TENTATIVE RULINGS

FOR: April 9, 2019

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. Go to http://napacountybar.org/court-reporting-services/ for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

In the Matter of the Angiolina A Martini Trust **16PR000174**

PETITION FOR ORDER DETERMINING TITLE TO PROPERTY

TENTATIVE RULING: The notice does not contain a specific description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property or a statement advising any person interested in the property that they may file a response to the petition. (Prob. Code, § 851, subd. (c).) Based on counsel's representation that she is seeking waivers from the beneficiaries, the matter is continued to April 24, 2019, at 8:30 a.m. in Dept. A. If waivers are not filed, proper notice is necessary and the matter will need to be continued.

Conservatorship of Richard Wilczak **17PR000240**

ACCOUNTING AND REVIEW

TENTATIVE RULING: The matter is CONTINUED to April 25, 2019, at 8:30 a.m. in Dept. A.

Conservatorship of Murray D. Smith, Jr. **19PR000050**

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON AND ESTATE

APPEARANCE REQUIRED. The proposed conservatee need not appear.

Estate of Charles W. Lewis, Jr. **19PR000056**

AMENDED PETITION FOR LETTERS OF ADMINISTRATION, LETTERS OF SPECIAL ADMINISTRATION, AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

TENTATIVE RULING: GRANT amended petition. Petitioner shall file an amended proposed order and letters conforming to the amended petition by checking the caption for special administration and including the requested powers from Attachment 3g(3).

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

In the Matter of Heather Noelle Dorso **19CV000264**

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Notice has been properly published and no written objections have been filed. The petition is GRANTED without need for appearance.

In the Matter of Emanuel Ramirez **19CV000344**

PETITION FOR CHANGE OF NAME

TENTATIVE RULING: Notice has been properly published and no written objections have been filed. The petition is GRANTED without need for appearance.

At 1:30 p.m.

Kathleen D. McBride v. Byron C. Smith, *et al.* **26-63368**

PLAINTIFFS' MOTION FOR LEAVE TO FILE SIXTH AMENDED COMPLAINT TO ADD AN INDISPENSABLE PARTY

NO UPDATED TENTATIVE RULING

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Conservatorship of Barbara Daub **19MH000009**

PETITION FOR APPOINTMENT OF PROBATE [LPS] CONSERVATOR OF THE PERSON

APPEARANCE REQUIRED: Court's February 19, 2019 Minute Order granted petition but continued for status regarding service on Kimberly Alvarez. Nothing in the Court's file addresses this service.

Estate of Georgiana P. Borroughs **18PR000049**

PETITION FOR TERMINATION OF FURTHER PROCEEDINGS AND FOR DISCHARGE OF THE ADMINISTRATOR AND FOR AN ORDER

TENTATIVE RULING: GRANT petition. However, the Court will cross-out paragraph 5 of the proposed order regarding the payment of debts and expenses because the verified petition does not contain this information.

Conservatorship of Rodney M. Clark **26-05229**

EIGHTEENTH ACCOUNTING AND REPORT OF CONSERVATOR; PETITION FOR ALLOWANCE OF FEES TO CONSERVATOR OF PERSON AND ESTATE AND FOR ATTORNEY'S FEES

TENTATIVE RULING: GRANT petition, including fees as prayed. After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the matter is set for a biennial review hearing and an accounting in two years on April 9, 2021, at 8:30 a.m. in Dept. B. All accounting documents must be filed at least 30 days prior to the hearing. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

At 9:00a.m.

Conservatorship of Aztlan Ramos **18MH000072**

PETITION FOR REHEARING OF CONSERVATORSHIP

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Arsenio L. Palle et al. v
Mr. Cooper f/k/a Nationstar Mortgage LLC et al. **18CV000339**

DEFENDANTS NATIONSTAR MORTGAGE LLC D/B/A MR. COOPER AND WELLS FARGO BANK, N.A.'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

TENTATIVE RULING: Defendants' motion for Summary Judgment is GRANTED. The Court orders a hearing for OSC Re: Dismissal be set for May 22, at 8:30 a.m. in Dept. B. The Mandatory Settlement Conference scheduled for April 25, Trial Management Conference scheduled for May 30, and Trial set for June 3, are vacated.

This action arises out of a dispute between Plaintiffs as borrowers/mortgagors relating to residential real property, and Defendants as the purported assignees of the related promissory note and deed of trust. Plaintiffs assert four causes of action[1], based on claims that the transfers and assignments of the promissory note and deed of trust – in the course of the alleged securitization of Plaintiffs' loan – are invalid.

A. Factual Background

For the present discussion, the following facts are material. It is undisputed that in 2005, Plaintiffs obtained a loan from Bank of America, N.A. (BANA) secured by a Deed of Trust (DOT) for certain real property in American Canyon, California. BANA was the named beneficiary in the DOT. The DOT provides, "Note or a partial interest in the Note (together with the [DOT] can be sold one or more times."

Defendants maintain that in or about 2013, the DOT was transferred and assigned to Wells Fargo and servicing transferred to Nationstar. Plaintiffs contend that such assignments were improperly accomplished, and/or that BANA had insufficient rights or interests in the DOT to so transfer.

[1] While the First Amended Complaint, the operative pleading, sets out five causes of action, Plaintiffs have withdrawn their fourth cause of action for violation of Civil Code section 2923.6. (See Plaintiffs' Responses to Separate Statement of Undisputed Material Facts at p.12 – 13.)

It is undisputed that Plaintiffs contacted Defendant Nationstar in September 2016, to request information on applying for a loan modification, and in March 2017, Plaintiffs fell behind on their loan payments.

The following facts asserted by Defendants are "disputed" by Plaintiffs, but Plaintiffs fail to present or identify any evidence supporting their claim that the facts are in dispute. Plaintiffs requested and Nationstar provided an additional modification "packet" in March 2017. On April 22, 2017, Nationstar notified Plaintiffs by mail that the loan was thirty days or more past due. Nationstar made scores of attempts by phone and sent a letter to Plaintiffs seeking to engage in discussions regarding foreclosure avoidance.

The following facts are undisputed. In July 2017, Plaintiffs remained behind on their monthly payments, and a Notice of Default and Election to Sell Under Deed of Trust (Notice of Default) was recorded in the Napa County Recorder's Office. A Notice of Trustee's Sale (Notice of Sale) was recorded on October 31, 2017. The Trustee's Sale was scheduled for December 5, 2017. Throughout October and November 2017, Plaintiffs and Nationstar continued to discuss avenues of foreclosure avoidance. In late November 2017, Plaintiffs submitted a loan modification application. The Trustee's sale did not take place on December 5, and in fact has not taken place. In January 2018, Nationstar declined Plaintiffs' application for a modification on the ground that Nationstar was unable to underwrite a sufficient monthly payment reduction. Plaintiffs appealed the denial, at least partially on technical grounds for asserted failure to comply with the California Homeowner Bill of Rights. Nationstar responded to the appeal on February 9, 2018, affirmed the denial, and identified other foreclosure avoidance options.

Plaintiffs filed the original complaint in this action on March 14, 2018. It is undisputed that, on the same day, Plaintiffs submitted another loan modification application to Nationstar. Nationstar extended a permanent modification offer on August 6, 2018. On August 27, 2018, Plaintiffs accepted the modification offer by executing and returning the loan modification agreement together with a first payment thereunder. A Notice of Rescission of the Notice of Default was recorded October 5, 2018.

No foreclosure has occurred, and Nationstar continues to service the Loan.

B. General Discussion

The party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A defendant meets this burden by showing that one or more elements of plaintiff's cause of action cannot be established, or that there is a complete defense thereto. (*Ibid*.) The moving party also bears an initial burden of production to make a prima-facie showing of the nonexistence of any triable issue of material fact. (*Id*. at p. 850-51.) If the party carries this burden, there is a shift and the opposing party is then subjected to a burden of production to make a prima-facie showing. (*Ibid*.) "In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the opposing party." (*Collin v. CalPortland Co*. (2014) 228 Cal.App.4th 582, 588.) However, "[t]he opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Visueta v. GM Corp*. (1991) 234 Cal.App.3d 1609, 1615.) Finally, "[t]he function of the pleadings in a

motion for summary judgment is to delimit the scope of the issues." (*Orange County Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 113.)

C. Second Cause of Action – Wrongful Foreclosure

"A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal. 4th 919, 929.) Here, it is undisputed that the scheduled trustee's sale did not take place, and that no foreclosure has occurred. (Plaintiffs' Responses to Separate Statement of Undisputed Material Facts, p. 7 at ¶24, p. 9 at ¶33.)

Plaintiffs cannot, therefore, sustain their cause of action for Wrongful Foreclosure.

D. Third Cause of Action – Quiet Title; and Fifth Cause of Action – Cancellation of Instrument

Following the 2008 collapse of the housing bubble, defaulting borrowers began challenging the validity of foreclosure actions on legal theories founded on claims that the foreclosing party was without rights due to defects in the process by which those parties had been assigned the notes or deeds of trusts (generally in the process of grouping and securitizing loans). While Plaintiffs here cannot challenge an imminent foreclosure, their complaint relies on these same legal theories.

It is undisputed that in 2005, Plaintiffs obtained a loan, executed a note, and that the note was secured by the DOT. It is further undisputed that Plaintiffs agreed to a modification of the loan in 2017. There is no allegation that the loan has been repaid. Plaintiffs causes of action for quiet title and cancellation of instrument are based on allegations that the assignment of the note and DOT from BANA, in the process of securitization, "is null and void *ab initio* for a variety of reasons." (First Amended Complaint at p. 6:12-13.) The reasons include forged assignments, a precedent transfer, and failure to comply with the terms of the trust's pooling and servicing agreement.

The Court finds that Plaintiffs do not have standing to bring either cause of action based on the foregoing theories.

"[A] borrower can generally raise no objection to assignment of the note and deed of trust. A promissory note is a negotiable instrument the lender may sell without notice to the borrower." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal. 4th 919, 927.) A deed of trust is inseparable from the note it secures. (Civil Code § 2936.) The DOT provides, by its terms, for its possible assignment.

The holding in *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 is controlling. In upholding a trial court's decision sustaining demurrer to a quiet title cause of action, the court held that even in the context of allegations of "improper secularization . . . or any other invalid assignments or transfers of the promissory note subsequent to [borrower's] execution" the relevant parties to the assignment transaction are the transferors and transferees of the note. (*Id.* at p. 515.) As to the borrower, an assignment merely substitutes one creditor for another, without changing the borrower's obligations under the note. (*Ibid.*) For these reasons,

"as an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [borrowers] lack standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions." (*Ibid,* see also, *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 742.)

Plaintiffs' reliance on *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal. 4th 919 is misplaced. The Yvanova court expressly held that "[o]ur ruling in this case is a narrow one . . . a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." (*Id*. at 924.) Here, it is undisputed that there has been no foreclosure, and that as a result, Plaintiffs cannot be said to have "suffered a nonjudicial foreclosure." Therefore, the holding in *Yvanova* does not control. The other cases cited by Plaintiffs are similarly inapposite to the facts presented.

For the foregoing reasons, Plaintiffs are without standing to bring their third cause of action for quiet title and fifth cause of action for cancellation of instruments, based on claims that the purported assignment of the DOT by BANA, during the securitization process, was improper. (*Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th at 515.)

E. First Cause of Action – Declaratory Relief

Any party with interests under a written instrument who desires a declaration of his or her rights or duties thereunder, where there is an actual controversy relating to those rights and duties in relation to another party, may bring an action for declaratory relief. (Code Civ. Proc. § 1060.) "The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject." (*Jenkins v. JPMorgan Chase Bank, N.A., supra,* 216 Cal.App.4th at p. 513.)

Again, it is undisputed that in 2005, Plaintiffs obtained a loan, executed a note, and that the note was secured by the DOT. It is further undisputed that Plaintiffs agreed to a modification of the loan in 2017. There has been no foreclosure. There is no allegation that the loan has been repaid.

For the reasons set forth above, Plaintiffs cannot construct a dispute between themselves and Defendants by alleging an improper transfer or assignment of the note or DOT. The Court therefore finds that Plaintiffs fail to produce evidence sufficient to show that an actual controversy exists.

F. Conclusion

For the foregoing reasons, Defendants Motion for Summary Judgment is GRANTED.

Tiffany Smejkal v. Western Dental & Orthodontics, et al. **18CV001525**

DEMURRER TO THE FIRST AMENDED COMPLAINT

TENTATIVE RULING: Defendants Western Dental Services, Inc. (incorrectly named as Western Dental & Orthodontics) and Dr. David A. Gordon's request for judicial notice is GRANTED as to the first amended complaint, but not for the truth of the matters asserted therein. (Evid. Code, § 452, subd. (d) [permitting judicial notice of court records].)

Defendants' demurrer to the second cause of action for medical battery, third cause of action for intentional misrepresentation, and fourth cause of action for violation of Business and Professions Code section 17200 on the ground of uncertainty is OVERRULED. An uncertainty demurrer is strictly construed, even where a pleading is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty should only be sustained when the complaint is so bad that the defendant cannot reasonably respond. (*Id*.) Here, the pleading is certain enough to allow defendants to understand the nature of the allegations, and the theory of liability in order to fashion an appropriate response.

Defendants' demurrer to the second cause of action for medical battery on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Traditionally, "[a] medical battery occurs where 'a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained . . . .'" (*So v. Shin* (2013) 212 Cal.App.4th 652, 669, quoting *Cobbs v. Grant* (1972) 8 Cal.3d 229, 239.) There also is a theory for medical battery based on conditional consent. "There are three elements to a claim for medical battery under a violation of conditional consent: the patient must show his consent was conditional; the doctor intentionally violated the condition while providing treatment; and the patient suffered harm as a result of the doctor's violation of the condition." (*Conte v. Girard Orthopaedic Surgeons Med. Group, Inc.* (2003) 107 Cal.App.4th 1260, 1269.) *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 608-09, highlights these elements: consent was given for surgery, but the consent was expressly conditioned on the use of only family-donated blood for transfusions, and the doctor ignored the condition by using blood from non-family members.

Plaintiff has not satisfied the elements to plead a traditional claim for medical battery. Plaintiff alleges defendants advised her that several of her teeth and gums were diseased with deep cavities requiring crowns immediately in order to avoid root canals later. (First Amended Compl., ¶ 11.) Plaintiff alleges she consented to dental procedures. (*Id*., ¶ 18.) Defendants performed dental procedures despite the fact the work did not need to be performed because the conditions presented to plaintiff in order to obtain her consent did not exist. (*Id*., ¶ 19.) Plaintiff specifically alleges she consented to the exact treatment she asserts caused her harm. The alleged mistreatment and poor care that followed after her consent is tied to defendants' purported professional negligence.

Plaintiff additionally has not satisfied the elements to plead a claim based on conditional consent. Plaintiff alleges she conditionally consented to dental procedures, "but only on the

condition that her dentition was so poor that plaintiff required immediate dental work to prevent further bone loss, future root canals and loosing teeth." (*Id*., ¶ 18.) Plaintiff has not alleged she informed defendants her consent to the operation was conditioned on her dentition being "so poor that plaintiff required immediate dental work to prevent further bone loss, future root canals and loosing teeth," or alleged defendants intentionally violated this condition while performing the operation.[2]

Defendants' demurrer to the third cause of action for intentional misrepresentation on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. The elements of a fraud claim are the following: (1) a misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) Fraud causes of action must be pled with specificity in order to give notice to the defendant and to furnish him with definite charges. (*Gil v. Bank of Am., N.A.* (2006) 138 Cal.App.4th 1371, 1381.) The particularity requirement necessitates pleading facts that "show how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645.) The first, second, and third elements are not pled with the requisite particularity.[3] For example, plaintiff does not allege with specificity how defendants knew the representations were false or connect how the taking of X-rays or performing an exam would lead defendants to know plaintiff did not need dental work. (See First Amended Compl., ¶ 26.)

Defendants' demurrer to the fourth cause of action for violation of Business and Professions Code section 17200 is SUSTAINED WITH LEAVE TO AMEND. The claim is based on the allegation that defendants knowingly made false representations to plaintiff. (*Id*., ¶ 33.) Because the fraud claim fails, this cause of action necessarily fails.

If plaintiff elects to do so, she shall file a second amended complaint within 10 calendar days of service of notice of entry of order.

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[2] Plaintiff is given leave to amend, but the claim may ultimately, as a matter of law, be one for negligence. Plaintiff may have alleged she consented "only on the condition" that her dentition was poor, but that is inherent in any operation following a diagnosis (even an incorrect one) requiring medical attention. Plaintiff's theory would turn nearly all negligence causes of action into medical battery claims. Notably, as currently pled, the specific condition set forth in *Ashcraft* or other conditional consent cases is not alleged here. (See *Conte, supra*, 107 Cal.App.4th at p. 1269, citing *Keister v. O'Neil* (1943) 59 Cal.App.2d 428, 434-35 [operation consented to but "'absolutely did not want . . . a spinal anesthetic'"], *Clark v. Miller* (Minn.Ct.App. 1986) 378 N.W.2d 838, 847 [surgical procedure authorized only if doctor discovered arthritis or malalignment], *Chambers v. Nottebaum* (Fla.Dist.Ct.App. 1957) 96 So.2d 716, 717 [operation consented to but patient "would not permit a spinal anesthetic"], *Rolater v. Strain* (1913) 1913 Okla. 634 [patient consented to operation upon "express condition that no bone should be removed from her foot"].)

[3] Plaintiff repeatedly mentions periodontal disease in her opposition even though it is not alleged in her pleading. Plaintiff alleges defendants informed her that her gums were diseased. It is unknown whether reference to diseased gums is equivalent to periodontal disease.