1. MAISEL v. BUSSELL, ET AL., 23CV1464

Demurrer

Pursuant to Code of Civil procedure section 430.10, defendant Ryan Bussell ("defendant") demurs to plaintiff Ashley Maisel's ("plaintiff") Complaint as follows: (1) defendant alleges the First cause of action ("C/A") for breach of contract fails to state a claim, is uncertain, is void for illegal purpose, and is barred by the statute of frauds; (2) defendant alleges the Second C/A for fraud fails to state a claim, is uncertain, and is barred by California's Anti-Heart-Balm Statutes; (3) defendant alleges the Third C/A for fraudulent inducement fails to state a claim, is uncertain, and is barred by the anti-heart-balm statutes; (4) defendant alleges the Fourth C/A for unjust enrichment fails to state a claim; (5) defendant alleges the Fifth C/A for quiet title fails to state a claim; and (6) defendant alleges the Sixth C/A for partition fails to state a claim.

1. Factual Background

Plaintiff and defendant began a romantic relationship approximately eight years ago. (Compl., ¶ 9.) They planned to "jointly" purchase at least two homes and eventually get married. (*Id*. at ¶¶ 10–11, 14.) "[I]n order to capitalize on the first-time home buyer's credit for a second home that the [couple] intended to purchase in the future, they would need to purchase their initial home and secure financing in only one of their names." (*Id*. at ¶ 11.) The first home was purchased in defendant's name alone (*id*. at ¶ 12) and the second home would eventually be purchased in plaintiff's name alone. (*Ibid*.)

As part of their arrangement, plaintiff and defendant agreed that defendant would remit the mortgage payments for their initial home purchase while plaintiff paid for other living expenses (i.e., utilities, food, entertainment, furniture, and travel). (Compl., ¶ 13.) Additionally, plaintiff would save money for and pay the down payment on their intended second home. (*Ibid*.) The couple agreed that after purchasing their second home, they would get married and place one another on the title to both properties. (*Id*. at ¶ 14.)

In June 2017, defendant purchased a home located at 1870 Agate Street in South Lake Tahoe, California (the "Property") in his name alone. (Compl., ¶¶ 7, 16.) Over the next few years, the couple renovated the Property, adding two bedrooms and a bathroom and doubling the square footage. (*Id*. at ¶ 21.) Plaintiff alleges that she and her family "devoted their time, energy, and resources to remodel the Property based on [the] agreement that Plaintiff was a fifty percent (50%) owner of the Property and upon [defendant's] constant representations to all that he intended to propose to Plaintiff once the Property was completely remodeled." (*Id*. at ¶ 19.)

"In late 2021, there was a marked shift in [defendant's] demeanor towards Plaintiff in that he began to distance himself from Plaintiff both physically and emotionally." (Compl., ¶ 20.) "Despite this shift, [defendant] assured Plaintiff that all was well in their relationship and continued to tell Plaintiff, her friends, and her family that he intended to propose to Plaintiff after the remodel of the Property was complete." (*Ibid*.)

After a certificate of occupancy was issued for the Property, defendant terminated the relationship. (Compl., ¶ 22.) Defendant allegedly refused to place plaintiff on the title for the Property or compensate plaintiff for her alleged ownership interest in the Property. (*Id*. at ¶ 27.)

2. Legal Principles

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however, improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable

interpretation, reading it as a whole and its parts in context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

3. Discussion

3.1. <u>First C/A for Breach of Contract</u>

Defendant alleges the First C/A for breach of contract fails to state a claim, is uncertain, is void for illegal purpose, and is barred by the statute of frauds.

The terms of the subject agreement are as follows: "Plaintiff and [defendant] agreed that the Property was their joint property and that Plaintiff would ultimately [be] put on title to the Property as a joint owner [after the couple purchased their second home using the first-time home buyer's credit and after the couple got married. (Compl., ¶ 14.)] As a result, Plaintiff and [defendant] further agreed that [defendant's] payment of the mortgage would be offset by Plaintiff's payment of Plaintiff's and [defendant's] other living expenses including but not limited to utilities, food, entertainment, furniture, and travel." (Opp. at 5:2–10, quoting Compl., ¶ 25.)

3.1.1. Failure to State a Claim

The elements of a cause of action for breach of contract are: (1) existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damages to the plaintiff. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Defendant argues that the First C/A is "unclear and uncertain, consisting of no coherent breach of contract claim that satisfies the four (4) required elements." (Dem. at 12:10–11.) According to defendant, there are three possible interpretations of the alleged contract, each of which is flawed.

First, defendant argues, if the terms of the contract are that " 'Plaintiff and [defendant] agreed that the Property was their joint property' and 'that Plaintiff would ultimately [be] put on title to the Property as a joint owner,' " then this does not amount

to a valid contract. (Dem. at 10:21–23.) The court rejects this argument because it fails to consider the full terms of the agreement, as outlined above.

Next, defendant argues that the alleged contract could be summed up as, "[defendant] pays the mortgage in exchange for Plaintiff paying certain living expenses." (Dem. at 10:28–11:1.) In that case, defendant claims that plaintiff does not satisfy the third element of a breach of contract claim, which is to plead a breach. (Dem. at 11:2–3.) However, the court finds that plaintiff has alleged a breach of the contract—that defendant "failed and refused to acknowledge [plaintiff's ownership] interest or provide Plaintiff with such compensation." (Compl., ¶ 23.)

Lastly, defendant argues that the alleged contract could be summed up as, " 'Plaintiff and [defendant] further agreed that Plaintiff would save money for and pay the down payment on their second home to offset the use of [defendant's] funds as a down payment on their initial home.' " (Dem. at 11:11–14 (quoting Compl., ¶ 13).) In this case, defendant argues, plaintiff fails to allege that she either performed or was excused from performing her obligation(s) under the contract. (Dem. at 11:16–19.) Plaintiff claims she was excused from performance because defendant breached the contract. (Opp. at 6:19–21 (citing 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 813, 814, p. 906; *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863; *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 529–530; *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 404; *Walker v. Harbor Bus. Blocks Co.* (1919) 181 Cal. 773, 778; 15 Williston on Contracts (4th ed. 2000) § 44:46, pp. 200–201; Civ. Code, § 1439.)) However, the Complaint does not allege excuse from performance. (See *Fenn v. Pickwick Corp.* (1931) 117 Cal.App.236, 242–243 [to obtain remedies for defendant's breach of contract, the plaintiff must plead and prove it performed its own obligation under the contract or was excused from doing so].) Therefore, the court sustains the demurrer with leave to amend.

3.1.2. Uncertainty

" '[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' " (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3; accord, *Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.) " 'A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.' " (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822, quoting *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

Here, the court finds that the Complaint contains substantive factual allegations sufficient to apprise defendant of the claims against him. Therefore, the court overrules the demurrer on the ground of uncertainty.

3.1.3. Illegal Purpose

Civil Code section 1608 provides, "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." (Civ. Code, § 1608.)

The Complaint alleges, "in order to capitalize on the first-time home buyer's credit for a second home that [plaintiff and defendant] intended to purchase in the future, they would need to purchase their initial home and secure financing in only one of their names." (Compl., ¶ 11.) Defendant argues that this amounts to an illegal plan to commit mortgage fraud, and therefore, the agreement is void as against public policy. (Dem. at 12:23–13:26.)

The court finds, however, that the alleged illegal purpose is not apparent from the face of the Complaint. As such, the court overrules the demurrer on the ground of illegal purpose.

3.1.4. Statute of Frauds

The statute of frauds requires any contract subject to its provisions to be memorialized in a writing subscribed by the party to be charged or by the party's agent. (Civ. Code, § 1624; *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552.) An agreement for the sale of real property or an interest in real property comes within the statute of frauds. (See Civ. Code, § 1624, subd. (a)(3); Code Civ. Proc., § 1971.) Where the complaint seeks to enforce an agreement required to be in writing under the statute of frauds, but nonetheless alleges the agreement was oral, a general demurrer lies. The complaint on its face discloses a bar to recovery. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1503.)

Here, defendant claims that the statute of frauds bars enforcement of the alleged oral agreement. (Reply at 3:11–15.) Plaintiff, however, contends that defendant is estopped from asserting the statute of frauds defense based on the doctrines of promissory estoppel and part performance. (Supp. Opp. at 2:4–20, 4:3–5:4.)

A party may be estopped from asserting the statute of frauds defense where there has been "part performance" by the other party and it appears that "a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to fraud." (*Anderson v. Stansbury* (1952) 38 Cal.2d 707, 715; see *Secrest v. Security Nat. Mortgage Loan Trust 2002-2*, 167 Cal.App.4th at p. 555 ["In addition to having partially performed, the party seeking to enforce the contract must have changed position in reliance on the oral contract to such an extent that application of the statute of frauds would result in an unjust or unconscionable loss."].)

Here, the only change of position cited by plaintiff is (1) the payment of other living expenses, and (2) the investment of six years of plaintiff's life remodeling the Property. (Supp. Opp. at 3:2–5.) "The payment of money is not 'sufficient part performance to take an oral agreement out of the statute of frauds' [citation], for the party paying money

'under an invalid contract … has an adequate remedy at law.' [Citations.]" (*Anderson*, *supra*, 38 Cal.2d at p. 716.) As for plaintiff's efforts remodeling the Property, the court finds that this was not done in reasonable reliance on the parties' agreement. Instead, plaintiff's (and her family's) efforts amount to a gratuitous gift.

In sum, the court finds that plaintiff's breach of contract claim is barred by the statute of frauds. Therefore, the court sustains the demurrer. Because there does not appear to be a reasonable possibility that the Complaint can be amended to cure the defect, leave to amend is denied. (See *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.)

3.2. <u>Second C/A for Fraud</u>

Defendant alleges the Second C/A for fraud fails to state a claim, is uncertain, and is barred by California's anti-heart-balm statutes.

3.2.1. Failure to State a Claim

"A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

The Complaint alleges that defendant "falsely represented to Plaintiff that he would hold the Property in his name but that the Subject Property would be their joint property." (Compl., ¶ 32.) Defendant allegedly "made such false representation with the intent to induce Plaintiff to rely on the same by paying their mutual living expenses and investing her, her family's, and her friends' time and financial resources into remodeling the Property." (*Id.*, ¶ 34.)

The court finds that plaintiff has not alleged that defendant knew the representation was false when he made it. Therefore, the court sustains the demurrer with leave to amend.

3.2.2. Uncertainty

As previously discussed, " 'demurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' " (*Mahan*, supra, 14 Cal.App.5th at p. 848, fn. 3.) The court finds that the Complaint contains substantive factual allegations sufficient to apprise defendant of the claims against him. Therefore, the court overrules the demurrer on the ground of uncertainty.

3.2.3. Anti-Heart-Balm Statutes

Defendant argues that plaintiff's fraud claim is barred by the "anti-heart-balm statutes," Civil Code sections 43.4 ("A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages.") and 43.5 ("No cause of action arises for: (a) Alienation of affection, (b) Criminal conversation, (c) Seduction of a person over the age of legal consent, (d) Breach of promise of marriage."). Generally speaking, the anti-heart-balm statutes prohibit lawsuits seeking contract damages for the emotional pain of a broken engagement. (See *Askew v. Askew* (1994) 22 Cal.App.4th 942, 954.)

The court finds that plaintiff's fraud claim is not barred by the anti-heart-balm statutes. The underlying agreement is not a promise to get married but rather an agreement concerning the parties' interests in real property. (See *Marvin v. Marvin* (1976) 18 Cal.3d 660, 674 [holding that unmarried adults who live together are free under general principles of contract law to make agreements concerning their property and earnings].)

3.3. Third C/A for Fraudulent Inducement

Defendant alleges the Third C/A for fraudulent inducement fails to state a claim, is uncertain, and is barred by the anti-heart-balm statutes.

3.3.1. Failure to State a Claim

"A promise to do something necessarily implies the intention to perform; hence where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) To establish a claim of fraudulent inducement, one must show that the defendant did not intend to honor its contractual promises when they were made. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.)

Here, plaintiff does not allege that defendant did not intend to honor his contractual promises at the time the promises were made. Therefore, the court sustains the demurrer with leave to amend.

3.3.2. Uncertainty

As previously discussed, " 'demurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.' " (*Mahan*, supra, 14 Cal.App.5th at p. 848, fn. 3.) The court finds that the Complaint contains substantive factual allegations sufficient to apprise defendant of the claims against him. Therefore, the court overrules the demurrer on the ground of uncertainty.

3.3.3. Anti-Heart-Balm Statutes

For the same reasons as discussed in the Second C/A, the court finds that the anti-heart-balm statutes do not bar plaintiff's claim for fraudulent inducement.

3.4. Fourth C/A for Unjust Enrichment

Defendant alleges the Fourth C/A for unjust enrichment fails to state a claim, arguing that there is no C/A in California for unjust enrichment. (Dem. at 19:7–12; citing *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.) The court agrees. "The phrase, 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." (*Lauriedale Associates, Ltd. v. Wilson* (1992) 7 Cal.App.4th 1439, 1448.) Unjust enrichment

is " 'a general principle, underlying various legal doctrines and remedies,' " rather than a remedy itself. (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315.)

Accordingly, the court sustains the demurrer as to the Fourth C/A for unjust enrichment without leave to amend as there does not appear to be a reasonable possibility that the Complaint can be amended to cure the defect. (See *Roman*, *supra*, 85 Cal.App.4th at p. 322.)

3.5. Fifth C/A for Quiet Title

Defendant alleges the Fifth C/A for quiet title fails to state a claim.

The elements of a C/A for quiet title are: (1) a description of the property including both its legal description and its street address or common designation; (2) the plaintiff's title and the basis upon which it is asserted; (3) the adverse claims as against which a determination is sought; (4) the date as of which a determination is sought and, if other than the date the complaint is filed, a statement why the determination is sought as of that date; and (5) a prayer for determination of plaintiff's title against the adverse claims. (Code Civ. Proc., § 761.020.)

The court finds that plaintiff's allegations, if true, would establish all the elements of quiet title. Therefore, the court overrules the demurrer to the Fifth C/A.

3.6. Sixth C/A for Partition

Defendant alleges the Sixth C/A for partition fails to state a claim.

"A partition action may be commenced and maintained by" an owner of real property that "is owned by several persons concurrently or in successive estates." (Code Civ. Proc., § 872.210, subd. (a).) The elements of a C/A for partition are: (1) a description of the property including both its legal description and its street address or common designation; (2) all interests the plaintiff has or claims in the property; (3) all interests of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff; (4) the

estate as to which partition is sought and a prayer for partition of the interests within; and (5) where the plaintiff seeks sale of the property, an allegation of the facts justifying such relief. (Code Civ. Proc., § 872.230.)

The court finds that plaintiff's allegations, if true, would establish all the elements of partition. Therefore, the court overrules the demurrer to the Sixth C/A.

TENTATIVE RULING # 1: THE DEMURRER IS OVERRULED IN PART AND SUSTAINED IN PART WITH AND WITHOUT LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

2. CALLAHAN v. POTTS, ET AL., 23CV0236

Motion to Set Aside Default and Default Judgment and Dismiss

Default was entered on December 14, 2023, and default judgment was entered on December 18, 2023. Pending is defendants' motion to set aside default and default judgment pursuant to Code of Civil Procedure section 473.5 on the grounds that plaintiff failed to serve defendants with the Summons and Complaint, and therefore, the default and default judgment are void.[1]

1. Preliminary Matters

Pursuant to Evidence Code section 452, subdivision (d), the court grants plaintiff's request for judicial notice of the court's records in this case. (Evid. Code, § 452, subd. (d).) The court denies plaintiff's requests for judicial notice of social media accounts, as well as the public record from the Arizona Corporations Commission Records Division and the City of Scottsdale Community Input register. These documents are not official acts of the legislative, executive, or judicial departments (see Evid. Code, § 452, subd. (c)) and do not fall under any other category provided by Evidence Code section 452.

2. Discussion

Code of Civil Procedure section 473.5 sets out the circumstances when a party may move for relief from a default or default judgment and be allowed to defend the action. The statute expressly allows a party to "file a notice of motion to set aside [a] default or default judgment" "[w]hen service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action." (Code Civ. Proc., § 473.5, subd. (a).) The motion must be accompanied by "an affidavit showing under oath that the party's lack of actual notice in time to defend the action the action was not caused by his or her avoidance of service

[1] While it appears that defendants may have grounds to move under Code of Civil Procedure section 473, subdivision (b), the court notes that the instant motion is made pursuant to Code of Civil Procedure section 473.5 only.

or inexcusable neglect. The party shall serve and filed with the notice a copy of the answer, motion or other pleading proposed to be filed in the action." (Id., subd. (b).)

The party challenging a default or default judgment must file the notice of motion and accompanying documents "within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." (Code Civ. Proc., § 473.5, subd. (a).) If the trial court finds "the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect," the court "may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action." (Id., subd. (c).)

"It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation.] Therefore, when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) " ' "Even in a case where the showing … is not strong, or where there is any doubt as to setting aside of a default, such doubt should be resolved in favor of the application." ' " (*Rosenthal v. Garner* (1983) 142 Cal.App.3d 891, 898.)

In this case, defendants claim they were not, and to date have not ever been, properly served with plaintiff's Summons and Complaint. (Mtn. at 1:12–13.) Further, defendants claim, plaintiff has not filed a proof of service for the Summons. (*Id.* at 1:14–15.) That is incorrect. Plaintiff filed a proof of service on October 16, 2023. According to the proof of service, process server Jack Cox served defendants by substitute service.

Substitute service is authorized both for individual defendants and for entity defendants (corporations, partnerships, public entities, etc.). (Code Civ. Proc., § 415.20, subds. (a), (b).) However, the big difference in using substitute service for individual, as

opposed to entity, defendants is that a good faith effort at personal service must first be attempted (i.e., there must be a showing that the summons "cannot with reasonable diligence be personally delivered" to the individual defendant). (*Id.*, § 415.20, subd. (b).)

Code of Civil Procedure section 415.20, subdivision (b) provides: "If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing."

If defendant challenges this method of service, the burden is on plaintiff to show that reasonable attempts were made to serve defendant personally before resorting to substitute service. (*Evartt v. Superior Court* (1979) 89 Cal.App.3d 795, 801.) Two or three attempts to personally serve a defendant at a "proper place" ordinarily qualifies as "reasonable diligence." (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750; *American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 389 [citing text]; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182.)

Here, the proof of service indicates that substitute service was performed on August 30, 2023, at 15834 N. 80th Street, Scottsdale, Arizona. The process server's declaration attached to the proof of service states, "I attempted to serve Craig Potts and Potts

Properties LLC at 23875 N. 91st St., Scottsdale, Arizona,[2] believed to be the residence of Craig Potts, defendant, on August 24th at 8:18 a.m., again on August 26th at 7:55 p.m., and on August 30, 2023, at 2:18 p.m. I was unable to make contact." (Cox Decl. to Proof of Service, ¶ 2.) On August 30, 2023, at 2:50 p.m., the process server left the Summons and Complaint in the presence of "Nathan Dallas (Caucasian Male, 20s-30s, 6'5", dark hair AND John Doe (Caucasian Male, 40s-50s, med [sic] build, dark hair, sitting at desk)." On September 13, 2023, the process server mailed copies of the documents to defendants at the place where the copies were left.

In support of the instant motion, Nathan Dallas submitted a declaration stating, "I am an independent contractor providing services as a[n] hourly mechanic to Potts Racing. I do not work for any other Potts entity." (Dallas Decl., ¶ 2.) Further, Mr. Dallas states that "[w]hen the [process server] arrived, he spoke to me and I told him that I was a contract worker and not an employee of Potts Racing, and not able to accept anything from him. The [process server] said 'that's fine' and then walked out. He did not tell me anything about the contents of the materials he left behind." (*Ibid.*)

Although Mr. Dallas declares that he told the process server he was a contract worker for Potts Racing and not able to accept anything from the process server, the court finds that Mr. Dallas was a person apparently in charge of defendant at defendants' place of business. (Code Civ. Proc., § 415.20, subd. (b).) Therefore, substitute service was properly completed. The motion to set aside default and default judgment is denied without prejudice.

TENTATIVE RULING # 2: MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT IS DENIED WITHOUT PREJUDICE. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY

[2] The reason for the discrepancy between the address listed in the proof of service and the declaration is unclear.

THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

3. SUWAIDAN v. EL DORADO COUNTY, ET AL., 23CV1081

Demurrer

On the court's own motion, the matter is continued to March 22, 2024. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 3: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, MARCH 22, 2024, IN DEPARTMENT FOUR.

4. IMPERIUM BLUE TAHOE HOLDINGS, LLC v. TAHOE CHATEAU LAND HOLDINGS, LLC, ET AL., 22CV1204

Motion for Leave to File Third Amended Complaint

This action involves a dispute arising from rooftop construction activities above plaintiff's real property. Pending before the court is plaintiff's motion for leave to file its proposed Third Amended Complaint ("TAC").

Motions for leave to amend are directed to the sound discretion of the judge: "The court may, in furtherance of justice and on any terms as may be proper, allow a party to amend any pleading…." (Code Civ. Proc., § 473, subd. (a)(1).) The court's discretion will usually be exercised liberally to permit amendment of the pleadings. (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.) The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified. (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158.) "Leave to amend should be denied only where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but under substantive law, no liability exists and no amendment would change the result." (*Edwards v. Superior Court* (2001) 93 Cal.App.4th 172.)

In this case, plaintiff submitted a declaration stating that the proposed TAC "seeks to clarify and update the allegations and claims to reflect what has happened and is happening at the Chateau development before and after the filing of the second amended complaint, including Tahoe Chateau's failure to pay any shared maintenance costs that it is obligated to pay under the M&E Agreement. In addition to already named defendants Tahoe Chateau and Propriis, Imperium Blue also seeks to join the general contractor of the rooftop construction work, DL Propriis Construction, Inc." (Sherman Decl., ¶ 5.)

Defendants oppose the motion, arguing that plaintiff has failed to comply with California Rules of Court, Rule 3.1324, subdivision (b), which requires a party moving for leave to file an amended complaint to specify in a separate declaration: (1) the effect of

the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) why the request for amendment was not made earlier. (Cal. Rules of Ct., Rule 3.1324, subd. (b).)

The court finds that plaintiff has substantially complied with California Rules of Court, Rule 3.1324, subdivision (b). Plaintiff's declaration in support of its motion sets forth the effect of the amendment. Compared to the Second Amended Complaint (filed April 7, 2023),[3] the proposed TAC adds causes of action for contractual indemnity, equitable indemnity, negligence, and nuisance; it also joins DL Propriis Construction, Inc. as a defendant. Plaintiff's declaration explains that "[s]ince the filing of the second amended complaint, defendants in fact have not only begun rooftop construction activities above the real property owned by Imperium Blue (i.e. Chateau Retail) but Imperium Blue has suffered actual damages as a result of what Imperium Blue alleges is defendants' unreasonable interference with Imperium Blue's and its tenants' business operations as well as other breaches by Tahoe Chateau under the agreement." (Sherman Decl., ¶ 5.) While plaintiff's declaration does not explicitly state when the facts giving rise to the amended allegations were discovered and why the request for amendment was not made earlier, defendants have not demonstrated any prejudice resulting therefrom. Therefore, the court exercises its discretion to grant plaintiff's motion for leave to amend.

TENTATIVE RULING # 4: MOTION IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE

[3] On June 30, 2023, the court sustained defendants' demurrer to the Third and Fourth C/A of the Second Amended Complaint for injunctive relief without leave to amend; the court also granted defendants' motion to strike certain portions of the Second Amended Complaint in part without leave to amend. It appears that the proposed TAC is not inconsistent with the court's June 30, 2023, ruling.

TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

5. KUSHNER v. RIGHTPATH SERVICING, LLC, ET AL., 23CV1329

Motion for Preliminary Injunction

Pending before the court is plaintiff's motion for a preliminary injunction to halt the foreclosure sale on plaintiff's residence, which was originally scheduled to occur on August 30, 2023.

1. Factual Background

1.1. The Parties

Plaintiff has brought this action against two corporate defendants seeking to block the foreclosure of his home located at 2357 Highlands Drive in South Lake Tahoe, California.

Defendants are Nationstar Mortgage LLC d/b/a Mr. Cooper (erroneously sued as "RightPath Servicing, LLC aka Nationstar Mortgage and Mr. Cooper") and Barrett Daffin Frappier Treder & Weiss, LLP.[4]

The court relies on plaintiff's allegations and the evidence submitted by the parties on the request for preliminary injunction to set out the facts below.

1.2. The Loan and Default

On June 16, 2005, plaintiff and his wife, Valerie Kushner, as trustees of the Kushner Living Trust Dated December 9, 1991, obtained a loan for $645,000.00 secured by a deed of trust against real property in South Lake Tahoe. (Request for Judicial Notice ("RJN") Ex. 1.) Plaintiff's initial monthly payments were to be $2,074.57. On February 15, 2012, an assignment of the deed of trust was recorded to U.S. Bank National Association, as trustee for the Certificateholders of Harborview Mortgage Loan Trust 2005-08, Mortgage Loan Pass-Through Certificates, Series 2005-08 ("U.S. Bank"). (RJN Ex. 2.) In September 2013, Nationstar became the servicer for the loan. (Nelms Decl., ¶ 8.)

[4] Nationstar argues that U.S. Bank is an indispensable party because it is the current noteholder and record beneficiary of the deed of trust. (Opp. at 4:3–7.) The court does not reach that issue here.

In March 2014, the parties executed a loan modification agreement. (Compl., ¶ 20; Nelms Decl., Ex. 2.)

Plaintiff's current default arose on March 1, 2016, after he failed to make payments under an earlier trial loan modification. (Nelms Decl., ¶ 7.)

1.3. Nationstar's Communications with Plaintiff

Nationstar claims it "has repeatedly contacted and communicated with plaintiff to inform him of foreclosure alternatives beginning as early as September 2013, when Nationstar took over servicing of the loan. [Citation.] Among other things, Nationstar provided the name and contact information of a Dedicated Loan Specialist who could assist plaintiff and toll-free phone numbers for HUD-approved housing counselors. In addition, Nationstar sent periodic correspondence explaining options to avoid foreclosure and providing online resources for additional information. [Citation.]" (Nelms Decl., ¶ 8.)

1.4. Notice of Default

On June 29, 2022, a notice of default was recorded, representing that there was a past due balance of $382,702.87 and that plaintiff had been contacted as required by Civil Code section 2923.5. (RJN Ex. 4.)

On August 2, 2023, a notice of trustee's sale was recorded, setting an initial sale date of August 30, 2023, and indicating the unpaid balance for the loan was $1,039,539.31. (RJN Ex. 5.)

1.5. The Instant Lawsuit and Request for Preliminary Injunction

Plaintiff filed this lawsuit on August 8, 2023. The Complaint includes causes of action for (1) violations of California's Homeowner Bill of Rights; (2) violation of Civil Code section 2923.5; (3) declaratory relief; (4) injunctive relief; and (5) accounting.

On August 9, 2023, plaintiff submitted an ex parte application seeking a temporary restraining order to stop the foreclosure sale. On November 17, 2023, the court granted plaintiff a temporary restraining order, postponing the foreclosure sale, and scheduled a hearing on whether a preliminary injunction should issue.

2. Preliminary Matters

Pursuant to Evidence Code section 452, subdivision (d), the court grants defendant Nationstar Mortgage LLC's unopposed request for judicial notice of Exhibits 1 through 15.

3. Legal Principles

"When ruling on a motion for preliminary injunction, 'trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. [Citations.]' [Citations.]" (*Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) 193 Cal.App.4th 168, 174.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.]" (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 678.)

4. Discussion

"As its name suggests, a preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim. [Citation.]" (*White v. Davis* (2003) 30 Cal.4th 528, 554.) The purpose of such an order is to preserve the status quo pending a determination on the merits of the action. (*Id.*, at p. 553; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)

"To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis*, *supra*, 30 Cal.4th at p. 554.) While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, the plaintiff is "not required to wait until they have suffered actual harm before they apply for an injunction, but may seek injunctive relief against the threatened infringement of their rights." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292.)

If the threshold requirement of irreparable injury is established, then the court must examine two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits, and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. (*Butt v. State of Cal.*, *supra*, 4 Cal.4th at pp. 677–678.) It is settled law that a preliminary injunction may not issue unless the proponent shows they establish they have a reasonable probability of prevailing on the merits. (*Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 422.)

4.1. Likelihood of Success on the Merits

Plaintiff has asserted five causes of action against defendants: (1) violations of California's Homeowner Bill of Rights; (2) violation of Civil Code section 2923.5; (3) declaratory relief; (4) injunctive relief; and (5) accounting.

4.1.1. California's Homeowner Bill of Rights Claims

"The Homeowner Bill of Rights [HBOR] ([Civ. Code, §§] 2920.5, 2923.4-7, 2924, 2924.9-12, 2924.15, 2924.17-20) … , effective January 1, 2013, was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' ([Civ. Code,] § 2923.4)" (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) The statute, however, also emphasizes that "[n]othing in the act that added this section … shall be interpreted to require a particular result of that process." (Civ. Code, § 2923.4.)

Plaintiff's Complaint alleges that Nationstar violated Civil Code sections 2923.5, 2923.6, 2923.7, 2924.9, 2924.11, and 2924.18. (Compl., ¶¶ 9–13.)

4.1.1.1. <u>Civil Code Section 2923.5</u>

Civil Code section 2923.5 requires a mortgage servicer to contact a borrower to assess their financial situation and explore options to avoid foreclosure before recording a notice

of default. Plaintiff claims Nationstar violated this section because they did not contact him to discuss his loss mitigation options. (Mtn., ¶ 5.)

Though plaintiff, not defendants, bears the burden of proof on this issue, Nationstar presented affirmative business record evidence refuting the charge. (See Nelms Decl., Ex. 2.) The records show that, after the March 1, 2016, default, Nationstar first had a telephone call with plaintiff on March 4, 2016. (Nelms Decl., Ex. 2 at p. 18.) During the call, they advised plaintiff of his options to avoid foreclosure, his right to request a subsequent meeting, and the other ways to seek assistance. (*Ibid.*) Further, Nationstar's business records show that they had numerous other communications with plaintiff over the next several years before recording the notice of default on June 29, 2022. (Nelms Decl., Ex. 2.)

Based on this evidence, the court finds that plaintiff is not likely to prevail on this claim.

4.1.1.2. Civil Code Section 2923.6

Civil Code section 2923.6 prohibits "dual tracking," in which a lender proceeds with the foreclosure process while reviewing a loan modification application. (See Civ. Code, § 2923.6, subd. (c).) "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer ... shall not record a notice of default, or conduct a trustee's sale, while the complete first lien loan modification application is pending." (*Id.*) Civil Code section 2923.6, subdivision (d) further provides that the "borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error." (*Id.*, § 2923.6, subd. (d).)

Here, plaintiff has not alleged and has not submitted any evidence showing that he submitted a complete loan modification application during the relevant time period. Therefore, the court finds that plaintiff is not likely to prevail on this claim.

4.1.1.3. Civil Code Section 2923.7

Plaintiff claims that defendants violated the requirement that a mortgage servicer provide a borrower a single point of contact for discussions regarding foreclosure prevention alternatives *if the borrower requests one*. (Civ. Code, § 2923.7.)

However, plaintiff has not alleged and has not submitted any evidence showing he requested Nationstar to provide a single point of contact. Therefore, the court finds that plaintiff is not likely to prevail on this claim.

4.1.1.4. Civil Code Section 2924.9

Under Civil Code section 2924.9, subdivision (a), a mortgage servicer must provide written communication to a borrower detailing foreclosure alternatives within five business days after a notice of default is recorded, unless the borrower has previously exhausted the first lien loan modification process offered by, or through, his or her mortgage servicer described in Civil Code section 2923.6. In this case, plaintiff admits that in March 2014, the parties executed a loan modification agreement. (Compl., ¶ 20.) Therefore, Civil Code section 2924.9 does not apply.

4.1.1.5. Civil Code Section 2924.11

Civil Code section 2924.11, subdivision (a) provides, in pertinent part, as follows: "If a foreclosure prevention alternative is approved in writing prior to the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default under [certain] circumstances." (Civ. Code, § 2924.11, subd. (a).)

Here, plaintiff has not alleged that a foreclosure prevention alternative was approved in writing prior to the recordation of the notice of default. Therefore, the court finds that plaintiff is not likely to prevail on this claim.

4.1.1.6. Civil Code Section 2924.18

Like Civil Code section 2923.6, Civil Code section 2924.18 prohibits "dual tracking" (i.e., proceeding with foreclosure while an application for a loan modification is pending).

As previously discussed, however, plaintiff has not alleged and has not submitted any evidence showing that he submitted a complete loan modification application during the relevant time period. Therefore, the court finds that plaintiff is not likely to prevail on this claim.

4.1.2. Declaratory Relief Claim

Plaintiff claims there is a dispute regarding the amount plaintiff owes on the mortgage. Plaintiff contends that $453,468.09 is owed and defendant contends that $465,104.42 is owed. (Compl., ¶ 24.) Plaintiff does not explain and has not submitted any evidence showing his calculations. Therefore, plaintiff has not established that he has a reasonable possibility of prevailing on this claim.

4.1.3. Injunctive Relief Claim

"Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. [Citation.]" (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168; see also *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 [a permanent injunction is attendant to an underlying cause of action].) As such, the court finds that plaintiff is not likely to prevail on this claim.

4.1.4. Accounting Claim

A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due *the plaintiff* that can only be ascertained by an accounting. (*Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 460; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 819, p. 236.) The purpose of the accounting is, in part, to discover what, if any, sums are owed to the plaintiff. Here, there is no allegation that any sum of money is owed to plaintiff. Rather, this action is based on plaintiff's default on his mortgage payment. Therefore, the court finds that plaintiff is not likely to prevail on this claim.

Because plaintiff has not established a reasonable probability of prevailing on the merits of any of his claims, the court does not reach the issue of relative interim harm and

denies the request for a preliminary injunction. (*Choice-in-Education League v. Los Angeles Unified School Dist.*, *supra*, 17 Cal.App.4th at p. 422.)

TENTATIVE RULING # 5: PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.