SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: November 14, 2024 TIME: 9:00 A.M.

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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV391881	Amir Weiner et al vs Matthew Carpenter et al	**Motion to Strike** The motion to strike was filed July 30, 2024, and is directed at a late opposition brief (filed July 29, 2024) to a motion for judgment on the pleadings. That motion was heard on August 8, 2024, and ruled upon on August 27, 2024. No opposition to the motion to strike was filed. As such, this motion to strike is MOOT and this motion is OFF CALENDAR.
LINE 2	23CV416339	Cathay Bank vs RPRO152N3, LLC, et al	**Motion for Summary Adjudication** Scroll down to LINE 2 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	23CV417273	Sarah Barrog vs Rommel Pascua Cipriano et al	**Motion to Compel (Requests for Production)** Plaintiff Sarah Barrog's motion to compel further responses and production of responsive documents to Plaintiff's Requests for Production (Set 1) and a request for sanctions against Defendant Rooster's Light Corp. for $3,233.25. Plaintiff served her first set of Requests for Production via electronic service on March 29, 2024. After being granted multiple extensions to respond to written discovery, Counsel for Defendant served (method of service is unknown) responses on June 24, 2024. Plaintiff sent Defendant a meet and confer letter on August 4, 2024, and did not receive any response thereto. This motion was filed On August 12, 2024. No opposition was filed; however, the Court does not find that the meet and confer effort was satisfactory and the request for sanctions is merely "estimated". Sending one meet and confer letter a few days before the motion deadline, appears to the Court to be a mere formality, rather than an actual good faith and adequate effort to meet and confer regarding the discovery in dispute. As such, the hearing of this motion to compel is CONTINUED to March 13, 2025, at 9a.m. in Department 18b. The parties are ordered to (1) meet and confer, either in person, by phone or video conference, for *each* of the items in dispute in the motion to compel and (2) file a *joint* statement no later than January 13, 2025, identifying the discovery items in those motions that remain in dispute, and the reasons why they should be compelled/not compelled. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 4	23CV423546	Irina Buckvar et al vs Bernard Buckvar et al	**Motion to Compel (Requests for Admission)** Plaintiffs Owen and Irina Buckvar's motion to compel Defendant Bernard Buckvar to provide further responses to Plaintiffs' First Set of Requests for Admission, Nos.1- 44, and (2) for monetary sanctions of no less than $2,010. Defendant opposes the motion. The motion to compel is CONTINUED to February 25, 2025, at 9a.m. in Department 18b. The parties are ordered to (1) meet and confer, either in person, by phone or video conference, for *each* of the items in dispute in the motion to compel and (2) file a *joint* statement no later than February 11, 2025, identifying the discovery items in the motion that remain in dispute, and the reasons why they should be compelled/not compelled. Moving party to prepare formal order.
LINE 5	23CV423986	Areli Mendoza vs American Honda Motor Co., Inc., a California Corporation	**Motion to Compel (Special Interrogatories)** This motion was CONTINUED to January 30, 2025, by order on November 5, 2024. The parties are to comply with the Court's November 5, 2024 order.
LINE 6	24CV442712	Nemat Maleksalehi et al vs Baudeli Plastering, Inc. et al	**Demurrer** Scroll down to LINE 6 for Tentative Ruling.
LINE 7	22CV407215	Florentina Velazquez Diaz et al vs Alfredo Velazquez et al	**Motion for Terminating Sanctions** OFF CALENDAR per moving party.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	21CV384329	Long Venture Partners LP vs Justin Waldron et al	**Motion for Sanctions** Defendants Playco Global Inc. and Justin Waldron's motion for an order imposing sanctions against Plaintiff Long Venture Partners LLP for $10,853.50 (the amount for reasonable attorney fees and costs incurred for preparation for and attending a mediation and for bringing this motion. The motion is made pursuant to Code Civ. Proc., §128.5 on the grounds that Plaintiff, without notice, failed to attend or participate in an agreed notice, and in doing so engaged in bad-faith actions or tactics that are frivolous and/or solely intended to cause unnecessary delay. On March 19, 2024, Plaintiff proposed mediating the case with Judge Elfving (Ret.) of JAMS in May 2024. On April 1, 2024, Defendants agreed to mediate with Judge Elfving (Ret.) in May 2024 and on April 3, 2024, the parties confirmed a full day meditation via Zoom on May 24, 2024. Defendants paid a $3,675 fee for its share of the mediation. On May 23, 2024, the day before the schedule mediation, Plaintiff's Counsel informed JAMS and the Defendants' counsel that due to a family emergency in Plaintiff's Counsel family, Plaintiff had not filed a mediation brief and requested the mediation be postponed by a week to allow the filing of a mediation brief. On June 4, 2024, the parties rescheduled a full day mediation with Judge Elfving (Ret.) for August 14, 2024. On July 3, 2023, the parties were informed that Judge Elfving (Ret.) was in the process of retiring and was no longer able to conduct the August 14, 2024 mediation. On July 26, 2024, the parties retained Judge Volkman (Ret.) for the mediation on August 14, 2024. The Defendants also paid a $825 retainer for Judge Volkman's services. Both parties provided briefs to the new Mediator. Pre-mediation calls took place. Defense counsel and all parties and personnel attended. On the day of the mediation, only Plaintiff's counsel attended, and he tried to contact his absent client for over an hour. The mediation was terminated. It was later determined that the Plaintiff client was sick. By this motion Defendants seek mediation fees of $4550, $850.50+ for attending the mediation and attorney's fees of $3180.50 for bringing this motion. Plaintiff opposes the motion arguing that no subjective bad faith has been shown as required by Code Civ. Proc., §128.5 and the Declaration of Sam Yu. Plaintiff also seeks sanctions. Good cause appearing, the motion is GRANTED IN PART and DENIED IN PART. Defendants' motion is GRANTED but limited to an award of any non-refundable mediation fees that were paid by Defendants. This payment shall be made by Plaintiff to Defendants no later than December 2, 2024. Both parties' requests for sanctions are DENIED, in particular as only total amounts of sanctions are requested, no hourly rate or time spent is detailed and sanctions are not warranted. Moving party to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	21CV389667	Andrew Truitt et al vs Stephen Michella et al	**Hearing for Post Judgment Costs and Attorney's Fees** Plaintiffs Andrew Truitt, Anthony Conroy and Dirgesh Patel's motion for an order pursuant to Code Civ. Proc., §§ 685.040 and 685.070, for an award of Plaintiffs' reasonable and necessary post-judgment costs and attorney's fees to be added to the principal amount of the judgment previously awarded in this action and a corresponding amendment of the Judgment. Plaintiffs request that the Judgment be amended from $116,397.27 to an award of $274,811.12. Included in the additional amount requested is $97,084 for Ryan's services to facilitate the terms of Dissolution Order (Exhibit 1-- 154 hours of time performed between June 2023 and May 2024). Plaintiffs have also incurred additional fees and costs of $61,329.85 since entry of the Default Judgment. Judgment creditors are "entitled to the reasonable and necessary costs of enforcing a judgment." Code Civ. Proc., § 685.040. A "judgment" under the statute means "a judgment, order, or decree entered in a court of this state." Code Civ. Proc., § 680.230. An action for involuntary dissolution of a corporation is "a special proceeding". (*Merlino v. Fresno Macaroni Mfg. Co.* (1946) 74 Cal.App.2d 120, 124). In such a special proceeding: "costs are allowed of course". Plaintiffs have incurred necessary and reasonable post-judgment fees and costs. This Court's October 30, 2024 *ex parte* order advanced the hearing on this motion from December 12, 2024 to November 14, 2024. Any opposition to this motion was to be filed by November 7, 2024. The proof of service of this *ex parte* was not filed until November 8, 2024, but does show that the *ex parte* order was served as ordered. Defendants did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. The Ryan fees and Plaintiffs' fees and costs are reasonable, necessary and permitted by the Dissolution Order. The motion is therefore GRANTED. Moving party to prepare formal order and Judgment.
LINE 10	22CV405349	Sanjay Taxpro, Inc. vs Neil Jesani et al	**Motion to Compel (Request for Production of Documents)** Scroll down to LINE 10 for Tentative Ruling.

- oo0oo -

Calendar Line 2
Case Name: *Cathay Bank v. RPRO152N3, LLC, et al.*
Case No.: 23CV416339

Before the Court is the motion for summary adjudication of the plaintiff's fourth cause of action for judicial foreclosure against defendant Brent W. Lee. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

On or about April 1, 2019, plaintiff Cathay Bank ("Bank") extended credit to defendant RPRO152N3, LLC ("Borrower") in the form of a loan ("Loan") in the original principal amount of $8,500,000. (Complaint, ¶5.) The Loan was extended pursuant to certain instruments, documents, and agreements (collectively, "Loan Documents") including a promissory note ("Note") dated April 1, 2019; business loan agreement ("Loan Agreement") dated April 1, 2019; deed of trust dated April 1, 2019 and recorded in Sacramento County on June 7, 2019 encumbering real property commonly known as 11931 Foundation Place in Gold River, California ("Sacramento Property"); assignment of rents dated April 1, 2019 and recorded in Sacramento County on June 7, 2019 encumbering the Sacramento Property; deed of trust dated April 1, 2019 and recorded in Placer County on June 7, 2019 encumbering real property commonly known as 9040 Vista De Lago Court in Granite Bay, California ("Placer Property"); and other related documents. (Complaint, ¶5(a) – (f).)

On or about April 1, 2019, defendant Brent W. Lee aka Lee Brent (hereafter, "Lee" or "Guarantor") executed a written Commercial Guaranty ("Guaranty") in favor of plaintiff Bank wherein defendant Guarantor agreed to, among other things, unconditionally and irrevocably guaranty payment of all amounts defendant Borrower owes plaintiff Bank under the Loan Documents and defendant Borrower's performance under the Loan Documents. (Complaint, ¶6.)

Commencing on or about December 1, 2022, defendant Borrower defaulted under the Loan Documents by, among other things, failing to make payments when due on December 1, 2022 and in each month thereafter. (Complaint, ¶9.) On or about February 10, 2023, plaintiff Bank elected to accelerate all sums due under the Loan and declare them immediately due and payable, and made demand for such payment. (*Id.*)

Despite demand therefor, defendant Borrower failed and refused to pay the indebtedness in full to plaintiff Bank. (Complaint, ¶10.) As of May 9, 2023, the amounts due, owing, and outstanding under the Loan Documents are principal of $7,658,725.36, plus interest in the amount of $264,240.36, plus interest at the Interest After Default Rate of $169,130.19 from December 1, 2022 through May 9, 2023, plus late charges of $14,054.01, appraisal fee of $3,320, force placed insurance premiums of $5,830, for a total sum of at least $8,115,299.91, exclusive of legal fees and costs in the litigation of this action. (Complaint, ¶13.) On May 10, 2023 and on each day thereafter, interest continues to accrue at a daily rate of $2,606.09. (*Id.*)

On May 16, 2023, plaintiff Bank filed a complaint against defendants Borrower and Guarantor asserting causes of action for:

(1) Breach of Note [against defendant Borrower]

(2) Breach of Guaranty [against defendant Guarantor]

(3) Judicial Foreclosure as against Sacramento Property [against defendant Borrower]

(4) Judicial Foreclosure as against Placer Property [against defendants Borrower and Guarantor]

(5) Specific Performance and Appointment of Receiver for Sacramento Property [against defendant Borrower]

On November 1, 2023, defendants Borrower and Guarantor jointly filed an answer to plaintiff Bank's complaint.

On April 11, 2024, plaintiff Bank filed the motion now before the court, a motion for summary adjudication of its fourth cause of action against defendant Guarantor.

Based on an original hearing date of October 8, 2024, defendant Guarantor filed untimely opposition on September 30, 2024, six calendar days late.

Although plaintiff Bank filed a reply brief on October 3, 2024, the court continued the hearing on plaintiff Bank's motion for summary adjudication to November 14, 2024, allowing plaintiff Bank to file a [further] reply no later than October 31, 2024.

On October 31, 2024, plaintiff Bank filed further reply papers in support of its motion for summary adjudication.

II. PLAINTIFF BANK'S MOTION FOR SUMMARY ADJUDICATION IS GRANTED.

A. PRELIMINARY REQUESTS.

In opposition, defendant Lee makes a number of preliminary requests including a request that the court first hear defendants' motion/ petition to compel arbitration. Defendant Lee acknowledges, however, that the court already denied defendants' ex-parte application to advance (and thereby prioritize) the hearing on their motion/ petition to compel arbitration. Having already denied defendants' request, the court finds no basis for reconsideration of that ruling now. Nor will the court entertain any of defendant Lee's other preliminary requests regarding amendment of defendants' answer or change of venue. The only properly noticed motion presently before the court is plaintiff Bank's motion for summary adjudication.

As a further preliminary matter, defendant Lee requests the hearing on plaintiff's motion for summary adjudication be continued to allow for further discovery. Defendant Lee's current counsel substituted into this action on August 30, 2024. Defendant's counsel requests a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h), which states, in pertinent part, that, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

"To mitigate summary judgment's harshness, the statute's drafters included a provision making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395 (*Bahl*); internal punctuation omitted.)

However, "[i]t is not enough to ask for a continuance … in opposing points and authorities. The statute requires that the opposition be accompanied by affidavits or declarations showing facts to justify opposition may exist; or that such showing be made by an ex parte motion on or before the date the opposition is due." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶10:207.10, pp. 10-88

to 10-89.) In *Hill v. Physicians & Surgeons Exch.* (1990) 225 Cal.App.3d 1, 7 – 8, the "pleadings contain[ed] no affidavit detailing facts to show the existence of evidence supporting her theory of coverage and the reasons why this evidence could not be presented at the time of the hearing." "The purpose of the affidavit required by Code of Civil Procedure 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion." (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 325 – 326.)

The opposing party's declaration in support of a motion to continue the hearing should show the following:

- Facts establishing a likelihood that controverting evidence may exist and why the information sough is essential to opposing the motion;
- The specific reasons why such evidence cannot be presented at the present time;
- An estimate of the time necessary to obtain such evidence; and
- The specific steps or procedures the opposing party intends to utilize to obtain such evidence.

(Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶10:207.15, p. 10-89 citing Code Civ. Proc., §437c, subd. (h) and *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254 (*Cooksey*), et al.)

> A declaration in support of a request for continuance under section 437c, subdivision (h) must show: "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" [Citation.] "The purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]" [Citation.] "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.' [Citation.]

(*Cooksey, supra*, 123 Cal.App.4th at p. 254.)

> Where a party requests a continuance under the statute and satisfies its conditions, the determination whether to grant the request is vested in the discretion of the trial court, and will not be disturbed on appeal unless an abuse of discretion appears. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100 [20 Cal. Rptr. 3d 1]; *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190 [133 Cal. Rptr. 2d 408].) In exercising its discretion the court may properly consider the extent to which the requesting party's failure to secure the contemplated evidence more seasonably results from a lack of diligence on his part. (*Desaigoudar v. Meyercord*, *supra*, 108 Cal.App.4th at p. 190 ["Where a lack of diligence results in a party's having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under Code of Civil Procedure section 437c, subdivision (h), the trial judge may deny the request for continuance of the motion."]; *Knapp v. Doherty*, *supra*, 123 Cal.App.4th 76, 102, quoting *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 76 [41 Cal. Rptr. 2d 404] [request for discovery properly denied where requesting party offered " 'no justification for the failure to have commenced the use of appropriate discovery tools at an earlier date' "]; *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257 [19 Cal. Rptr. 3d 810] ["majority of courts" have held that "lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing"]; but see *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398 [107 Cal. Rptr. 2d 270] [questioning whether diligence plays any proper role in the matter, given absence of any statutory reference to it].) [Footnote.]

(*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038 (*Rodriguez*).)

"[T]he court must determine whether the party requesting the continuance has established good cause for it. That determination is within the court's discretion." (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020)

¶10:208, pp. 10-90 to 10-91 citing *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716, et al.) "Usually, the court's discretion should be exercised in favor of granting a continuance: 'The interests at stake are too high to sanction the denial of a continuance without a good reason.'" (*Id.* citing *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634; et al.)

Factors the court may consider in deciding to continue include:

- The length of time the case has been pending. [17 months: Complaint filed May 16, 2023.]
- The length of time the requesting party had to oppose the motion. [1 month: MSJ filed April 11, 2024; but, current counsel substituted in on August 30, 2024.]
- The proximity of the trial date or the 30-day discovery cut-off before trial. [Not applicable.]
- Whether the continuance motion could have been made earlier.
- Prior continuances for this purpose.
- Whether the evidence sought is "essential" to the issue to be adjudicated. [As set forth in the supporting declaration/ opposition.]
- Death or serious illness of an attorney or party is normally good cause for granting a continuance. [Not applicable.]

(*Id.* at ¶10:208.1, pp. 10-91 to 10-92.)

Here, defendant Lee's counsel submits a declaration in which he states he received emails from defendant Lee's former counsel on September 5, 2024 attaching some of the pleadings.[1] Defendant's former counsel further stated his office would send the rest of the file to defendant's current counsel on the following week, but that did not occur.[2] Defendant's current counsel received defendant Lee's deposition transcript, but did not receive exhibits to that deposition until September 26, 2024.[3] Defendant's current counsel concludes with the statement that "discovery which is identified in the accompanying Memorandum of Points and Authorities is reasonably necessary to provide a full and complete response to Plaintiff's

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[1] See ¶3 to the Declaration of William C. Dresser in Opposition to Motion for Summary Adjudication, etc. ("Declaration Dresser").
[2] See ¶4 to the Declaration Dresser.
[3] See ¶5 to the Declaration Dresser.

Motion for Summary Adjudication."[4] In the accompanying memorandum of points and authorities, defendant identifies people and documents it contends are relevant, but does not explain whether such people/ documents exist, how they are essential to defeating the plaintiff's motion for summary adjudication, what specific steps or procedures defendant intends to utilize to obtain such evidence; or how much time is necessary to obtain such evidence. While the court can appreciate current counsel's limited involvement in this action thus far, his declaration in support of a request for continuance is grossly inadequate. As such, the court, exercising its discretion, hereby DENIES defendant Lee's request for a continuance.

B. **PLAINTIFF BANK'S MOTION FOR SUMMARY ADJUDICATION OF THE FOURTH CAUSE OF ACTION [JUDICIAL FORECLOSURE] AGAINST DEFENDANT LEE IS GRANTED.**

> When a borrower defaults on a loan secured by real property, the lender can use one of three procedures to recover the debt. First, the lender can initiate a judicial foreclosure by filing a lawsuit. (§ 725a.) As the plaintiff in the suit, the lender must prove that "the subject loan is in default and the amount of default." (*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 470 [145 Cal. Rptr. 3d 678] (*Arabia*).) If the lender proves its case, the court can order the sale of the property to satisfy the borrower's debt. (§ 726.)

(*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 672.)

> As its name implies, to commence a judicial foreclosure, the foreclosing party must file a lawsuit. Therefore, instead of merely causing a notice of default to be recorded and proceeding toward a foreclosure sale per the Civil Code without court involvement, the plaintiff must prove its case to the satisfaction of the court. The plaintiff must establish the subject loan is in default and ***the amount of default***. (See 1 Bernhardt, Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2011) Judicial Foreclosure, § 3.1, p. 181 (Bernhardt).) If successful in proving the loan is in default, the plaintiff will ask the court to order the property sold to satisfy the loan balance. (*Ibid.*)

[4] See ¶8 to the Declaration Dresser.

> Inherent in this process, the plaintiff must prove it has the right to initiate the judicial foreclosure.

(*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 470-471; emphasis added.)

Code of Civil Procedure section 726 "provides that the court may, by its judgment, direct the sale of the encumbered property and the application of the proceeds thereof to the amount due to the plaintiff. ***It follows that this judgment directing such sale and such application must also fix the amount which is then to be paid to the plaintiff***." (*Kuster v. Parlier* (1932) 122 Cal.App. 432, 434; emphasis added.)[5]

In relevant part, plaintiff Bank contends and submits evidence that, "[a]s of April 8, 2024, the total amounts due, owing, and outstanding under the Loan Documents are principal of $1,460,628.74, plus interest under the Loan Documents in the amount of $64,815.40, plus interest at the Interest After Default Rate under the Loan Documents of $43,210.27 from September 9, 2023 through April 8, 2024, plus Late Charges of $44,164.80, plus Appraisal Fee of $3,320.00, plus Force Placed Insurance Premium Fees of $19,430.00, plus foreclosure fees of $14,755.52, plus recording fees of $800.00, plus [plaintiff Bank's] attorneys' fees and costs of $129,517.85, for a total sum of at least $1,780,642.58.[6] On April 9, 2024 and on each day thereafter, daily interest continues to accrue at the Interest After Default Rate of $202.87 per day plus interest at the Note rate of $304.30 per day, for a combined daily rate of $507.17.[7]

In the further reply, plaintiff Bank submits evidence to support an updated amount due as of October 3, 2024: $1,962,863.32 reflecting an increase based on further accumulation of interest and attorneys' fees and costs.[8]

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[5] Code of Civil Procedure, section 726, subdivision (a), continues to read, in relevant part, "In the action the court may, by its judgment, direct the sale of the encumbered real property … and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff…"

[6] See Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication of the Plaintiff's Fourth Cause of Action for Judicial Foreclosure against Defendant Brent W. Lee ("Bank's UMF"), Fact No. 23.

[7] See Bank's UMF, Fact No. 23.

[8] See ¶3 to the Declaration of David Scheiber in Support of Further Reply in Support of Motion for Summary Adjudication of the Plaintiff's Fourth Cause of Action for Judicial Foreclosure against Defendant Brent W. Lee.

In opposition to the merits, defendant Guarantor argues initially, without citation to any relevant authority, that plaintiff Bank "did not move to have this court determine, that [Guarantor] is liable on the Guarantee before moving to foreclose."[9] As discussed above, an action for judicial foreclosure requires the plaintiff lender to establish that the "subject loan is in default." Plaintiff Bank has done so here.[10]

Defendant Guarantor argues next that plaintiff Bank has not sufficiently pleaded a claim for judicial foreclosure because "the complaint must name all persons with a recorded interest in the property at the time of filing and the rights of which may be impacted by the foreclosure," citing to Code of Civil Procedure section 726, subdivision (c).[11] That particular provision states:

> ***No person*** holding a conveyance from or under the mortgagor of real property or estate for years therein, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action ***need be made a party to the action***, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the person holding the unrecorded conveyance or lien as if the person had been a party to the action. Notwithstanding Section 701.630, ***the sale of the encumbered real property or estate for years therein does not affect the interest of a person*** who holds a conveyance from or under the mortgagor of the real property or estate for years therein mortgaged, or has a lien thereon, if the conveyance or lien appears of record in the proper office at the time of the commencement of the action and the person holding the recorded conveyance or lien is ***not made a party to the action***.

(Emphasis added.)

The court reads the highlighted language above to suggest the opposite of what defendant Guarantor argues. Even cursory independent legal research confirms "no authority

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[9] See page 9, lines 8 – 9, of the Memorandum of Points and Authorities in Opposition to Cathay Bank's Motion for Summary Adjudication, etc. ("Opposition MPA").
[10] See Bank's UMF, Fact Nos. 1 – 20. To the extent defendant Guarantor objects to the underlying evidence, defendant Guarantor's objections are OVERRULED.
[11] See page 9, lines 22 – 24, of the Opposition MPA.

that the failure to include the junior lienholder as a defendant in a judicial foreclosure action renders the action improper as to the named parties, including the borrower." (*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 473-474.)

Defendant also attacks the pleading by asserting the "relief requested in the complaint … does not include a count for a deficiency judgment in the foreclosure complaint."[12] Defendant Guarantor cites Code of Civil Procedure section 726, subdivision (b) which states, in relevant part:

> The decree for the foreclosure of a mortgage or deed of trust secured by real property or estate for years therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the personal liability of any defendant for the payment of the debt secured by the mortgage or deed of trust and shall name the defendants against whom a deficiency judgment may be ordered following the proceedings prescribed in this section. In the event of waiver, or if the prohibition of Section 580b is applicable, the decree shall so declare and there shall be no judgment for a deficiency. In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for the debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the real property or estate for years therein sold as of the date of sale, the court shall render a money judgment against the defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of levy and sale and of action exceeds the fair value of the real property or estate for years therein sold as of the date of sale. In no event shall the amount of the judgment, exclusive of interest from the date of sale and of costs exceed the

[12] See page 10, lines 7 – 9, of the Opposition MPA.

> difference between the amount for which the real property or estate for years therein was sold and the entire amount of the indebtedness secured by the mortgage or deed of trust. Notice of the hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing.

The court does not read this provision to set forth a pleading requirement. Rather, as plaintiff Bank points out in reply, this provision merely sets forth the procedure by which a plaintiff may obtain a deficiency judgment.

Defendant Guarantor then cites legal authority [Code Civ. Proc., §§729.040 and 701.540] to support an assertion that this action has been filed in the wrong county. However, the legal authority cited does not affect the court's subject matter jurisdiction.

Next, defendant Guarantor alludes to the one-action and security first rule codified in Code of Civil Procedure section 726. "[Code of Civil Procedure] Section 726 sets out the one action rule as well as the security first rule. Our Supreme Court described the operation of section 726 as follows: 'A secured creditor can bring only one lawsuit to enforce its security interest and collect its debt. Moreover, section 726(a) is part of a broader statutory scheme designed to protect debtors. "Under California law 'the creditor must rely upon his security before enforcing the debt.' " ' [Citation.] The purpose of the one action rule is to protect debtors from multiple collection actions, not to bar entry of more than one final determination in a foreclosure action. [Citations.]" (*Kinsmith Financial Corp. v. Gilroy* (2003) 105 Cal.App.4th 447, 453 – 454.)

"Section 726 embodies more than the 'one-action' rule. …section 726 and the statutory scheme of which it is a part require a secured creditor to proceed against the security before enforcing the underlying debt. (*Walker v. Community Bank, supra*, 10 Cal.3d 729, 733–734, 518 P.2d 329.) This rule is hornbook law in California and warrants no extended discussion." (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 999.)

"[S]ection 726 is susceptible of a dual application—it may be interposed by the debtor as an affirmative defense or it may become operative as a sanction. If the debtor successfully

raises the section as an affirmative defense, the creditor will be forced to exhaust the security before he may obtain a money judgment against the debtor for any deficiency. [Citations.] If the debtor does not raise the section as an affirmative defense, he may still invoke it as a sanction against the creditor on the basis that the latter by not foreclosing on the security in the action brought to enforce the debt, has made an election of remedies and waived the security. [Citation.]" (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 734.)

Defendant Guarantor, however, does not adequately demonstrate how the one-action or security first rule would operate here as an affirmative defense or sanction. Without referring to any specific evidence, defendant Guarantor proffers only the assertion that plaintiff Bank "already sought and obtained recovery against the Sacramento property."[13] Even if credited, this one fact is insufficient to create a triable issue of material fact with regard to whether plaintiff Bank can pursue judicial foreclosure or whether an affirmative defense applies.

Defendant contends summary adjudication ought to be denied because plaintiff Bank "engaged in financial exploitation of [Guarantor] … within the meaning of financial [elder] abuse."[14] However, as plaintiff Bank points out in reply, defendant Guarantor has not asserted a cross-claim for financial elder abuse. Even if defendant Guarantor had done so, his cross-claim does not operate as an affirmative defense nor does it create a triable issue with regard to plaintiff Bank's cause of action for judicial foreclosure.

In its previous tentative ruling, the court reached the conclusion that defendant Guarantor proffered evidence which created a triable issue of material fact with regard to the amount plaintiff Bank contends should be fixed in its favor. More specifically, defendant Guarantor proffered evidence that defendant Guarantor paid money to [plaintiff] Cathay Bank for principal and interest.[15] Defendant Lee tendered additional money - $500,000 – to [plaintiff] Cathay Bank.[16] Plaintiff Bank has not provided credit for the amounts paid and tendered by defendants [Borrower] and [Lee].[17]

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[13] See page 10, lines 12 – 13, of the Opposition MPA.
[14] See page 12, lines 3 – 6, of the Opposition MPA.
[15] See Defendants' Additional Undisputed Material Facts ("Defendant Lee's AMF"), Fact No. 113.
[16] See Defendant Lee's AMF, Fact No. 114.
[17] See Defendant Lee's AMF, Fact No. 118.

However, upon further consideration and more careful review of the underlying evidence, the court now concludes defendant Guarantor's evidence is insufficient to create a triable issue of material fact. As noted above, the court found plaintiff Bank established the subject loan is in default. To be more specific, the court relied on the following two facts proffered by plaintiff Bank: Commencing on or about December 1, 2022, RPRO defaulted under the Loan Documents by failing to make payments when due under the Loan Documents, including but not limited to the failure to make the required monthly payments due on December 1, 2022 and in each month thereafter.[18] Commencing on or about December 1, 2022, RPRO defaulted under the Loan Documents in that there were material adverse changes in RPRO's financial condition, arising from, at least, RPRO's continuing material decline in net operating income generated by the Property.[19]

In opposition, defendant Guarantor contends a triable issue of material fact exists based on ¶43 of his declaration which states, "I dispute that I was in default, or that RPRO152N3, LLC was in default, on the loan based on the amounts due, or on any other bases under the loan." Stating that a dispute exists in a declaration does not make it so. This is entirely conclusory and the court gives this statement no evidentiary weight. The court even considered defendant Guarantor's statement at paragraph 41 of his declaration which states, in part, "I made payments in full for years." The issue, however, is not whether defendants made payments, but rather whether defendants made any payments on December 1, 2022 and thereafter. At paragraph 38 of his declaration, defendant Guarantor does state, in relevant part, "I paid Cathay Bank … from payments that I regularly and timely made on both principal and interest in the full amount due, complete through until the bank refused to tell me the status of the loan …." While still lacking in specificity, this statement if liberally construed perhaps creates a triable issue with regard to whether the subject loan was in default ***based on lack of payment***.

However, plaintiff has also proffered evidence concerning other bases for default. (See ¶13 to the Declaration of David Scheiber in Support of Motion for Summary Adjudication,

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[18] See Bank's UMF, Fact No. 15.
[19] See Bank's UMF, Fact No. 16.

etc.) Defendant has not proffered any admissible evidence which would create a triable issue of material fact with regard to those other bases for default.

There being undisputed evidence that the subject loan was in default, the court turns to whether there exists a triable issue of material fact with regard to the amount of default. In that regard, defendant Guarantor contends a dispute exist based upon his tender of $500,000. However, defendant Guarantor himself acknowledges plaintiff Bank refused this tender.[20] In this court's opinion, defendant Guarantor's tender of $500,000 only creates a triable issue if he can also establish that plaintiff Bank had an obligation to accept/ credit the tendered payment. Given the undisputed default of the subject loan and acceleration of all sums due under the loan, plaintiff Bank established that $1,460,628.74 was due and owing as of April 8, 2024.[21] Without identification of a contractual or statutory right to reinstate the loan/ cure the default, defendant Guarantor's tender is inconsequential and does not create a triable issue of material fact.

The only other fact defendant Guarantor raises in an attempt to create a triable issue with regard to the amount of default is his assertion that "Cathay Bank caused a reduction in the sale price of the Sacramento property," the other collateral for the loan.[22] Like defendant Guarantor's argument concerning financial elder abuse, defendant Guarantor has not asserted any claim for intentional interference with contractual relations or intentional interference with prospective economic advantage. Even if he had, they would operate as cross-claims and not as affirmative defenses to a judicial foreclosure cause of action.

For the reasons discussed above, plaintiff Bank's motion for summary adjudication of its fourth cause of action against defendant Lee is GRANTED. Plaintiff Bank shall prepare a formal order and judgment reflecting the amount of default to be $1,962,863.32 as of October 3, 2024.

The Court will prepare the order on this motion.

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[20] See Defendant Lee's AMF, Fact No. 114. [Defendant Lee's AMF includes two AMFs numbered 114. This citation is to the second numbered AMF 114.] See also ¶32 to the Declaration of Defendant, Brent W. Lee in Opposition to Motion for Summary Adjudication, etc. ("Declaration Lee")—"I wrote a check for $500,000 payable to Cathay Bank. I delivered it to the Cupertino branch. Keith refused to cash it. Then other management from Cathay Bank refused to cash it, and sent it back to me much later."

[21] See Bank's UMF, Fact Nos. 21 and 23.

[22] See Defendant Lee's AMF, Fact No. 116.

Calendar Line 6
Case Name: *Nemat Maleksalehi et al. v. Baudeli Plastering, Inc. et al.*
Case No.: 24CV442712

Before the Court is Defendant S.R. Freeman, Inc.'s Demurrer. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

Plaintiffs Nemat Maleksalehi and Maryam Maleksalehi, individuals and Trustees of the Nemat and Maryam Maleksalehi Revocable Trust dated September 3, 2023 ("Plaintiffs") are owners of the residents located at 21549 Saratoga Hills Road, Saratoga, California 95070 ("the Residence"). (Complaint at ¶ 2.) Defendant, S.R. Freeman, Inc. ("S.R. Freeman" or "Defendant") was hired as a contractor in February 2017 for the construction of the Residence. (*Id.* at ¶ 13.) Plaintiffs allege that Defendant S.R. Freeman, as well as the other named contractors entered into various subcontractor agreements to perform work or provide services and materials for the Residence. (*Id.* at ¶ 14.)

Plaintiffs allege that in the past three years, they have discovered "certain systemic conditions at the Residence resulting in water intrusion and leaks, and tangible property damage thereto." (Complaint at ¶ 16.) Plaintiffs allege that they are informed and believe that "there are defects in the construction of the Residence at and around, but not limited to the Residence's window and window assemblies, exterior decks and walkways, and exterior doors." (*Ibid.*)

Plaintiffs filed suit on July 9, 2024 alleging six causes of action against the various contractors and subcontractors, including Defendant S.R. Freeman, Inc. Plaintiffs have alleged the following causes of action in their Complaint: (1) breach of contract against all Defendants and DOES 1 through 10; (2) breach of express warranty against all Defendants and DOES 1 through 10; (3) breach of contract as third party beneficiary against the Subcontractor Defendants and DOES 11 through 75; (4) negligence against all Defendants; (5) strict products liability against Naddour, TBS, and DOES 76 through 100; and (6) products liability (negligence) against Naddour, TBS, and DOES 76 through 100.

On August 27, 2024, Defendant S.R. Freeman, Inc. filed its Demurrer to Plaintiffs' Complaint with respect to the fourth cause of action for negligence. Plaintiffs filed their Opposition on October 30, 2024. Defendant filed its Reply on November 6, 2024.

II. DISCUSSION

a. TIMELINESS

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).) Even if a demurrer is untimely filed, the Court has discretion to hear the demurrer so long as its action ". . . 'does not affect the substantial rights of the parties.' [Citations.]" (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.)

Plaintiffs filed their Complaint on July 9, 2024. The Complaint was received by Defendant S.R. Freeman, Inc. on July 29, 2024. (Proof of Service & Notice of Acknowledgment dated August 19, 2024.) Defendant filed the instant Demurrer within 30 days of service of the Complaint on August 27, 2024. Therefore, the Demurrer is timely.

b. MEET & CONFER

"Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc. § 430.41, subd. (a).) "As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc. § 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc. § 430.41, subd. (a)(4).)

Counsel for Defendant, Matthew Slater ("Mr. Slater"), states that he met and conferred with counsel for Plaintiff via e-mail and explained the grounds for Demurrer as addressed herein. (Declaration of Mathew Slater ["Slater Decl."] at ¶ 2.) Mr. Slater states that he requested that Plaintiffs dismiss their fourth cause of action for negligence against Defendant

S.R. Freeman, Inc., but Plaintiffs' counsel declined. (*Ibid.*) Mr. Slater states that the parties exchanged additional e-mails but were unable to reach an agreement on the matter. (*Ibid.*) Copies of these e-mails are attached as exhibits to the Declaration of John F. Kazanovicz. (Declaration of John F. Kazanovicz ["Kazanovicz Decl."], Ex. A.) Plaintiffs maintain Defendant did not meet and confer in good faith because although the parties exchanged a total of three e-mails, they never conferred telephonically as required by Code of Civil Procedure section 430.41. (Kazanovicz Decl. at ¶ 3.) Even if the Court were to find the meet and confer efforts insufficient based on the parties' failure to telephonically meet and confer, the parties have nonetheless exchanged their respective positions on the issues before the Court and have reached an impasse. The Court may still consider the Demurrer and reaches the merits below.

c. LEGAL STANDARD

A demurrer must distinctly specify the grounds upon which a pleading is objected to; a demurrer lacking such specification may be disregarded. (Code Civ. Proc. § 430.60.) Defendants object to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10, subd. (e).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc. §§ 430.10, 430.50, subd. (a).)

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "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.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

d. MERITS

Defendants argue the fourth cause of action for negligence is superseded by Civil Code section 896,[23] otherwise known as the Right to Repair Act. (Demurrer at p. 3:3-8.) The Right to Repair Act ("the Act") sets forth various standards for residential construction projects and procedures for construction defect actions brought under the Act:

> In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title . . . .

(Civ. Code, § 896.) The construction standards set forth in section 896 pertain to water issues (subd. (a)), structural issues (subd. (b)), soil issues (subd. (c)), fire protection issues (subd. (d)), plumbing and sewer issues (subd. (e)), electrical system issues (subd. (f)), and other area of construction (subd. (g)). The Act also includes "a requirement that builders provide a one-year 'fit and finish' warranty ([Civ. Code,] § 900), and it established a new 10-year statute of limitations ([Civ. Code,] § 941.)" (*Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 832.)

The Act establishes pre-litigation procedures that a claimant must initiate prior to filing an action for violation of these standards. (Civ. Code, § 910.) "These procedures include a requirement that the claimant provide notice of claim 'to the builder.'" (*Greystone Homes, Inc.*

[23] All further undesignated statutory references are to the Civil Code.

v. Midtec, Inc. (2008) 168 Cal.App.4th 1194, 1211 (*Greystone*), citing Civ. Code, § 910, subd. (a).) "The builder may elect to respond to the claim by inspecting the alleged violation ([Civ Code,] § 916), offering to repair it ([Civ Code,] § 917), and either repairing the violation or arranging for a repair to be done ([Civ. Code,] §§ 918, 921)." (*Greystone, supra,* 168 Cal.App.4th at p. 1211.) "If the builder fails to respond to the claim, or otherwise fails to comply with the requirements of the Act's prelitigation procedures, the claimant may bring an action for violation of the Act's standards without further resort to the prelitigation procedures. ([Civ. Code,] §§ 915, 920.)" (*Ibid.*)

In *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 247, 251 (*McMillin*), the California Supreme Court held that (1) the Legislature made the Act the virtually exclusive remedy for economic loss and property damage arising from construction defects; and (2) common law actions alleging construction defects resulting in both economic loss and property damage are subject to the Act's prelitigation notice and cure procedures.

The Act defines "builder" under Civil Code section 911 as follows:

> (a) For purposes of this title, except as provided in subdivision (b), "builder" means any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim.
>
> (b) For the purposes of this title, "builder" does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. For purposes of this title, these nonaffiliated general contractors and nonaffiliated contractors shall be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals.

(Civ. Code, § 911.)

Additionally, the Act provides that "[e]ach and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product

manufacturers, and design professionals to the extent that the general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals caused in whole or in part, a violation of a particular standard as the result of a negligent act or omission or breach of contract." (Civ. Code, § 936.)

Plaintiffs argue that because they are homeowners who built their home or are "owner-builders", the Right to Repair Act does not apply because there was no "builder" as defined by the statute. (Opposition at pp. 4:24-5:2, 5:28-6:3.) However, the statute is not limited to just "builders" as defined above. As stated, section 896 applies to contractors as set forth in Chapter 4 commencing with section 910, including nonaffiliated contractors in only that capacity as defined in section 911, subdivision (b). Section 936 extends liability to contractors for negligent acts that result in the violation of a particular standard under the Act. Plaintiff has not cited any authority precluding application of the Act to owner-builders for construction defects alleged against general contractors.

Here, Plaintiffs' Complaint alleges that within the last three years, they have discovered water intrusion, leaks, and property damage at the Residence "at and around the window and window assemblies, exterior decks and walkways, and exterior doors," as a result of the construction defects performed by the named defendants. (Complaint at ¶ 16.) The standards addressing water issues found in these specific areas are addressed in section 896, subdivision (a). Thus, the fourth cause of action falls within the scope of the Right to Repair Act.

Plaintiffs raise concerns with respect to the timeline to bring forth claims under section 896 given that the statute of limitations is set by the close of escrow. (Opposition at p. 5:3-13.) Plaintiffs argue that, here, there was no close of escrow because there was no sale of the home because Plaintiffs built it for themselves. (Opposition at p. 5:7.) Defendant argues "[t]he statutes applicable to Plaintiff's claims are of 4 and 10 years for patent and latent defects under *Code of Civil Procedure* §§ 337.1 and 337.15, both of which run from the date of substantial completion of construction instead of close of escrow." (Reply at p. 3:22-25.)

Section 896 establishes statute of limitations specific to several of the functions and components discussed therein; where a specific statute does not apply, "no action may be brought to recover under this title more than 10 years after substantial completion of the

improvement but not later than the date of recordation of a valid notice of completion." (Civ. Code, § 941, subd. (a).) Where it applies, the Act expressly supersedes the statute of limitations applicable to other construction defect claims. (Civ. Code, § 941, subd. (d) ["Sections 337.15 and 337.1 of the Code of Civil Procedure do not apply to actions under this title."]; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 374, fn. 16 ["Where it applies, the new scheme expressly supersedes section 337.15, though it retains the basic premise that suit may commence no later than 10-years after substantial completion of the project."].)

For plumbing and sewer issues and electrical system issues, section 896 specifically sets forth a four-year statute of limitations after the close of escrow. (Civ. Code, § 896, subd. (e).) However, the Complaint on its face seems to suggest that the water intrusion and leaks caused damage to the windows, decks, walkways, and exterior doors, reflecting the water issues described in subdivision (a) that do not set forth a specific statute of limitations period. Under these facts, Plaintiff's claim could be subject to the default 10-year statute of limitations period commencing after substantial completion of the improvement but no later than the date the notice of completion is recorded. (Civil Code, § 941.)

Plaintiffs here have alleged that construction on the Residence began in February 2017, but do not allege when construction was completed. (Complaint at ¶ 13.) Nonetheless, Plaintiffs' argument is unpersuasive because there is a catchall/default statute of limitations within the Right to Repair Act under section 941 that does not begin to run from the date the escrow closes. For the reasons set forth above, Defendant S.R. Freeman, Inc.'s Demurrer is SUSTAINED. The Right to Repair Act is the exclusive remedy for the negligence cause of action as challenged by Defendant. (*McMillin, supra,* 4 Cal.5th at pp. 247, 251.)

Plaintiffs bear the burden of proving an amendment would cure the defect identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see also *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 112 fn. 8 (*Medina*) ["As the Rutter practice guide states 'It is not up to the judge to figure out how the complaint can be amended to state a cause of action. Rather, the burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the

pleading.'"]; *Drum v. San Fernando Valley Bar Ass'n*. (2010) 182 Cal.App.4th 247, 253 [citing *Medina, supra,* 164 Cal.App.4th at p. 112 fn. 8].)

"[W]here the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal … .' (Code Civ. Proc., § 472c, subd. (a).) Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law. Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found 'only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case.'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal App 4th 497, 507, disapproved on another ground in *Yvanova v. New Century Mortg. Corp., supra,* 62 Cal.4th at p. 939, fn. 13.)

In their Opposition, Plaintiffs argue they can amend to state their cause of action under the Right to Repair Act: "Notwithstanding the foregoing, even if the Court decides that the Plaintiffs' claims are governed by California Civil Code section 896, et al., rather than the common law actions pleaded, Plaintiffs should be granted leave to amend their complaint accordingly, as the pleaded primary rights (defective workmanship and resulting damage) are clearly actionable, regardless of which legal theory applies." (Opp, p. 2:24-28.) The Court will grant 30 DAYS' LEAVE TO AMEND so that Plaintiffs' may re-assert these primary rights through the Right to Repair Act and engage in the requisite pre-litigation procedure under Chapter 4, commencing with Civil Code section 910.

III. CONCLUSION

Defendant S.R. Freeman, Inc.'s Demurrer to the fourth cause of action for negligence is SUSTAINED WITH 30 DAYS' LEAVE TO AMEND because the Right to Repair Act under Civil Code section 896 is Plaintiffs' exclusive remedy pursuant to *McMillin, supra,* 4 Cal.5th at pp. 247, 251.

The Court will prepare the final order.

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Calendar Line 10
Case Name: *Sanjay Taxpro, Inc. vs Neil Jesani et al*
Case No.: 22CV405349

Before the Court is Defendants and Cross-Complainants Neil Jesani and Beamalife Corporation's ("Jesani") motion to compel Plaintiff and Cross-Defendant Sanjay Taxpro, Inc. ("Taxpro") to amend its discovery responses, without objection, and provide materials responsive to Jesani's Request for Production of Documents, Set Six (Request Nos. 22-47). The motion is brought pursuant to Code Civ. Proc., § 2031.310. Jesani argues that Taxpro's objections are without merit. Jesani also seeks monetary sanctions.

This case arises from a business arrangement between the parties regarding referrals and sharing of commissions relating thereto. On January 13, 2023, Taxpro filed a Cross-Complaint in this action against Jesani alleging causes of action based on Jesani's alleged failure to comply with the terms of this arrangement. On August 28, 2024, Jesani served Taxpro with a sixth document request, requesting that Taxpro produce *all* communications with individuals that were referred by Jesani. Taxpro objected on various grounds and refused to produce any documents. Jesani attempted, at the eleventh hour, to meet and confer by a letter on October 9, 2024, sent after hours at 6:11pm asking for response by Friday October 11, 2024—effectively asking for a response the next day. Taxpro responded the next morning on October 10, 2024, at 8:57 a.m., explaining that Taxpro's counsel was in all-day depositions that day and the next and was therefore unable to respond until the next business day after the depositions concluded.

Jesani filed this motion to compel on October 11, 2024, at 4:56pm, without any good faith or reasonable meet and confer. Jesani argues that (1) only boilerplate objections were served that included that the requests sought confidential financial information and were overbroad and (2) Taxpro has already disclosed communications with some customers that included financial information. Jesani also suggested that private sensitive financial information (other than commissions earned and fees paid) could be redacted.

Taxpro opposes the motion, arguing that the requests at issue seek communications between Taxpro and third-party clients referred by Jesani for tax preparation and that these communications are protected by privacy rights as they involve sensitive client tax preparation information. Taxpro also argues that it has already provided responsive information in its responses to concurrently served special interrogatories and requests for admission; these responses directly address the revenue Taxpro earned from the individuals whose communications are being sought in the Requests for Production that are the subject of this motion. These responses detail the amounts earned from each referred client for each relevant year. Taxpro also argues that this motion should be denied for Jesani's failure to meet and confer in a reasonable and good-faith manner as required by the Discovery Act.

The motion to compel against Taxpro is DENIED. The Court finds that Jesani's meet and confer effort on effectively the day before the motion filing deadline, was wholly inadequate and is not a meet and confer as required by the Code of Civil Procedure; a single boilerplate letter sent at the eleventh hour, requesting a response within 24 hours, does not constitute a reasonable or good faith effort to meet and confer. Further, the requests are overbroad, and the information requested has already been provided by Taxpro in other discovery responses. Jesani's request for sanctions is also DENIED. Taxpro also sought

sanctions for opposing this motion, such sanctions are GRANTED in the amount of $2,750 to be paid by Jesani by November 30, 2024. Code of Civil Procedure section 2023.020 states: "the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (*Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute).

Responding party to prepare formal order.

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