

TENTATIVE RULINGS

FOR: June 14, 2017

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. C (Historic Courthouse)

Estate of Brenda L. Szody

16PR000035

FIRST AND FINAL ACCOUNT AND REPORT OF ADMINISTRATOR AND PETITION FOR ITS SETTLEMENT; FOR FINAL DISTRIBUTION; FOR STATUTORY ATTORNEY AND ADMINISTRATOR FEES; FOR GUARDIAN AD LITEM FEES; FOR COSTS; FOR RESERVE; AND FOR REDUCTION IN BOND

TENTATIVE RULING: GRANT petition, including fees as prayed.

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In the Matter of Toni M. Rios

17CV000435

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: The petition for name change is GRANTED without need for appearance.

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In the Matter of The L. Meade Baldwin 2000 Revocable Trust

17PR000089

ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR SETTLEMENT OF ACCOUNT, AND FOR APPROVAL OF TRUSTEE FEES

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. C (Historic Courthouse)

DHMS, LLC v. Gerrett Snedaker, et al.

26-66889

- (1) DEFENDANT SNEDAKER'S DEMURRER TO THE THIRD AMENDED COMPLAINT
- (2) DEFENDANT BECKSTROM'S MOTION TO STRIKE
- (3) DEFENDANT BECKSTROM'S MOTION FOR SANCTIONS

TENTATIVE RULING: Defendant Gerrett Snedaker did not comply with the requirements under Code of Civil Procedure section 430.41 by filing a meet-and-confer declaration. All matters are continued to June 23, 2017, at 8:30 a.m. in Dept. C. Snedaker shall file the meet-and-confer declaration by June 19, 2017.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

In the John Moreno Living Trust Dated November 15, 1991

26-67464

FIRST ACCOUNTING AND PETITION FOR APPROVAL

TENTATIVE RULING: The matter is continued to July 28, 2017, at 8:30 a.m. in Dept. F pursuant to counsel's request.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Dennis H. Bethke and Fonda V. Bethke as Trustees of the Bethke Family Trust v. Specialized Loan Servicing, LLC, et al.

16CV001190

DEMURRER TO THE FIRST AMENDED COMPLAINT

TENTATIVE RULING:

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendants' counsel is directed to contact the opposing party forthwith and advise the opposing party of Local Rule 2.9 and the Court's tentative ruling procedure. If defendants' counsel is unable to contact the opposing party prior to the hearing, defendants' counsel shall be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 2.9.

Defendants Specialized Loan Servicing, LLC, the Law Offices of Les Zieve, and the Bank of New York Mellon FKA the Bank of New York's (as trustee for certificate holders of the CWALT, Inc., Alternative Loan Trust 2006-OA10 Mortgage Pass-Through Certificates, Series 2006-OA10) request for judicial notice of the recorded documents and court filings from the various bankruptcy cases is GRANTED.

Rather than reference their pleading, plaintiffs Dennis H. Bethke and Fonda V. Bethke (as trustees of the Bethke Family Revocable Trust Established on July 12, 1982) cited extensively to declarations in their opposition. The declarations are not in the court file and there is no indication the documents were served with the opposition. In any event, to the extent this information is raised in opposition to the demurrer, the evidence falls outside the four corners of the first amended complaint. The Court has not considered this material as its introduction is not proper on demurrer. (See Code Civ. Proc., § 430.30; *Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213-14 ["A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court."].)

A. Uncertainty

Defendants' demurrer to each cause of action in the first amended complaint on the ground of uncertainty is OVERRULED. An uncertainty demurrer is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty should only be sustained when the complaint is so bad that the defendant cannot reasonably respond. (*Id.*) Here, the complaint is certain enough to allow defendants to understand the nature of the allegations, and the theory of liability in order to fashion an appropriate response.

B. First and Second Causes of Action

Defendants' demurrer to the first cause of action for violation of Civil Code sections 2924, 2924g, 2924b, and 2924f, and second cause of action for violation of Civil Code section 2924, subdivision (c), is SUSTAINED WITHOUT LEAVE TO AMEND. First, plaintiffs do not have a private right of action as to the first and second causes of action. The Homeowner Bill of Rights ("HBOR") consists of Civil Code sections 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, and 2924.17–2924.20. (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) "In the HBOR, the Legislature enacted two statutory provisions – sections 2924.12(a)(1) and 2924.19(a)(1) – that allow a borrower to enjoin a foreclosure when a lender violates other specified HBOR sections." (*Lucioni v. Bank of Am., N.A.* (2016) 3 Cal.App.5th 150, 157.) These "two provisions provide the exclusive means for a borrower to obtain injunctive relief under the HBOR. To enjoin a foreclosure under the HBOR, the borrower must state a cause of action for a material violation of one of the nine statutory sections that are specified in those two provisions." (*Id.*) Plaintiffs allege violations of Civil Code sections 2924, 2924g, 2924b, and 2924f [first claim], and section 2924, subdivision (c) [second claim]. These

code sections are not among the actionable violations under sections 2924.12 or 2924.19. Plaintiffs otherwise have not shown monetary damages are available for these claims.

Second, plaintiffs do not allege the property was owner-occupied under Civil Code section 2924.15, subdivision (a). “Every action must be prosecuted in the name of the real party in interest” (Code Civ. Proc., § 367.) Moreover, as set forth in Civil Code section 2924.15, subdivision (a), enumerated provisions of the HBOR apply only to first mortgages or deeds of trust secured by “owner-occupied” residences containing fewer than five dwelling units.¹

“Owner-occupied” means “the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes.” (Civ. Code, § 2924.15, subd. (a).) The statute’s language is clear and unambiguous. Defendants have no obligation to comply with certain designated provisions of the HBOR when the property securing the mortgage is not plaintiffs’ principal residence at the time foreclosure is being pursued. For instance, a trustee or other mortgage servicer in such a case is not required to comply with section 2923.55, which generally requires the trustee or other mortgage servicer to contact the borrower and explore options to avoid foreclosure. (See Civ. Code, §§ 2923.55, subd. (c), 2924.15, subd. (a).) Because the designated provisions of the HBOR do not apply unless the residence securing the mortgage is “owner-occupied,” a borrower is ineligible for injunctive relief or damages under the HBOR for a violation of those provisions unless the borrower uses the property securing the mortgage as the borrower’s principal residence.

Plaintiffs maintain, without citation to their pleading, both of these requirements are satisfied. (Opp. at p. 5:23.) The Court disagrees. Plaintiffs are not the owners of the property. They quitclaimed the property to defendant Medline Management Corporation, which was recorded on July 19, 2010. (RJN, Ex. 15 [“for valuable consideration” plaintiffs “hereby REMISE(S), RELEASE(S), AND FOREVER QUITCLAIM(S) to Medline Management Corporation, a California Corporation the following described real property in the City of Angwin”].) Plaintiffs allege they reside at the property, and the property “is an owner-occupied property.” (First Amended Compl., ¶¶ 1, 13.) Plaintiffs, however, do not actually allege they own the property or they used the property as their “primary residence” as “security for a loan made for personal, family, or household purposes.” Thus, the pleading does not contain facts sufficient to establish the property was owner-occupied within the meaning of section 2924.15, subdivision (a).

Third, plaintiffs have not alleged sufficient facts demonstrating defendants violated the statutes.

C. Third Cause of Action

Defendants’ demurrer to the fourth cause of action for negligence on the grounds of lack of jurisdiction and failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. This claim is based on two sets of allegations. First, the claim is based on allegations that

¹ The statutes enumerated in section 2924.15, subdivision (a) include sections 2924, subdivision (a)(5), 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.18.

defendants owed a duty of care “to maintain proper and accurate loan records and to discharge and fulfill the other incidental duties required for the maintenance, accounting, and servicing of Plaintiffs’ loan, including, but not limited [to], disclosing to Plaintiffs the status of any foreclosure actions taken by it, refraining from taking any action against Plaintiffs that it did not have the legal authority to do, and providing all relevant information regarding the loan.” (First Amended Compl., ¶ 31.) The borrower-lender relationship does not create a duty of care. (See *Nymark v. Heart Fed. Sav. & Loans Ass’n* (1991) 231 Cal.App.3d 1089, 1096 [financial institution owes no duty of care to borrower when its involvement in the transaction does not exceed the scope of its conventional role as a mere lender of money].) Plaintiffs otherwise fail to allege facts showing defendants owed plaintiffs any duty of care.

Second, the claim is based on allegations defendants violated the automatic stay in the bankruptcy court. (First Amended Compl., ¶¶ 32, 34.) The bankruptcy court has jurisdiction over all claims regarding violation of the automatic stay. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.)

D. Fourth, Fifth, and Sixth Causes of Action

Defendants’ demurrer to the fourth cause of action for violation of Civil Code section 2923.6, fifth cause of action for violation of Civil Code section 2923.7, and sixth cause of action for violation of Civil Code section 2923.55, on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. These HBOR claims fail for the second [primary residence] and third reasons [insufficient facts] noted above in Section B.

E. Seventh Cause of Action

Defendants’ demurrer to the seventh cause of action for violation of Civil Code section 2937 on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Defendants argue plaintiffs lack standing and there is no private right of action for this claim under the HBOR. Defendants have not shown section 2937 is part of the HBOR. However, the cause of action fails because plaintiffs have not alleged sufficient facts demonstrating defendants violated the statute.

F. Eighth Cause of Action

Defendants’ demurrer to the eighth cause of action for unfair business practices on the ground of lack of jurisdiction and failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. This claim is premised on the other causes of action, which are inadequately pled.

If plaintiffs elect to do so, they shall file a second amended complaint within 10 calendar days of service of notice of entry of order. Plaintiffs’ attorneys shall meaningfully engage in meet-and-confer efforts prior to the filing of another demurrer. Failure to do so may result in sanctions.

The case management conference set for July 14, 2017, is vacated and reset to September 14, 2017, at 8:30 a.m. in Dept. F.