

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2002219

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: LOVELL HOLDINGS, LLC

vs.

DEFENDANT: JAJ PARTNERS, LLC, ET
AL
(COMPLEX)

NATURE OF PROCEEDINGS: MOTION – SUMMARY JUDGMENT

RULING

The motion for summary judgment is **continued to October 22, 2024 at 1:30 pm in Courtroom A.**

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for July, 2024 is as follows:

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Meeting ID: 160 292 5171

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2200970

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: KATHRYN THOMPSON

vs.

DEFENDANT: RESTORATION
HARDWARE, INC., ET AL

NATURE OF PROCEEDINGS: MOTION – OTHER: FINAL APPROVAL OF CLASS
ACTION SETTLEMENT [PLTF] KATHRYN THOMPSON

RULING

Plaintiff's unopposed motion for final approval of class-action and PAGA settlement is
GRANTED.

The Court granted preliminarily approval of the class action settlement on December 29, 2023 and set the matter down for a final hearing. The Court has received no opposition or objection to Plaintiff's motion for final approval of the class settlement or the proposed PAGA settlement. After appropriate notice, no class member requested exclusion and no class member submitted objections. (See Decl. of K. Lee, ¶¶ 10-12.)

Having reviewed the papers submitted to the Court in connection with the motion, the Court confirms and adopts its findings in connection with preliminary approval of the settlement. The requirements for class certification for settlement purposes are met in that (a) the parties are sufficiently numerous that it is impracticable to bring them all before the court; (b) there are questions of law or fact common to the class that are substantially similar and predominate over questions affecting individual members; (c) the claims of the named representative are typical of those of the class; and (c) the named representative can fairly and adequately protect the interests of the class. (Code Civ. Proc., § 382; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 240.)

Accordingly, the Court orders that:

1. The proposed class is certified, and Plaintiff is approved as class representative.

2. The Court approves the appointment of Cottrell Konecky LLP as class counsel.

3. The Court has reviewed and approves of the administration of the settlement by Phoenix Class Action Administration Solutions, including the notice and exclusion provisions, and finds that the fees and expenses incurred are reasonable as to be paid pursuant to the terms of the settlement.
4. After considering the factors set forth in *Clark v. American Residential Services LLC* (2009) 175 Cal.App. 4th 785, 799, the Court finds the class settlement, including the amount, is fair and reasonable.
5. The Court approves the award of proposed attorneys' fee and litigation costs as fair and appropriate.
6. The Court approves the service award to be paid to Plaintiff for her efforts on behalf of the Class.
7. The Court approves the PAGA settlement and allocation.
8. The Court approves the proposed implementation schedule.

Absent objection, the court will sign the proposed final approval order and judgment submitted by Plaintiff.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2200992

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: ONE SILVER SERVE, INC.

vs.

DEFENDANT: COLORADO STRUCTURES
INC., ET AL

NATURE OF PROCEEDINGS: MOTION – LEAVE TO AMEND FIRST AMENDED
CROSS-COMPLAINT

RULING

The motion for leave to file a second amended cross-complaint (“SACC”) by Monahan-Parker, Inc. and 1201 Fifth Avenue, LLC (“Owners”) is GRANTED.

Background

This cross-action arises out of the construction of a new AC Hotel by Marriott in San Rafael, California (the “Project”). Owners filed a cross-complaint against multiple parties involved in the construction after plaintiff One Silver Serve, Inc. (a sub-contractor) filed a complaint against Owners alleging it was not paid for work it performed on the Project.

Owners’ first amended cross-complaint (“FACC”) alleges they hired DLR Group, Inc. (“DLR”) to be the architect for the Project and Colorado Structures, Inc. (“CSI”) to be the general contractor. (FACC, ¶¶ 16-17.) The FACC further alleges that Owners engaged Maroevich, O’Shea & Coghlan Insurance Services, Inc. (“MOC”) and MOC’s successor-in-interest, Symphony Risk Solutions Insurance Services, Inc. (“Symphony”)(collectively, “Broker”) to procure insurance for the Project. Owners allege they provided Broker with specifications for said insurance and paid Broker a fee for procuring the same. (FACC ¶ 18.)

In October 2021, the Bay Area was hit with severe storms causing significant water damage to the Project. (FACC ¶¶ 28-29.) Owners allege, among other things, that because of the various failures of DLR and CSI, including Broker’s failure to provide insurance coverage that complied with specifications provided by Owner, they are entitled to damages, including indemnity from CSI. (See FACC.)

Currently before the Court, is Owners’ motion for leave to file a second amended cross-complaint (“SACC”).

Legal Standard

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding. As judicial policy favors resolution of all disputed matters in the same lawsuit, courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Denial is rarely justified unless opposing parties demonstrate unreasonable delay plus prejudice if the motion is granted. A mere showing of unreasonable delay by the plaintiff without any showing of resulting prejudice to defendants is an insufficient ground to justify denial of the plaintiff's motion. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting loss of critical evidence or added costs of preparation, and an increased burden of discovery, *inter alia*. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.)

Generally, courts allow the amendment and then let the parties test the legal sufficiency in other appropriate proceedings such as a demurrer. (See *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, and *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2024) ¶ 6:644.)

A party requesting leave to amend must also comply with California Rules of Court, rule 3.1324. Compliance with the Rules of Court is satisfied by including a copy of the proposed amended pleading, detailing what changes will be made from the previous pleading by stating what allegations are to be deleted or added as compared to the previous pleading including page, paragraph and line number, and attaching a declaration by plaintiff's counsel, as to: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) why the request was not made earlier.

Ultimately, as long as no prejudice to the defendant is shown, the liberal policy regarding the amendment prevails. (*Mesler v. Bragg Mgt. Co.* (1985) 39 Cal.3d 290, 296-297.)

Discussion

Owners seek leave to file the SACC to add three sets of claims: 1) a violation of Business and Professions Code section 7031 against CSI for a failure to be properly licensed; 2) indemnity-related claims against DLR and Broker; and breach of contract and negligence claims against the subcontractors.¹ (See Declaration of Michael J. Betz, ¶ 3.) Owners assert that discovery has revealed the additional claims and wrongdoers and that the indemnity claims were only realized after the filing of the FACC. (*Id.* at ¶ 5-7.)

Only CSI opposes the proposed amendment. It argues, among other things, that at the October 2, 2023 Case Management Conference, Owners failed to disclose that it may later seek to amend the FACC. CSI argues that the motion is unreasonably late and would result in prejudice in light of the April 2025 trial date. However, CSI fails to adequately describe the prejudice to which it would be subjected if the Court grants the leave requested. Owners assert that the discovery of

¹ Owners further propose additional stylistic revisions to "harmonize the SACC." (See Amended Notice of Motion and Motion for Leave to Amend First Amended Cross-Complaint, p. 3:4-5; see also Declaration of Michael J. Betz, ¶ 8.)

the additional claims and parties was not until after conducting discovery and taking depositions as of February 2024.

CSI further opposes the motion arguing that “Undisputed Facts and California Law Confirm [Owners] Cannot Prevail On [their] Disgorgement Claim.” (Oppo., p. 9:12-13.)

The standard for the Court’s consideration of whether an amendment should be allowed does not include an evaluation of the evidentiary and substantive merits of a case. The opposing party may test the legal sufficiency of the allegations in other proceedings. (See *Kittredge Sports Co.*, *supra*, 213 Cal.App.3d 1045, 1048, and *Atkinson*, *supra*, 109 Cal.App.4th 739, 760.)

Owners have satisfied the requirements of California Rules of Court, rule 3.1324. They provide a copy of the proposed amended cross-complaint including the allegations and addition of subcontractor cross-defendants. (See Betz Decl., ¶ 4, Notice of Motion Exhs. 1 & 2; see also Cal. Rules of Court, rule 3.1324(a); *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366, 1380.) Owners further include a declaration specifying why the amendment is now necessary, when facts giving rise to the amendment were discovered, and why the request was not made earlier. (Cal. Rules of Court, rule 3.1324(b); Betz Decl., ¶¶ 3, 5-9.)

Accordingly, the Court grants the motion for leave to amend as proposed.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2301286

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: JAMES SCHAFER, ET AL

vs.

DEFENDANT: VERONICA SMITH, ET AL

NATURE OF PROCEEDINGS: MOTION – SUMMARY ADJUDICATION

RULING

Plaintiffs James and Donna Schafer’s (“Plaintiffs”) motion for summary adjudication is **DENIED** in full.

Background

This a dispute between neighbors over a fence. The operative complaint alleges that Defendants Veronica and George Smith (“Defendants”) and Plaintiffs own adjacent parcels of real property burdened by reciprocal easements. (Complaint, ¶¶ 6-8.) Plaintiffs used a small portion of the easement benefitting their property (the “Driveway Easement”) to construct a driveway. (*Id.*, ¶ 10.) In early 2021, Defendants installed a fence near the boundary between the two properties. (*Id.*, ¶ 11.) Plaintiffs allege that Defendants’ fence was built in violation of the parties’ homeowners’ association’s Covenants, Conditions, and Restrictions (the “CC&Rs”); narrows the usable portion of Plaintiffs’ driveway; and encroaches on the Driveway Easement. (*Id.*, ¶¶ 11-12.) The complaint asserts causes of action for private nuisance, declaratory relief, injunctive relief, and interference with easement. Plaintiffs now seek summary adjudication of seven issues.

Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The motion “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th 826, 843.) Similarly, “[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication . . . shall proceed in all procedural respects as a motion for summary judgment.” (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted; and see Code Civ. Proc., § 437c, subd. (f).) The object of the summary judgment procedure is “to cut through the parties’

pleadings” to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th 826, 843.)

The “party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar, supra*, 25 Cal.4th 826, 850; see Evid. Code, § 110.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar, supra*, 25 Cal.4th 826, 851.) When the moving party is the plaintiff, this initial burden entails “prov[ing] each element” of the cause of action at issue. (Code Civ. Proc., § 437c, subd. (p)(1); see also *Quidel Corporation v. Superior Court of San Diego County* (2020) 57 Cal.App.5th 155, 163.) Once the initial burden has been met, the burden shifts to the opposing party to “show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subds. (p)(1)-(2).)

“[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar, supra*, 25 Cal.4th 826, 850.) If the moving party does not carry its initial burden, the burden never shifts to the opposing party and the motion must be denied. (*Ibid.*; accord *Teselle v. McLaughlin* (2009) 173 Cal.App.4th 156, 169.)

Throughout the process, the trial court “must consider all of the evidence and all of the inferences drawn therefrom.” (*Aguilar, supra*, 25 Cal.4th 826, 856.) The moving party’s evidence is strictly construed, while the opponent’s is liberally construed. (*Id.* at p. 843.)

Discussion

Defendants’ Evidentiary Objections

Objection No. 7 (Patch Dec., Ex. 1 [Depo. Ex. 1]) is sustained based on lack of authentication. (Evid. Code, § 1400.)

Plaintiffs attempted to authenticate this exhibit through the following statement in Plaintiffs’ counsel’s declaration: “Attached as Exhibit 1 is a true and correct copy of the document that has been marked as Deposition Exhibit 1 in this matter.” (See Patch Dec., ¶ 2.) This sentence, interpreted as generously as possible, establishes only that the document submitted as Exhibit 1 to the Patch Declaration was Deposition Exhibit 1 in an unspecified deposition. It does not establish that Exhibit 1 to the Patch Declaration is what Plaintiffs claim it to be in their brief and separate statement: a copy of the CC&Rs. (See, e.g., Memorandum, pp. 7-8; Plaintiffs’ Separate Statement (“SS”) Nos. 1-2.) As a result, Plaintiffs have not “introduc[ed] . . . evidence sufficient to sustain a finding that that [this document] is the writing that [Plaintiffs] claim[] it is” and have not properly authenticated the exhibit. (Evid. Code, § 1400.)

Plaintiffs could have authenticated this exhibit through a declaration by a declarant with personal knowledge attesting to its identity as a true and correct copy of the CC&Rs or by submitting deposition testimony in which the deponent authenticated them. Plaintiffs submitted four exhibits consisting of deposition transcript excerpts with their moving papers (see Patch Dec., ¶¶ 18-21 & Exs. 17-20), but Exhibit 1 to the Patch Declaration is not authenticated anywhere in those transcripts.

With their reply papers, Plaintiffs submitted a Supplemental Declaration of Richard Patch attaching additional deposition transcript excerpts for the purpose of authenticating Exhibit 1 and numerous other exhibits Plaintiffs attempted to authenticate in the same insufficient manner. (See Plaintiffs' Response to Defendants' Objections to Evidence, Response to Objection No. 7.) "The general rule of motion practice . . . is that new evidence is not permitted with reply papers."¹ (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537; see also *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 [trial court violated due process rights of party opposing summary judgment by considering evidence submitted by the moving party after the opposition was filed].) The Court will not consider the Supplemental Patch Declaration or its exhibits, particularly where there was no good cause for Plaintiffs to omit this evidence from their moving papers. (See *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 ["The salutary [sic] rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before."])

The Court's ruling on Objection No. 7 is dispositive of this motion, as discussed below. Accordingly, the Court does not rule on the parties' remaining evidentiary objections because they were not material to its disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)

Procedural Matters

Marin County Rule, Civil 2.8(C)(2) requires that parties filing a motion for summary adjudication attach the operative pleading as an exhibit. Plaintiffs did not comply with this rule. More critically, the rules governing motions for summary adjudication require the moving party to specify the issues on which summary adjudication is sought in the notice of motion and repeat those issues, verbatim, in the separate statement. (Cal. Rules of Court, rule 3.1350(b).) Plaintiffs' notice of motion states only that they are seeking summary adjudication "as to their Second Cause of Action for Declaratory Relief and their Third Cause of Action for Injunctive Relief." (Notice of Motion, p. 2.) However, their separate statement enumerates seven issues on which Plaintiffs seek summary adjudication.²

¹ Plaintiffs cite *People v. Partida* (2005) 37 Cal.4th 428, 434 for the proposition that a "proponent of evidence must be provided an opportunity to overcome evidentiary objections." (Reply, p. 14.) In *Partida*, a criminal appeal, the Supreme Court discussed the rule that a "verdict or finding" shall not be set aside based on erroneous admission of evidence unless the party opposing the evidence at issue objected to it in a manner that made the specific ground for the objection clear. (*Id.* at p. 433-434; see also Evid. Code, § 353, subd. (a).) The *Partida* court explained that this requirement is "necessary in criminal cases because a 'contrary rule would deprive the People of the opportunity to cure the defect at trial.'" (*Id.* at p. 434.) Plaintiffs' citation to *Partida* recasts this dicta as a holding and applies it out of context to civil summary judgment proceedings. Under the circumstances, Plaintiffs are asking the Court to hold that, under the guise of responding to an evidentiary objection, a movant for summary judgment may shift the burden to its opponent using evidence submitted after the opponent filed its opposition. This rule would flout the burden-shifting procedure mandated by the summary judgment statute and violate Defendants' right to due process. (Code Civ. Proc., § 437c, subd. (p)(1); *San Diego Watercrafts, supra*, 102 Cal.App.4th 308, 316.)

² In *Sequoia Ins. Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, 1478, the Sixth District held that a movant seeking summary adjudication need not "identify specific issues" in the notice of motion, but could simply "list[] . . . the disputed causes of action[.]" This case predated the 1997 adoption of California Rules of Court, rule 342, which was subsequently renumbered rule 3.1350(b). It is no longer good law to the extent it holds that a movant need not specify in the notice of motion the *precise issues* on which it seeks summary adjudication, and specify them in identical language in the notice and the separate statement, as required by Rule 3.1350(b).

The motion will not be denied due to these rule violations. The first was a largely technical failure that did not prejudice Defendants. The second violation presents a closer question, but there is no indication that Defendants were confused about which issues Plaintiffs sought to have summarily adjudicated. (See, e.g., Opposition,³ pp. 18-19 [directly addressing issues that were defined in Plaintiffs' separate statement, but not mentioned in their notice of motion, such as the fence height and drainage/grading issues, Issue Nos. 2 and 4 respectively].) The Court will defer to the description of the issues in Plaintiffs' separate statement. Plaintiffs are admonished to follow all applicable rules when filing documents with the Court moving forward.

Issue Nos. 1-5

All of these issues seek summary adjudication of the declaratory relief claim on the ground that Defendants breached the CC&Rs. They vary only in their description of the breach. Issue No. 1 states that the breach consisted of Defendants' failure to get permission prior to building the fence; Issue No. 2 states that it was building a fence that exceeded height limitations; Issue No. 3 states that it was building a fence in a location that infringes on Plaintiffs' property rights; Issue No. 4 states that it was Defendants' "improperly draining and grading their improvements"; and Issue No. 5 states that it was "leaving the unpermitted fence in place."

"A motion for summary adjudication shall be granted only if it *completely disposes* of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1) [emphasis added].) As pleaded, Plaintiffs' declaratory relief claim is two-pronged. It requests "a judicial determination of [Plaintiffs'] rights and duties under the Driveway Easement *and* the CC&Rs." (Complaint, ¶ 46 [emphasis added].) Defendants argue that Issue Nos. 1-5 are improper subjects for summary adjudication because a ruling in Plaintiffs' favor on any of them would dispose of only a portion of the declaratory relief cause of action – the portion dealing with the parties' rights and duties under the CC&Rs. (Opposition, p. 15; see also Notice of Motion, p. 2 ["There is no triable issue as to any material fact regarding whether the fence was built in violation of the CC&Rs. The Schafers are entitled to a declaration that the Smiths have violated the CC&Rs."].)

The Court does not address this argument because it concludes that even assuming these issues are proper subjects for summary adjudication, Plaintiffs have not carried their burden as to any of them. Plaintiffs rely exclusively on Exhibit 1 to the Patch Declaration, consisting of the CC&Rs themselves, to establish that the parties are bound by the CC&Rs and to define what conduct constitutes a breach. (See SS Nos. 1-4, 18-19, 22-23, 32-34, 37 [citing only to Patch Dec., Ex. 1].) The Court has sustained Defendants' objection to that exhibit, meaning there is no remaining evidence that the parties are bound by the CC&Rs at all or of what the CC&Rs require. Without those vital components, Plaintiffs cannot prove that anything Defendants did breached the CC&Rs.

Where the evidence submitted in support of a motion for summary judgment or adjudication does not support judgment in the movant's favor, the court must deny the motion without looking at the opposing evidence, if any, submitted by the opposing party. (See *Y.K.A.*

³ The Court does not rule on the request for judicial notice submitted with Defendants' opposition because, given that it concludes that Plaintiffs did not meet their burden, the Court did not have occasion to reach Defendants' opposing evidence.

Industries, Inc. v. Redevelopment Agency of City of San Jose (2009) 174 Cal.App.4th 339, 354; Code Civ. Proc., § 437c, subd. (p)(1).) Plaintiffs have not carried their burden as movant on Issue Nos. 1-5, so the motion is denied as to these issues.

Issue No. 6

This issue seeks summary adjudication of Plaintiffs' claim for injunctive relief. This cause of action relies on the Court finding that the fence violates the CC&Rs. (See Memorandum, pp. 23-24.) Plaintiffs' showing in support of Issue No. 6 again relies solely on Exhibit 1 to the Patch Declaration to establish what the CC&Rs require and that the parties are bound by the CC&Rs at all. (See SS Nos. 40, 44-46, 49, 59, 62, 71-72 [citing only to Patch Dec., Ex. 1].) Because that evidence has been deemed inadmissible, Plaintiffs have not carried their burden and the motion is denied as to this issue.

Issue No. 7

Finally, Plaintiffs seek summary adjudication of whether they are entitled to attorney's fees. Plaintiffs seek attorney's fees under the Davis-Stirling Common Interest Development Act, which entitles the "prevailing party" in "an action to enforce [a common interest development's] governing documents" to "reasonable attorney's fees and costs." (Civ. Code, § 5975, subd. (c).) Summary adjudication of this issue is denied because Plaintiffs have not prevailed on any of the issues for which they sought summary adjudication.

Plaintiffs James and Donna Schafer's ("Plaintiffs") motion for summary adjudication is DENIED in full.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0000194

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: MARINERS LANDING, LLC

vs.

DEFENDANT: CHERYL YANNOTTI
FOLAND

NATURE OF PROCEEDINGS: MOTION – PRO HAC VICE

RULING

The unopposed application to admit Nathan A. Holcomb as Counsel Pro Hac Vice for the Defendants is **GRANTED**. (Calif. Rules of Court, rule 9.40.)

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0000763

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: RANDY G. SHERMAN

vs.

DEFENDANT: C.D.C.R., ET AL

NATURE OF PROCEEDINGS: 1) DEMURRER
2) CASE MANAGEMENT CONFERENCE
3) ORDER TO SHOW CAUSE – OTHER: PROOF OF SERVICE AS TO DEFENDANTS S. GATES; B. PHARRIS; C.C.H.C.S.; AND C.D.C.R.

RULING

The demurrer of Defendant K. Ashe and M. Ashe M.D (“Defendants”) was filed prior to the Court issuing its May 24, 2024 Order sustaining the general demurrer of Defendant K. Masbad to the entire complaint. As no amended complaint has been filed, there is currently no operative pleading in the action. Defendants’ demurrer (which has not been opposed) is therefore **moot**. Defendants may renew their demurrer in the event an amended pleading is filed.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0002063

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PLAINTIFF: GLENN AXWORTHY

vs.

DEFENDANT: ROGER LA VOIE, ET AL

NATURE OF PROCEEDINGS: DEMURRER

RULING

The unopposed demurrer of Defendant New Broadway, LLC (erroneously sued as MAC's at 19 Broadway) (hereinafter referred to as "Defendant") is **SUSTAINED**. The demurrer is sustained without leave to amend as to the Fourth Cause of Action. Plaintiff is granted leave to amend as to the Fifth and Sixth Causes of Action.

Discussion

Plaintiff brings this action against an acquaintance, Roger La Voie ("La Voie"), for taking his car without permission. The incident allegedly happened while both Plaintiff and La Voie were at a nightclub in Fairfax. Plaintiff names Defendant, the owner of the nightclub, in three counts of the complaint. Plaintiff asserts a violation of Business & Professions Code section 25602 (Fourth Cause of Action) because Defendant furnished alcohol to La Voie. He asserts a negligence claim against Defendant based on the same conduct (Fifth Cause of Action). Finally, Plaintiff asserts a claim for "defamation and slander" (Sixth Cause of Action) because Defendant allegedly "spread false and malicious statements about Plaintiff."

Defendant demurs to these causes of action contending they fail to state claims and are uncertain. (Code Civ. Proc. § 430.10, subd. (e) and (f).)

Plaintiff failed to timely file an opposition or response to the demurrer. A failure to oppose may be deemed a consent to the granting of the motion. (Cal. Rules of Court, rule 8.54, subd. (c).) Failure to oppose a motion may also lead to the presumption that [plaintiff] has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489, disapproved of by *Garcia v. McCutchen* (1997) 16 Cal.4th 469, on other grounds.) Defendant's demurrer is therefore sustained on this basis.

Defendant's demurrer is also well taken on the merits. Business and Professions Code section 25602, subdivision (b) expressly provides that the statute does not create civil liability in these circumstances. As a result, the demurrer to the Fourth Cause of Action is sustained without leave to amend. As to the negligence cause of action, Plaintiff has not adequately pled a "duty" on the part of Defendant. The demurrer to this cause of action is sustained with leave to amend. As to the sixth cause of action for the defamation-slander, Plaintiff has not alleged sufficient facts in order to state a viable claim. The complaint is wholly conclusory and does not identify what statements and to whom, how the statements were allegedly false and defamatory, or that the statements were unprivileged. Thus, this cause of action fails to state a claim and the demurrer is sustained with leave to amend.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for July, 2024 is as follows:

<https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09>

Meeting ID: 160 292 5171

Passcode: 868745

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: <https://www.marin.courts.ca.gov>

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0002451

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PETITIONER: CHARLES CARTER

vs.

RESPONDENT: C/O T. ASCENCIO, ET AL

NATURE OF PROCEEDINGS: DEMURRER

RULING

The unopposed demurrer of Defendant California Department of Corrections and Rehabilitation (“CDCR”) to the Petition for Writ of Mandate is **SUSTAINED** with leave to amend.

Discussion

Petitioner is a self-represented inmate serving a sentence in the California state prison system. He filed his petition for a writ of mandate seeking return of items allegedly confiscated from his cell from correctional officers. The CDCR demurs to the petition asserting, *inter alia*, that the Court is without jurisdiction to consider the claims because Petitioner has failed to exhaust his administrative remedies.

Petitioner has filed no opposition or response to the motion. A failure to oppose a motion may be deemed a consent to the granting of the motion. (Cal. Rules of Court, rule 8.54, subd. (c).) Failure to oppose a motion may also lead to the presumption that [plaintiff] has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489, disapproved of by *Garcia v. McCutchen* (1997) 16 Cal.4th 469, on other grounds.)

It is well established that “ ‘where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.’ ” (*Upshaw v. Superior Court* (2018) 22 Cal.App.5th 489, 505 [citations omitted].) This exhaustion requirement is jurisdictional. (*Wright v. State* (2004) 122 Cal.App.4th 659, 665.)

Petitioner alleges that he has exhausted his administrative remedies (Petition, ¶ 5.) However, the claims documentation he attaches as exhibits to his petition shows that his appeal of the denial of his claim was “Rejected.” (*Id.*, Exh. 6.) Under the governing regulations, a decision of the Office of Appeals resulting in a conclusion of “reject” “does not constitute exhaustion of all administrative remedies available to a claimant within the department.” (15 CCR, § 3485, subd.

(D)(2.) Accordingly, on the face of the petition, Petitioner has failed to exhaust his administrative remedies.

Accordingly, the demurrer of the CDCR is sustained. Because the Court sustains the demurrer on this basis, it need not address the other grounds asserted by CDCR. Petitioner is granted ten (10) days leave to file an amended petition addressing this defect.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for July, 2024 is as follows:

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 07/16/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV0003147

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER:

CLERK: Q. ROARY

PETITIONER: IN THE MATTER OF
GEOFF FEDOROFF

vs.

RESPONDENT: BAY AREA SIDING AND
DECKING CONCEPTS, INC., A
CALIFORNIA CORPORATION

NATURE OF PROCEEDINGS: PETITION – OTHER: RELEASE ORDER FOR CLAIM OF LIEN

RULING

The unopposed petition of Geoff Fedoroff, Successor Trustee of the John Fedoroff Trust, to release the mechanics lien from real property is **GRANTED**. (Civ. Code, § 8460.)

Discussion

A mechanics lien protects laborers for a finite period pending resolution of a dispute. However, the failure to enforce the lien by timely prosecution permits the owners of the affected property to petition the court for the release of the lien. (Civ. Code, § 8460.) In this case, Petitioner has submitted a verified petition establishing all of the following:

- (1) the date of recordation of the claim of lien, and a copy of the claim of lien;
- (2) the county in which the claim of lien is recorded;
- (3) the book and page or series number of the place in the official records where the claim of lien is recorded;
- (4) the legal description of the property subject to the claim of lien;
- (5) no extension of credit has been granted under the statute governing the time to enforce the lien;
- (6) the owners have given the claimant notice under the statute governing the time for making a petition, demanding that the claimant execute and record a release of the lien and that the claimant has failed to do so;
- (7) no action to enforce the lien is pending;
- (8) the owners of the property have not filed for relief in bankruptcy.

Petitioner has satisfied all required elements of the statute. (Civ. Code, § 8484.) Respondent has not filed a response or opposition to the petition.

Accordingly, the petition is granted and Petitioner is awarded \$7,600 in attorney's fees. Petitioner shall prepare and submit a proposed order consistent with this ruling.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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