

These are the tentative rulings for civil law and motion matters set for Thursday, November 3, 2016, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, November 2, 2016. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

**NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).**

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EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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**1. M-CV-0065644 Wells Fargo Bank, N.A. vs. Tyshkevich, Aleksandr, et al.**

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 43:

Plaintiff's Motion for Summary Judgment

Preliminary Matters

As an initial matter, the court declines to consider the amended declaration of Svetlana Tyschkevich filed on October 31, 2016 as plaintiff has not had an opportunity to review this newly submitted evidence. (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8.)

Ruling on Request for Judicial Notice

Plaintiff's request for judicial notice is granted as to Exhibits 2-4 and 6-10 pursuant to Evidence Code section 452. The court takes "judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.)

Plaintiff's request for judicial notice of Exhibits 1 and 5 are denied.

Plaintiff's supplemental request for judicial notice is denied as defendant has not had an opportunity to respond to this newly submitted evidence. (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8.)

### Ruling on Motion

A motion for summary judgment in an unlawful detainer action may be brought at any time after the answer is filed upon five days notice. (*Code of Civil Procedure section 1170.7.*) A party is entitled to bring a motion for summary judgment where there are no triable issues of fact. (*Code of Civil Procedure section 437c.*) The party seeking summary judgment bears the burden of showing there is no triable issue of material fact and that the party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party has the burden of showing, by affidavit, facts establishing every element necessary to sustain a judgment in favor of the party. (*Consumer Cause, Inc. v. Smilecare* (2001) 91 Cal.App.4th 454, 468.) Once a plaintiff proves its prima facie case, the burden of proof shifts to the defendant to prove triable issue of material fact. (*Code of Civil Procedure section 437c(p)(1).*)

To prevail in an action for unlawful detainer following a foreclosure, plaintiff must show that (1) plaintiff purchased the property upon foreclosure and title following the foreclosure sale has been duly perfected, (2) defendant was served with a three-day written notice to quit the property, and (3) defendant continued in possession after expiration of the notice. (*Code of Civil Procedure section 1161a(b)(3).*) Plaintiff provides evidence that it purchased the property at a trustee's sale and said title was duly perfected. (Plaintiff's SSUMF Nos. 4, 5.) Plaintiff also shows that defendants were served with a notice to quit and vacate the property. (*Id* at Nos. 6, 7.) Finally, plaintiff submits evidence that defendants remain on the property after the expiration of the notice. (*Id.* at No. 8.) This shifts the burden to defendants to establish a triable issue.

Defendants, however, have failed to make such a showing. The only evidence presented by defendants is the declaration of Svetlana Tyshkevich. While she avers that plaintiff did not have standing to bring the foreclosure sale; could not receive a valid assignment; and the notice of defaults were void, Mrs. Tyshkevich lacks personal knowledge of these facts to act as admissible and competent evidence. (Evidence Code section 700 et seq.) Without admissible evidence, defendants do not present a triable issue of material fact and the motion is properly granted.

## **2. M-CV-0065926      Galt's Gulch Property Holdings vs. Radibeau, John**

Defendant's second motion to set aside the default judgment is denied. There are significant substantive and procedural deficiencies related to the current motion. Initially, there is no proof of service in the file that comports to the requirements of CCP§1013. Furthermore, the court previously denied an identical motion on September 29, 2016. The current motion does not address the previous denial nor does it meet the

requirements for a motion for reconsideration under CCP§1008. Finally, there is no substantive basis for relief under CCP§473(b) demonstrated by defendant. For all of these reasons, the motion is denied.

**3. M-CV-0066348      Romeo, Tony vs. Ballard, Tommy, et al**

Defendants' demurrer is overruled. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) The complaint complies with Code of Civil Procedure §1166 as (1) the complaint has been verified, (2) the facts for which recovery is based are sufficiently set forth in the complaint, (3) the premises are described with reasonable certainty, and (4) the method for service is attached to the complaint.

Defendants shall file and serve their answer or general denial on or before November 7, 2016.

**4. S-CV-0030314      Belisle, David, et al vs. Centex Homes, et al**

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 43:

Centex's Motion for Summary Judgment

The court file reflects that several defendants filed joinders to Centex's motion for summary judgment. These joinders have expanded the scope of review that must be conducted for this motion beyond what was contemplated when the matter was initially set for the current hearing date. In order to fully address all of the issues raised in the several joinders, the court continues the motion to November 17, 2016 at 8:30 a.m. in Department 43.

Cross-Defendant American Woodmark Corporation's Motion for Good Faith Settlement

The unopposed motion is granted solely as to plaintiff Rosa Ahlberg. The court notes that the other Ahlberg parties mentioned in the motion are not parties to this action. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling cross-defendant's proportionate shares of liability for plaintiff Rosa Ahlberg's injuries and therefore is in good faith within the meaning of CCP§877.6.

Cross-Defendant Ad Land Corp.'s Motion for Good Faith Settlement

The motion is denied as cross-defendant has not sufficiently identified the settlement amount for the court to sufficiently review the settlement and determine it is

entered into in good faith under *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488. Cross-defendant's reference to a proportionate share of \$10,000 is insufficient.

**5. S-CV-0033635 Walsh, Liliya vs. THR California, LP, et al**

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 43:

Plaintiff's Motion for Consolidation

The motion is denied as moot in light of the dismissal entered on September 29, 2016 in THR California, L.P. v. Kosovski, MCV-58479.

Defendant E\*Trade's Demurrer to the First Amended Complaint (FAC)

Preliminary Matters

As an initial matter, the court notes that plaintiff filed a series of supplemental documents in opposition to the current demurrer without obtaining leave of court. The court declines to consider this additional briefing presented by plaintiff.

Ruling on Request for Judicial Notice

Defendant's request for judicial notice is granted pursuant to Evidence Code section 452.

Ruling on Demurrer

The demurrer is sustained without leave to amend. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) Furthermore, "[t]he courts ... will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) "Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (*Ibid.*) The court keeps these principles in mind as it reviews the FAC.

A review of the FAC shows significant deficiencies. The allegations are conclusory and assert more legal argument than factual allegations. This, in and of itself, is a sufficient basis to sustain the demurrer. The more significant deficiencies, however, relate to plaintiff's standing to assert either cause of action against defendant. Plaintiff

alleges she owns the subject property. (FAC ¶1.) The exhibits referred to in her “Request for Judicial Notice in Support of First Amended Complaint”, tend to show that the home was owned by Ivan Kosovski and Zoya Kosovska. This is also seen in the filings by Mr. Kosovski, who asserted he was the owner of the subject property in other proceedings. (Defendant’s RJN, Exhibit C, F.) The culmination of conclusory and contradictory allegations result in a defective FAC that does not sufficiently allege a cause of action against defendant.

The final issue to address is whether plaintiff should be afforded leave to amend. A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. [Citation omitted.]” (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854.) Plaintiff’s opposition provides no guidance on how the FAC may be amended to cure the numerous pleading deficiencies. Nor does a review of the FAC reveal it is amenable to an amendment. In light of this, the demurrer is sustained without leave to amend.

#### Defendant E\*Trade’s Motion to Strike the First Amended Complaint (FAC)

In light of the court’s ruling on the demurrer, the motion to strike is dropped as moot.

#### Defendant Asset Foreclosure’s Demurrer to the First Amended Complaint (FAC)

##### Preliminary Matters

As an initial matter, the court notes that plaintiff filed a series of supplemental documents in opposition to the current demurrer without obtaining leave of court. The court declines to consider this additional briefing presented by plaintiff.

##### Ruling on Request for Judicial Notice

Defendant’s request for judicial notice is granted as to Exhibits A through L pursuant to Evidence Code section 452. The request is denied as to Exhibit M.

##### Ruling on Demurrer

The demurrer is sustained without leave to amend. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff’s allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) Furthermore, “[t]he courts ... will not close their eyes to situations where a complaint contains allegations of

fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) “Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless.” (*Ibid.*) The court keeps these principles in mind as it reviews the FAC.

A review of the FAC shows significant deficiencies. The allegations are conclusory and assert more legal argument than factual allegations. This, in and of itself, is a sufficient basis to sustain the demurrer. The more significant deficiencies, however, relate to plaintiff’s standing to assert either cause of action against defendant. Plaintiff alleges she owns the subject property. (FAC ¶1.) The exhibits referred to in her “Request for Judicial Notice in Support of First Amended Complaint”, tend to show that the home was owned by Ivan Kosovski and Zoya Kosovska. This is also seen in the filings by Mr. Kosovski, who asserted he was the owner of the subject property in other proceedings. (Defendant’s RJN, Exhibit E, F.) The culmination of conclusory and contradictory allegations result in a defective FAC that does not sufficiently allege a cause of action against defendant.

The final issue to address is whether plaintiff should be afforded leave to amend. A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. [Citation omitted.]” (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854.) Plaintiff’s opposition provides no guidance on how the FAC may be amended to cure the numerous pleading deficiencies. Nor does a review of the FAC reveal it is amenable to an amendment. In light of this, the demurrer is sustained without leave to amend.

Defendant Asset Foreclosure’s Motion to Strike the First Amended Complaint (FAC)

In light of the court’s ruling on the demurrer, the motion to strike is dropped as moot.

**6. S-CV-0036594                      Pereira, John David vs. City of Rocklin et al**

Defendant Von Housen Motor’s Demurrer to the Third Amended Complaint (TAC)

Preliminary Matters

As an initial matter, the demurrer to the sixth cause of action for UCL violations is moot in light of plaintiff’s dismissal entered on September 14, 2016.

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Ruling on Request for Judicial Notice

Defendant's request is granted as to Exhibits B, C, D, and F. The request is denied as to Exhibits A and E.

Ruling on Demurrer

The demurrer is overruled. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Defendant's moving papers challenge the veracity of the factual allegations within the TAC rather than the sufficiency of the allegations and it has failed to sufficiently demonstrate that the second cause of action is deficiently pleaded.

Defendant shall file and serve its answer or general denial on or before November 18, 2016.

**7. S-CV-0038498 Brooks, John, et al vs. FCI Lender Services, Inc, et al**

The OSC re preliminary injunction is dropped from the calendar. The case was removed to federal court on October 31, 2016.

**8. S-CV-0038556 United Leasing, Inc. vs. Gio Fitness, LLC, et al**

Plaintiff's unopposed application for writ of possession is granted. The court finds defendants have no interest in the property and waives an undertaking under CCP§515.010.

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