

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 06/28/2019

TIME: 09:00:00 AM

DEPT: C-67

JUDICIAL OFFICER PRESIDING: Eddie C Sturgeon

CLERK: Patricia Ashworth

REPORTER/ERM: Darla Kmety CSR# 12956

BAILIFF/COURT ATTENDANT: M. Micone

CASE NO: **37-2018-00039388-CU-OR-CTL** CASE INIT.DATE: 08/07/2018

CASE TITLE: **SH Westpoint Investments Group LLC vs Malan [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Other Real Property

EVENT TYPE: Motion Hearing (Civil)

MOVING PARTY: Ninus Malan, American Lending and Holdings LLC

CAUSAL DOCUMENT/DATE FILED: Motion for Judgment on the Pleadings, 03/22/2019

APPEARANCES

Maura Griffin, counsel, present for Plaintiff(s).

Steven A Elia, counsel, present for Plaintiff(s).

James Joseph, counsel, present for Plaintiff(s).

Daniel T. Watts, counsel, present for Defendant(s) telephonically.

The Court hears oral argument and confirms the tentative ruling as follows:

TENTATIVE RULING

Defendants Ninus Malan and American Lending and Holdings, LLCs' ("ALH") motion for judgment on the pleadings is denied to plaintiffs SH Westpoint Investments Group, LLC and Salam Razuki's first amended complaint, and to each cause of action. Preliminarily, the court disregards all declarations, and certificates submitted in the reply brief.

Although it does not appear the parties met and conferred pursuant to California Civil Procedure Section 439, the court is aware of the various interplay between the parties and their counsel. Thus, the court does not place great weight to this factor.

Plaintiffs' first amended complaint does not violate the sham pleading doctrine. The sham pleading doctrine is not violated when a plaintiff provides a plausible explanation for the discrepancies in his amended complaint. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.Ap.4th 508, 426.). Plaintiffs state they amended their complaint is because of "confusion regarding the numerous entities owned by Razuki" (FAC ¶12). This is plausible. Plaintiffs may have been confused about the ownership of ALH because Razuki has been in business with Malan since before 2014. (FAC ¶8). Also, plaintiffs may not have had enough time to investigate all of the documents related to ALH "due to the imminent threat of Malan's wrongful and fraudulent attempt to foreclose on the Property via ALH." (FAC ¶ 12). Finally, the court infers Razuki simply may not be able to keep track of and manage the enterprises he owns.

Third, the fact that defendants "admitted" that Malan owns ALH in their verified answer does not take this issue out of the dispute. Plaintiffs have since amended their complaint, with the court's permission, to

assert that Razuki owns ALH. Defendants responded with a motion for judgment on the pleadings, asserting that Malan owns ALH. Thus, there are facts outside the first amended complaint necessary to review to resolve the issues presented in the causes of action.

Fourth, Plaintiffs are not relying on antagonistic facts in the amended complaint. Rather, plaintiffs have pleaded multiple causes of action based on *alternative* theories of fact. While the first five causes of action rely on the theory that Razuki owns ALH, the last three rely on the theory that Malan does. None of the causes of action rely on the plaintiffs asserting that both Razuki and Malan are sole owners of ALH.

Plaintiffs' first cause of action thus states a claim for declaratory relief. Plaintiffs have alleged that Razuki is the owner of ALH and seeks declaratory relief affirming this statement. (FAC ¶ 5).

Plaintiffs' second cause of action states a claim for injunctive relief. Even though the Barrios property has already been foreclosed on, plaintiffs seek an injunction to enjoin Malan from acting as a member and/or manager of ALH and from taking any action on behalf of ALH. Plaintiffs seek this relief because plaintiffs state Razuki is the true owner of ALH. (FAC ¶ 67).

The demurrer to plaintiffs' third cause of action for constructive trust is overruled. Plaintiffs claim that Razuki is the owner of ALH and that defendants have/are attempting to sell/foreclose ALH properties for their personal gain. (FAC ¶ 69)

The demurrer to plaintiffs' fourth cause of action for breach of fiduciary duty is overruled. Plaintiffs state that Razuki employed Malan as a manager of ALH and that Malan sold/foreclosed ALH properties below fair market value and without Razuki's consent and Malan was a manager of ALH, with an undivided duty of loyalty. (FAC ¶73-74.)

Plaintiffs' fifth cause of action for fraud states a claim. Plaintiffs state that Malan attempted to collect principal, interest, and late charges under the note and trust while knowing that the note and trust were invalid, unenforceable, reconveyed, and/or extinguished. Plaintiffs also state Malan falsely represented to the world that he is the true owner of ALH, and held himself out as a sole member, knowing this was false, or with reckless disregard to the truth, with the intent to defraud plaintiffs. (FAC ¶ 80-81.)

Plaintiffs' sixth, seventh, and eight causes of action for quiet title, removal of cloud title, and slander of title also state claims. If it turns out that Malan actually owns ALH, plaintiffs have raised issues whether the interest rate was usurious, as it does appear the amount of interest in the notice of default was calculated at 8%. (FAC ¶ 25-26.)

Eddie C. Sturgeon

Judge Eddie C Sturgeon