Each demurring defendant herein contends first that plaintiff's entire lawsuit is barred by res judicata and/or collateral estoppel, relying on both the express allegations within the operative pleading and the undisputed facts set forth in the documents provided for purposes of judicial notice.

Res judicata, also known as claim preclusion, bars subsequent litigation of a claim involving violation of the same primary right at issue in an earlier action, provided that earlier action reached a final judgment on the merits between the same parties in the current litigation. Collateral estoppel, which is also known as issue preclusion, applies when the issue sought to be precluded from relitigation is identical to that decided in a prior proceeding; the issue was actually litigated and not entirely unnecessary to the prior proceeding; the decision in the prior proceeding is on the merits and final; and the party against whom preclusion is sought is the same as, or in privity with, the party to the prior proceeding. (See *Samara v. Matar* (2018) 5 Cal.5th 322, 326-327; *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824-826; *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 686; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 727-729.)

According to plaintiff, the prior litigation did not conclude in any determination on the merits, which is a condition precedent to the application of either res judicata or collateral estoppel. Plaintiff asks this Court to drill down into the substance of the underlying demurrer, and conclude that arguments regarding plaintiff's "lack of standing" equate with a procedural dismissal, not one on the merits. By looking only at the demurrer, plaintiff views the issue too narrowly. Plaintiff lost an unlawful detainer action, as well as motion to expunge a lis pendens. Both of those adjudications were on the merits, and are long-since final. Thus, it is necessary to drill down into all three to determine what, if any, claims might still be viable. (See *Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1314.)

In an unlawful detainer action brought under CCP §1161a, the court necessarily must decide whether the purchaser at the trustee's sale acquired legal title to the subject property in accordance with Civil Code §2924. The resulting unlawful detainer judgment is therefore a

determination that the foreclosure sale was conducted in accordance with Civil Code §2924. Consequently, a judgment in an unlawful detainer action is collateral estoppel for purposes of any subsequent fraud or quiet title action founded upon allegations of irregularity in a trustee's sale (ie, the foreclosure sale had been duly conducted, and the successful bidder obtained duly perfected legal title). (See *Vella v. Hudgins* (1977) 20 Cal.3d 251, 255; *Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, 974-976; in accord, *Struiksma v. Ocwen Loan Servicing, LLC* (2021) 66 Cal.App.5th 546, 554-558.) Since the unlawful detainer action actually and necessarily decided that the foreclosure sale was duly conducted and that U.S. Bank had acquired duly perfected title, the judgment entered against plaintiff in 12UD10594 precludes relitigation of U.S. Bank's status as bona fide owner post-foreclosure.

On the successful defense motion to expunge plaintiff's *lis pendens* in 13CV39159, the trial court's Order dated 10/03/13 only states that the motion "is granted." Since the order itself does not state with particularity what was actually and necessarily decided, it is necessary – as plaintiff suggests – to analyze the moving and opposing papers. Defendants first argued that the 13CV39159 did not contain real property claims. Since a wrongful foreclosure case is clearly a challenge to title (see CCP §405.4 and Chavez v. Indymac Mortgage Services (2013) 219 Cal.App.4th 1052, 1062), that argument is not persuasive. Defendants next argued that plaintiff could not establish the probable validity of her real property claims because (1) *Gomez v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1154 prohibited challenges to a trustee's authority, (2) plaintiff failed to allege tender as a condition precedent, (3) plaintiff failed to rebut the presumption of validity found in Civil Code §2924a, and (4) there was no legal basis for cancelling the various instruments simply because there was some confusion as to who actually owned the note. In opposition, plaintiff argued the merits and presented whatever evidence he had. Since it was plaintiff's burden to present evidence sufficient to show that he was more likely than not to prevail on his real property claims (see CCP §405.3 and *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, 1007), the trial court's order granting the motion to quash necessarily concluded on the merits that plaintiff did not meet his evidentiary burden. Since this was litigated to finality, plaintiff is collaterally estopped from relitigating those same theories found wanting on the motion to expunge.

Finally, there is the question of the demurrer to those same real property claims. The trial court's Order dated 10/03/13 sustained defendants' demurrer in its entirety "for the reasons set forth in defendants'" papers and because "the First Amended Complaint does not state facts sufficient to constitute a cause of action and is uncertain." Since the order itself does not state with particularity what was actually and necessarily decided, it is necessary – as plaintiff suggests – to once again look to the moving and opposing papers. The moving papers for the demurrer were essentially a restatement of the arguments made on the motion to expunge, albeit with the added wrinkle that the absence of facts renders the claims legal deficient, and that leave to amend would be fruitless since those claims cannot survive as a matter of law. Plaintiff's opposition was similar to his opposition on the motion to expunge. While a motion to expunge is an evidentiary hearing, a demurrer is not. As such, a conclusion that the pleading did not contain sufficient facts is not itself entitled to issue preclusion. However, a demurrer sustained without leave to amend for failure to state is entitled to preclusion. (See *Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 855 ["a demurrer which is sustained for failure of the facts alleged to establish a cause of action, is a judgment on the

merits"]; *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675; in accord, *Andres v. Ocwen Loan Servicing, LLC,* WL8112531 at *6 (C.D. Cal. 2019).)

Plaintiff contends that when this Court granted the motion to expunge, and sustained the demurrer without leave to amend, the only issue decided was that plaintiff lacked standing to bring the various claims, and that a "lack of standing" is not a decision on the merits. While an absence of standing to bring suit is indeed not on the merits (see *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592), the defendants' repeated claim that plaintiff "lacked standing" was not a challenge to plaintiff's status as a real party in interest, but instead a shorthand description of the concept that a borrower in default does not have a legal right to challenge a trustee's authority to commence a nonjudicial foreclosure sale. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 928 n.3.) In other words, the trial court's ruling in the prior action that plaintiff could not object to third-party transfers of his promissory note and deed of trust was a substantive adjudication, not a technical one. (See, *e.g., Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037, 1043.)

Based on the totality of the circumstances, plaintiff's primary right to avoid the wrongful taking of his interest in secured real property was fully litigated on the merits by virtue of the unlawful detainer action, the motion to expunge in 13CV39159, and the demurrer in that same case. That same primary right lies at the heart of the pending lawsuit, and in fact most of the same causes of action are pled. The current lawsuit is barred by either claim or issue preclusion (depending on which defendant is asking). The fact that plaintiff now includes averments regarding loan origination and table-funding is of no consequence since those averments could have, and really should have, been expressly included in the earlier litigation taking issue with all aspects of the note handling.

Statute of Limitations

A corollary to the affirmative defense of preclusion is defendants' assertion that any claim not barred by preclusion is nevertheless barred by the passage of the statute of limitations. This would seem rather obvious given that the nonjudicial foreclosure sale at issue took place almost a decade ago, with the longest statute of limitations for any claim asserted herein being four years. This concern is particularly relevant here since at the time plaintiff's causes of action accrued, the law in California forbade the kind of legal theory espoused by plaintiff (voidable assignment to securitized pool) – but in the intervening decade, that theory might now work.

Plaintiff admits that his causes of action accrued on 10/13/12, the day of the foreclosure sale (see Opp. Brf. 6:1). Plaintiff then proceeds to cite various rules regarding delayed discovery and tolling, and contends in conclusory fashion that the statute of limitations for the claims asserted in this 2021 case were tolled while "different" claims were on appeal in the 2013 case, and it was not until the 2013 case was final that the statute of limitations began to run again. Initially, it is important to note that voluntarily taking an appeal of an adverse decision does NOT toll any applicable statute of limitations. (See *Vishva Dev, M.D., Inc. v. Blue Shield of California Life & Health Ins. Co.* (2016) 2 Cal.App.5th 1218, 1224-1225; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 737–738; *Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324, 1328.) Even beyond that, there is no basis in law or fact to find that plaintiff can avoid preclusion after losing on appeal, and yet retain the benefit of tolling while awaiting that unfavorable decision to refile a duplicate lawsuit. The fact

that the substantive law on plaintiff's theory of liability has changed in the intervening decade to his slight benefit is of no concern.

The lawsuit filed 06/15/21 is, on its face, untimely since plaintiff suffered harm over eight (8) years earlier, and actually suspected wrongdoing by virtue of his having filed a lawsuit in federal court in 2012 and another in state court in 2013.

Demurrer **SUSTAINED without** leave to amend. The Clerk shall provide notice of this Ruling to the parties forthwith. Each defendant to prepare a formal Order for their respective motion pursuant to CRC 3.1312 in conformity with this ruling.

TRYON v. ANGELS GUN CLUB

17CV42160 (Related to 19CV44275)

MOTION FOR SUMMARY JUDGMENT

This is a neighbor dispute involving noise, trespass, firearm projectiles, unrecorded parcel assignments, and equitable/prescriptive easements. Before the Court is a defense motion for summary judgment/adjudication. Due to an excusable error on the part of plaintiff's counsel, the opposition papers were filed/served late, causing defendant to falsely assume that the motion was unopposed. There being no reply papers on file a continuance to allow a reply to be served and filed is warranted. Defendant shall file and serve reply papers on or before May 31, 2022. **Hearing is continued to June 10, 2022, at 9:00 a.m. in Department 2**.

The Clerk shall provide notice of this Ruling to the parties forthwith. No formal order pursuant to CRC 3.1312 shall be required.

This is a personal injury and wrongful death action stemming from a traffic collision on 10/04/19 between two vehicles crossing paths in the 5400 block of State Route 12. Before the Court is a motion to bifurcate and a motion for summary judgment – both presented by defendants Mitchell McGee (driver) and his employer R&M Water Well Drilling and Pumps. (While other parties previously sought bifurcation, those other requests have since been withdrawn, likely based on plaintiffs' representation that the other defendants have reached a settlement.)

Summary Judgment

The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. A defendant may prevail on the motion in one of three ways: (1) by affirmatively negating at least one of plaintiff's essential elements; (2) by showing that plaintiff does not have, and cannot get, evidence to establish an essential element after fully exploring plaintiff's case through discovery; or (3) by presenting evidence as to each element of an affirmative defense upon which defendant bears the burden of proof at trial. Once the defendant's initial burden is met, the burden shifts to the plaintiff to show by substantial evidence that a triable issue of material fact exists as to the claim or defense. Contrary to popular folklore, summary judgment is no longer a disfavored remedy; instead, it is "now seen as a particularly suitable means to test the sufficiency of the plaintiff's case" to see if trial is really warranted. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851-854.)

Since the operative pleading forms the outer measure of materiality on a motion for summary judgment, a review of that pleading must occur first. (See *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444; *Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 289-290.) The operative pleading here is the Second Amended Complaint, filed 07/29/20. There are four causes of action stated therein: wrongful death; survival action; negligence; NIED (bystander). Although the essential elements for the causes of action differ slightly, defendants' motion is based entirely on what they describe as a lack of evidence supporting breach of any duty. (See MPA 4:20-21.) Defendants' erroneous commingling of distinct elements (breach and duty) notwithstanding, the contention is easily disposed of without shifting the burden to plaintiffs.

In terms of legal duty, Civil Code §1714(a) provides that "everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." This is the codification of the legal duty imposed upon everyone, including defendant, to operate their motor vehicle in a safe manner. (See *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771.) Defendants do not dispute that Mitchell had a duty to use ordinary care, and that he

may be liable for injuries caused by any failure to exercise reasonable care under the circumstances. Defendants also do not dispute that Mitchell was in the course and scope of his employment with R&M, subjecting R&M to vicarious liability (in addition to registered owner liability).

Regarding breach, it is important first to note that "a determination that the defendant did not breach the duty of ordinary care is for the jury to make." (*Cabral* at 772; in accord, *Kim v. County of Monterey* (2019) 43 Cal.App.5th 312, 327.) While the issue could in theory be decided on motion when no reasonable mind could dispute the lack of wrongdoing, defendants' contention that Mitchell "did nothing wrong" is an opinion – not an indisputable fact. As plaintiffs point out, there will be evidence that Mitchell may have been traveling at an unsafe speed for the road conditions (Veh. Code §§ 21809, 22350, 22362), was distracted by his cellular telephone (Veh Code §23134), or simply failed to keep a proper lookout when approaching a driveway (Veh Code §§ 21800, 22352(a)(2)). The existence of "video footage" may certainly aid defendants in ultimately prevailing at trial, but it does not "negate" breach of the duty to drive carefully – particularly since plaintiffs can prevail by establishing only 1% fault to defendants, whereas defendants must show 100% no-fault. (See *Phipps v. Copeland Corporation LLC* (2021) 64 Cal.App.5th 319, 332-333; *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 202.) Defendants are not entitled to summary judgment.

Bifurcating Liability From Damages

Trial courts have plenary power to provide for the orderly conduct of proceedings (CCP §128(3)), including the power to control the order of issues presented or separate trials when doing so will be conducive to economy and efficiency. (See CCP §§ 598, 1048(a).) One option is bifurcation, which is an order from the Court establishing separate trials of issues within the same case. Bifurcation services two principal purposes: first, to prevent a waste of time and money resulting from a trial of unnecessary issues; and second, to minimize prejudice to the defendant by inviting a finding on liability which supports an emotional reaction to the damages. However, if such an order results in duplication of effort, or the possibility of conflicting findings, bifurcation is not warranted. The decision to bifurcate liability from damages is committed to the sound discretion of the trial court. (See *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1283; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 911; *Notrica v. State Compensation Ins. Fund* (1999) 70 Cal.App.4th 911, 939; *Prudential Property & Casualty Ins. Co. v. Superior Court* (1995) 36 Cal.App.4th 275, 279.)

Defendants McGee and R&M proffer that bifurcating liability from damages here would promote economy and efficiency because it would be virtually impossible for jurors to "dispassionately evaluate [liability] in light of" the obvious sympathy for a child who essentially witnessed his mother take her last breath. Defendants further posit that there would be no duplication since none of the twenty (20) "liability" witnesses will testify in the damage phase, or vice versa. Plaintiffs counter that at least four of the "liability" witnesses would be called by plaintiff in the "damage" phase to establish the minor child's emotional distress. Plaintiffs further advise that the "damage" phase could take as little as two days, making bifurcation unduly time-consuming.

Given the child's age (see Evid. Code §701), it is beyond peradventure that percipient witnesses will be critical to plaintiff's bystander claim. This cuts against bifurcation. However,

defendants make a strong argument – which plaintiff all but ignores – regarding juror passions. Having carefully considered the arguments, this Court finds that the problem here is not liability vs. damages (the traditional bifurcation), but rather "liability for the accident" vs. "liability for derivative claims." The survival action depends both on negligent driving and expert proof that Molly experienced pain and suffering from the accident. The bystander claim depends both on negligent driving and evidence of Leo's contemporaneous experience of Molly's plight. The concerns raised by both parties are alleviated by the following order under authority of CCP §598:

- Phase 1 – liability *for the accident* (Molly v. Mitchell – COA 1 and 3);
- Phase 2 – liability for survivor and bystander (Molly/Leo v. Mitchell – COA 2 and 4)
- Phase 3 – damages from Phase 1 and 2.

The parties are ordered to meet, confer, and submit for this Court a *joint* trial plan to include exhibits and witnesses reasonably anticipated for each Phase (excluding of course rebuttal evidence). This joint trial plan is to be filed by the close of business on May 27, 2022, and may be addressed at the Trial Confirmation Conference on June 2, 2022.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants shall prepare a formal Order for their bifurcation motion pursuant to CRC 3.1312 in conformity with this ruling. Plaintiffs shall prepare a formal Order for the summary judgment motion pursuant to CRC 3.1312 in conformity with this ruling.