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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID LAWENDOWSKI et al., Plaintiffs and Appellants, v. CITY OF LONG BEACH, Defendant and Respondent.	B260764 (Los Angeles County Super. Ct. No. BC519517)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Westrup & Associates, R. Duane Westrup and Ian Chuang for Plaintiffs and Appellants.

Charles Parkin, City Attorney, and Monte H. Machit, Assistant City Attorney, for Defendant and Respondent.

INTRODUCTION

Plaintiffs David and Jamie Lawendowski appeal from a summary judgment entered in favor of defendant City of Long Beach (City). They contend the trial court erred in granting summary judgment, in that triable issues of fact remain as to whether the City is liable to them for breach of contract. We affirm.

FACTS[1]

The undisputed facts presented at summary judgment establish that City offers purchase and rehabilitation assistance to qualified homebuyers under the Neighborhood Stabilization 2 Program (NSP2 Program). This program is funded by the Department of Housing and Urban Development through the Neighborhood Stabilization Program, which was established by the American Recovery and Reinvestment Act of 2009 (Pub.L. No. 111-5, 123 Stat. 115). Under the NSP2 Program, the City offers up to $200,000 in second mortgage assistance to purchase an eligible home, up to $10,000 in closing cost assistance in the

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[1] On summary judgment, we consider the facts set forth in the separate statements of undisputed and disputed facts and the supporting evidence. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266-1267; *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1209-1216) Statements in a party's motion are not evidence. (See *Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 835; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 256.)

form of a grant, and up to $30,000 in rehabilitation assistance, also in the form of a grant. The second mortgage is silent during the term of the loan and is repaid upon sale or transfer of the property. The grant funds are not repaid.

The Lawendowskis applied and qualified for a second mortgage in the amount of $200,000 and a grant for closing costs in the amount of $10,000. They also qualified for a grant of up to $30,000 for rehabilitation of the home to be purchased. They selected a home located at 720 West Burnett Street for purchase.

On October 25, 2010, the City sent its inspection staff to the property to conduct an inspection. The Work Write-Up Report prepared following that inspection indicated, in key part: "Floor/deck structure that supports second floor bedroom may not be permitted. Upgrade and acquire permit if necessary." With respect to the second floor bedroom, the report further stated: "Bedroom has no insulation in walls or ceiling," and "[p]rovide and install new framing and patching to create required head clearance at stairs." The Lawendowskis did their own separate inspection as well, which they reviewed prior to closing escrow.

On March 30, 2011, the Lawendowskis signed an acknowledgement letter stating that they had received and reviewed the "Work Write-Up Report . . . and home inspection from SoCal Property Inspection (Inspection)." The acknowledgement letter stated: "We understand that the [Work Write-Up] Report includes a list of code-deficient items and/or energy efficient improvements to be completed by a State-licensed contractor of the City's choice. We understand that we are responsible for any and all repair items identified in the Inspection. We understand that the CITY WILL NOT BE RESPONSIBLE FOR ANY REPAIR ITEMS IDENTIFIED IN

THE INSPECTION." It further stated: "We understand that the City will make payments directly to the contractor, upon their completion of the work. We will at no time be asked to pay any related rehabilitation expenses with our personal funds. We also understand that we have no authority to request that the contractor complete any work beyond what is listed in the [Work Write-Up] Report." The City did not sign the acknowledgement letter.

David Lawendowski believed that the City committed to completion of the items specified in the Work Write-Up Report within six months of the close of escrow. Based upon the understanding "that the items identified in the Report would be repaired once the property was purchased, and that the rehabilitation grant would cover the cost of those repairs, [the Lawendowskis] entered into an agreement to purchase the [p]roperty." They executed a promissory note and recorded a trust deed in the amount of $200,000 in favor of the City on April 21, 2011, and escrow closed on that date.

The City then requested bids for the rehabilitation work and selected Master Builders to do the work, based on its bid in the amount of $19,750 for completion of the items specified in the Work Write-Up Report. This amount included $4,500 to upgrade and acquire a permit if necessary for the floor-deck structure supporting the second floor bedroom. The City and Master Builders executed a contract for performance of the work specified in the Work Write-Up Report, to be completed within 60 days, entitled "Neighborhood Stabilization Program Rehabilitation Contract" (NSPR Contract).

Master Builders began work on July 26, 2011. On September 6, 2011, Master Builders submitted a change order for

architectural plans for the second story bedroom in the amount of $5,000. The City rejected the change order and decided Master Builders would be paid for the work it had completed, and another contractor would be hired to complete the rehabilitation. The City paid Master Builders and released it from the project.

The City conducted another inspection of the property on October 6, 2011 and discovered that in addition to the unpermitted (and uncorrected) second story addition, an additional structure built at the rear of the property was also unpermitted. City staff generated a new scope of work for the unpermitted structures. With respect to the second floor bedroom, the work specification stated that "[t]he 2nd story addition, attached to the rear of the single family dwelling is unpermitted. Provide architectural drawings to include foundation plans, structural framing plans, elevations, etc., for submittal and approval by the Development Services Department for proposed repair plan to bring addition up to minimum code. [¶] Obtain the required permits for 2nd story, obtain required inspections and approvals. [¶] Provide necessary construction work outlined on the approved plan to bring the 2nd story addition up to minimum code. . . ."

Only two contractors showed up to bid on the project. Island Construction bid $117,780, and City staff suggested that the work be re-bid. During this period, the City experienced layoffs due to fiscal problems, which delayed the rebid process. In February 2012, the City moved the contractor selection process to the Lawendowskis and mailed them a bid package and instructions.

There followed various bids and a revised Work Write-Up Report, all well in excess of $30,000. Because of the cost of the

work, the City asked the Lawendowskis to consider an addition to the ground floor rather than bringing the second story bedroom up to code. The Lawendowskis were unhappy that the work on the home was not completed, and the delay in completing the work caused further deterioration of the home. They also were unhappy with the plans for adding a bedroom to the first floor, as the addition would block their view of the yard where the children played. In January 2013, the Lawendowskis submitted a claim for damages to the City.

DISCUSSION

A. *The Complaint and Summary Judgment Motion*

The sole cause of action in the Lawendowskis' operative second amended complaint is for breach of contract, based on the contract between City and Master Builders for performance of the work specified in the Work Write-Up Report. The Lawendowskis alleged that they were third party beneficiaries of the contract and the City breached the contract by firing Master Builders before the work specified in the contract was completed and failing to have the work completed within the time specified in the contract.

The alleged contract, attached as an exhibit to the second amended complaint, is Master Builders' Work Specification-Contractor Bid Proposal, signed on behalf of the City under the line, "Acceptance of attached Work Specification and Bid Proposal." The signature page also contains a provision that all work must comply with City codes and ordinances, and "[o]wner shall select colors and patterns of materials where applicable."

The City moved for summary judgment on several grounds. First, it pointed out that the Work Specification-Contractor Bid Proposal is not an enforceable contract under the Long Beach City Charter, section 1800, and "[n]o other written agreements are at issue in the [Second Amended Complaint]." It added that, in any event, it did not breach the Work Specification-Contractor Bid Proposal, because it paid Master Builders for the work performed on the property and was not obligated to approve any change orders.

Second, it relied on the acknowledgement letter, also attached as an exhibit to the second amended complaint, in which the Lawendowskis acknowledged: "We understand that we are responsible for any and all repair items identified in the Inspection. We understand that the CITY WILL NOT BE RESPONSIBLE FOR ANY REPAIR ITEMS IDENTIFIED IN THE INSPECTION."

Third, the City asserted the basis of the second amended complaint, like its two predecessors, was the Lawendowskis' "belief that the City made implied and unwritten promises and representation[s] to them about work to be performed on their house," and the gravamen of their complaints was their "apparent belief that the original City inspection of their property underestimated the cost of the necessary repairs to bring the property up to code. [Their] entire cause of action still appears to be predicated on vague oral promises, beliefs, and expectations, none of which are contained in any written agreement that was properly executed in compliance with [s]ection 1800 of the City's Charter, and are therefore unenforceable." Additionally, Government Code section 818.6 provided immunity for any negligence in the inspection of the property.

In opposition, the Lawendowskis argued that the Work Specification-Contractor Bid Proposal was part of an "overarching [written] contract" between the City and Master Builders, the NSPR Contract, which plaintiffs contended had been executed in compliance with the city charter.[2] They further argued that they were third party beneficiaries of that contract, under which they were entitled to completion of the work specified therein, namely bringing the second floor bedroom up to code and obtaining a permit for it.

At the hearing on the motion, the trial court rejected the Lawendowskis' claim that a reasonable interpretation of the contract was that the City "promise[d] that it would find the second floor, when there's new insulation and more headway on the stairway, compliant" with City codes, or that the City promised to bring the second story bedroom up to code. The court noted that "[t]he difficulties arose in the course of the rehabilitation work, and the City terminated the City-approved contractor that was performing the work. I don't find that the City breached the contract, I find that the contractor breached the contract.

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[2] While the NSPR Contract was not attached to the second amended complaint, it was submitted by plaintiffs as part of the evidence in opposition to the motion for summary judgment and was considered by the trial court as an integral aspect of the Lawendowskis' breach of contract claim. The NSPR Contract was addressed by both parties in their summary judgment papers and on appeal. Accordingly, we consider whether the language of this additional contract, in conjunction with the other alleged contractual provisions, created a triable issue of fact under a breach of contract theory.

"The claim of the [Lawendowskis] is that the City did not hire another contractor to perform the work within a reasonable period of time. As it turns out, when the contract was rebid, the City discovered, and I think the contractor discovered, that the work that had been approved would not be sufficient to obtain a certificate of occupancy, at least for the second floor." The court did not "find a basis for breach of contract against the City" and so granted summary judgment.

B. *Standard of Review*

Summary judgment is properly granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) To be entitled to summary judgment, the moving defendant must show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met this burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849.) On appeal, we exercise our independent judgment in reviewing the evidence and determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 574.)

C. *The Lawendowskis Have Failed To Demonstrate Error in the Granting of Summary Judgment*

The Lawendowskis argue that the trial court erred in granting the City summary judgment on their claim for breach of contract. The contract they seek to enforce is the "NSPR Contract" entered between the City and Master Builders, which incorporated the November 8, 2010 "Work Specification-Contractor Bid Proposal." They argue that genuine issues of material fact exist whether this contract contained an enforceable promise by the City to bring the second floor bedroom up to code for the original bid amount, or at the City's expense, which they are entitled to enforce as third party beneficiaries under Civil Code section 1559.

1. *The Contract Cannot be Interpreted to Require the City to Make or Pay for the Repairs Sought*

Civil Code section 1559 provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." "This section excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it." (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400.) "The intended beneficiary 'bears the burden of proving that the promise he seeks to enforce was actually made to him personally or to a class of which he is a member. [Citations.]' (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348-349 . . . .) Although, generally, it is a question of fact whether a third party is an intended beneficiary of a contract, 'if "the issue is presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those

facts need be answered," appellate review is de novo. [Citations.]' [Citation.]" (*The H.N. & Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 43; accord, *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233.) "[I]t is not necessary that the contract be exclusively for the benefit of the third party to give him a right thereunder nor that he be named and identified as an individual. [Citation.]" (*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916. 920.)

"'The Government may, of course, deliberately implement a public purpose by including provisions in its contracts which expressly confer on a specified class of third persons a direct right to benefits, or damages in lieu of benefits, against the private contractor. But a governmental intent to confer such a direct right cannot be inferred simply from the fact that the third persons were intended to enjoy the benefits. The Restatement of Contracts makes this clear in dealing specifically with contractual promises to the Government to render services to members of the public: "A promisor bound . . . to a . . . municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless, . . . *an intention is manifested in the contract*, as interpreted in the light of the circumstances surrounding its formation, *that the promisor shall compensate members of the public for such injurious consequences* . . . ." (Rest., Contracts, § 145 . . . .)'" (*Dateline Builders, Inc. v. City of Santa Rosa* (1983) 146 Cal.App.3d 520, 527.)

Case law is conflicted as to whether and under what circumstances a party may claim it is a third party beneficiary to

a contract entered by a public entity. For example, in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, disapproved on other grounds by *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, footnote 10, a land development project applicant sued a consultant and the county based on an inaccurate environmental impact report, arguing that it was a third party beneficiary of the county's contract with the consultant. The court of appeal disagreed, finding that while the California Environmental Quality Act confers a duty on the local agency to produce an adequate environmental impact report, and the discretion to evaluate the project, these statutory obligations did not create a duty to or confer third party beneficiary standing on the developer. (*Mission Oaks*, *supra*, at p. 724.) In *Dateline Builders, Inc. v. City of Santa Rosa*, *supra*, 146 Cal.App.3d at pp. 523-524, the court declined to find plaintiff builders to be third party beneficiaries of an agreement between a city and county whereby the city agreed to provide sewer services in areas outside of its borders, where the plaintiff sought to develop property. By contrast, in *Shell v. Schmidt* (1954) 126 Cal.App.2d 279, on facts very similar to those here, the court held that 12 veterans were intended third party beneficiaries of a contract made by the Federal Housing Authority and a developer to construct priority dwelling for veterans according to certain specifications. (See also *Unite Here Local 30 v. Department of Parks & Recreation* (2011) 194 Cal.App.4th 1200 [denying third party beneficiary standing to union local to assert claims based on alleged failure to follow competitive bidding process as part of concession contract]; *Souza v. Westlands Water Dist*. (2006) 135 Cal.App.4th 879 [denying third party beneficiary standing to landowners who

sought to enforce a contract between their tenants and a water district].) We find no case, however, to allow a party to claim standing as a third party beneficiary to enforce a claim *against* a public entity, based on a contract entered by that public entity with another entity, public or private. (See generally *Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1200-1203.)

We need not decide whether the Lawendowskis can establish that they are intended third party beneficiaries of the contract between the City and Master Builders,[3] because even if they are deemed to be beneficiaries, they can only enforce the actual contractual provisions contained in that agreement. As alleged third party beneficiaries, the Lawendowskis can only enforce the contractual benefit which the City would have derived from its agreement with Master Builders.

Pursuant to the terms of that agreement, Master Builders promised to perform certain work for $19,750, which included the following changes relating to the second story bedroom: "Floor/deck structure that supports second floor bedroom may not be permitted. Upgrade and acquire permit if necessary";

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[3] There is conflicting language on this point in the written contract. The NSPR Contract expressly provides that the "City and Contractor agree that they are the sole parties to this Contract." Elsewhere in the contract, however, there is language stating "[t]he current owner of the Property has granted City authority to contract for rehabilitation of the Property on its behalf"; the contract makes multiple references to the property owners; and in the warranty section of the contract, the Contractor expressly warrants that the warranty extends to the City and the "current property owner."

"Bedroom has no insulation in walls or ceiling"; "Provide and install new framing and patching to create required head clearance on stairs." Master Builders agreed to complete the work within 60 days "subject to extensions approved by City for the period of any excusable delays (including strikes, acts of God or other reasons beyond the control of Contractor"). The parties further agreed that liquidated damages "in the event that Contractor fails to complete the described work within the time prescribed by this Contract" shall be $50 per day and such damages are the City's sole remedy for any delay. The contract further provides that the "City shall have the right to terminate this Contract for convenience, effective immediately upon receipt of written notice of termination by Contractor; provided, however, that Contractor shall be paid in full for all work completed under this Contract up to and including the effective date of termination." If the City terminated the contract, it could hire an outside contractor to complete the work. In that case, the City would be entitled to have Master Builders pay up to $19,500 towards the new contractor's bill, minus any amounts already paid to Master Builders for work performed. The "City may determine whether or not work by Contractor on the project is in compliance with plans, and specifications. City may stop the work of Contractor if necessary to prevent improper execution . . . . City may reject all work and materials, which do not conform to the requirements of this Contract." The Contractor agreed that it was "responsible for property line desigation, properly designed plans, securing building permits, certifications and paying fees." Finally, the agreement provided: "The only additions to this Work Specification, which may be considered, are those, which are necessary due to an unforeseen

condition at the time of initial inspection of this property by the City representative. Additional work items, or changes, require a fully executed 'CHANGE ORDER' or 'ADDENDUM' and must be approved by the City representative . . . ." (Underscoring omitted.)

Under the terms of the written agreement, therefore, the City retained the authority to terminate the contract for any reason, including the presentation of a change order with which the City did not agree. The parties contemplated that change orders might be required due to unforeseen conditions. The City was given full authority to determine whether the work was completed according to plans and specifications. The undisputed facts establish that the City decided not to approve the change order submitted by Master Builders and to terminate the contract. The City elected not to enforce the liquidated damages or other provisions with respect to disagreements with the contractor. In so acting, the City exercised the discretion delegated to it under the terms of the contract. Even as third party beneficiaries, the Lawendowskis could not require the City to take additional steps beyond those the City actually elected to take to enforce the terms of the contract. "'A third party beneficiary cannot assert greater rights than those of the promisee under the contract. [Citation.] Because the foundation of any right the third person may have is the promisor's contract, "[w]hen [a] plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take the contract as he finds it. . . . . [T]he third party cannot select the parts favorable to him and reject those unfavorable to him." [Citation.]' [Citation]." (*Souza v. Westlands Water Dist.*, *supra*, 135 Cal.App.4th at p. 895.)

2. *The Lawendowskis Cannot Claim Contractual Rights Based on Oral Representations or Quasi-Contract*

Assuming the Lawendowskis' claim is not based on the written agreements between the City and Master Builders but on the theory that the City's conduct or representations with respect to rehabilitating the property constituted promises on which the Lawendowkis relied, this claim must fail as well. As the trial court correctly found, the City can only be sued for breach of contract based on a contract which complies with the Long Beach City Charter section 1800.[4] (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650 [developers could not pursue breach of contract claim against city where contract had not been signed by designated city officials in accordance with city charter]; *Dynamic Ind. Co. v. City of Long Beach* (1958) 159 Cal.App.2d 294, 298-299 [absence of city manager's signature on purported contract with oil company did

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[4] Section 1800 of the Long Beach City Charter provides:

"The City shall not be and is not bound by any contract, except as otherwise provided herein, unless the same is made in writing, by order of the City Council, and signed by the City Manager or by another officer authorized to do so by the City Manager. The approval of the form of the contract by the City Attorney shall be endorsed thereon before the same shall be signed on behalf of the City. The City Council, by ordinance duly adopted, may authorize the City Manager, or any commission or agent of the City, with the written approval of the City Manager, to bind the City without a contract in writing for the payment of services, supplies, materials, equipment and labor or other valuable consideration furnished to the City in an amount not exceeding the limit established by ordinance of the City Council. . . ." (Long Beach City Charter, § 1800.)

not satisfy city charter's requirements for a valid contract]; *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 353 ["It is . . . settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable"].) The only contract which arguably complied with section 1800 of the Long Beach City Charter was the written contract between the City and Master Builders, which was signed by the city attorney's office. Promises or representations made by city employees which do not comply with section 1800 of the Long Beach City Charter are insufficient to bind the City. (*Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, 831.) The Lawendowskis cannot point to any written agreement signed by an authorized city official which contains any promise to bring their property to code at city expense, or to provide any rehabilitation funds beyond those set forth in the agreement with Master Builders. The two-page acknowledgment letter, relied on by the Lawendowskis, was not signed by anyone other than the Lawendowskis.

Alternatively, the Lawendowskis argue that they "entered into an agreement to purchase the [p]roperty based on the representation by the City that the items identified in the [Work Write-Up] Report would be repaired by funds from the rehabilitation grant." Whether this argument is based on detrimental reliance, equitable estoppel or some other quasi-contract theory, it cannot be invoked against a public entity except under unusual circumstances, not present here. The City may not be liable under "an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to

protect and limit a public entity's contractual obligations." *(Lundeen Coatings Corp. v. Department of Water & Power*, *supra*, 232 Cal.App.3d at p. 831, fn. 9; see also *First Street Plaza Partners v. City of Los Angeles*, *supra*, 65 Cal.App.4th at pp. 668-669 [that developer had expended money in reliance on negotiations with city could not be basis for estoppel where the city had not executed a contract in compliance with city charter]; *Dynamic Ind. Co. v. City of Long Beach*, *supra*, 159 Cal.App.2d at pp. 298-299 [same].) Moreover, the argument fails based on the undisputed fact that the Lawendowskis closed escrow months before the City asked for bids and entered into a repair contract with Master Builders; the Lawendowskis could not have relied on that agreement or the bid placed by Master Builders, since both of those actions occurred after the Lawendowskis had already purchased the property.

In sum, the Lawendowskis have failed to meet their burden of demonstrating error in the trial court's grant of summary judgment. (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457; *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1000, fn. 3.)

DISPOSITION

The judgment is affirmed. The City is to recover its costs on appeal.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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