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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF SAN MATEO**

10  
11 *In the matter of:*

12 TRUST A UNDER THE JAMES F. HO  
13 AND GRACE C. HO DECLARATION  
OF TRUST DATED SEPTEMBER 11,  
14 1992, as amended.

15 \_\_\_\_\_  
16 PETER C. HO, TRUSTEE OF TRUST A  
OF THE JAMES F. HO AND GRACE C.  
17 HO DECLARATION OF TRUST  
DATED SEPTEMBER 11, 1992, as  
amended,

18 Petitioner,

19 v.

20 DEBBY CHANG, and DOES 1 through  
21 20, inclusive,

22 Respondents.  
23  
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CASE NO. 17PRO00973

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO EXPUNGE NOTICES  
OF PENDING ACTION

**01/14/2020**

**Date:**

**9:00 a.m.**

**Time:**

**Dept.:** 28

**Judge:** Hon. George A. Miram

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## I. INTRODUCTION

Petitioner Peter Ho wrongfully recorded two lis pendens on properties Respondent Debby Chang owns: 1627 McCollum St., Los Angeles and 229 Fulton St., Redwood City. The Court should expunge these lis pendens on two independent statutory grounds: (1) Peter’s petition does not allege a “real property claim” as to either property; and (2) Peter cannot establish the probable validity of his claim as to the Los Angeles property.

Peter’s petition seeks alternative relief as to the Redwood City property: either (1) monetary damages; or (2) equitable remedies – to impose a constructive trust on the property and have the Court declare that he holds equitable title to the property and modify legal title accordingly. These equitable remedies are the same: the second merely describes what a court does when imposing a constructive trust. As to the Los Angeles property, Peter’s sole claim is for a constructive trust.

The case law is clear that when a pleading combines claims for monetary damages with claims for equitable relief such as a constructive trust, the plaintiff may not maintain a lis pendens. The Court should grant this motion on that ground as to the Redwood City property. Case law also more broadly holds that a claim to impose a constructive trust on real property does not permit the plaintiff to record a lis pendens. The Court should grant this motion on that ground as to both properties.

Finally, the Court should also expunge the lis pendens on the Los Angeles property because Peter cannot establish the probable validity of his constructive trust claim regarding that property. To obtain a constructive trust requires a showing – here, by clear and convincing evidence – of the wrongful acquisition or detention of the res by another party who is not entitled to it. Peter can make no such showing.

Peter alleges that in 2006 his now-deceased father James transferred his interest in the Los Angeles property to Debby. He does not claim, however, that Debby in any way wrongfully induced James to make that transfer. Peter also alleges that James made a financial contribution to the Los Angeles property’s acquisition and

1 subsequent expenses. That too shows no wrongdoing by Debby. Debby's accompanying  
2 declaration anticipates and refutes the claim that she engaged in any wrongdoing in  
3 connection with the Los Angeles property.

4 Peter also cannot establish the probable validity of his claim regarding the Los  
5 Angeles property because Debby's statute of limitations and laches defenses bar it. At  
6 the latest, the statute of limitations expired four years after James transferred his  
7 interest in the Los Angeles property to Debby in April 2006. Peter filed suit in  
8 September 2017, *eleven years after the transfer*. An eleven-year delay in bringing suit  
9 is manifestly unreasonable and necessarily prejudices Debby. During those eleven  
10 years James died, memories faded, and records became unavailable. James' inability  
11 to testify is particularly prejudicial since he is a key witness to the events and  
12 transactions relating to the Los Angeles property in which he personally participated.  
13 Debby's statute of limitations and laches defenses therefore preclude Peter from  
14 establishing the probable validity of his claim on the Los Angeles property, also  
15 requiring expungement of the lis pendens encumbering it.

16 Accordingly, and for the reasons stated more fully below, the Court should issue  
17 an order expunging both lis pendens.

## 18 II. STATEMENT OF FACTS

19 On September 19, 2017, Peter filed his initial Petition and recorded a Notice of  
20 Pendency of Action encumbering 229 Fulton Street, Redwood City (the "Redwood City  
21 Property"). (*See* Req. for Jud. Notice, ¶1 and Exh. 1.) On November 15, 2017 he  
22 recorded a second Notice of Pendency of Action encumbering 1627 McCollum Street,  
23 Los Angeles (the "LA Property"). (*Id.*, ¶2 and Exh. 2.) On November 19, 2017 Peter  
24 filed his Amended Petition for Return of Trust Property, etc. (the "Petition").

25 The Petition includes seven causes of action related to the LA Property. Six are  
26 for damages: (1) undue influence, seeking the return of \$1,167,050 to James' trust (the  
27 "Trust") (Pet., ¶¶67-78); (2) fraud (alleging Debby damaged James by claiming the  
28 \$1,167,050 he gave her was a gift) (*id.*, ¶¶80-83); (3) conversion (alleging Debby is

1 liable for converting James' property (*id.*, ¶¶86-89); (4) mistake (alleging Debby should  
2 return money James gave her due to his mistake of law (*id.*, ¶¶86-89); (5) financial  
3 elder abuse (alleging Debby is liable for financial elder abuse for procuring over \$1  
4 million from James) (*id.*, ¶¶92-97); and (6) wrongful taking of property under Probate  
5 Code section 850 (reclaiming \$1,167,050 and other payments to Debby and for double  
6 damages under Probate Code section 859 (*id.*, ¶¶99-100). (See also Prayer for Relief,  
7 ¶¶1, 2, and 6-9.)

8 In addition, three claims on the Redwood City Property seek equitable relief.  
9 These are for: (1) undue influence (seeking modification of the title as an alternative  
10 remedy) (*id.*, ¶79); (2) mistake (same) (*id.*, ¶90); (3) financial elder abuse (claiming  
11 that Debby holds the Property as a constructive trustee) (*id.*, ¶95); and (4) seeking a  
12 ruling that the Trust holds equitable title (*id.*, ¶103; see also Prayer for Relief ¶¶ 3-4).

13 The Petition includes only one cause and two paragraphs concerning the LA  
14 Property, neither of which alleges wrongdoing by Debby. Paragraph 26 alleges that in  
15 2006 James transferred the LA Property co-owned by him and Debby to her trust, but  
16 continued to receive 50% of the income and pay 50% of the expenses, and remained a  
17 borrower on the loan encumbering the Property. It further alleges that "the intention  
18 was always that he [James] retained an equitable interest in the property," but fails  
19 to state who had that intention, much less that it was communicated or part of an  
20 agreement. (*Id.*) Paragraph 102 alleges that Trust assets were used for the down  
21 payment and mortgage payments. Based on these allegations concerning a transfer  
22 made *eleven years* before Peter filed suit, he seeks a determination that the Trust holds  
23 equitable title to the LA Property and an order modifying legal title accordingly. (*Id.*,  
24 at ¶102; see also Prayer for Relief ¶5.) Debby's declaration in support of this motion  
25 ("Chang Dec.") explains the transactions related to the LA Property, refuting Peter's  
26 stale claim.

27 Debby and James began a close friendship in 1995 after James' wife passed  
28 away. (Chang Dec. ¶¶2 and 4.) In 2001, Debby retired from her government job and

1 began living with James. (*Id.*, ¶4.) They shared their lives as if they were a married  
2 couple until James passed away in Sept. 2017. (*Id.*)

3 In June 2002, Debby was considering purchasing an investment property in  
4 Albany, California (the “Albany Property”). (Chang Dec. ¶5.) James wanted to help  
5 Debby purchases it, but believed that she would not be able to obtain financing. (*Id.*)  
6 James therefore took out a \$250,000 loan from Washington Mutual (“WAMU”), account  
7 # x3147, secured by his house located at 148 CSM Drive in San Mateo. (*Id.*, ¶5 and  
8 Exh. 1.)

9 Contrary to James' expectations, in January 2003, Debby obtained a home  
10 equity line of credit for \$249,000. (Chang Dec. ¶6 and Exh. 2.) Debby then wrote a  
11 check dated February 6, 2003 for \$250,136.90 payable to WAMU so James could pay  
12 off his \$250,000 loan. (*Id.*, ¶7 and Exh. 3.) A WAMU Transaction Summary shows  
13 the compounding payment of \$250,136.90 to account #xxxx3147 on February 6, 2003.  
14 (Chang Dec. ¶7 and Exh. 4) repaying James' loan in full. (*Id.*)

15 Previously, also in June 2002, James had obtained a \$200,000 line of credit from  
16 WAMU, account # x3154. (Chang Dec. ¶8 and Exh. 5.) In July 2002, Debby began  
17 making the monthly payments on James' \$200,000 line of credit. (*Id.*, ¶12 and Exh.  
18 12.) James had also previously opened WAMU checking account # x9922, into which  
19 he could transfer draws from the line of credit and converted this to a joint account  
20 with Debby in September 2013. (*Id.*, at ¶9 and Exh. 6.)

21 In September 2003, James and Debby made deposits into their joint account  
22 totaling \$165,800, consisting of: (a) a \$10,000 check from Debby and a \$5,800 transfer  
23 from her checking account (see Chang Dec. ¶10, Exhs. 7 and 8); (b) a \$50,000 check  
24 deposited by James (*id.*, ¶10, Exhs. 8 and 9); and (c) a \$100,000 deposit (*Id.*, Exh. 7.)

25 On October 1, 2003, James and Debby purchased the Albany Property as joint  
26 tenants for \$620,000, making a \$169,267 down payment from their joint checking  
27 account. (Chang Dec. ¶11 and Exhs. 10 and 11.) Debby paid all of the expenses in  
28 connection with the Albany property. (*Id.*, ¶13.)

1 James contributed \$155,000 to the Albany Property's purchase from his line of  
2 credit. (*Id.*) Starting in July 2002 Debby made the monthly payments on James' line  
3 of credit. (Chang Dec. ¶12 and Exh. 2.) She subsequently made payments totaling  
4 \$211,423.08 to WAMU on the line of credit or to James for him to pay it down. (*Id.*,  
5 ¶12 and Exh. 13.) After her final payment on February 15, 2006 there was no  
6 remaining principal balance. (*Id.*)

7 In April 2005, James and Debby sold the Albany Property for \$1.1 million and  
8 initiated a 1031 Exchange with an exchange facilitator. (Chang Dec. ¶14 and Exh. 14.)  
9 The net sales proceeds were \$347,665.81, which remained on deposit with the  
10 exchange facilitator in anticipation of purchasing a replacement property in LA. (*Id.*,  
11 ¶15 and Exh. 14 (line item "Net Proceeds Due Seller").)

12 In 2005, Debbie identified the LA Property, a three-unit residence, as a suitable  
13 exchange property. (Chang Dec. ¶16.) She and James purchased the property on  
14 September 2, 2005 for \$995,000. (*Id.*, ¶¶17-18 and Exhs. 15 and 16.) The purchase was  
15 funded almost entirely by the \$347,665.81 in proceeds from the Albany Property's sale  
16 that had been deposited with the exchange facilitator and a \$646,750.00 loan that  
17 James and Debby took out because Debby alone could not obtain a loan of that size.  
18 (*Id.*, ¶17 and Exh. 15.) To take advantage of the tax benefits of a 1031 exchange, James  
19 took title to the Los Angeles Property as a tenant-in-common with Debby. (*Id.*, ¶18  
20 and Exh. 16.)

21 A few months after the close of escrow, in April 2006, James and Debby  
22 transferred the LA Property to Debby's revocable trust for no consideration. (Chang  
23 Dec. ¶19 and Exh. 17.) James made the transfer voluntarily and without pressure by  
24 Debby. (*Id.*, ¶19.) James told Debby then that he considered the LA Property to be  
25 hers. (*Id.*) After making this transfer, James did not ask Debby to transfer an interest  
26 back to him. (*Id.*, ¶20.) Nor did Debby tell James or agree that she would do so. (*Id.*)

27 After James transferred his interest in the LA Property, he remained on the  
28 purchase money loan obtained to finance the Los Angeles Property's purchase. (Chang

1 Dec. ¶21.) Nevertheless, James did not ask Debby to refinance the loan. (*Id.*)

2 Following the April 2006 transfer, Debby paid or reimbursed all of the LA  
3 Property's expenses totaling more than \$1 million for loan payments, property taxes,  
4 insurance, maintenance, landscaping, an addition, remodeling, renovations and  
5 upgrades. (Chang Dec. ¶22.) Debby made these payments from accounts into which  
6 she deposited the rent. (*Id.*, ¶23.) To the extent the rents were insufficient to pay all  
7 expenses, Debby paid for them herself. (*Id.*) Although James was not an owner,  
8 through 2015 Debby provided James with the LA Property's income and expense  
9 information so that he could report half of it on the tax returns that Peter prepared for  
10 him. (*Id.*, ¶24.) In 2016 the LA Property became profitable and from then on James  
11 no longer reported the LA's Property's income and expenses on his returns. (*Id.*)

### 12 III. ARGUMENT

#### 13 **A. To Avoid Expungement Peter Must First Show That His Pleading 14 Contains a Real Property Claim, Then Show Such Claim's Probable Validity.**

15 It is improper to record a notice of pending action, aka *lis pendens*, unless the  
16 pleading underlying the notice asserts a "real property claim," i.e., a cause of action  
17 which, if meritorious, would affect title to or the right to possession of specific real  
18 property or the use of an easement. (Code Civ. Proc. §§405.4 and 405.20.)<sup>1</sup>

19 A motion to expunge a *lis pendens* is typically made on the ground that either:  
20 (1) "the pleading on which the notice is based does not contain a real property claim"  
21 (§405.30); or (2) "the claimant has not established by a preponderance of the evidence  
22 the probable validity of the real property claim." (§405.32.) Whichever the ground,  
23 Peter has the burden of proof. (§405.30.)

24 On a motion to expunge for want of a real property claim, "the legislative history  
25 expressly requires courts to consider only the specific claim as pled and to determine  
26 whether that claim is a real property claim..." (*Kirkeby v. Superior Court* (2004) 33  
27 Cal.4th 642, 650.) This analysis "is analogous to, but more limited than, the analysis

28 <sup>1</sup> All statutory citations are to the Code of Civil Procedure unless otherwise stated.

1 undertaken by a court on a demurrer...” (*Id.*, internal quotations omitted.)

2 **B. The Petition Does Not State A Real Property Claim.**

3 **1. The Petition’s causes of action to impose a constructive trust on and**  
4 **declare the trust holds “equitable title” to the Redwood City Property do**  
5 **not state a real property claim.**

6 Peter’s allegations regarding the Redwood City Property do not state a “real  
7 property claim.” As noted above, the causes of action on that Property seek monetary  
8 damages or, alternatively, a constructive trust on the Property and a judgment  
9 declaring that the Trust holds equitable title to the Property and modifying legal title  
10 to reflect this. (Pet. ¶103.) But the second equitable remedy merely recasts the first.

11 A constructive trust is not a substantive claim for relief, but rather an equitable  
12 remedy – an involuntary equitable trust created by operation of law – to compel the  
13 transfer of property from the person wrongfully holding it to the rightful owner.  
14 (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451,  
15 1485; *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*  
16 (2007) 150 Cal.App.4th 384, 398.) “The essence of the theory of constructive trust is to  
17 prevent unjust enrichment and to prevent a person from taking advantage of his or  
18 her own wrongdoing.” (*American Master Lease LLC, supra*, 225 Cal.App.4th at pp.  
19 1484-1485; internal citations omitted.) Requesting the Court to determine that  
20 Petitioner holds “equitable title” to the Redwood City Property is no different than  
21 asking it to impose a constructive trust on the Property for Peter’s benefit as the  
22 Trust’s trustee. Likewise, requesting the Court to modify legal title to the Redwood  
23 City Property is no different than asking it to compel Debby to convey an interest in  
24 the Property to Peter as its purported “rightful owner.”

24 **2. Combining damages claims with requests for equitable remedies**  
25 **precludes Peter from recording a lis pendens on the Redwood City**  
26 **Property.**

26 In defining “real property claim” the Legislature left it to the courts

27 to determine in particular cases whether a claim supporting a constructive  
28 trust will justify the maintenance of a lis pendens. (Comment to §405.4 [“The  
definition of ‘real property claim’ neither includes nor excludes claims of

1 constructive trust or equitable lien. Instead, the law in this area is left for  
2 judicial development."].) In determining this issue on a case-by-case basis,  
3 the courts have been restrictive because of well-known dangers that the lis  
4 pendens procedure can be abused to coerce a defendant to settle a claim."

5 (*BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 971.)

6 Following that restrictive trend, *BGJ Associates* held that "[i]n a case ... where  
7 the pleading combines theories of liability for monetary damages and for a constructive  
8 trust... plaintiffs should not be able to maintain a lis pendens. The danger is too great  
9 that a lis pendens, which effectively renders the property unmarketable, will have the  
10 coercive effects condemned by the cases." (*Id.*, at 972.) Thus, even though the plaintiffs  
11 in *BGJ Associates* sought to recover legal title to real property of which they were  
12 deprived by the defendants' wrongful conduct (*id.*, at 971), the Court upheld the order  
13 expunging the lis pendens (*id.*, at 955).

14 No authority exists contrary to *BGJ Associates*, which is indistinguishable from  
15 this case. Like the complaint there, Peter's "pleading combines theories of liability for  
16 monetary damages and for a constructive trust..." (*BGJ Associates, supra*, 75  
17 Cal.App.4th at 972.) As such, like the plaintiff there, Peter "should not be able to  
18 maintain a lis pendens" encumbering the Redwood City Property (*Id.*)

19 **3. Peter could not properly record lis pendens encumbering the Redwood  
20 City and LA Properties because a constructive trust claim does not  
21 support a lis pendens.**

22 Case law also holds that as a general matter a claim to impose a constructive  
23 trust on property does not permit the plaintiff to record a lis pendens. (See *Lewis v.*  
24 *Superior Court* (1994) 30 Cal.App.4th 1850.) This rule supports expunging the lis  
25 pendens on both the Redwood City and LA Properties.

26 The complaint in *Lewis*, like Peter's claims on the Redwood City Property,  
27 sought "to impose a constructive trust on property purchased with money wrongfully  
28 obtained." (*Id.*, at 1863.) After analyzing the plaintiff's five claims for relief regarding  
the property at issue in *Lewis*, the Court found "none of these claims describes any  
transfer of real property. None of them alleges that any of the plaintiffs had any kind  
of interest in the property beyond the fact that [the defendant's predecessor in interest]

1 ... used allegedly misappropriated funds to buy it.” (*Id.*, at pp. 1861-1862.)

2 Following a line of cases preceding the 1992 revisions to the lis pendens statutes  
3 holding a constructive trust claim does not support a lis pendens, *Lewis* held that rule  
4 still applies under the current statutes. (*Id.*, at 1863-1864; citing, among other cases,  
5 *La Paglia v. Superior Court* (1989) 215 Cal.App.3d 1322 and *Urez Corp. v. Superior*  
6 *Court* (1987) 190 Cal.App.3d 1141.) In so holding at page 1864 *Lewis* states:

7 There is no reason to believe the Legislature intended to change the scope of  
8 the term “real property claim.” The State Bar Report that supported the  
9 legislation disclaimed any definitional strictures: it stated that the term “  
10 ‘neither includes nor excludes claims of constructive trust or equitable lien,’  
11 “ and suggested leaving the area for further judicial development. (See 22  
12 Cal.App.4th at p. 72.) In the face of this report and the *Urez* line of decisions,  
13 the fact that the Legislature made no definitional change in the statute  
14 creates a very strong presumption that it was satisfied with the restrictive  
15 interpretation given to the statute by the overwhelming majority of  
16 decisions. (E.g., *Buchwald v. Katz* (1972) 8 Cal.3d 493, 502.) (*Id.*, at 1864.)<sup>2</sup>

17 Peter’s Petition is the same as the complaint in *Lewis*. He alleges that by various  
18 means – undue influence, fraud, conversion, mistake, and financial elder abuse –  
19 Debby used \$1,167,050 she obtained from James to purchase the Redwood City  
20 Property. *But he does not allege that he holds or James ever held legal title to that*  
21 *Property*. Rather, as in *Lewis* the Petition claims that Peter holds *equitable* title to the  
22 Redwood City Property because “the monies it alleges were wrongfully obtained have  
23 been invested therein.” (*Lewis v. Superior Court, supra*, 30 Cal.App.App.4th at p. 1863;  
24 internal quotations omitted.) Accordingly, also as in *Lewis*, the Court should expunge  
25 the lis pendens on the Redwood City Property.

26 As to the LA Property, Peter’s single cause of action seeks a constructive trust  
27 on the grounds that James contributed to the Property’s purchase and expenses, not  
28 because Debby engaged in any wrongdoing to deprive him of legal title. As such, under  
*Lewis* the Petition also states no “real property claim” as to the LA Property.  
Regardless of what Peter alleges in his claim for a constructive trust on the LA

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<sup>2</sup> The Supreme Court has yet to decide “whether a claim that seeks to impose a constructive trust or equitable lien may be a basis for a lis pendens.” (*Kirkeby v. Superior Court, supra*, 33 Cal.4th at p. 650, n. 7.) *Lewis* thus remains good law.

1 Property, the Court should expunge his lis pendens encumbering it because a  
2 constructive trust claim does not support a lis pendens. (*Lewis v. Superior Court*,  
3 *supra*, 30 Cal.App.4th at 1862-1864; see also *Campbell v. Superior Court* (2005) 132  
4 Cal.App.4th 904, 922 [a plaintiff may not file a lis pendens based on a constructive  
5 trust claim if the complaint fails to plead facts entitling the plaintiff to that remedy].)

6 **C. Petitioner Cannot Establish the Probable Validity of His Claim**  
7 **Regarding the LA Property.**

8 The Court must also expunge the lis pendens encumbering the LA Property  
9 because Peter cannot meet his burden under Section 405.32 to establish the probable  
10 validity of his claim that the Trust holds “equitable title” to that Property. Debby’s  
11 statute of limitations and of laches defenses also preclude Peter from establishing that  
12 claim’s probable validity.

13 **1. Peter cannot establish the probable validity of his claim regarding the**  
14 **LA Property because James voluntary transfer of his interest in that**  
15 **Property to Debby was not attributable to any wrongdoing by her.**

16 As the owner of legal title to the LA Property, Debby “is presumed to be the  
17 owner of the full beneficial title” and Peter may rebut this presumption “only by clear  
18 and convincing proof.” (Evid. Code §662; see also Civil Code §1107 [a grant of a real  
19 estate is conclusive against the grantor.]) As noted above, Peter’s request that the Court  
20 modify legal title to reflect his equitable interest in reality seeks a constructive trust.  
21 (*Infra*, at p. 7.) For the court to impose a constructive trust, the plaintiff must prove  
22 three elements: “(1) the existence of a res (property or some interest in property); (2)  
23 the right of a complaining party to that res; and (3) some wrongful acquisition or  
24 detention of the res by another party who is not entitled to it.” (*PCO, Inc. v.*  
25 *Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, supra*, 150  
26 Cal.App.4th at 398; internal citations and quotations omitted.) Here, Peter must prove  
27 all three elements by clear and convincing evidence. (Evid. Code §662.) His equitable  
28 title/constructive trust claim founders on the second and third elements.

Notably, Peter alleges no claim for undue influence, fraud, conversion, or

1 financial elder abuse as to the LA Property. Nor does he allege that Debby in any other  
2 way wrongfully induced James to transfer his interest in the LA Property to her in  
3 2006. (See Pet., ¶¶26 and 102.) In fact, James made the transfer voluntarily, free of  
4 any pressure by Debby, and told Debby he considered the property to be hers. (Chang  
5 Dec., ¶19.) Nor did she subsequently breach any agreement or promise to transfer an  
6 interest in the LA Property back to James. (*Id.*, ¶20.) There was no such agreement or  
7 promise, nor did James ever ask Debby to return his interest in the LA Property. (*Id.*)

8 Peter claims that James made a financial contribution to the LA Property's  
9 acquisition and expenses. (See Pet., ¶¶26 and 102.) But standing alone, a contribution  
10 by James would not equate to the Property's wrongful acquisition or detention by  
11 Debby. In fact, tracing the funds used to acquire the LA Property to their sources  
12 shows that James' made no such contribution. The down payment on the LA Property  
13 derives almost entirely from the net sales proceeds of the Albany Property, but by the  
14 time the LA Property was purchased Debby had already fully reimbursed James for  
15 his contributions to the Albany Property. (Chang Dec., ¶¶11-12 and Exhs. 12-13.) After  
16 James contributed \$155,000 to the Albany Property's down payment from his line of  
17 credit (*id.*, ¶11), from October 2003 through July 2015 Debby made payments to pay  
18 down and ultimately pay off the line of credit *totaling* \$211,423.08. (*Id.*, ¶12 and Exh.  
19 13.) As well, Debby had made the monthly payments on James' line of credit and paid  
20 for all the Albany Property's expenses. (*Id.*, ¶¶12-13 and Exh.12.)

21 James and Debby took out a loan together to finance the LA Property's  
22 purchase. (*Id.*, ¶17 and Exh. 15.) But after James transferred his interest to Debby in  
23 April 2006, she made the loan payments and paid for all other LA Property expenses.  
24 (*Id.*, ¶22-23.) During the seven months between the purchase and the transfer the  
25 expenses were paid from the rent, with Debbie making up any shortfall. (*Id.*, at ¶23.)

26 Peter notes that James remains a borrower on the mortgage (Pet. ¶102)  
27 securing a purchase money loan. (Chang Dec. ¶21.) But this entails neither  
28 wrongdoing by Debby nor risk to the Trust. The lender's only remedy is to foreclose.

1 (See §580b(a)(2) [no deficiency judgment lies on a purchase money loan for a three-  
2 unit residence].) Now that James is deceased a default in payment cannot harm his  
3 credit. Nor would a default damage Peter's credit since he is not a borrower.  
4 (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596-597 [a grantee of real property  
5 encumbered by a deed of trust has no personal liability absent a written agreement to  
6 pay the loan]; see also Civ. Code §1624(a)(6) [statute of frauds applies to agreement to  
7 pay debt secured by a deed of trust].)

8 In fact, James only took title to take advantage of the tax benefits of a 1031  
9 exchange. (Chang Dec. ¶18.) Consequently, James gifted his interest to Debby only  
10 seven months after the LA Property's purchase, telling her he considered the Property  
11 hers. (*Id.*, ¶ 19 and Exh. 7.)

12 Lacking proof of any wrongful act by Debby or any corresponding right of the  
13 Trust to the LA Property, much less clear and convincing proof, Peter cannot establish  
14 the probable validity of his claim. The Court should therefore expunge the *lis pendens*.

15 **2. Debby's statute of limitations defense precludes Peter from**  
16 **establishing the probable validity of his LA Property claim.**

17 Peter also cannot establish the probable validity of his LA Property claim  
18 because the statute of limitations expired at most four years after James transferred  
19 his interest to Debby in April 2006. Peter nevertheless filed his original petition over  
20 *eleven years* later, on September 19, 2017. Because Peter's claim derives from James'  
21 claim and the statute of limitations on James' claim expired during his lifetime, the  
22 statute of limitations also bars Peter from asserting the claim.<sup>3</sup>

23 "A cause of action that survives the death of the person entitled to commence  
24 an action or proceeding passes to the decedent's successor in interest." (§377.30.) The

25 <sup>3</sup> Peter also lacks standing to pursue any claim regarding the LA Property. James took title  
26 individually, then transferred his individual interest to Debby. (See Chang Dec., Exhs. 14 and  
27 15.) Nothing shows that James transferred his LA Property claim to the Trust (see Exh. A to  
28 Pet. [Declaration of Trust] and Exh. A thereto listing the assets transferred to the Trust]; Exh.  
B to the Pet. [1995 amendment] making no transfer to the Trust] and Exh. C to the Pet. [2002  
amendment] same.) The LA Property claim is a probate asset, requiring Peter's appointment  
as executor to assert it.

1 survival statutes do not create or revive a cause of action. Rather, “[t]hey merely  
2 prevent the abatement of the cause of action of the injured person and provide for its  
3 enforcement by or against the personal representative of the deceased.” (*Quiroz v.*  
4 *Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264.) Thus, becoming James’  
5 successor in interest did not entitle Peter to sue on a claim that James was not then  
6 “entitled to commence” because the statute of limitations expired during his lifetime.  
7 Alternatively, since the statute of limitations expired when James was the trustee,  
8 Peter cannot sue as James’ successor trustee.

9 The statute of limitations on a constructive trust claim not arising from fraud  
10 is four years under Section 343. (See also *Estate of Yool* (2007) 151 Cal.App.4th 867;  
11 Weil & Brown, *The Rutter Guide, Civ. Proc. Before Trial*, §§4:854 and 4:1810; *Nelson*  
12 *v. Nevel* (1984) 154 Cal.App.3d 132, 138-141; *McCosker v. McCosker* (1954) 122  
13 Cal.App.2d 498, 501 [§343 applies to a cause of action for constructive trust not based  
14 on fraud, mistake, breach of trust, or violation of confidential relationship].)

15 Were Peter to allege a cause of action regarding the LA Property on the grounds  
16 of fraud or mistake, under Section 338(d) the statute of limitations would be three  
17 years, commencing on discovery of the fraud or mistake. (See also *Civ. Proc. Before*  
18 *Trial, supra.* at §4:1190.) This statute of limitations applies whether the complaint  
19 seeks legal or equitable relief or pleads a cause of action in tort or contract (*Hatch v.*  
20 *Collins* (1990) 225 Cal.App.3rd 1104, 1110) and applies to the equitable remedy of  
21 imposing a constructive trust on real property (*Douglas v. Douglas* (1951) 103  
22 Cal.App.2d 29, 32). Finally, were Peter to allege a cause of action for elder abuse  
23 concerning the LA Property, under Welfare & Institutions Code section 15657.7 the  
24 statute of limitations would be four years. The statute of limitations on any of these  
25 grounds expired no later than April 2010, *seven years before Peter filed suit.*

26 Likewise, Peter pleads no facts to support delayed discovery, as he must to make  
27 that assertion. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.) Under  
28 the delayed discovery rule “the statute of limitations begins to run when the plaintiff

1 has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads  
2 and proves that a reasonable investigation at that time would not have revealed a  
3 factual basis for that particular cause of action.” (*Id.*, at 803.)

4 Any allegations of delayed discovery Peter might belatedly make now would  
5 carry no weight. The 2006 deed James signed before a notary transferring his interest  
6 in the LA Property to Debby shows on its face he was aware of the transfer. (See Exh.  
7 15 to Chang Dec.) James also had to know that Debby did not transfer any interest in  
8 the Property back to him, since that would require her to deliver a signed and  
9 notarized deed to him. (Civ. Code §§1054, 1091-1092 and 1624(a)(3).) Last, even  
10 mistakenly assuming that James’ purported contributions to the LA Property entitled  
11 him to an interest in the Property, James would know of his own contributions.

12 Since Debby’s statute of limitations defense negates the probable validity of  
13 Peter’s claim on the LA Property, his *lis pendens* encumbering it must be expunged.

14 **3. Debby’s laches defense also precludes Peter from establishing the**  
15 **probable validity of his claim regarding the LA Property.**

16 The laches defense bars a cause of action when the plaintiff unreasonably delays  
17 in suing on a claim and the delay prejudices the defendant, making it unfair or  
18 inequitable to grant relief. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68; *In*  
19 *re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1359.) The prejudice  
20 may be factual in nature or compromise the presentation of a defense. (*San Bernardino*  
21 *Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 605.) In  
22 *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, the court found that the petitioner’s  
23 failure to bring an action prior to the decedent’s death was, “necessarily prejudicial  
24 where, as here, each and every cause of action set forth in the underlying petition  
25 centered on [Decedent] – her mental capacity, defendant’s influence over her, and her  
26 understanding of [trust documents] and her estate.” (*Id.*, at 409.)

27 Waiting to assert any claim regarding the LA Property until *eleven years* after  
28 James’ 2006 transfer to Debby epitomizes unreasonable delay. The Petition’s

1 allegations concerning the LA Property date back to transactions that occurred as long  
2 ago as 2002. James, a key percipient witness to his own transactions, can no longer  
3 testify. Over the course of *seventeen years*, memories regarding those transactions have  
4 no doubt faded. Some records concerning the transactions are unavailable to Debby,  
5 as the lack of greater specificity in her declaration on certain points demonstrates.  
6 Peter's unreasonable delay thereby prejudiced Debby.

7 The Court should also expunge the lis pendens encumbering the LA Property  
8 because the laches defense negates the probable validity of Peter's underlying claim.

9 **D. The Court Should Award Debby the Attorney's Fees and Costs She  
10 Incurs In Making This Motion.**

11 The prevailing party on a motion to expunge shall recover her reasonable  
12 attorney's fees and costs "unless the court finds that the other party acted with  
13 substantial justification or that other circumstances make the imposition of attorney's  
14 fees and costs unjust." (§405.38.) As explained above, Peter wrongly recorded lis  
15 pendens encumbering the Redwood City and LA Properties and there is no substantial  
16 justification for him to oppose this motion. Requiring him to pay Debby's expenses for  
17 making this motion would be just and serve a prophylactic purpose: preventing abuse  
18 of the lis pendens procedure. To date, Debby has incurred attorney's fees and costs of  
19 \$39,517.50. (Dec. of David Baer ISO Motion.) The Court should award Debby that  
20 amount and any additional legal expenses she incurs for her Reply Brief or the  
21 hearing.

22 **IV. CONCLUSION**

23 For the foregoing reasons, Respondent respectfully requests the Court to order  
24 the expungement of the notices of pending action encumbering the Redwood City and  
25 LA Properties and award Debby her reasonable attorney's fees and costs.

26 DATED: December 9, 2019

HARTOG, BAER & HAND  
A Professional Corporation

27 By:   
28 DAVID W. BAER, *Attorneys for*  
*Respondent Debby Chang*

4 **PROOF OF SERVICE**

5 I, the undersigned, declare as follows:

- 6 1. At the time of service, I was over 18 years of age and not party to this action.  
7  
8 2. My business address is 4 Orinda Way, Suite 200-D, Orinda, CA 94563.  
9 3. The fax number from which I served the documents is *(complete if service was*  
10 *by fax)*: \_\_\_\_-\_\_\_\_-\_\_\_\_.  
11 4. My electronic service address is *(complete if service was by e-mail)*: \_\_\_\_\_.  
12 5. On December 9, 2019, I served the following documents:

13 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
14 **MOTION AND MOTION TO EXPUNGE NOTICES OF PENDING**  
15 **ACTION**

- 16 6. I served the documents on the person or persons below, as follows:

17 *Attorneys for Petitioner and Trustee*  
18 **Peter C. Ho**  
19 James P. Cilley  
20 Temmerman, Cilley & Kohlmann, LLP  
21 140 Town & Country Drive, Suite A  
22 Danville, CA 94526  
23 Tel: (925) 529-3999  
24 Email: Jcilley@tcklawfirm.com

- 25 7. The documents were served by the following means:  
26 a.  **By personal service.** I personally delivered the documents to the  
27 persons at the addresses listed in item 6. (1) For a party represented by  
28 an attorney, delivery was made (a) to the attorney personally; or (b) by  
leaving the documents at the attorney's office, in an envelope or package  
clearly labeled to identify the attorney being served, with a receptionist  
or an individual in charge of the office; or (c) if there was no person in the  
office with whom the notice or papers could be left, by leaving them in a  
conspicuous place in the office between the hours of nine in the morning  
and five in the evening. (2) For a party, delivery was made to the party

1 or by leaving the documents at the party's residence with some person  
2 not younger than 18 years of age between the hours of eight in the  
3 morning and six in the evening.

4 b.  **By United States mail.** I enclosed the documents in a sealed  
5 envelope or package addressed to the persons at the addresses in item 6  
6 and (*specify one*):

7 (1)  deposited the sealed envelope with the United States Postal  
8 Service, with the postage fully prepaid.

9 (2)  placed the envelope for collection and mailing, following our  
10 ordinary business practices. I am readily familiar with this  
11 business's practice for collecting and processing correspondence for  
12 mailing. On the same day that correspondence is placed for  
13 collection and mailing, it is deposited in the ordinary course of  
14 business with the United States Postal Service, in a sealed  
15 envelope with postage fully prepaid.

16 I am a resident or employed in the county where the mailing occurred.  
17 The envelope or package was placed in the mail at Orinda, California.

18 c.  **By overnight delivery.** I enclosed the documents in an envelope  
19 or package provided by an overnight delivery carrier and addressed to  
20 the persons at the addresses in item 6. I placed the envelope or package  
21 for collection and overnight delivery at an office or a regularly utilized  
22 drop box of the overnight delivery carrier.

23 d.  **By electronic service:**

24 i.  Courtesy copy(ies) only.

25 ii.  Based on an agreement of the parties to accept electronic  
26 service, I served the documents electronically on the persons  
27 listed in item 6. No undeliverable message was received.

28 e.  **By fax transmission.** Based on an agreement of the parties to  
accept service by fax transmission, I faxed the documents to the persons  
at the fax numbers listed in item 6. No error was reported by the fax  
machine that I used. A copy of the record of the fax transmission, which  
I printed out, is attached.

I declare under penalty of perjury under the laws of the State of California that  
the foregoing is true and correct.

Dated: December 9, 2019

  
Cynthia M. Tallent