Superior Court of California
County of San Benito

Tentative Decisions for November 15, 2023

Courtroom #2: Judge Thomas Breen

CU-21-00005 Irma Gonzalez v. Rolan Resendez, et al. 11-15-23

Plaintiff: Chad Morgan
Defendant: Anthony Livesay

On for Plaintiff's 8-11-23 Motion for 473 set aside of orders 3-13-23, 5-31-23 (monetary sanction).

Opposition due 9-15-23; Reply Due 9-21-23

9-19-23 Plaintiff files notice of non-opposition.

9-27-23 Court is unclear as to what relief is sought by Plaintiff's counsel and seeks clarification. Matter continued to permit Plaintiff to submit a supplemental request. Moving parties to provide proper notices. Matter set to 11-15-23.

10-18-23 Amended Notice of Motion: Plaintiff is seeking set aside of dismissal for the limited purpose of establishing the Court's jurisdiction to modify its prior orders regarding the imposition of monetary sanctions. After that order is modified, Plaintiff consents to the entry of dismissal as otherwise provided in the Court's 5-31-23 order granting Defendant Resendez's motion for terminating sanctions.

11-7-23 Plaintiff's second notice of Defendant's non-opposition.

This case arises from Plaintiff's 1-8-21 complaint alleging that the defendants, and each of them harassed the plaintiff, cyber harassment against plaintiff, and further, violated her civil rights for which she seeks damages. The Defendants demurred to this complaint which was sustained with leave to amend on 7-12-21, resulting in the filing of the first amended

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**

complaint on 9-30-21. The Defendant demurred to the FAC, which sustained on 1-20-22 with leave to amend. The motion to strike the first amended complaint without leave to amend filed by Defendants Velasquez and the City of Hollister was granted, and the Plaintiff was ordered to pay attorneys' fees for these defendants in the sum of $2115.00. The Plaintiff then filed her second amended complaint to which the sole remaining Defendant demurred. The court on 5-27-22 sustained the demurrer as to the first, fourth, and fifth causes of action without leave to amend. The court overruled the demurrer to the second cause of action (False Light Invasion of Privacy.) Judgment in favor of Defendants Velasquez and City of Hollister was entered 7-26-22, ordering Plaintiff to pay the sum of $10105.00.

On 3-13-23 the court granted each of the Defendant's motions to compel discovery, requiring the Plaintiff to provide verified responses and produce the documents requested, without objections, within 10 days of the date of the court's order. The court also granted the request to deem admitted each of the matters in the Defendant's Requests for Admissions. For each of these four motions the court granted the Defendant's request for $960.00 per motion for a total of $3840.00, due and payable forthwith. On 5-31-23 the Court granted the Defendant's motion for terminating sanctions and additional monetary sanctions for ongoing failure to comply with the court's orders granting the motion to compel discovery. The operative complaint was dismissed with prejudice, and $2200.00 in additional monetary sanctions payable to Defendant by the Plaintiff.

Argument: Relief under Code of Civil Procedure 473 (b) is available at the discretion of the court, to relieve a party of judgment or order taken against them through inadvertence, mistake, surprise or excusable neglect. Here such relief is proper because the failure to comply with discovery and with court order is not the result of the Plaintiff's conduct, but rather her attorney's abandonment of her case. While ordinarily an attorney's neglect, if not excusable, is attributed to his or her client, there are exceptions to this rule "where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence." (*Carroll v. Abbott Laboratories, Inc.*(1982)32 Cal. 3d 892, 898.) Similar to the case in *Daley v. County of Butte* (1964) 227 Cal. App. 2nd 380, this case likewise warrants relief based on the attorney's abandonment of his client. Though not asking to set aside the dismissal, the Plaintiff asks that she be relieved monetary sanctions issued 3-13-23 and 5-31-23, and these instead be attributed to her former counsel.

Legal Standards: Code of Civil Procedure section 473 grants the court authority to relieve a party from an order taken against him through his or her own "mistake, inadvertence, surprise, or excusable neglect," upon any terms that may be just. (CCP§473 sub. (b).) The motion must be made within a reasonable time, not to exceed six months from the date of the order. (*Ibid.*) Relief may be mandatory, or discretionary. Mandatory relief is appropriate to requests to set aside default and default judgment, when made in proper form and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, unless the court finds that the default or dismissal was not caused by the attorney's mistake, inadvertence, surprise, or neglect. (*Ibid.*) All other relief is granted on a discretionary basis. That discretion is broad, but is not must be exercised impartially, guided by fixed legal

principles, in conformity with the spirit of the law to serve and not impede the ends of substantial justice (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal. 2nd 523, 526.) Ordinarily an attorney's inexcusable neglect is charged to the client making relief under the statute unavailable. The exception is when the attorney's neglect is of such extremity that it amounts to positive misconduct and the party seeking relief is "relatively free from negligence." (*Carroll, supra,* at 898.) It is premised on the idea that the attorney's conduct, effectively, obliterates the attorney-client relationship, and for this reason, the attorney's negligence should not be imputed to the client. (*Carroll, supra,* at 898, internal citations omitted.) In application, courts have emphasized that an attorney's authority to bind his or her client does not allow them to impair or destroy the client's cause of action or defense. (*Daley, supra,* at 391.)

Whether a client has been abandoned by counsel is a factual determination for the court based on the facts of each case. (*Seacall Devel. Ltd. v. Santa Monica Rent Ctrl. Bd.* (1999)73 Cal. App. 4th 201 , 205.) Factors include equitable consideration, including the client's own conduct in pursuing and following up in the case, and whether a defendant would be prejudiced by allowing the case to proceed. (*Ibid.*) In deciding if a party has been abandoned and is entitled to relief, the court must balance the policy of favoring trial on the merits against the policy favoring finality of judgment and disfavoring unreasonable delay in litigation. It must also balance the policy that an innocent client should not have to suffer its attorney's gross negligence against a policy that "a grossly incompetent attorney should not be relieved from the consequences of his or her incompetence." (*Ibid.*)

In *Daley,* the court found that the attorney's failures included not serving the plaintiff's son, to join him as a party, resulting in postponement of trial, failure to appear at successive pretrial conferences, failure to communicate with the court or the client, or other counsel. Moreover, the attorney in *Daley* did not sign a substitution for more than five months, apparently refusing to either get out of the case or proceed with it. The court thus determined that the plaintiff had legal representation in only "a nominal and technical sense." (*Daley, supra,* at 392.) Other cases include one where the attorney failed to file an appearance in the case, and despite advance notice of trial date, failed to appear at trial, while simultaneously assuring his client he was taking care of the case and the trial. (*Orange Empire Nat. Bank v. Kirk* (1968)259 Cal. App. 2nd 347.) The commonality is the total failure on the part of counsel to represent the client: each attorney de facto substituted themselves out of the case. *Carroll* determined "under such circumstances it would have been unconscionable to apply the general rule charging the client with the attorney's neglect. " (*Carroll, supra,* at 900.)

Analysis: The motion is unopposed. The Plaintiff's declaration clarifies that despite her own efforts to comply with discovery, her prior attorney appears to have neglected her case and failed to perform. In this instance, the Plaintiff has declared that she had provided responses to discovery to her attorney for proper formatting and service on the Defendant. However, for whatever reason, her former attorney failed to prepare and serve those responses. (Gonzalez dec. 9-12.) Here, much like in *Daley*, and in *Orange Empire*, the declaration of the Petitioner indicate counsel repeatedly failed to communicate with either his client, opposing counsel, or the court with regard to discovery matters, despite having received draft responses. There is

counsel's repeated failure to appear or to respond to motions, and disturbingly, the report that information regarding the status of this case was withheld or misrepresented to the Plaintiff.

The Discovery statute allows for monetary sanctions to be imposed on the client, the attorney, or both, for misuse of discovery. The failure to comply with a lawful method of discovery and to comply with court orders compelling discovery is an abuse of the discovery process subject to sanction. The court notes that the motions made by Defendant's counsel sought monetary sanctions jointly and severally against both the Plaintiff and the Plaintiff's counsel. The court therefore finds that Plaintiff's prior attorney abandoned this matter and the Plaintiff. The court therefore will dismiss imposition of sanctions against the Plaintiff and instead impose them solely upon former counsel, Brad Sullivan

Proposed Ruling: The court grants the motion for set aside of the dismissal and set aside of the order for sanctions against the Plaintiff, Irma Gonzalez, pursuant to California Code of Civil Procedure section 473 sub. (b). The court further orders that the monetary sanctions imposed in the orders issued 3-13-23 and 5-31-23 will be imposed solely upon Plaintiff's former counsel, Brad Sullivan.

Pursuant to the Plaintiff's stated stipulation the set aside of the dismissal is granted only for the limited purpose of amending the orders for monetary sanction. The court reiterates that the court has sufficient grounds to impose terminating sanction against the Plaintiff as requested by Defendant, and imposes terminating sanction, with the order on monetary sanctions as amended herein. The court dismisses the case with prejudice.

CU-20-00023 CR Asset Management, LLC. v. Hector Galvan 11-15-23

Plaintiff : Justin Stockton
Defendant: Fred Schwinn

Cross-Complainant: Fred Schwinn
Cross-Defendant: Justin Stockton
Cross-Defendants: Roes 3-10; Melissa Shaffer (Roe 1- Pro Per); Brendan Ozanne (*Roe 2?*- Pro Per)

On for Cross- Complainant's 9-7-23 Demurrer to Cross Defendant Ozanne's Answer.
The underlying case arises from Plaintiff's complaint for damages for breach of a written installment contract. Plaintiff asserts that on or about 3-2-06 Defendant Galvan executed a Promissory Note secured by the equity in the real property of Defendant for a loan. The Defendant agreed to repay the amount with interest in monthly installments. The original lender transferred its ownership and all rights on the contract (including the transfer of the security interest) which were then assigned to the current plaintiff. Defendant failed to make payments, and this action followed.

Plaintiff pled a single cause of action in their 2-6-20 complaint for damages: Breach of written installment contract. 7-8-20 Defendant Galvan filed his answer, and filed his cross-complaint.

Galvan's 7-8-20 Cross- Complaint alleges that the Cross-Defendants (LCR) is in violation of the Fair Debt Collection Practices act, 15 U.S.C. §§1692-1692p (FDCPA), prohibiting debt collectors from using abusive, deceptive, or unfair practices. The Cross- Complaint lists the following causes of action: 1) Violation of California Fair Debt Buying Practices Act. (Against LCR only); 2) Violation of Fair Debt Collection Practices Act (Against all Cross Defendants, pursuant to FDCPA , 15 U.S.C 1692-1692p); 3) Violation of the Rosenthal Fair Debt Collection Practices Act (Against all Cross-Defendants pursuant to Cal. Civ. §§1788-1788.33).

The Cross Complaint was subsequently amended to name Roe Defendants.

On or about 4-20-21 a Default judgment was entered in favor of Defendant with regard to the Cross- Complaint as to Cross Defendant LCR Asset Management.

12-16-22 A stipulation granting leave to extend time for Cross Complainant Galvan to file demurrer to Cross Defendant Shaffer's Answer or amended Answer. Any demurrer to Shaffer's initial Answer to be served and filed by no later than 2-10-23. 2-9-23 Cross Plaintiff's Demurrer to Shaffer's initial answer is filed. The Court sustained the Demurrer on 4-24-23 with leave to amend allowing 30 days for counsel to file any amended Answer. On 6-14-23 the Court ordered that the Amended Answer to the Cross Complaint was to be filed by 6-22-23.

The First Amended Answer to the Cross Complaint (LCR Asset Management and Melissa Shaffer) is filed 6-23-23.

After the entry of a stipulation and Order to set aside default as to Cross Defendant Brendan Ozanne, Ozanne filed his Answer to the Cross Complaint on 7-27-23. On 8-16-23 the Court granted a 30 day continuance to the Cross Plaintiff to file Demurrer.

Argument: Cross Plaintiff demurs to Cross Defendant Ozanne's answer arguing that the Answer and the affirmative defenses set forth in it do not state sufficient facts to constitute a defense. (Cal. Civ. Pro. §430.20 (a).) Further, Cross Plaintiff demurs on the basis that the Cross Defendant Ozanne's Answer and the Affirmative defenses set forth are uncertain and/or ambiguous (Cal. Civ. Pro. §430.20(b).) Cross Plaintiff requests that the demurrer be granted without leave to amend. Specifically, Cross Plaintiff argues that the affirmative defenses set forth fail to state any new matter alleging any independent reason why the Cross Plaintiff should be barred from recovery. The statement of legal conclusions is insufficient to plead an affirmative defense, nor is mere labeling an allegation an affirmative defense sufficient. In order to properly plead an affirmative defense the answer must set forth facts as carefully and with as much detail as the facts constituting the cause of action in the complaint.

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**

Opposition is due 11-3-23. The Reply is due 11-9-23. Thus far no opposition nor reply has been filed.

Legal Authority: Defective pleadings may be challenged by way of demurrer, motion to strike, or motion for judgment on the pleadings. (CCP§430.30(a).) The purpose of a demurrer is to test, as a matter of law, whether the facts as alleged in the complaint state a cause of action under any legal theory. (*New Livable Cal. V. Association of Bay Area Gov'ts* (2020)59 Cal. App. 5th 709,714-715.) A demurrer to an answer may only be taken to the entire Answer (CCP§430.50 (b).) It may also be taken to any one or more of the defenses alleged in the Answer (CCP §430.50(b).) The grounds for a demurrer to an Answer are that it does not state facts sufficient to constitute a defense (CCP§430.20(a); *Timberidge Enters. v. City of Santa Rosa* (1978) 86 Cal. App. 3rd 873 879-880.); that the Answer is uncertain, ambiguous, or unintelligible (CCP §430.20); or when an Answer pleads a contract, it cannot be determined from the Answer whether the contract is written or oral. (CCP§430.20(c).) The first ground may be raised at any time, and is not waived by the failure to raise it by demurrer. The second and third grounds are waived if not raised by demurrer. (CCP§430.80(b).)

The determination of whether an answer states a defense is governed by the same principles applicable in determining if a complaint states a cause of action. (*South Shore Land Co. v. Petersen* (1964) 226 Cal. App. 2nd 725, 732.) As with any other demurrer, a judge must regard the allegations of the answer as true. (*Id.*) In ruling on the demurrer, the court must consider each defense separately and without regard to any other defense. (*South Shore Land Co. v. Petersen, supra,* 226 Cal. App. 2nd at 733.) A defendant's answer to the complaint must contain in addition to a general or specific denial of the complaint's allegations, a statement of any new matter constituting a defense or risk waiving the defense. (CCP§§431.20(b), 431.30(b).) A statement of any new matter constitutes a defense. (CCP§431.30(b)(2).) Any matter on which the defendant has the burden of proof is a new matter. (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203,239.) Merely stating legal conclusions is insufficient to plead an affirmative defense. (*FPI Devel. Inc. v. Nakashima* (1991, 3rd Dist) 231 Cal. App. 3rd 367,384.) Because any new matter must set forth sufficient facts in support of the defense, merely pleading legal conclusions fails to meet the necessary requirements to put the plaintiff on notice. (*Id., see also* Weil & Brown, et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group, 2017) §6:459; *Harris v. City of Santa Monica, supra,* 56 Cal. 4th at 240.)

Analysis: The court notes in review of the Answer to the Cross Complaint that the Cross Defendant styled the answer in a manner that appears to conflate the underlying Complaint by LCR and the Cross Complaint filed by Galvan, while this is alleged by the Cross Plaintiff to make the Answer uncertain, it appears despite the improper styling of the pleadings addressed therein, there does not appear to be confusion on the part of the Cross Plaintiff that the document styled Answer to the Complaint is actually an Answer to the Cross Complaint, while this is an uncertainty, it does not appear that it created an ambiguity which Cross Plaintiff was unable to resolve. Of more import is the framing of the affirmative defenses presented by the Cross-Defendant.

Cross Plaintiff rightly notes, and the court concurs that when pleading a new matter, such as an affirmative defense, the Cross Defendant's answer must contain sufficient ultimate facts put forth in the same manner as if they were set forth in a complaint. (*Bruck v. Tueker* (1871) 42 Cal. 346.) A new matter is one where the Cross Defendant bears the burden of proof. (*Harris v. Santa Monica, supra,* 56 Cal. 4th at 239.) An affirmative defense is such a new matter, and requires that the Cross defendant put forward carefully and with as much detail the facts constituting the defense as would be provided in framing a cause of action alleged in a complaint. The mere statement of a conclusion of law fails to meet this requirement. (*Perkins v. Sup Ct.* (1981) 117 Cal. App. 3rd 1.) What the Cross Defendant in the Answer styles as affirmative defenses fail in this regard. No facts constituting the affirmative defense have been pled. Moreover, the affirmative defenses, as styled, are not necessarily defenses. The First Affirmative Defense, as styled is that the Cross Plaintiff has failed to state facts sufficient to constitute a cause of action. This is not an affirmative defense setting forth new matter which the Cross Defendant would have to prove at trial- it is a mere denial, and fails to state facts sufficient to constitute a defense. (CCP §430.20(a).)

The Second Affirmative defense pled, that the Cross Complaint is frivolous suffers from the same fault as the first, for the same reasons. The Third Affirmative defense, Uncertainty, raises no new matters but seeks instead to negate the allegations of the Cross Complaint. This is more appropriately a basis for the Cross Defendant to have demurred to the Cross Complaint. The Fourth Affirmative Defense- Acts of Others, as pled again offers no factual support as to who purportedly contributed to the alleged statutory violations of the Cross Defendant, nor how these acts or omissions resulted in the alleged violations. As a form of contributory negligence, the defense raises new matter and requires that it be specifically pled and supported by facts. As such it too suffers from the same defects as the First and Second affirmative defenses, moreover, pursuant to CCP §430.20) it is uncertain and ambiguous. The Fifth affirmative defense of Respondent Superior is a theory of alternate liability invoked to bind an employer to an employee's acts. It does not function to avoid liability as a shield, but rather is a sword to deflect a legal blow to a different target. Much like the Fourth Affirmative Defense it is uncertain and ambiguous, particularly since no purported employer alleged to be responsible vicariously is named; moreover it suffers from the same lack of factual support of the defense as the First and Second affirmative defenses. The Sixth affirmative defense is a reservation of rights, to claim additional unstated affirmative defenses, and an allegation that the Cross Complainant has suffered no damages. This too is an improper defense (*Hulsey v. Koehler* (1990) 218 Cal. App. 3rd 1150,1159.)

The court generally must grant leave to amend after sustaining a demurrer when a party seeking such leave shows how amendment will cure the defect. (*Thornton v. Cal. Unemployment Ins. Appeals Bd*. (2012) 204 Cal. App. 4th 14003, 1423.) Though much of the jurisprudence in this regard focuses on the Complaint, it would seem that the same basic structure for liberality would apply to allowing leave to amend an answer. Rarely should the court sustain a demurrer to an initial complaint without granting leave to amend (*Cabral v. Soares* (2007) 157 Cal. App. 4th 1234,1240.) If the plaintiff, for example, has not had an opportunity to amend the complaint in response to the demurrer, leave to amend should be liberally allowed as a matter of fairness, unless the complaint on its face shows that it cannot

be amended. (*City of Stockton v. Sup. Ct.* (2007)42 Cal. 4th 730, 747.) The court properly denies leave to amend when no amendment could change the result. (*Nealy v. County of Orange* (2020) 54 Cal. App. 5th 594,608-609.) But, the court need not grant leave to amend when the plaintiff has not requested it. (*Thornton v. Cal. Unemployment Ins. Appeals Bd., supra,* 204 Cal. App. 4th at 1423.*)*

Proposed Ruling: Based on the failure of the Cross Defendant to put forth sufficient ultimate facts in pleading new matters in the Answer to the Cross Complaint, the court sustains the Demurrer to the Affirmative Defenses One through Six, inclusive, with leave to amend. The Cross Defendant will file the amended Answer to Cross Complaint by no later than December 15, 2023.

CU-19-00102 Gina M. Annotti, et al. v. Wells Fargo Bank, et al. 11-15-2023

Plaintiffs: Elsa Berry
Defendant: Amanda Groves (Wells Fargo)

On Calendar for 1) 9-5-23 Defendant Wells Fargo's Demurrer to Plaintiff's Third Amended Complaint; 2) 9-6-23Defendant Wells Fargo's Motion to Strike Plaintiff's Third Amended Complaint; and, 3) Plaintiff's Motion for Reconsideration of Court's Orders issued July 2, 2021.

This case originates from Plaintiff's complaint seeking to set aside a trustee's sale of their residence by the Defendant, Wells Fargo, and to set aside the transfer of the property to the purchaser at the trustee's sale. The underlying complaint was subsequently amended. Thereafter, on July 2, 2021 the court ruled on the Defendants' demurrer to the Second Amended Complaint. In its ruling the Court sustained without leave to amend the Demurrer of Defendant Barrett Daffin, Frappier, Treder, &Weiss, LLP's (BDFTW) Demurrer as to the First, Second, Fourth, and Sixth Causes of action. The court also granted the Request for Judicial Notice as failed by both the Plaintiffs and BDFTW. The Court also Sustained without leave to amend Defendant Ouita Martin LLC's demurrer as to the First, Fourth, Eighth, and Ninth Causes of Action. Ouita Martin LLC's request for Judicial Notice was granted. The court Sustained, without leave to amend, Defendant Wells Fargo Bank (WFB)'s demurrer to the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Thirteenth causes of action. The Demurrer was overruled as to the Fifth and Twelfth causes of action.

The Plaintiff's appealed to the Sixth District Court of Appeal as to Defendants' BDFTW and Ouita Martin, LLC. They did not appeal the court's decision as regards to Wells Fargo Bank. The Court of Appeal issued its ruling on June 2, 2023. The Court of Appeal held as to Defendant Ouita Martin, LLC that the court erred in sustaining the demurer without leave to amend where the cause of action alleged a statutory violation under Civil Code section

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**

2923.6.[1] The Court of Appeal for similar reasons held that the Ninth Cause of Action could be amended to state a claim, and thus reversed and remanded on these matters back to the Trial Court. The Sixth District noted however, that the appeal concerned only the trial court's judgment in dismissing the Plaintiffs' causes of action against Ouita Martin. They did not reverse or remand with regard to the trial court's decision as to Wells Fargo Bank. On remand, the matter returned to the trial court to vacate the portion of its order sustaining Martin's demurrer without leave to amend, and was directed to 1) Sustain Martin's demurrer as to the first cause of action, without leave to amend; and 2) sustain Martin's demurrer as to Plaintiff's Fourth, Eighth, and Ninth causes of action to the extent they were consistent with the Plaintiff's theory that the non-judicial foreclosure sale of their home violated Civil Code section 2923.6.

The Plaintiffs on 8-1-23 moved to disqualify the judge who initially heard the demurrer and rendered the 7-2-21 decision, pursuant to Civil Procedure section 170.6(a) (2). The motion for disqualification was granted, and the case was reassigned.

On 8-2-23 The Plaintiff's filed their Third Amended Complaint (TAC) against WFB, Ouita Martin LLC, and BDFTW. The TAC asserts the following causes of action against the following Defendants : 1)

Declaratory Relief (WFT, Does 1 to 100); 2) Violation of the 2012 Civil Code §2923.5 (WFB, BDFTW, certain does 1-100); 3) Violation of section 2923.7 (WFB, certain Does 1-100); 4) Wrongful Foreclosure (WFB, Ouita Martin, Certain Does 1-100); 5) Negligence (WFB, Certain Does 1-100); 6) Under Civil Code section 2924.12 for violation of section 2923.6 (WFB and Does 1-100); 7) Intentional Misrepresentation or Omission (WFB and Does 1-100); 8) Negligent Misrepresentation (WFB and Does 1-100); 9) Set Aside Trustee Sale (Ouita Martin, WFB, does 1-100); 10) Quiet Title (Ouita Martin, WFB, Does 1-100); 11) Promissory Estoppel (WFB, Does 1-100); 12) Violation of Business and Professions Code section 17200 (WFB and Does 1-100); 13) False Advertising- Violation of Business and Professions Code section 17500 (WFB and Does 1-100).

9-5-23 Ouita Martin filed their answer to the TAC.

9-5-23 Wells Fargo Bank filed their Demurrer to the TAC. Wells Fargo Argues that the Plaintiff is unable to reinstate previously dismissed claims against WFB; their newly added Civil Code §2923.6 claim is untimely moreover, they have failed to state a claim under this section. Further, the claims are preempted by HOLA, and the claims for Wrongful Foreclosure, Quiet Title, and to set aside the Trustee's Sale fail. Defendant states the Fourth Cause of Action for Wrongful Foreclosure was previously dismissed on the prior Demurrer without leave to amend. This decision was not appealed as to Wells Fargo. They demur to the Sixth Cause of Action (violation of section 2923.6) on the basis that they have already filed an Answer to the SAC, and the Plaintiff did not seek leave of court to amend the complaint to add this new claim, moreover, they owed no duty to Plaintiffs to grant a loan modification.

[1] The Fourth and Eighth causes of action, respectively.

They demur to the Ninth Cause of Action (set aside the Trustee's sale as it was previously dismissed without leave to amend and this issue was not appealed as to Wells Fargo Bank. Finally they demur to the purported tenth cause of action to quiet title, again because this cause of action was dismissed by the court without leave to amend, and which was not appealed as to WFB. The claim is also preempted by HOLA (Cal. Civ. Pro. §430.10(e).) and, because Plaintiff has not adequately pled violation of Civil Code section 2923.6, which is the basis of this cause of action.

10-31-23 Plaintiff opposes the Demurrer in part based on the decision by the court of appeal, stating that the trial court in its underlying order sustaining the demurrer to the Fourth Cause of Action, failed to consider the facts of the SAC as presented. The order as to WFB's demurrer was not appealable, but should be overruled pursuant to the decision from the Sixth District and based on their motion to reconsider. The court should grant leave to amend in the TAC because the cause of action under Civil Code section 2923.6 which prohibits dual tracking is not time barred. Again Plaintiff's refer to the court of appeals decision. The TAC satisfies the elements of a cause of action under section 2923.6. It is incorrect to state that the lender must owe a duty to agree to loan modification as a prerequisite under the code. It requires only a borrower that submits a complete application for a first lien loan modification, and that the mortgage servicer or its agent recorded notice of default or notice of sale, or conducted a trustee's sale while the complete first lien loan modification application was pending. (Civ. Code §2923.6 sub (c).) Nor does HOLA preempt the action for Wrongful Foreclosure, Set Aside of Trustee's Sale, Quiet Title, or the alleged violations of Civ. Code §2923.6

10-25-23 Plaintiff's Request for Judicial Notice. Plaintiff seeks Judicial Notice of the Sixth District Court of Appeal Decision and remittitur. They also seek judicial notice of the court's order of 7-2-21, the SAC filed 3-25-20 (without exhibits); a copy of the Judgment after order Sustaining Defendant Ouita Martin's Demurrer to the SAC without leave to amend filed 7-28-21, and a copy of the Plaintiff's TAC filed 8-2-23 with its exhibits. The request is made pursuant to Cal Ev. Code section 452(d)

Argument: The Defendants aver that the Plaintiff has filed their TAC 1) without leave to file a Third Amended Complaint, noting that they (WFB) has filed an answer to the SAC as to those causes of action which survived demurrer; and that the Defendant's demurrer to the remaining causes of action were sustained without leave to amend. A number of the causes of action presented in the Plaintiff's TAC repeat causes of action for which a demurrer without leave to amend was sustained. The Plaintiff argues that the TAC is appropriate as drafted and the demurrer should be overruled given the content of the Sixth District Court of Appeals decision and orders issued on remand as to Defendant Martin. They also argue that in light of the discussion in the text of the decision from the Sixth District Court of appeal the claims with regard to Civil Code section 2923.6 are properly made.

9-6-23 Wells Fargo Bank filed their Motion to Strike portions of the TAC. Defendant WFB seeks to strike Paragraphs 98-114 (Fourth Cause of Action) ; paragraphs 115-121 (Fifth Cause of Action) ; paragraphs 122-133 (Sixth Cause of Action), paragraphs 136 to 150 (

Ninth Cause of Action) ; paragraphs 151-172 (tenth Cause of Action); and paragraphs 1 and 22 (with respect to the sixth cause of action) of the Plaintiff's prayer for relief. The motion is grounded in Code of Civil Procedure section 436.

10-31-23 Plaintiff opposes the motion stating leave to amend should be granted because the Plaintiffs took the steps necessary to correct the defects in the TAC, by filing their motion to reconsider. If the court reconsiders the order of 7-2-21 and grants leave to amend as requested in that motion to WFB to the same extent the Court was directed by the Sixth District to grant leave to Amend to Martin, then this will cure the defects to the TAC and the law of the case will be uniform as to both defendants.

10-16-23 Plaintiff's filed their Motion to Reconsider the court's decision issued 7-2-21, arguing that the decision by the Sixth District raises the opportunity under CCP §1008 (c) for the court to reconsider the decision on the Demurrer as to Wells Fargo Bank, in order to harmonize "the law of the case."

11-1-23 Defendant opposes noting that the Plaintiff's arguments do not fall within what is permissible under CCP§1008, noting that sub part (c) allows the court on its own motion to reconsider its decision, however, once a motion has been filed by a party seeking to have the court reconsider, the motion falls under the auspices of sub part (a) of the code. The motion is non-compliant with statute and must be denied.
Argument

Plaintiff argues that pursuant to CCP§1008 sub (c) and with the court's consent, this motion is brought following the Court of Appeals Decision reversing the judgment after order sustaining Defendant Martin's Demurrer to the SAC without leave to amend and remanding with instruction to vacate a portion of the order sustaining Martin's demurrer without leave to amend. The doctrine of the law of the case, any principle or rule of law stated in an appellate court o pinion that is "necessary to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on later appeal." (*Lieder v. Lewis* (2017) 2 Cal. 5th 1121, 1127.) The case may not go over ground on remand that was covered previously in the appellate court. (*Sargon Enterprises Inc. v. Univ. of So. Cal.* 2013) 215 Cal. App. 4th 1495, 1506.) The doctrine applies following reversal with a general remand, as well as after reversal with direction for particular proceedings on remand. But the doctrine only applies to the same parties in the same case. An Appellate court ruling that is law of the case as to one party is not the law of the case as to another party who was not a party to the prior appeal. (*Bergman v. Drum* (2005) 129 Cal. App. 4th 11, 20.)

Defendant argues that the procedural requirements of a CCP §1008 motion to reconsider have not been met. A motion to reconsider must comply with the procedures as set forth in the statute. Written motions from a party are not based on the Court's power to reconsider prior orders "on its own motion." (CCP§1008 sub (c).) Written motions are governed by sub part (a). A party "may not file a written motion to reconsider that has procedural significance if it does not satisfy the requirements of …1008." (*Le Francois v. Goel* (2005) 35 Cal. 4th 1094, 1108.)

These requirements have not been met. Moreover, the doctrine of the "law of the case" is inapplicable in this instance.
Legal Authority:

Motion to Reconsider: Motions to reconsider are governed by Code of Civil Procedure section 1008. That section frames the procedures for any application for the court to reconsider any previous interim court order." (*Le Francois v. Goel* (2005) 35 Cal 4th 1094, 1098, *as modified* (6-10-05).) The court does have power to reconsider prior orders on its own motion. (CCP§1008 sub (c).) However, written motions from a party are governed by a different subsection of the code, specifically sub part (a). A written motion to reconsider which has procedural significance that does not satisfy the requirements of the code is prohibited. (*Le Francois, supra,* at 1108.) The code requires that motions to reconsider must be brought before the same judge who made the order, within 10 days of service on the party of written notice of entry of the order, be based on new or different facts, circumstances, or law, and supported by affidavit. (CCP§1008) IF there are no new or different facts, circumstances, or law, the motion must be denied. (*Le Francois, supra,* at 1098.) A court does not base it decision on a motion to reconsider "on its own motion" when it "act[s] in response to a written motion for reconsideration brought under section 1008."(*N.Y. Times Co. v. Sup. Ct.* (2005) 135 Cal. App. 4th 206, 215.) When acting in response to a written motion for reconsideration, and that motion fails to satisfy the requirements of section 1008, including those laid out in subsection (a), the "trial court abuse[s] its discretion in granting the motion for reconsideration. " (*Id*.)

When a motion is made under section 1008 sub (a), it must be filed within ten days after service upon the party of written notice of the entry of the order. Failure to meet that deadline renders the motion untimely, and the courts strictly apply this ten-day time limit. (*In re Marriage of Furie* (2017) 16 Cal. App. 5th 816; see also *In re Imperial Ins. Co.* (1984) 157 Cal App. 3d. 290, 299.) Similarly, an affidavit in support of the motion is required by the code, and it must state what new or different facts, circumstances, or law are claimed shown. If the motion does not have such an affidavit in support, the motion is invalid. (*Branner v. Regents of Univ. of Cal.* (2009) 175 Cal. App. 4th 1043, 1048.) Finally a motion under Code of Civil Procedure section 1008 sub (a) must demonstrate new facts, circumstances, or law which justify reconsideration. Disagreement with the way the court interpreted facts is not a ground for relief as it does not state *new or different* facts. (CCP§1008(a).) California courts acknowledge that in nearly all cases "the losing party will believe that the trial court's 'different' interpretation of the law or facts was erroneous." (*Gilberd v. AC Transit* (1995) 32 Cal. App. 4th 1494, 1500, *as modified on denial of rehearing* (4-3-95).) It would be erroneous to interpret section 1008 as applying when a litigant disagrees with the trial court's ruling as it would be contrary to the legislature's intent to limit motions to reconsider to instances when a party proffers new facts or law.

Finally, the motion to reconsider must be made to the judge who initially made the order, unless that judge is unavailable. A judge who is reassigned to a case cannot reconsider the orders made by the prior judge, save in a very narrow set of circumstances that are not present in this case. The rule is well established that "a trial judge cannot overrule another." (*Paul*

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**

Blanco's Good Car Co. Auto Grp. v. Sup. Ct. (2020) 56 Cal. App. 5th 86, 101; *In re Marriage of Oliverez* (2015) 238 Cal App. 4th 1242, 1249.) Even when a case has been reassigned, and "no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court."(*Paul Blanco, supra,* at 99; *In re Marriage of Olivarez, supra,* at 1248.) The risk in permitting this to occur would result in shopping a case between judges sitting in the same trial court, since if one would deny relief a party would simply try another and another until they achieved their desired result. This would ultimately result in a lack of confidence in the integrity of the court.

Demurrer: A demurrer generally serves to test the legal sufficiency of the complaint's factual allegations. (*Genis v. Schainbaum* (2021) 66 Cal. App. 5th 1007, 1014.) It does not test the factual accuracy or truth of the facts alleged. The court must assume the truth of all properly pled allegations. The process of a demurrer does not serve to test the merits of the Plaintiff's case. (*Tenet Health System Desert Inc. v. Blue Cross of CA. (2016*) 245 Cal App 4th 821, 834.) Because a demurrer only challenges the defects on the face of the complaint, it can only refer to matters outside the pleadings which are subject to judicial notice. (*Tenet, supra,* at 831.) For the purpose of demurrer, a judge must treat the demurrer as an admission of all material facts properly pled in the challenged pleading or that reasonably rise by implication, however improbable they are. (*Collins v. Thurmond* (2019) 41 Cal. App 5th 879, 894.) Before a demurrer is filed, the demurring party must meet and confer with the other party in person or by telephone to determine if agreement can be reached to resolve the objections raised in the demurrer. (*CCP §430.41 (a).*) The meet and confer must occur at least five days before the responsive is due and a declaration stating the means of the meet and confer is required. (*CCP§43.41 (a) (3).*)

Motion to Strike: Motions to strike address defects appearing on the face of a pleading or form matters of which a judge may take judicial notice and are not grounds for demurrer (*Pierson v. Sharp Mem. Hosp.* (1989) 216 Cal. App. 3rd 340,342.) It is the proper means to attack allegations requesting improper relief but not to attach the sufficiency of the allegations justifying relief, as that is ground for general demurrer. (*Id.*) A motion to strike can be directed to all or part of a complaint, cross complaint, answer, or demurrer. (CCP§435 sub. (a).) Like demurrer, the moving party must meet and confer with the opposing party by telephone or in person to determine if they can reach agreement resolving the objections to be raised in the motion. As part of that process the moving party must identify all of the specific allegations believed to be subject to being stricken and the legal basis for the same. The grounds for the motion must appear on the face of the challenged pleading or from any matter which a judge may take judicial notice. (CCP§437 sub (a); see also Ev. Code §§451-453.) Pursuant to section 435 a judge may, on motion, or at any time in the judge's discretion, strike out irrelevant, false, or improper matter in a pleading on terms the court deems proper. (CCP§436 sub (a).) Irrelevant matters mean immaterial allegations, including demands for judgment requesting relief that is not supported by the allegations of the complaint or cross complaint (CCP §431.10(b) (3).); i.e., a request for relief to which the plaintiff is not entitled. Pleadings filed without leave of court when leave is required are also subject to strike. (*Loney v. Sup. Ct.* (1984) 160 Cal. 3d 719, 721-724.)

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**

Analysis: In reviewing the interwoven motions herein the court elects to analyze the motions out of order of filing. In order to understand why, one must first look to this Court's ruling issued 7-2-21 and the decision of the Sixth District Court of Appeal reversing and remanding with instructions on a portion of that ruling as applied only to Defendant Martin. The ruling instructed the Court with regard to allowing amendment to the Second Amended Complaint with regard to specific causes of action as they related to Defendant Martin. While the decision noted that this may create challenges given that the Plaintiffs did not pursue any appeal or other relief as regards to Defendant Wells Fargo Bank, it did not order this court with regard to allowing amendment to the Complaint with regard to the causes of action in the Second Amended Complaint as directed to Wells Fargo Bank.

The Plaintiff argues that the doctrine of the law of the case mandates that this court grant its request for reconsideration of its orders sustaining Wells Fargo Bank's demurrer without leave to amend to Plaintiff's Second Amended Complaint in order to "harmonize" the cases. However, a review of the case law interpreting the application of this doctrine does not support the Plaintiff's position. Case law states clearly that the doctrine only applies to the same parties in the same case. An Appellate court ruling that is law of the case as to one party is not the law of the case as to another party who was not a party to the prior appeal. (*Bergman v. Drum* (2005) 129 Cal. App. 4th 11, 20.) Moreover, the application for relief pursuant to Civil Procedure section 1008 is irretrievably flawed. As the court notes above, a written application to the court to reconsider its prior decision is not an invitation to the court to reconsider "on its own motion."." (*Le Francois v. Goel* (2005) 35 Cal 4th 1094, 1098, 1108; as *modified* (6-10-05).) Once a written motion for reconsideration is filed, the party seeking reconsideration must comply with the requirements of sub part (a) of the code. This, the Plaintiff has not done. Nor, does it appear that it is in any way possible for them to do so.

A motion to reconsider under Civil Procedure section 1008 subsection (a) must meet strict procedural requirements, the first of which is timeliness. The Plaintiffs' motion here is substantially untimely. Moreover it is not directed to the same Judge who made the order sought to be reconsidered. In this case, the Plaintiffs requested, and were granted, reassignment of the case to a new judge. This however, is not the same thing as that judge being *unavailable.* Judge Rodriguez is still seated as a judge in this county, and is currently the Presiding Judge in this county. He is undoubtedly available. To request and the Plaintiffs do here, that a different judicial officer reconsider the orders issued effectively asks that the second judge function as a one-judge appellate court. (*Paul Blanco, supra,* at 99.) This is impermissible. The Motion to reconsider for these, as well as the failure to comply with the requirements of an affidavit stating new or different law, facts, or circumstances warrant this court denying the motion for reconsideration. Absent that reconsideration being granted, the Plaintiffs also lack this court's authorization to attempt to reinvigorate their previously dismissed causes of action against Wells Fargo Bank.

The demurrer filed by Wells Fargo Bank seeks to demur to Causes of Action which were dismissed as a result of this court previously sustaining demurrer without leave to amend addressing these same causes of action in Plaintiff's second amended complaint. The

inclusion of these causes of action against Wells Fargo Bank in the Third Amended Complaint, without leave of this court to amend that pleading to raise these causes of action against this defendant is improper. For similar reasons the Motion to Strike with regard to Causes of Action previously Dismissed pursuant to this court sustaining Wells Fargo Bank's Demurrer without leave to amend in 2021 addressing these same allegations and making these same requests for relief, is granted. Such pleading filed without leave of court when leave of court is required warrants this court granting the motion to strike as prayed. (*Loney v. Sup. Ct.* (1984) 160 Cal. 3d 719,721-724)

Proposed ruling:

1) The Court grants the Plaintiff's request for Judicial Notice pursuant to Evidence Code section452 sub (d). The Court takes Judicial Notice of the Sixth District Court of Appeal Decision and remittitur. They also seek judicial notice of the court's order of 7-2-21, the SAC filed 3-25-20 (without exhibits);, a copy of the Judgment after order Sustaining Defendant Ouita Martin's Demurrer to the SAC without leave to amend filed 7-28-21, and a copy of the Plaintiff's TAC filed 8-2-23 with its exhibits.
2) The Court Denies the Plaintiff's request for Reconsideration. The motion is procedurally improper in light of the requirements of the code of Civil Procedure section 1008 sub. (a). A written motion to reconsider, as differentiated from the court taking up on its own motion to reconsider a decision pursuant to sub part (c), has strict procedural requirements which the Plaintiff is unable to meet. Moreover, the underlying argument that the doctrine of the law of the case mandates reconsideration is flawed. AS the Plaintiff themselves note an appellate court ruling that is the law of the case as to one party is not the law of the case as to another party who was not the party to the prior appeal. (*Bergman v. Drum* (2005) 129 Cal. App. 4th 11, 20.) Wells Fargo Bank was not a party to the Plaintiff's appeal, nor did the Sixth District Court of Appeals decision address any direction or orders to the court with regard to Wells Fargo Bank. Therefore the doctrine is inapplicable in this instance and for this purpose.
3) Wells Fargo Bank's demurrer to the TAC is SUSTAINED without leave to amend as to the Fourth Cause of Action, the Ninth Cause of Action, and the Tenth Causes of Action. The filing of the Sixth District Court of Appeals Decision and its orders on remand as to Defendant Martin are inapplicable to resuscitating these causes of action for which demurrer was previously sustained without leave to amend. As to the sixth cause of action, the court SUSTAINS the demurrer with leave to amend. Should the Plaintiff file a proper motion for leave to amend the complaint after the Defendant has filed an answer to craft a new cause of action, they may do so within the next 30 calendar days.
4) Motion to Strike. The Plaintiff's motion to strike is granted as prayed. The Plaintiff's argument in favor of granting leave to amend and file the Third Amended Complaint

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**

hinges significantly on whether this court grants their motion to reconsider. In light of this court's denial of the motion for reconsideration, the court has in doing so denied the Plaintiff's request for leave to amend to include new claims and to reinstate previously dismissed causes of action as to Wells Fargo Bank.

END OF TENTATIVE RULINGS

****Please contact Judicial Courtroom Assistant, Wendy Guerrero, at (831) 636-4057 x129 or wendy.guerrero@sanbenito.courts.ca.gov with any objections or concerns.**