Special Set 11/19/2025 at 3:00pm

24CV00099, Burns v. Kuok

PROPOSED TENTATIVE RULING:

Cross-Defendants Ocwen Loan Servicing, LLC ("Ocwen"), Wells Fargo Bank, N.A. (as Trustee for Harborview Mortgage Loan Trust 2006-10) ("Wells Fargo"), and Altisource Online Auction, Inc. move for summary judgment, or summary adjudication in the alternative, to Defendants/Cross-Complainants' Hen Kuok and Dim Nhey ("Cross-Complainants") Cross-Complaint pursuant to C.C.P. section 473c. Cross-Defendants' motion for summary judgment/summary adjudication is **DENIED** in its entirety.

Cross-Complainants' counsel shall submit a written order on its motion to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

I. Material Facts

On or about March 14, 2006, Elizabeth Bjornstad ("Bjornstad") obtained a loan for $416,000.00 ("the Loan") secured by a Deed of Trust recorded against real property located at 1158 Comalli Street in Santa Rosa, California ("the Property"). (Undisputed Material Fact, ["UMF"], No. 1.) The Loan and Deed of Trust were assigned to Well Fargo Bank, N.A. as Trustee for Harborview Mortgage Loan Trust 2006-10 ("the Trust"), for whom PHH Mortgage Corporation (successor by merger to Ocwen Loan Servicing, LLC) ("PHH") acted as servicer. (UMF, No. 2.) On April 1, 2016, Plaintiffs Jordan Burns and Jennifer Branham-Burns ("Plaintiffs") entered into a written Lease Agreement with Bjornstad, which contained a Purchase Option to purchase the Property. (UMF, No. 3.) Bjornstad defaulted on the Loan and around October 2017, Plaintiffs received a notice from Ocwen that the Property was being foreclosed upon and sold at auction. (Plaintiffs' Additional Material Facts ["AMF"], No. 9.) In a letter dated October 16, 2017, Plaintiffs informed Ocwen of the Purchase Option in their lease and that they would continue to occupy the Property and intended to exercise the Purchase Option. (AMF, No. 10.) Plaintiffs subsequently sent a copy of the Purchase Option to Wells Fargo on May 16, 2018. (AMF, No. 11.) On April 8, 2018, Plaintiff Jordan Burns (with two other purchasers) and Bjornstad entered into a purchase agreement as a short sale for the Property as an exercise of the Purchase Option, which was sent to Ocwen and on April 13, 2018, Ocwen rejected the offer of short sale via a letter to Bjornstad. (Beletsis Exhibit Index, Exhibits E–F.)

Ultimately, the Property was foreclosed upon with title reverting to the Trust in or around May 2018 via Trustee's Deed Upon Sale. (UMF, No. 4.) On or about July 15, 2018, the Trust and Cross-Complainant Kuok entered into a written Purchase Agreement for the sale of the Property, which stated that it was "Buyer's sole responsibility to determine and verify the occupancy status of the Property" and that "the Property may be subject to leasehold or other interests of various tenants or other occupants." (UMF, Nos. 5–6.) The Purchase Agreement was amended to add Cross-Complainant Nhey as a buyer of the Property with all other terms of the Purchase

Agreement remaining unchanged. (UMF, No. 10.) The sale of the Property to Cross-Complainants closed on or about July 26, 2018, with title to a Grant Deed recorded against the Property. (UMF, No. 12.) Cross-Defendants did not provide a copy of the Lease Agreement to Cross-Complainants.

Plaintiffs filed their Complaint for breach of contract/specific performance, breach of implied contract, fraud, declaratory relief, and money had and received on January 5, 2024, against Defendants/Cross-Complainants. On March 11, 2024, Cross-Complainants filed a Cross-Complaint against Cross-Defendant financial institutions alleging that the defrauded Cross-Complainants by failing to disclose the lease option to purchase the Property at the time of the sale. This matter is on calendar for Cross-Defendants Ocwen and Wells Fargo's motion for summary judgment or summary adjudication in the alternative ("MSJ/MSA"). The Parties dispute as to whether Plaintiffs' lease agreement was extinguished when the property was foreclosed upon, whether Cross-Defendants' owed a duty of disclosure of Plaintiffs' lease agreement to Cross-Complainants, and whether Cross-Complainants owed a duty of indemnity to Cross-Defendants.

II. Requests for Judicial Notice

The court may take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452(h).) The court must take judicial notice of any matter requested by a party, so long as it complies with the requirements under Evidence Code section 452. (Evid. Code § 453.) Courts may take notice of public records but not take notice of the truth of their contents. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

A. Cross-Defendants Request for Judicial Notice

In support of their MSJ/MSA, Cross-Defendants request judicial notice of five publicly recorded documents including, the 2006 Deed of Trust, the 2009 Corporate Assignment of Deed of Mortgage, two Corporate Assignment of Deed of Trusts recorded on August 29, 2026, and Trustee's Deed Upon Sale recorded May 4, 2018. The request is **GRANTED** subject to the evidentiary limitations stated above.

B. Cross-Complainants Request for Judicial Notice

In support of their Opposition to Cross-Defendants' MSA/MSJ, Cross-Complainants request judicial notice of a Judgment of Dismissal, Superior Court of Arizona, Maricopa County, Case No. CV2016-014133. The request is **GRANTED** subject to the evidentiary limitations stated above.

III. Third Cause of Action – Contribution

The Court first notes that it sustained Cross-Defendants' demurrer to the Cross-Complaint without leave to amend as to the Third Cause of Action for contribution on September 18, 2024,

for being unripe. Therefore, the Court shall not consider any argument applicable to the Third Cause of Action.

IV. Lease Agreement Viability Following Foreclosure

Cross-Defendants argue that Plaintiffs' lease was extinguished as a matter of law when the foreclosure commenced, therefore there was nothing for Cross-Defendants to disclose to Cross-Complainants at the time of the sale relying upon several cases. (See *Bank of America v. Hirsch Mercantile* (1944) 64 Cal.App.2d 175, 182 ["sale under the trust deed would terminate and cut off all rights in the real property which were created after the recording of the trust deed"], *Dover Mobile Estates v. Fiber Form Products* (1990) 220 Cal.App.3d 1494, 1498 ["foreclosure proceeding destroys a lease junior to the deed of trust, as well as the lessee's rights and obligations under the lease"], *Bailey v. Citibank, N.A.* (2021) 66 Cal.App.5th 335, 356 ["'[t]he trustee's deed therefore passes the title held by the trustor at the time of execution,' free of liens or encumbrances attaching after the deed of trust was recorded"], *Miscione v. Barton Development* (1997) 52 Cal.App.4th 1320, 1326 ["foreclosure of a senior encumbrance terminates subordinate liens, including leases"], *R-Ranch Markets v. Od Stone Bank* (1993) 16 Cal.App.4th 1323, 1327 ["[w]hen property is sold under a trust deed, the purchasers acquire title free and clear of all encumbrances subsequent to the deed of trust"].)

In their Opposition, Cross-Complainants contend that the option to purchase portion of the Lease did not survive foreclosure because 1161b cannot be read to protect extinguishment of non-tenancy related rights, such as an option to purchase a property written into a lease and not a stand-alone option agreement. Cross-Complainants argue that section 1161b in May of 2018 (the time of foreclosure in this case) did not include the provision that "all rights and obligations under the lease should survive foreclosure." Based on *Nativi v. Deutsche Bank Nat'l Tr. Co.* (2014) 223 Cal.App.4th 261 ("*Nativi*"), Cross-Complainants assert that the Court of Appeal's analysis on 1161b makes clear that the scope of this statute is to protect renter possession for the term of the lease, which is not at issue in the instant action with a purchase option. Furthermore, Cross-Complainants now present a copy of an Arizona lawsuit filed by Bjornstad asserting that the signature found on the April 1, 2016, Lease raises a question of possible falsification of her signature on the Lease, which is a triable issue of fact as to the Lease's validity. (Cross-Complainants RJN, Exhibit 1.)

Plaintiffs also oppose this motion solely as to the issue of the viability of the Lease and argue that they have standing because any party to a case may oppose the MSA/MSJ so long as the opposing party and moving party are adverse to one another, which is the case here as Cross-Defendants contend that the Lease was extinguished. Plaintiffs argue that the cases relied upon by Cross-Defendants pre-date the current iteration of C.C.P. section 1161b, which was enacted in 2008 and amended in 2012 into its current iteration. Plaintiff contends that the consideration of the changes to section 1161b is most thorough in *Nativi* and the language of the statute is plainly clear that "and all rights and obligations under the lease shall survive foreclosure" which would include purchase options.

C.C.P. section 1161b was first enacted in 2008 and amended in 2012 to "bring California law in line with the federal PTFA [Protecting Tenants at Foreclosure Act] … [and] 'make the state law

provisions described above comparable to federal law by providing that a new owner of a foreclosed property must honor a tenant's lease.'" (*Nativi, supra,* at 274–275 quoting Assem. Conc. in Sen. Amends. to Assem. Bill No. 2610 (2011–2012 Reg. Sess.) as amended Aug. 20, 2012, pp. 3–4; see Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2610 (2011–2012 Reg. Sess.) as amended Aug. 20, 2012, pp. 2, 4–5.) The provision in section 1161b(b) that "all rights and obligations under the lease shall survive foreclosure" was first added in the 2012 amendment (effective January 1, 2013 to December 31, 2019) and remained unchanged by the 2019 amendment (effective January 1, 2020 [current]). (C.C.P. § 1161b(b) as amended by Stats. 2012, ch. 562 (A.B. 2610), § 3; as amended by Stats. 2019, ch. 134 (S.B. 18), § 3, eff. Jan. 1, 2020.) Therefore, the provision in the statute that "all rights and obligations under the lease shall survive foreclosure" was in effect in 2018 when the Property was foreclosed upon.

There is no dispute that the pre-2013 cases cited by Cross-Complainants and Cross-Defendants conflict with the language of C.C.P. section 1161b(b). The only post-2013 case cited by Cross-Defendants is *Bailey v. Citibank, N.A.* (2021) 66 Cal.App.5th 335, which does not mention or analyze section 1161b. The other cited cases analyze fact patterns concerning unlawful detainers and disputes as to possession of the property, including adverse possession. The issue being considered by this Court in the instant MSJ/MSA is distinct from the cited cases as the primary issue here is the enforceability of the Lease, the Purchase Option in the Lease, and Plaintiffs' exercise of such Purchase Option post the 2013 amendment to section 1161b. Generally, there is a presumption that the Legislature does not intend for statutory schemes to alter or displace common law, but "where there is no rational basis for harmonizing a statute with the common law will [the California Supreme Court] conclude that settled common law principles must yield." (*McMillin Albany LLC v. Superior Ct.* (2018) 4 Cal.5th 241, 249 [internal citations omitted].) *Dover* (decided in 1990) held that foreclosure terminates a subordinate lease reasoning that "[a] foreclosure proceeding destroys a lease junior to the deed of trust, as well as the lessee's rights and obligations under the lease," while C.C.P. section 1161b(b) (effective in 2013) states that "all rights and obligations under the lease shall survive foreclosure." (See *Dover Mobile Ests. v. Fiber Form Prods., Inc.* (1990) 220 Cal.App.3d 1494, 1498–1499 ["*Dover*"] citing Nelson & Whitman, Real Estate Finance Law (2d ed. [Lawyer's Ed.] 1985) § 15.11, p. 1114.) Thus, the post-2012 version of the statute directly conflicts with settled common law principles, meaning that the common law principles must yield to the statute. (*McMillin Albany LLC, supra*, at 249.)

C.C.P. section 1161b was first enacted in 2008, in the wake of the foreclosure/housing crisis and the Legislature's intent with the 2013 amendment was to require a new owner of a foreclosed property to honor a tenant's lease, i.e., to provide greater protection to tenants. (See *Nativi, supra,* at 273–275.) Here, there is no dispute that the Lease Agreement is junior to the Deed of Trust on the Property, as the Deed of Trust was recorded on March 22, 2006 and Plaintiffs executed the Lease Agreement with Bjornstad on April 1, 2016. (Cross-Defendants RJN, Exhibit A; Beletsis Decl., Exhibit A.) Based on the Legislative intent behind section 1161b and its more recent amendments to protect tenants and their lease agreements, the Court finds the statute to be controlling in this case and the settled common law principle that foreclosure extinguishes all rights and obligations in a lease agreement must yield to the statute. While purchase options may not have been the primary intent considered by the Legislature in enacting and amending section

1161b, a purchase option is a tenant's "right" under a lease, intended to benefit them by allowing them to have the option to buy the property they are leasing and providing a viable path to home ownership. Therefore, Cross-Defendants have failed to show that they are entitled to judgment as a matter of law that the Lease Agreement was extinguished upon foreclosure pursuant to the language and Legislative intent of C.C.P. section 1161b. Summary judgment is **DENIED** on this basis.

As to the authenticity of Bjornstad's signature on the Lease Agreement compared to the Arizona court filings and Purchase Option, Cross-Complainants only offer these documents as evidence of inconsistencies in her signatures. Cross-Complainants present conflicting arguments as they concede that the option to purchase did not survive foreclosure but also contend that this discrepancy in Bjornstad's signatures creates a triable issue of fact regarding the validity of the Purchase Option *ab initio*. Cross-Complainants' Opposition to Cross-Defendants' MSA/MSJ is the first instance where the authenticity of Bjornstad's signature on the Lease Agreement has been challenged. Bjornstad is not a party to this action and has not verified the authenticity of her signature on the Lease Agreement via declaration or other admissible evidence. (See Evid. Code § 1415.) Moreover, Cross-Complainants do not present an expert opinion of the comparison of the signatures and their authenticity or other evidence of forgery and instead solely rely on the visual variation between the signatures. (See Evid. Code § 1418.) Cross-Defendants do not respond to this argument in their Reply. Furthermore, Plaintiffs have not been given an opportunity to respond to such argument as they were served with Cross-Complainants Opposition the same day they filed their Opposition to the MSA/MSJ and this determination directly affects the validity and enforceability of the Lease Agreement and the Purchase Option. Therefore, Cross-Complainants have failed to produce sufficient admissible evidence to establish that there is a triable issue of fact as to the authenticity or genuineness of Bjornstad's signature on the Lease Agreement containing the Purchase Option.

V. Duty to Disclose

Next, Cross-Defendants argue that it owed no duty of disclosure of the Purchase Option in the Lease Agreement to Cross-Complainants pursuant to Civil Code section 1101.2. Cross-Defendants maintain that the Purchase Option was known to or within the reach of Cross-Complainants and thus no duty of disclosure was owed.

Cross-Complainants assert that extinguishment of the disputed Purchase Option does not excuse Cross-Defendants from their liability for failure to disclose the material fact of the unrecorded Lease Agreement and Purchase Option. Cross-Complainants contend that the Lease Agreement was in Cross-Defendants possession as early as August of 2017, knew it was unrecorded, and were informed of Plaintiffs sought to exercise the Purchase Option believing that it was valid and enforceable and did not communicate any of these facts to Cross-Complainants. Cross-Complainants further argue that while various Purchase and Sale documents state that they believed the Property was non-owner occupied in generic or vague terms, this does not absolve or waive Cross-Defendants' duty to disclose. They contend that the Purchase Option was not in reach because the Lease Agreement and Purchase Option were not recorded and that Cross-Defendants do not dispute that they did not disclose the unrecorded Lease Agreement with Purchase Option and prohibited Cross-Complainants from speaking to Plaintiffs.

As discussed above, Cross-Defendants' contention that the Lease Agreement and Purchase Option was extinguished upon foreclosure and therefore there was nothing to disclose is incorrect.

A real estate seller has both a common law and statutory duty of disclosure. (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161.) "Where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735–736.) While the seller has a duty to disclose such material facts, the buyer "is charged with all those facts which might have been ascertained had a reasonably diligent inquiry been made," including if the premises is occupied by a tenant. (*Claremont Terrace Homeowners' Assn. v. United States* (1983) 146 Cal.App.3d 398, 408–409 [citations omitted].) "A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts." (*Calemine v. Samuelson, supra,* 171 Cal.App.4th at 161.) "Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose [citation].'" (*Id.* citing *Lingsch v. Savage, supra*, at 736.) Whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact. *(Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544.)

In a letter dated August 9, 2017 to a P.O. Box in Texas, Plaintiffs informed Ocwen of their Lease Agreement with Purchase Option and that Plaintiffs intended to continue to occupy the Property and exercise the Purchase Option with a copy of the Lease Agreement attached, which one copy was stamped as received in West Palm Beach by Ocwen on August 24, 2017 and a second copy on August 30, 2017. (Beletsis Exhibit Index, Exhibit C.) Plaintiffs sent a similar letter on October 16, 2017 to Ocwen at an address in Florida stating that they had received notice of foreclosure sale of the home on November 17, 2017 but that they intended to continue their tenancy until the end of the Lease (April 1, 2022) and attempt to purchase the property. (Burns Decl., Exhibit 2.) Plaintiffs sent a copy of the Lease Agreement to Wells Fargo on May 16, 2018. (Burns Declaration, Exhibit 3.) Therefore, Ocwen had a copy of the Lease Agreement as early as August 24, 2017, and Wells Fargo had a copy of the Lease Agreement as of May 16, 2018.

Cross-Defendants did not provide the Lease Agreement to Cross-Complainants but instead included in the Purchase Agreement that "the Property may be subject to leasehold or other interests of various tenants or other occupants," which was acknowledged by Cross-Complainant Kuok in writing. (UMF, Nos. 6–7.) Cross-Complainant Kuok contends that he knew the Property was occupied but that Cross-Defendants prohibited him from speaking with the tenants (Plaintiffs). (Beletsis Exhibit Index, Exhibit G.) There is a triable issue of material fact as to the adequacy of Cross-Defendants' disclosures when Cross-Defendants knew of the existence of the Lease Agreement and Purchase Option (that had previously been exercised and denied by Ocwen) and withheld such documents from Cross-Complainants. Without disclosure of the unrecorded Lease Agreement with a Purchase Option, the Purchase Option was not within Cross-

Complainants' diligent attention. Plaintiff's possession of the Property and two boilerplate statements that Cross-Defendants "believed [the Property] to be non-owner occupied" and that "the Property may be subject to leasehold or other interests of various tenants or other occupants," are not enough to show that the Purchase Option was in Cross-Complainants' diligent attention. There is also a triable issue of fact of whether a Lease Agreement with a Purchase Option is of sufficient materiality to have affected the value or desirability of the Property and therefore should have been disclosed. Cross-Complainant Kuok stated that he would not have purchased the Property had he known about the Purchase Option in Plaintiffs' Lease. (Beletsis Exhibit Index, Exhibit G.) Therefore, summary judgment is **DENIED** on the basis that Cross-Defendants did not owe a duty to disclose the Lease Agreement.

VI. Indemnification

Cross-Defendants argue that Kuok agreed to indemnify PHH and its affiliates by signing the Occupancy Addendum to the Purchase Agreement that contained an indemnification clause.

Cross-Complainants contend that Ocwen's Addendum to the Purchase Agreement containing the indemnification clause is void for failure to disclose material facts. They contend that there is a triable issue of fact about whether Premium Title of California, Inc. was also aware of the unrecorded lease as it imposed its own indemnification agreement against Cross-Complainants and failure to disclose the Lease Agreement would make the indemnification agreement void for failure to disclose material facts. Cross-Complainants further argue that even if the documents are not void, they are unenforceable under the doctrine of unclean hands for intentional concealment of the Lease Agreement.

Here, the Occupancy Addendum contains an indemnification clause that states:

> Buyer shall defend, indemnify and hold harmless Seller, Seller's affiliates, parent companies, officers, directors, shareholders, members, managers, brokers, agents, set managers, auctioneers, attorneys and representatives (each individually and collectively, the "Seller Representatives" from and against any claims, demands, actions or expenses, including reasonable attorney's fees, arising out of any and all actions concerning security deposits, and for any eviction or unlawful detainer or other litigation arising out of the tenancy, occupancy or lease of the Property including any claims related to the Act after closing of the transaction.

(See Schwiner Dec., Exhibit 10; Legendre Dec., Exhibit C; UMF, No. 8.)

Cross-Defendants provide no authority that an indemnification clause overrides a seller's fiduciary duty to a buyer or that an indemnification clause may be enforced when a seller is alleged to have withheld material facts to the transaction, i.e., fraud. Cross-Defendants are using such indemnity clause and hold harmless agreement to shield them from liability for their alleged fraud in failing to disclose the Lease Agreement to Cross-Complainants, which the law does not support. (See *Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 693 [finding that an indemnity clause precluding any possibility that a buyer who has a meritorious claim of fraud falling within the scope of the indemnity clause could be made whole is

unconscionable].) Without more, Cross-Defendants have not met their burden in showing that they are entitled to judgment as a matter of law and that there is no triable issue of material fact as to the enforceability of the indemnification clause and hold harmless agreement when Cross-Defendants did not produce the Lease Agreement that was in their possession at the time of the execution of the Purchase Agreement. Summary judgment as to indemnification is **DENIED**.

VII. First, Fourth, Fifth, and Sixth Causes of Action

Cross-Defendants contend that the First, Fourth, Fifth, and Sixth Causes of Action (nondisclosure of material facts by mortgage holder, intentional false representation that the property was free from encumbrances, negligent misrepresentation, and intentional concealment) are all fraud-based claims that must fail because Cross-Complainants have failed to establish any misrepresentations, an intent to induce reliance, and justifiable reliance. Cross-Defendants contends that these causes of action are also time-barred, subject to the three-year statute of limitations governing fraud (C.C.P. section 338(d).)

Cross-Complainants argue that these causes of action are all sufficiently pled and timely raised.

Here, as discussed above, the misrepresentation is that Cross-Defendants actively withheld or concealed the Lease Agreement with Purchase Option from Cross-Complainants and absolved themselves of liability by including two boilerplate statements that Cross-Defendants "believed [the Property] to be non-owner occupied" and that "the Property may be subject to leasehold or other interests of various tenants or other occupants." While Cross-Defendants argue that they "advised [Cross-Complainants] over and over again throughout the Sale transaction that the Property was occupied," they still did not produce a copy of the Lease Agreement with Purchase Option or explicitly inform Cross-Complainants of the Purchase Option when it has been in their possession since 2017 and fail to show how that is not a misrepresentation that was material to the Sale. Withholding or concealing the Lease Agreement and relying on boilerplate statements to constructively convey the Lease Agreement without producing the Agreement itself shows an intent to induce reliance for the sale of the Property. As determined above, the evidence presented is not enough to show that the Purchase Option was in Cross-Complainants' diligent attention. Therefore, Cross-Defendants have failed to show how they are entitled to judgment as a matter of law and summary adjudication is **DENIED** as to the First, Fourth, Fifth, and Sixth Causes of Action.

Regarding statutes of limitations, the three-year statute of limitations applicable to fraud is three years but does not accrue until the discovery of the facts constituting fraud or mistake by the aggrieved party. (C.C.P. § 338(d).) Here, Cross-Complainants first received production of documents from Cross-Defendants in December 2024 through June 2025, which is when Cross-Complainants learned that the Lease Agreement was in Cross-Defendants' possession before they sold the Property to Cross-Complainants. (Beletsis Exhibit Index, Exhibits G–H.) The Cross-Complaint was filed on March 11, 2024, which is timely given the above discovery of concealment in 2024. However, as noted by Cross-Complainants, Cross-Defendants did not raise the statue of limitations defense in its October 10, 2024 General Denial to the Cross-Complaint or its September 18, 2024 demurrer. Therefore, Cross-Defendants have waived such defense and summary adjudication is **DENIED** on this basis. (*Save Agoura Cornell Knoll v. City of Agoura*

Hills (2020) 46 Cal.App.5th 665, 681 ["Because a statute of limitations is an affirmative defense, it is forfeited if it is not properly asserted in a general demurrer or pleaded in an answer"] [citations omitted].)

VIII. Second Cause of Action

Cross-Defendants maintain that the Second Cause of Action for equitable indemnity is barred because there are no grounds for indemnity based on the indemnity clause in the Purchase Agreement and Cross-Defendants did not owe a duty to Plaintiffs.

Cross-Complainants contend that the express indemnity provision was invalidly obtained through fraudulent concealment of material facts affecting the agreement to indemnify and therefore such claim should be put before a jury.

As discussed above, Cross-Defendants are attempting to use the indemnity clause and hold harmless agreement to shield themselves from liability for their alleged fraud in failing to disclose the Lease Agreement to Cross-Complainants. There are triable issues of fact as to the enforceability of the indemnity clause with Cross-Defendants' alleged concealment and whether concealing a Purchase Option is material to the transaction to affect the indemnification clause. Summary adjudication of the Second Cause of Action is **DENIED**.