Filed 11/15/18 Edelstein v. Single Room Occupancy Corp. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| MICHAEL EDELSTEIN,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SINGLE ROOM OCCUPANCY HOUSING CORP.,<br><br>Defendant and Respondent. | B284208<br><br>(Los Angeles County Super. Ct. No. BC658609) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Michael Edelstein, in pro. per., for Plaintiff and Appellant.

Berman Berman Berman Schneider & Lowary, Mark E. Lowary, David R. Casady and Amanda F. Riley for Defendant and Respondent.

Michael Edelstein appeals from a judgment dismissing his complaint against his landlord, Single Room Occupancy Housing Corp. (SRO), after the sustaining of a demurrer without leave to amend. The trial court found that a judgment in favor of SRO in a prior action based on the same set of facts barred the present action under the doctrine of claim preclusion. Edelstein contends that claim preclusion is inapplicable because the present action is based on a different contract from the prior action. We conclude that the trial court properly sustained the demurrer.

Edelstein also challenges a prejudgment order awarding $1,000 in sanctions against him under Code of Civil Procedure section 128.5 for filing a frivolous complaint.[1] Edelstein contends that his complaint is not frivolous, he did not file it in bad faith, he was never served with a notice of motion for sanctions, and the order is ambiguous as to the amount awarded. We conclude that the trial court properly granted the sanctions motion.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Prior Action*

Edelstein filed a complaint against SRO in December 2015 (*Edelstein v. Single Room Occupancy Corp.* (Super. Ct. L.A. County, No. BC604178)).[2] Edelstein alleged the following facts:

Edelstein and SRO entered into a written rental agreement for a furnished room at the Leonide Hotel in the City of

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[1] All undesignated section references are to the Code of Civil Procedure.

[2] We judicially notice the complaint filed on December 14, 2015, in Los Angeles Superior Court case No. BC604178 (Evid. Code, § 452, subd. (d)), as did the trial court.

Los Angeles. The parties also entered into a separate House Rules agreement.[3] Living conditions at the hotel were intolerable due to bed bugs, construction noise and dust, and the belligerent conduct of other tenants and former tenants. Edelstein complained to the manager. Management at the hotel became hostile toward Edelstein, harassed him, and eventually forced him out of his unit.

Edelstein also alleged other facts concerning a rent increase, a 60-day notice to pay rent or quit, damage to his unit, and being locked out of his unit. Edelstein alleged causes of action for (1) breach of lease, (2) breach of the implied covenant of quiet enjoyment, (3) intentional infliction of emotional distress, and (4) loss of enjoyment of life.

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[3] In his appellant's reply brief, Edelstein requests judicial notice of the rental agreement, House Rules, and other documents, some of which were never filed in the trial court in the present action. (See *California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803 ["Generally, '"when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered"'"].) He cites "Evidence Code sections 452 and 453" without citing any subdivision and without explaining the grounds for judicial notice of each document. We deny the request without reaching the merits. A request for judicial notice requires a formal noticed motion filed separately from any brief. (Cal. Rules of Court, rule 8.252(a)(1); *Canal Ins. Co. v. Tackett* (2004) 117 Cal.App.4th 239, 243 [citing former rule 22(a)(1)].)

The trial court granted SRO's motion for summary judgment and, on March 24, 2017, entered a defense judgment. Edelstein did not appeal from the judgment.[4]

2. *The Complaint in the Present Action*

Edelstein filed his original complaint against SRO in the present action in April 2017. He filed his first amended complaint in May 2017.[5]

Edelstein alleges the following facts in his first amended complaint: Edelstein and SRO entered into a rental agreement for a furnished room at the Leonide Hotel in the City of Los Angeles. Living conditions in the building were intolerable

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[4] Edelstein argues in his appellant's opening brief that the summary judgment was based on requests for admission that were deemed admitted, and the trial court in the prior action erroneously denied his request to withdraw the admissions. But Edelstein did not appeal from the judgment in the prior action and cannot challenge a ruling in the prior action in the present appeal. We previously denied Edelstein's motion to augment the record with documents filed in the prior action.

[5] Edelstein attached as exhibits to his appellant's opening brief copies of his first amended complaint and the rental agreement. This was improper. "A party filing a brief may attach copies of exhibits or other materials in the appellate record or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible." (Cal. Rules of Court, rule 8.204(d).) The attached materials were not included in the appellate record and do not constitute regulations, rules, or other citable materials. However, because it is directly relevant to the sustaining of the demurrer, we judicially notice the first amended complaint filed on May 26, 2017. (Evid. Code, § 452, subd. (d).)

because of tenant fights, bed bug infestation, poor plumbing, construction noise and dust, and diesel fumes.

SRO doubled Edelstein's rent in June 2015 and then served a 60-day notice to pay rent or quit. On July 2, 2015, when Edelstein attempted to pay rent at the increased rate, SRO's manager refused to accept payment.

On July 5, 2015, Edelstein returned to his room to find a swastika carved in his door, his peep hole damaged, his unit number partly removed, and his bathroom mirror and cabinet removed. He asked the manager to view the security camera recording to determine who was responsible for the acts of vandalism, but the manager refused.

SRO's manager agreed to meet with Edelstein on July 7, 2015, to discuss his concerns, but the manager was not in the management office at the appointed time and was absent from the office for the rest of the day. On July 8, 2015, Edelstein's inside door latch was put in place while he was out of the unit, forcing him to kick in the door when he returned, and this happened repeatedly after that date. On July 31, 2015, SRO changed the lock on his door, locking him out of his unit.

Edelstein alleges a single cause of action against SRO for breach of contract based on the conduct described above. He alleges that SRO breached the rental agreement and the implied covenant of quiet enjoyment. Edelstein also alleges that SRO acted with malice and oppression, and seeks both compensatory and punitive damages.

3. *The Demurrer and Motion for Sanctions*

SRO filed a general demurrer based on claim preclusion and requested judicial notice of documents filed in the prior

action. SRO also filed a motion under section 128.5 seeking $5,715 in sanctions on the ground that Edelstein had filed a frivolous complaint.

On August 1, 2017, the trial court heard the demurrer and the motion for sanctions. The minute order of that date stated that Edelstein was present in the courtroom before the matter was called for hearing, but that he left before the hearing.

The trial court granted SRO's request for judicial notice and sustained the demurrer without leave to amend. The order sustaining the demurrer stated that the prior action was based on the same facts as the present action and the same primary right, involved the same parties, and resulted in a final judgment on the merits. The order stated, "Both complaints allege tenant violence, bed bug infestation, construction noise and dust, plumbing problems, a change in the rent amount, damage to the unit during Plaintiff's absence, and Defendant's illegal lock out of Plaintiff. . . . The minor changes between the complaint in the Prior Action and the current FAC are non-substantive and are immaterial."

The trial court rejected Edelstein's argument that the prior summary judgment was not on the merits because the summary judgment for SRO was based on Edelstein's deemed admissions. The court stated that matters deemed admitted through requests for admission are conclusively established against the party making the admission unless the court permits a withdrawal or amendment of the admission.

The trial court also granted the sanctions motion in a separate order filed on August 1, 2017. The order began:

"Defendant Single Room Occupancy Housing Corporation's Motion for Sanctions Pursuant to Code of Civil Procedure Section

128.5 Against Plaintiff Michael Edelstein in the Amount of $5,715.00 is GRANTED."

The sanctions order stated that Edelstein's complaint clearly was barred by claim preclusion, and the evidence showed that Edelstein expressly stated at the hearing on SRO's summary judgment motion in the prior action that he would simply refile his case rather than appeal from the summary judgment. The order stated, "The court finds that the present action was frivolous within the meaning of Code of Civil Procedure section 128.5 and sanctions Edelstein for filing this clearly frivolous action."

However, the order stated that sanctions should be limited to an amount sufficient to deter a repetition of the conduct or similar conduct, and that the court need not award the full amount requested. The order continued:

"Taking into consideration the lack of complexity of the instant motion and the demurrer and the fact that plaintiff is a self-represented litigant, among other factors, the court exercises its broad discretion and determines that a reasonable sanction under these circumstances is $1000.00. Plaintiff is ordered to pay sanctions in the amount of $1000.00 to defendant and/or its counsel of record."

4. *The Appeal and Judgment*

On August 3, 2017, Edelstein filed a notice of appeal from a "[j]udgment of dismissal after an order sustaining a demurrer."[6]

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[6] On August 15, 2017, Edelstein filed a complaint against SRO in the United States District Court for the Central District of California (case No. CV 17-06042). His first amended complaint filed on September 7, 2017, alleges a single cause of

The notice of appeal was premature because it was filed before the judgment of dismissal. On September 15, 2017, the trial court entered a judgment of dismissal.[7]

**DISCUSSION**

1. *Standard of Review*

"A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 79 P.3d 569].) We construe the pleading in a

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action for discrimination in violation of the federal Fair Housing Act (42 U.S.C. § 4601 et seq.).

[7] In the interest of justice and absent any prejudice to SRO, we will treat the notice of appeal as filed immediately after the entry of judgment. (See Cal. Rules of Court, rule 8.104(d)(2); *Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, 1310–1311 [treated notice of appeal from a nonappealable order sustaining a demurrer as from the subsequently filed appealable order of dismissal].)

We judicially notice the judgment of dismissal filed on September 15, 2017. (Evid. Code, § 452, subd. (d).)

reasonable manner and read the allegations in context. (*Ibid.*) We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].)" (*Vitkievicz v. Valverde*, *supra*, 202 Cal.App.4th at pp. 1310–1311.)

2. *The Law of Claim Preclusion*

Claim preclusion, sometimes called res judicata, precludes the relitigation of a cause of action that was litigated in a prior proceeding between the same parties or parties in privity with them. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.) Claim preclusion applies only if (1) the cause of action in the present action is the same as the cause of action in the prior proceeding; (2) the decision in the prior proceeding is final and on the merits; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding. (*Ibid.*; *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.) If applicable, claim preclusion "not only precludes the relitigation of issues that were actually litigated, but also precludes the litigation of issues that could have been litigated in the prior proceeding. [Citations.]" (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557.)

"For purposes of res judicata, a cause of action consists of the plaintiff's primary right to be free from a particular injury, the defendant's corresponding primary duty and the defendant's wrongful act in breach of that duty. [Citation.] The violation of a primary right gives rise to only a single cause of action.

[Citation.] The plaintiff's indivisible primary right must be distinguished from both the legal theory on which the plaintiff seeks relief and the remedy sought. The plaintiff may seek various remedies based on different legal theories, all arising from a single cause of action. [Citation.]" (*Bullock*, *supra*, 198 Cal.App.4th at p. 557.)

"The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.]" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.) "[U]nder the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Ibid.*)

Whether claim preclusion applies is a question of law that we review de novo. (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.)

3. *The Trial Court Properly Sustained the Demurrer*

Edelstein argues in his appellant's opening brief that claim preclusion is inapplicable because he mistakenly based his prior action on a lease agreement between the Housing Authority of the City of Los Angeles and SRO, while the present action is based on the rental agreement between SRO and Edelstein.[8]

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[8] In his reply brief, in contrast, Edelstein argues that the rental agreement expired in April 2010, and his breach of contract cause of action is based on the House Rules. We conclude that claim preclusion applies regardless of which contract governs.

Both the prior action and the present action involve the same dispute regarding Edelstein's tenancy at the Leonide Hotel and the same alleged harm, all arising from breach of an agreement with SRO. Edelstein acknowledges in his appellant's opening brief that "[i]nstead of attempting to set aside the dismissal by motion to reconsider or appeal from the judgment, appellant filed a new action on April 20, 2017. Many of the allegations of the complaint in the new action were identical to the prior complaint . . . ." The dispute concerns living conditions at the hotel, damage to Edelstein's unit, SRO's refusal to accept rent, and the lock out. Regardless of the particular legal theories alleged and remedies sought, and regardless of which contract governs the landlord-tenant relationship, the two actions involve the same primary right and the same cause of action for purposes of claim preclusion.

Edelstein does not separately challenge the trial court's determination that the judgment in the prior action was final and on the merits and involved the same parties. Edelstein's argument that "[a] final judgment, was not rendered with the conclusive rights of the parties and was not a bar to a new complaint [because] a lease never existed between the parties but between SRO and the Housing Authority" only repeats his failed argument that claim preclusion does not apply because the present action is based on a different contract.

We conclude that the trial court properly sustained the demurrer based on claim preclusion.[9]

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[9] Edelstein does not argue that he can amend his complaint to allege a viable cause of action and therefore forfeits any argument that he is entitled to leave to amend. (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 290, fn. 2 [appellant's failure

4. *The Sanctions Order Is Reviewable in This Appeal*

An order awarding monetary sanctions is separately appealable only if the award exceeds $5,000. (§ 904.1, subd. (a)(12).) The trial court here awarded $1,000. Despite the statement in the first paragraph of the order that SRO's motion for $5,715 in sanctions was granted, the order later stated that the amount awarded was $1,000. The sanctions award was less than $5,000, so the order was not separately appealable.

On December 21, 2017, after the entry of judgment and after Edelstein filed his notice of appeal from the judgment, SRO filed and served a Notice of Entry of Order stating, "PLEASE TAKE NOTICE that the above-entitled Court has entered its Order on Defendant's Motion imposing Sanctions in the amount of $5,715.00, pursuant to Code of Civil Procedure section 128.5, against Plaintiff MICHAEL EDELSTEIN for the frivolous filing of his April 20, 2017 Complaint." A copy of the tentative ruling, which the trial court had adopted as its order, was attached to the notice. SRO apparently treated the sanctions order as an appealable order of sanctions in excess of $5,000, and served a notice of entry of order pursuant to section 664.5. The notice was inaccurate because it stated that the court had imposed sanctions in the amount of $5,175. A notice of entry signed by counsel is not a court order and cannot change the terms of an order. (Cf. *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1179 ["A notice of ruling is not an order"].)

An order awarding sanctions of $5,000 or less may be reviewed on appeal from the judgment. (§ 904.1, subd. (b) ["Sanction orders or judgments of five thousand dollars ($5,000)

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to raise a claim of error in the opening brief forfeits the argument].)

or less against a party or an attorney for a party may be reviewed on appeal by that party after entry of final judgment. . . ."]; see also § 906 [intermediate rulings that substantial affect a party's rights are reviewable on appeal from the judgment].) Contrary to SRO's argument, the sanctions order is reviewable in the present appeal.

5. *The Trial Court Properly Awarded $1,000 in Sanctions*

5.1. Code of Civil Procedure Section 128.5

Section 128.5 authorizes an award of monetary sanctions for actions or tactics that were frivolous or delaying and were made in bad faith. As of the date of the trial court's order on August 1, 2017, section 128.5, subdivision (a) authorized sanctions for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."[10]

" 'Actions or tactics' include . . . the filing and service of a complaint . . . ." (§ 128.5, subd. (b)(1).) " 'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (*Id*., subd. (b)(2).)

The bad faith requirement refers to an improper purpose. (*Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 804; *Summers v. City of Cathedral*

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[10] Urgency legislation effective on August 7, 2017, amended section 128.5, subdivision (a) to state that sanctions are authorized for "actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Stats. 2017, ch. 169, § 1.) According to the legislative history, the amendment to subdivision (a) was intended to clarify that the actions or tactics "must be made in subjective bad faith." (Assem. Floor Analysis of Assem. Bill No. 984 (2017-2018 Reg. Sess.) as amended July 12, 2017, p. 3.)

*City* (1990) 225 Cal.App.3d 1047, 1072.) The trial court may infer subjective bad faith from the prosecution of a frivolous action. (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1346 (*Shelton*) ["the trial court may infer subjective bad faith from the pursuit of a frivolous tactic"]; *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 997 (*Childs*) ["subjective bad faith may be inferred from the prosecution of a frivolous action"].)

5.2. Standard of Review

We review an order awarding sanctions under section 128.5 for abuse of discretion. (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893.) "'The "imposition of sanctions, monetary or otherwise, is within the discretion of the trial court. That discretion must be exercised in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards as adapted to current circumstances." [Citations.] "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.] A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." ' [Citation.]" (*County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 33.)

5.3. Edelstein Has Shown No Abuse of Discretion

The record shows that rather than challenge the summary judgment in the prior action by motion or by appealing from the judgment, Edelstein filed a new action seeking redress for the same harm. As explained above, the present action is based on the same dispute, seeks redress for the same harm, and involves the same parties and cause of action as the prior action. The trial court found that the requirements for application of claim preclusion were clearly present and the present action was frivolous, and Edelstein has not shown that the court was clearly wrong. We conclude that Edelstein has shown no abuse of discretion.

The record also supports the trial court's implied finding that Edelstein acted in bad faith in filing and serving his complaint.[11] The court could infer bad faith from the prosecution of a frivolous action (*Shelton*, *supra*, 94 Cal.App.4th at p. 1346; *Childs*, *supra*, 29 Cal.App.4th at p. 997), particularly in light of Edelstein's acknowledgment that he consciously sought to avoid the dispositive ruling in the prior action by filing a new action based on the same dispute, as noted by the trial court. Again, Edelstein has shown no abuse of discretion.

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[11] Although the trial court did not expressly find that Edelstein acted in bad faith in initiating the present action, such a finding is implied in support of the court's ruling. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 ["doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment"]; see *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1452 [inferred a finding of bad faith delay in seeking to compel arbitration].)

Finally, Edelstein argues that SRO never served him with the notice of motion for sanctions.[12] There is no indication in the record that Edelstein raised this issue in the trial court. An appellate court ordinarily will not consider an argument made for the first time on appeal. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) We have the discretion to consider for the first time on appeal an issue of law based on undisputed facts, but we will not consider a new issue if the appellant's failure to raise the issue in the trial court deprived the respondent of the opportunity to present relevant evidence. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.) The purported lack of notice is a factual issue, rather than a legal issue. Because Edelstein failed to raise the issue in the trial court, we will not consider it for the first time on appeal.

6. *SRO's Requests for Appellate Sanctions and to Declare Edelstein a Vexatious Litigant Are Denied*

SRO's respondent's brief includes requests to sanction Edelstein for filing a frivolous appeal and declare him a vexatious litigant. We deny the request for sanctions because a request for sanctions requires a formal noticed motion. (Cal. Rules of Court, rule 8.276(b)(1); *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919 ["Sanctions cannot be sought in the respondent's brief"].)

The vexatious litigant statutory scheme (§ 391 et seq.) authorizes a trial or appellate court to declare a party a vexatious litigant. (*John v. Superior Court* (2016) 63 Cal.4th 91, 93, 99.) "[A] defendant may move the court, upon notice and hearing, for

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[12] We note that the notice of motion filed in the trial court included a proof of service by mail on Edelstein at the post office box address stated in his complaint, 30 days before the hearing.

an order requiring the plaintiff to furnish security or for an order dismissing the litigation pursuant to subdivision (b) of Section 391.3." (§ 391.1.) In addition, "the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge. . . ." (§ 391.7.)

We deny the request to declare Edelstein a vexatious litigant because SRO did not file a noticed motion, as required. (Cal. Rules of Court, rule 8.54(a)(1) [except as otherwise provided by the Rules of Court, "a party wanting to make a motion in a reviewing court must serve and file a written motion"]; cf. *ReadyLink Healthcare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166, 1174 ["We decline to treat such a request presented in the middle of a reply brief as a formal motion to stay"].)

## DISPOSITION

The judgment is affirmed. SRO is entitled to costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MICON, J.*

We concur:

MANELLA, P. J. COLLINS, J.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.