

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 16**

**(Dept 16 is now hearing cases that were formerly in Dept 2)**

**Honorable Amber Rosen, Presiding**

Felicia Samoy, Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: 408.882.2270

**DATE: 02-13-24    TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear by video.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

**TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:**

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling  
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

**TO APPEAR AT THE HEARING:** The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.

[https://www.sccscourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml)

**TO SET YOUR NEXT HEARING DATE:** You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

**FINAL ORDERS:** The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

**COURT REPORTERS:** The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 16**

**(Dept 16 is now hearing cases that were formerly in Dept 2)**

**Honorable Amber Rosen, Presiding**

Felicia Samoy, Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: 408.882.2270

**DATE: 02-13-24    TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear by video.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in  
accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court  
3.1312.)**

LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	22CV409250 Hearing: Demurrer	Mardesich Company Camden LLC, a California limited liability company vs Hans J., Trustee Schmitt et al	See Tentative Ruling. Court will issue the final order.
<a href="#">LINE 2</a>	19CV343789 Motion: Summary Judgment/Adjudication	Richard Pierce et al vs RAINCROSS FUEL & OIL, INC. et al	Notice appearing proper and good cause shown, the unopposed motion for summary judgment of Defendant Riverside Air Service, Inc.is GRANTED. Defendant met its initial burden and Plaintiff's failure to respond ""creates an inference that the motion . . . is meritorious."" <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Defendant shall submit the final order.
<a href="#">LINE 3</a>	21CV383578 Motion: Withdraw as attorney	Dorothy Bolin vs Matthew Levy, MD et al	The unopposed motion to withdraw is GRANTED.

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 16**

**(Dept 16 is now hearing cases that were formerly in Dept 2)**

**Honorable Amber Rosen, Presiding**

Felicia Samoy, Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: 408.882.2270

**DATE: 02-13-24    TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear by video.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

<a href="#">LINE 4</a>	21CV383578 Conference: Case Management after mediation	Dorothy Bolin vs Matthew Levy, MD et al	Parties shall appear for a CMC.
<a href="#">LINE 5</a>	22CV408330 Motion: Order awarding atty fees	Armando Cortes et al vs General Motors LLC	Notice appearing proper, the unopposed motion for fees is GRANTED except that the Court grants a multiplier of .25 on fees (not costs) for a total of \$42,400.64. Defendant shall pay the total amount in fees and costs within 20 days of service of the final order. Plaintiff shall submit the final order and file a POS demonstrating service.
<a href="#">LINE 6</a>	22CV406086 Motion: Compel	ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY, an Iowa corporation vs MARICEL AQUISAP	It does not appear that notice was proper and no amended notice was filed. If moving party appears, matter will be continued to allow for proper notice. If notice was proper and plaintiff can demonstrate that at the hearing, then the unopposed motion will be granted.  Plaintiff's failure to appear will result in the matter being taken off calendar.
<a href="#">LINE 7</a>			
<a href="#">LINE 8</a>			
<a href="#">LINE 9</a>			
<a href="#">LINE 10</a>			

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 16**

**(Dept 16 is now hearing cases that were formerly in Dept 2)**

**Honorable Amber Rosen, Presiding**

Felicia Samoy, Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: 408.882.2270

**DATE: 02-13-24    TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear by video.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)**

<a href="#">LINE 11</a>			
<a href="#">LINE 12</a>			

- oo0oo -

## **Calendar Line 1**

**Case Name:** *Mardesich Company Camden LLC v. Hans J. Schmitt et al.* (and related cross-actions)

**Case No.:** 22CV409250

### **I. Factual and Procedural Background**

Cross-complainant, and defendant in the underlying action, Hans Schmitt (“Schmitt”), Trustee of the Hans J. Schmitt 2007 Trust (“Schmitt’s Trust” or “Cross-Complainant”), brings this action against cross-defendants First American Title Insurance Company (“First American”), Alliance Title Company (“Alliance”), Colliers International (“Colliers”), and John Machado (“Machado”)(collectively, “Cross-Defendants”).

According to the allegations of the Cross-Complaint (“XC”), on May 7, 2002, Schmitt purchased a fee estate of real property located at Hillsdale Ave in San Jose (“the Property”). (XC, ¶ 1.) Alliance was hired through Colliers’ agent Machado, to handle the transaction and prepare the grant deed for the Property. (*Id.* at ¶ 4.) Also on May 7, 2002, First American issued to Schmitt a written policy of title insurance, Policy No. 582297, File No. 11058890-004—CP (“the Policy”). (*Id.* at ¶ 8, Ex. 2.)

By the express terms of the Policy, First American insured Schmitt against any loss or damage sustained or incurred by Schmitt, not exceeding \$1,600,000, plus attorneys’ fees and costs, by reason of any defect in or lien or encumbrance on the title; unmarketability of the title; or lack of right of access to and from the Property’s land. (XC, ¶ 9.) The Policy provides that upon written request by Schmitt, First American shall, at its own cost and without unreasonable delay, provide for the defense Schmitt in which any third-party asserts a claim adverse to the title or interest as Schmitt, but only as to those stated causes of action alleging a defect, lien, or encumbrance. (*Id.* at ¶ 10.)

On December 29, 2022, plaintiff Mardesich Company Camden, LLC (“Plaintiff”),<sup>1</sup> filed an action to quiet title against Schmitt, asserting a claim adverse to the title or interest as insured by the Policy. (XC, ¶ 11.) Plaintiff alleges that on November 16, 1964, an amendment to an October 1963 Declaration terminated any easements, burdens, restrictions, encumbrances, common area access, parking, right to ingress and egress, etc. which encumber or burden Plaintiff’s property, effective December 31, 2019. (*Ibid.*)

On September 6, 2022, in accordance with the terms of the Policy, Schmitt notified First American in writing of Plaintiff’s action and requested First American defend him in the action. (XC, ¶ 12.)

On December 7, 2022, First American informed Schmitt that it would not defend him against Plaintiff’s action. (XC, ¶ 14.) Schmitt and First American dispute whether Plaintiff’s action is founded on an alleged defect, lien, or encumbrance insured against by the Policy and whether the statute of limitations has expired such that First American is not obligated to defend or indemnify Schmitt. (*Id.* at ¶ 15.)

On August 29, 2023, Schmitt filed his XC, asserting the following causes of action:

---

<sup>1</sup> Mardesich Company Camden, LLC is the Plaintiff in the underlying action.

- 1) Implied Indemnity [against all Cross-Defendants];
- 2) Equitable Indemnity [against all Cross-Defendants];
- 3) Contribution [against all Cross-Defendants]; and
- 4) Declaratory Relief [against all Cross-Defendants].

On October 10, 2023, First American filed a demurrer to the XC. Schmitt opposes the motion.

## **II. Demurrer**

### **a. Legal Standard**

“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.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

### **b. Request for Judicial Notice**

In support of its demurrer, First American requests the Court take judicial notice of the following:

- 1) Plaintiff’s Complaint filed on December 29, 2022 (Ex. 1). The request is GRANTED as to Ex. 1’s existence. (*Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768 [court may take judicial notice of court documents but not the truth of matters stated therein].)
- 2) Schmitt’s XC filed on August 29, 2023 (Ex. 2). The request is DENIED. Judicial notice of a complaint is unnecessary where it is the pleading under review. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [“Judicial notice is unnecessary because, in our review of the demurrer ruling, we accept the allegations in the complaint [or XC] and the facts in the exhibit as true”].)
- 3) The Policy dated May 7, 2002 (Ex. 3). The unopposed request is GRANTED, as the document is attached, in-part, to Schmitt’s XC and is referenced by Schmitt in opposition on several occasions. (See e.g., *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 fn.3 [judicial notice appropriate where complaint referenced to, and excerpted quotes from, documents not attached as exhibits to the complaint].)
- 4) Schmitt Grant Deed recoded on October 3, 2002 (Ex. 4). The unopposed request is GRANTED. (See Evidence Code section 452, subdivision (c) and (h); *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, [disapproved of on other grounds][“[A] court may take judicial notice of the fact of a document’s recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document’s legally operative language, assuming there is no genuine dispute regarding the document’s authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face.”].)

- 5) Schmitt Grant Deed recorded on December 5, 2003 (Ex. 5).
- 6) Interspousal Transfer Deed recorded on December 5, 2003 (Ex. 6).
- 7) Quitclaim Deed recorded on May 4, 2007 (Ex. 7).

As for Exs. 5-7, the requests for judicial notice are DENIED. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not “necessary, helpful, or relevant”].)

### c. Analysis

First American asserts the following arguments in support of its demurrer: 1) Schmitt’s Trust is not an insured under the Policy; 2) coverage under the policy terminated in 2002; 3) the easements in favor of the Property under the October 1963 Declaration were not part of the insured land under the Policy; 4) First American owed no duty to disclose the 1964 Amendment to the October 1963 Declaration; and 5) indemnity and contribution causes of action fail because First American is not a joint tortfeasor.

#### i. Schmitt’s Trust is Not Named as an Insured

First American first argues Schmitt’s Trust is not the named insured under the Policy. Rather, Schmitt and his wife are defined as the “insured” under the Policy. (Demurrer, p. 8:17-18, 24-26; see also XC, Ex. 2 [the Policy listing Renee K. Schmitt and Hans J. Schmitt as the insured].) Further, First American argues, the XC alleges Schmitt’s Trust was established on April 6, 2007, and the Trust did not acquire title to the Property until May 4, 2007, five years after the date of policy. (Demurrer, p. 9:1-2, citing XC, ¶ 1).

In opposition, Schmitt contends that the Policy is a “CLTA OWNER’S POLICY” which provides that the insurance will remain in force only so long as the insured retains an estate or interest in the land. (Opposition, p. 6:2-5, citing to XC, Ex. 1, p. 5.)<sup>2</sup> He further asserts that when real property is transferred to a trust, the trustee becomes the legal owner. Schmitt continues that because he is the trustee, he is already insured under the Policy. (*Id.* at p. 6:8-9.) Schmitt relies on *Kwok v. Transnation Title Insurance Company* (2009) 170 Cal.App.4th 1562 (*Kwok*) to support his argument. As First American notes in its Reply, *Kwok* is largely unhelpful to Schmitt.

In *Kwok*, a husband and wife sued an insurer. (*Kwok, supra*, 170 Cal.App.4th at p. 1563.) The trial court granted the insurer’s motion for summary judgment, finding plaintiffs did not succeed as insureds by operation of law under the terms of the policy after transfer of the property from a dissolved LLC, of which plaintiffs were sole members, to plaintiffs as trustees of a revocable family trust. (*Ibid.*) On appeal, plaintiffs argued that they became insured by operation of law because they succeeded to the LLC’s interest in the property upon their decision to dissolve it. (*Ibid.*) The Court of Appeal affirmed the trial court’s judgment. (*Ibid.*) The Second District concluded that coverage did not continue because title did not devolve to plaintiffs as members of the LLC on dissolution, but rather was transferred by deed from the named insured to plaintiffs as trustees of their family trust, a separate legal entity. (*Ibid.*) The Appellate Court further reasoned that even if plaintiffs had individually succeeded

---

<sup>2</sup> Schmitt cites to his own Exhibit 1, however, his Ex. 1 does not include the CLTA Owner’s Policy. But, First American’s RJN, Ex. 3 does include this information which the Court relies on in addressing Schmitt’s argument.

to the LLC's interest upon its dissolution, the transfer of title to themselves as trustees did not arise by operation of law because plaintiffs were not members of the LLC in their capacities as trustees. (*Ibid.*) The transfer of the property's title from the LLC as the named insured to the nonmember trustees terminated coverage under the policy as a matter of law. (*Ibid.*)

Thus, this Court does not find that *Kwok* stands for the proposition that when real property is transferred to a trust, the trustee becomes the legal owner and the trustee then becomes insured under the insurance policy, if he was previously the insured.

Therefore, the demurrer may be sustained for failure to allege Cross-Complainant is insured under the Policy. (See e.g., *Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 288 [to the extent factual allegations conflict with content of exhibits attached to the complaint, court relies on and accepts as true the contents of the exhibits].)

However, even if Cross-Complainant was named under the Policy, the Court is persuaded by First American's argument that the Policy was terminated upon transfer of title.

ii. Policy Terminated

First American asserts that Paragraph 2(b) of the Conditions and Stipulations of the Policy states the coverage of the Policy will continue as of the Date of Policy in favor of the insureds "only so long as the insured retains an estate or interest in the land." (Demurrer, p. 9:8-11, citing RJN Ex. 3, p. 2-3, ¶ 2(b).) On October 3, 2002, the insureds (Schmitt and his wife), transferred title of the Property by Grant Deed to an LLC named "Hans and Rene Schmitt, LLC, a Limited Liability Company." (Demurrer, p. 9:15-17, citing RJN, Ex. 4 [grant deed].) First American relies on *Kwok*, to support the assertion that because the individual insureds no longer retained an estate or interest in the land after the conveyance to the LLC, coverage terminated under the terms of the Policy. (Demurrer, p. 9:18-21, citing *Kwok, supra*, 170 Cal.App.4th at pp. 1570-1571 [because an LLC is a legal entity distinct from its individual members, insured LLC's transfer of title to husband and wife, the LLC members, terminated coverage under LLC's insurance policy].)

In opposition, Schmitt does not dispute this transfer but instead argues that nowhere in the Policy does it state the Policy terminates if the insured transfers the Property to an LLC given that it was transferred back. (Opposition, p. 6:18-21.) Schmitt continues that First American's reliance on *Kwok* is misplaced because there the original insured was the LLC and then became its members, whereas here the original insured was Schmitt and he, as the trust's owner, was the insured at the time of the suit. (*Id.* at pp. 6:2-23, 7:1-2.) First, Schmitt cites no authority for his proposition that the fact that the LLC transferred the property back to Schmitt does anything to change the effect of termination. *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 ["The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived."] If the policy is terminated at the point of transfer to the LLC, then there is no relevance to what the LLC does subsequent to that termination. Moreover, in Reply, First American asserts that the point of the *Kwok* holding "is that the insured's transfer of the insured land terminates a CLTA Standard Coverage title policy, and the separate legal existence of a limited liability company cannot be ignored to avoid the effect of such a transfer. (Reply, p. 5:10-13, citing *Kwok, supra*, 170 Cal.App.4th at p. 1571).



The Court finds that First American's interpretation of *Kwok* is correct. The Second District explained that an LLC "has a legal existence separate from its members. While members actively participate in the management and control of the company, they have limited liability for the company's debts and obligations to the same extent enjoyed by corporate shareholders." (*Kwok, supra*, 170 Cal.App.th at p. 1571.) Like in *Kwok*, the Policy indicates Cross-Complainant only becomes insured under the Policy "by operation of law." (RJN, Ex. 3, ¶ 2; see also Reply, p. 4:23-26.) The transfer of property by an insured into a trust "is a voluntary act and not one that arises by operation of law." (*Kwok, supra*, 170 Cal.App.th at p. 1571.)

Thus, Cross-Complainant has failed to allege it is insured under the Policy and that the Policy is still in effect. The demurrer may be sustained on these bases.

But even if not, Cross-Complainant's opposition makes no effort to address the Title Policy terms and settled authority set forth in First American's moving papers that make clear Plaintiff's Complaint challenging easement rights over Plaintiff's Property would not give rise to coverage under the Title Policy, even were it not terminated. *See Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 660 (no coverage under title policy where insured "land" did not include the disputed easement). (Moving papers at pp11-13).

Accordingly, the demurrer to the first through fourth causes of action is SUSTAINED without leave to amend. (*Eghtesad v. State Farm General Ins. Co.* (2020) 51 Cal.App.5th 406, 411 ["denial of leave to amend constitutes an abuse of discretion unless the complaint 'shows on its face that it is incapable of amendment.'"].)

Having sustained the demurrer on these grounds, the Court declines to consider the remaining arguments raised in support of the demurrer.

### **III. Conclusion and Order**

The demurrer is SUSTAINED in its entirety without leave to amend. The Court shall prepare the final order.