E056524

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

PALOMAR GRADING & PAVING, INC., et al.

Plaintiffs and Respondents,

v.

WELLS FARGO BANK, N.A., et al.

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT FOR RIVERSIDE COUNTY
HON. JOHN VINEYARD, JUDGE • NOS. RIC495881 & RIC508520

APPELLANT'S OPENING BRIEF

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Certificate of Interested Entities or Persons

Pursuant to Rules of Court, rule 8.208, appellant Wells Fargo, N.A., discloses that it is 54.06% owned by WFC Holding Corporation and 37.51% owned by Wells Fargo & Company.

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Introduction

This appeal primarily presents a purely legal question: under the mechanic's lien statutes, if a construction company seeking to foreclose on a mechanic's lien knows the name of the "construction lender" — a term specifically defined in the Civil Code to include mortgagees and other lenders with ownership interests — is that company

required to timely name the construction lender in its foreclosure action? The superior court incorrectly said "no," and although the question may sound esoteric, it is an important one for banks and other lenders that have ownership interests in property and rely on the carefully balanced due process protections the Legislature crafted in the mechanic's lien statutes. The superior court also reached several other incorrect conclusions, holding that a foreclosure judgment may exceed the amount of the lien foreclosed upon, that it did not need to judicially apportion a foreclosure judgment on a mechanic's lien that encumbers multiple pieces of property with different owners, and that prejudgment interest should apply to indefinite and unapportioned lien claims (and at a rate of 10%).

Accordingly, Wells Fargo Bank, N.A., appeals the superior court's entry of judgment of foreclosure in favor of plaintiffs Cass Construction, Inc., R3 Contractors, Inc., and Palomar Grading & Paving, Inc., on mechanic's liens they recorded on three parcels of commercial real estate in Beaumont, California, two of which are Wells Fargo's. (The third belongs to Kohl's Department Stores, Inc.) Wachovia Bank, which

Wells Fargo purchased in 2008 as part of a federal bank recapitalization program, loaned construction funds to the property's owner and developer in exchange for a deed of trust on the property as collateral to secure its interest. The developer hired a general contractor, which went bankrupt and failed to make some payments to its subcontractors Cass, R3, and Palomar. Although Cass and R3 identified Wachovia as the construction lender in the "preliminary notices" they served before recording their liens, they did not name Wachovia or Wells Fargo in their foreclosure complaints until more than 800 days after recording the liens — despite a statute that requires the plaintiff to name all interested parties in a foreclosure suit within 90 days of recording the mechanic's lien.

The superior court allowed Cass and R3 to employ the "Doe" fictitious naming convention to "relate back" the date they named Wells Fargo to the filing of their complaint, holding that knowledge a party is the construction lender does not establish knowledge that the party has an ownership interest in the property or must be named. As explained below, however, the superior court relied entirely on a case that did not

consider the Civil Code's definition of a construction lender, leading it to an incorrect judgment.

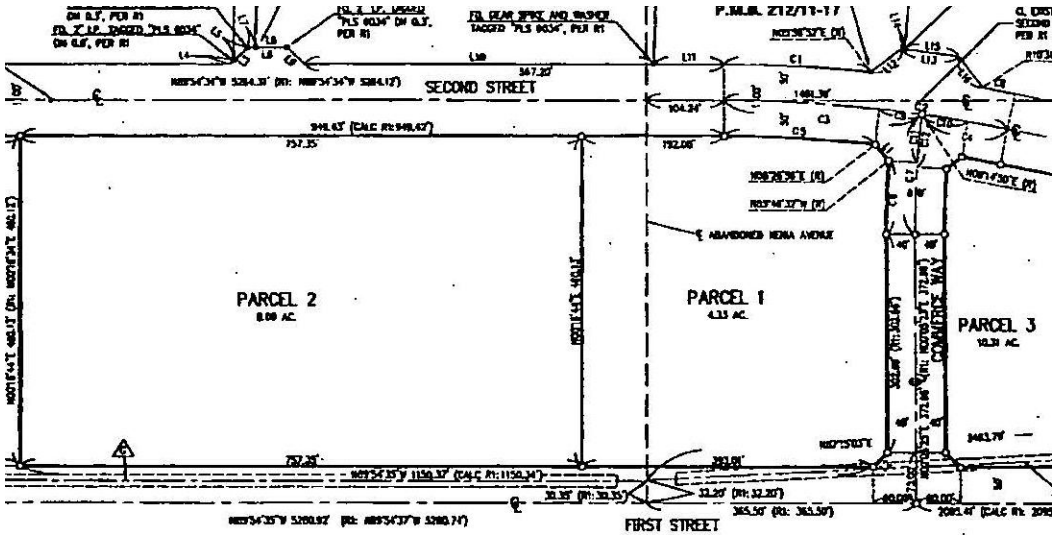
The superior court also erred by issuing a foreclosure judgment for Cass greater than the amount of its lien, by refusing to apportion the liens or its judgment among the three parcels, and by attaching 10% prejudgment interest to indefinite and unapportioned liens.

Therefore, for the reasons discussed below, this court should reverse.

Statement of Facts

North of where Commerce Way bisects Second Street in Beaumont, California, lies a commercial retail development with a Walmart, Chili's, Starbucks, Verizon, and a half-dozen other large and small icons of American capitalism. Until the mid-2000s, the land south of Second Street lay undeveloped, little more than grass, rock, and sand. (3 AA 635, 640-45; 8 AA 1924; 9 AA 1936, 1951-1952, .)

That's when a developer, Inland-LCG Beaumont, LLC, purchased Parcels 1, 2, and 3 of Beaumont Parcel Map No. 35266, between First and Second Streets and crossed by Commerce Way (7 AA 1627-1631):



(3 AA 641.) Inland-LCG paid for the property and development with a construction loan from Wachovia Bank, N.A., which secured its interest with a deed of trust. (1 AA 142-153.) Soon after, Inland sold parcel 2 to Kohl's Department Stores, Inc., which set about building a department store and parking lot on that parcel. (3 AA 525.)

Inland-LCG hired 361 Group Construction Services, Inc. to serve as general contractor for the development of parcels 1, 2 (pursuant to an agreement with Kohl's),

and 3. (1 RT 50-51; 3 AA 525.) 361 Group, in turn, subcontracted the work to a number of construction firms. Relevant to this appeal, 361 Group hired Cass Construction, Inc., R3 Contractors, Inc., and Palomar Grading & Paving, Inc., to clean and grade the parcels; build access roads, curbs, and water lines; prepare street signage and stoplights; and perform similar construction tasks the Kohl's store (and other potential stores built in the future) needed to open. (3 AA 587-600, 1 AA 48-54, 8 AA 1914.)

By the end of 2007, with the Kohl's building complete but the grading and paving work on the rest of the land still in process, the bottom began to fall out of the real estate economy. Inland-LCG failed to make its loan payments and defaulted on its construction loan with Wachovia. (3 AA 659.) Wachovia foreclosed on parcels 1 and 3 through its deed of trust. (3 AA 659-665.)

Around the same time, 361 Group began its own spiral into bankruptcy, failing to make some payments to Cass, R3, and Palomar. (2 RT 336; 3 RT 593; 1 AA 3-4, 42-43, 66-67.) In March 2007, Cass recorded and served a "Preliminary 20-day Notice,"

which Civil Code[1] section 3097[2] requires before any mechanic's lien may be filed. In the notice, Cass named the property owner, "LCG Beaumont, LLC," and its construction lender "Wachovia Bank," and identified work it performed on "Kohl's Development, First St. & Commerce Way" as a subcontractor for 361 Group. (2 AA 303.) R3 served a similar "Preliminary Notice" in March 2008, listing Wachovia Bank as the lender[3] for the project and serving Wachovia with the notice. (1 AA 56.)

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[1] In 2012, the Legislature recodified and modified the mechanic's lien laws, in the process moving them from Civil Code section 3082 et seq. to section 8000 et seq. By their terms, however, the new provisions apply only to work performed after July 2012, which does not include this case. (Civ. Code § 8052.) Thus, all references in this brief to the mechanic's lien portion of the Civil Code are to the statutes in force prior to 2012. For the court's convenience, all statutes cited in this brief are reprinted in the footnotes.

[2] Civil Code section 3097: "'Preliminary 20-day notice' . . . means a written notice from a claimant that is given prior to the recording of a mechanic's lien . . . [that must] be given to the owner or reputed owner, to the original contractor, or reputed contractor, and to the construction lender, if any, or to the reputed construction lender . . . ."

[3] While R3's preliminary notice simply called Wachovia "lender," Civil Code section 3097 establishes that the lender identified on a preliminary notice is the "construction lender."

On January 25, 2008, Cass recorded a mechanic's lien against "KOHL'S DEVELOPMENT, First Street and Commerce Way" in the amount of $1,835,999.59. (1 AA 20-21.) On June 9, 2008, R3 recorded a mechanic's lien against "1491 E. SECOND STREET MARKET PLACE" in the amount of $611,374.14. (1 AA 58.) Palomar also recorded a mechanic's lien, in the amount of $129,297.45. (1 AA 68-69.)

On April 8, 2008, Cass brought an action for, in relevant part, foreclosure of its mechanic's lien. (1 AA 1.) R3 filed an action to foreclose on its mechanic's lien on September 5, 2008. (1 AA 41.) Neither complaint named Wachovia as a defendant, though they both included allegations against dozens of "Doe" defendants. Palomar filed a foreclosure complaint on September 17, 2008, but unlike Cass and R3, Palomar specifically named Wachovia as a defendant. (1 AA 61.)

On June 16, 2008, pursuant to Code of Civil Procedure section 474,[4] Cass amended its complaint to name Wachovia Bank as Doe 91. (1 AA 27.) However, Doe

[4] Code of Civil Procedure section 474: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and when his true name is

91 was *not* included as a defendant in the complaint's mechanic's lien foreclosure allegations. Rather, Doe 91 was named in an allegation involving a subdivision improvement bond (which is long-dismissed and not on appeal). (See 1 AA 8-9.)

In December 2008, as part of a federally orchestrated bank recapitalization program, Wells Fargo purchased Wachovia and all its assets and liabilities, including parcels 1 and 3 and the instant lawsuit. (1 AA 173.) Wells Fargo has stipulated that it is the corporate successor of Wachovia and therefore stands in its shoes for the purpose of this litigation. (2 RT 369.)

Cass did not file an amendment naming either Wells Fargo or Wachovia as a defendant in its mechanic's lien cause of action until May 24, 2010 — more than two years after recording its lien. (1 AA 112.) R3 did not do so until September 13, 2010, an even longer 27-month delay. (2 AA 452.)

The litigation proceeded apace. On September 27, 2011, Wells Fargo submitted motions for summary judgment against Cass and R3. (1 AA 124; 1 AA 196.) The

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discovered, the pleading or proceeding must be amended accordingly . . . ."

motions contended that Cass and R3 improperly substituted Wachovia as a Doe defendant, because they knew when filing their complaint that Wachovia was the "construction lender" for the project. Therefore, they knew it had an interest in the property, meaning their substitution should not have related back to the filing of the complaint.

Thus, Wells Fargo contended, Cass and R3 failed to name Wachovia in their foreclosure cause of action within 90 days of recording their mechanic's liens, as Civil Code section 3144 requires.[5] Cass recorded its mechanic's lien on January 25, 2008, and amended its complaint to name Wells Fargo in its mechanic's lien cause of action on May 24, 2010 — an 850 day gap. (See 1 AA 20-21, 112.) R3 recorded its mechanic's lien on June 9, 2008, and amended its complaint to name Wells Fargo on September 13, 2010 — an 826 day delay. (See 1 AA 58; 2 AA 452.)

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[5] Civil Code section 3144, subdivision (a): "No lien provided for in this chapter binds any property for a longer period of time than 90 days after the recording of the claim of lien, unless within that time an action to foreclose the lien is commenced in a proper court . . . ."

Cass and R3 opposed on the ground that their amendments substituting Wells Fargo for Doe defendants related back to the initial filing of their complaints, which occurred within 90 days after they filed their mechanic's liens. (2 AA 279, 283-284, 385, 387-389.) They argued that *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554 (*Westfour)*, a case discussed at length in the argument section below, meant they did not need to name Wachovia at the time they filed their complaints, because their knowledge it was the construction lender did not establish that they knew it had any ownership interest in the property. They also argued that only interests with "priority" junior to theirs needed to be named, and since they had no duty to conduct a title search, they could never know the priority of Wachovia's interest as compared to their own.

Wells Fargo countered that Civil Code section 3087[6] — a statute the *Westfour* court did not consider — along with California Supreme Court precedent establish that a

[6] Civil Code section 3087: "'Construction lender' means any mortgagee or beneficiary under a deed of trust lending funds with which the cost of the work of improvement is, wholly or in part, to be defrayed, or any assignee or successor in interest of either, or any escrow holder or other party holding any funds furnished or to be furnished by the owner

construction lender like Wachovia *by definition* has an ownership interest in property. Thus, a known construction lender should always be timely named in a mechanic's lien foreclosure action, since it may be the only opportunity it has to defend its interest. (3 AA 485-489.) Wells Fargo also explained that plaintiffs' "priority" argument contradicts Supreme Court precedent, lacks a basis in statute, and would upset the careful balance of due process concerns captured in the mechanic's lien statutes. (3 AA 489.)

The superior court denied Wells Fargo's motions for summary judgment. (1 RT 1-13.) Cass, R3, and Palomar's claims for foreclosure of their mechanic's liens proceeded to a consolidated six day bench trial which began on February 21, 2012. (1 RT 14.) Foreclosure was the *only* cause of action that plaintiffs brought to trial. (See 3 AA 493-509.)

At trial, Cass sought a foreclosure judgment on its mechanic's lien of $2,023,896.21, even though the lien on which it sought to foreclose was for $1,835,999.59. (1 RT 265-266.) Cass contended that 361 Group owed it more than

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or lender or any other person as a fund from which to pay construction costs."

Cass's lien stated, and most of the evidence Cass proffered at trial consisted of both signed and unsigned "change orders" from 361 Group, which Cass argued were valid descriptions of the "reasonable" work it performed and which, when added up, came to a total bill greater than its lien. (See, e.g., 1 RT 255-256, 265-273.) Wells Fargo responded that irrespective of its claimed debt, Cass was limited to seeking the amount of the lien as a matter of law because its action only sought foreclosure of that lien, rather than damages for breach of contract. (4 AA 843-846.) Tellingly, Cass's president, Kyle Nelson, testified that Cass knew before recording the lien that the amount it would eventually be seeking would be greater than the amount stated in the lien, but admitted Cass recorded the lien anyway. (2 RT 299-300; see also 3 RT 693 [admission by Cass's counsel].)

Also at trial, Wells Fargo renewed its argument from summary judgment that plaintiffs' two-year-plus delay in naming Wachovia to their mechanic's lien foreclosure causes of action rendered those actions untimely, because Civil Code section 3087

establishes that a construction lender has an ownership interest in property sufficient to require it be timely sued in a lien foreclosure action. (3 RT 730-735.)

Further, Wells Fargo argued that pursuant to Civil Code section 3130,[7] Cass and R3 should have apportioned their liens between the parcels of land Kohl's and Wells Fargo owned, rather than levying on all three parcels together, because without apportionment the lien appears to overstate the cloud on the title of each parcel. (3 AA 567-572; 3 RT 740.) Because plaintiffs did not apportion their liens, Wells Fargo requested the superior court invoke its equitable discretion, expressly granted under

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[7] Civil Code section 3130: "[(1)] In every case in which one claim is filed against two or more buildings or other works of improvement owned or reputed to be owned by the same person or on which the claimant has been employed by the same person to do his work or furnish his materials, whether such works of improvement are owned by one or more owners, the person filing such claim must at the same time designate the amount due to him on each of such works of improvement; otherwise the lien of such claim is postponed to other liens. . . . [(2)] For all purposes of this section, if there is a single structure on more than one parcel of land owned by one or more different owners, it shall not be the duty of the claimant to segregate the proportion of material or labor entering into the structure on any one of such parcels; but upon the trial thereof the court may, when it deems it equitable so to do, distribute the lien equitably as between the several parcels involved."

section 3130, to judicially apportion the lien amount. (3 RT 737, 740.) During trial, the superior court admitted as much evidence as a court sitting in equity could possibly need to determine such an apportionment, including competing potential apportionment calculations from:

- Cass (1 RT 96-100; 7 AA 1623-1626),
- R3 (2 RT 455; 9 AA 1990-1993),
- Kohl's (1 RT 187; 6 AA 1235-1238), and
- Wells Fargo (3 RT 558; 8 AA 1887-1891).

The superior court also took testimony relevant to apportionment, such as that of Cass's president, Kyle Nelson, and vice-president, Jerry Gaier. Nelson and Gaier both testified that many of Cass's costs on which its mechanic's liens were based resulted from Kohl's decision to rush construction to open its department store in time for the 2007 holiday season, and that this acceleration did not benefit Wells Fargo's parcels. (1 RT 116; 2 RT 331.)

Near the end of trial, Palomar moved for judgment as a matter of law pursuant to Code of Civil Procedure section 631.8 on the ground it had established its prima facie case for foreclosure on its lien and no defense was presented. (3 RT 671.) Because Palomar had timely named Wachovia in its complaint, the 90-day limitation did not present a problem. The superior court granted Palomar's motion, reserving only the question whether a 7% or 10% interest rate applied to prejudgment interest. (3 RT 673-76.) The court entered final judgment for Palomar on March 23, 2012, in which it included a prejudgment interest rate of 10%. (4 AA 812.) Palomar sent notice of entry on April 18, 2012 (4 AA 814), and Wells Fargo filed a timely notice of appeal from that judgment (related to prejudgment interest only) on June 18, 2012 (4 AA 888).

Trial concluded, and the superior court ruled in favor of Cass and R3 on their mechanic's lien foreclosure claims. (4 AA 819-821.) The court again rejected Wells Fargo's timeliness argument. (4 AA 821.) The court also held that Cass and R3 were not required by Civil Code section 3130 to apportion their liens, and it refused to apportion the liens judicially. (*Ibid.*)

Further, without explanation, the superior granted Cass's request for a foreclosure judgment in an amount greater than the lien on which it foreclosed — $2,023,896.21, which is $187,896.62 more than the figure Cass recorded in its lien. (4 AA 821.) It granted R3's request for a foreclosure judgment of $415,061.89, which is the amount of its lien minus sums paid to other subcontractors on its behalf. (*Ibid.*) Finally, also without explanation, the court held that prejudgment interest applies to Cass's mechanic's lien, and at a 10% rather than 7% rate. (*Ibid.*) It held R3 waived prejudgment interest by listing "0%" as the rate of interest on its lien. (*Ibid.*)

Wells Fargo filed objections to these aspects of the statement of decision (4 AA 859-864), which the superior court overruled. (4 AA 876-877). On May 25, 2012, the superior court entered final judgment for Cass and R3. (4 AA 853-854.) Plaintiffs served notice of entry on June 15, 2012 (4 AA 878-879), and Wells Fargo filed a timely notice of appeal on July 9, 2012 (4 AA 928).

Kohl's filed a timely motion for new trial and motion for JNOV, which Wells Fargo joined. (4 AA 923-924, 934-943; 5 AA 997-998.) The superior court denied

both motions on August 20, 2012. (5 AA 1032.) In so doing, the court expressly held that a mechanic's lien claimant may obtain a foreclosure judgment in an amount greater than the lien foreclosed upon. (*Ibid.*) On September 18, 2012, Wells Fargo filed an amended notice of appeal referencing the post-trial motions. (5 AA 1038.)

Wells Fargo has since satisfied the judgment in favor of Palomar other than prejudgment interest, for which it awaits this court's resolution of that question in this appeal.

Statement of Appealability

This appeal arises from a judgment for foreclosure of mechanic's liens after a bench trial, and is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1).

Standard of Review

Wells Fargo's claims of error in the superior court's judgment on the basis of timeliness and the Civil Code's definition of "construction lender," the application of prejudgment interest, and limiting Cass's foreclosure judgment to the amount of its lien,

all raise questions of pure law and are thus reviewed de novo. (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 424.) Wells Fargo's claims of error in the superior court's refusal to apportion Cass's and R3's liens between the parcels are reviewed for abuse of discretion. (Civ. Code, § 3130.)

Argument

I. The Superior Court Erred In Allowing Cass and R3 To Wait More Than Two Years Before Naming Wells Fargo or Wachovia In Their Mechanic's Lien Foreclosure Causes of Action.

The mechanic's lien statutes, which are rooted in the state Constitution, are a product of the Legislature's tightrope-balanced walk between the needs of construction subcontracting companies like Cass and R3 to obtain payment for their work, and the due process rights of parties with an ownership interest in real property who never signed any contract with those companies. (Cal. Const., art. XIV, § 3; Civil Code, § 3082 et seq.) "The mechanic's lien law is a legislative attempt to adjust the respective interests between property owners and mechanics who improve the owners' property." (Miller & Starr, 10 Cal. Real Estate (3d ed. 2001) § 28:6, p. 24.) It "is a two-way street, requiring a

balancing of the interests of both lien claimants and property owners," because "'[i]t is no less the duty of the legislature, in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws.'" (*Borchers Bros. v. Buckeye Incubator Co.* (1963) 59 Cal.2d 234, 238-239; see also Miller & Starr, *supra*, § 28:6, p. 25 ["On the one hand, it is intended to assure payment to the mechanic for the value of the labor and materials applied to improve the owner's property. On the other hand, it is also intended to provide reasonable requirements for the imposition and enforcement of the lien for the protection of the property owner. Thus, the purpose of the lien law is to protect property owners as well as claimants"].) Therefore, "[mechanic's] lien laws are not to be applied blindly without regard to the rights of property owners . . . . [as the] Supreme Court recognized liens often result from activities of third parties over which the owner has no control and of which he may be unaware." (*Baker v. Hubbard* (1980) 101 Cal.App.3d 226, 233-234.)

As part of this balancing, courts have held that while mechanic's lien laws are by and large liberally construed, "'where the Legislature has provided a detailed and specific mandate as to the manner or form of serving notice upon an affected party that its property interests are at stake, any deviation from the statutory mandate will be viewed with extreme disfavor.'" (*San Joaquin Blocklite, Inc. v. Willden* (1986) 184 Cal.App.3d 361, 365-366 [finding mechanic's lien ineffective where claimant failed to send a required preliminary notice by "registered or certified mail," even though owner conceded he had actual knowledge of contractor's identity anyway].) The "legislature has prescribed certain procedural and substantive conditions precedent to the creation and enforcement of a lien . . . . The mechanic must comply strictly with each of these requirements in order to foreclose a lien on the owner's property." (Miller & Starr, *supra*, § 28:6, p. 27; see also *Halbert's Lumber, Inc. v. Burdett* (1988) 202 Cal.App.3d Supp. 14, 17 [failure to file mechanic's lien foreclosure claim in correct county within 90-day timeframe forever barred that claim because "the right to a mechanic's lien depends upon strict compliance with the requirements of the mechanic's lien statutes"]; *States Shingle Co. v. Kaufman*

(1964) 227 Cal.App.2d 830, 834-836 ["The choice of a period of limitation for the enforcement of mechanics' liens is purely legislative. Ever since 1872, [the Legislature has] required that construction lien foreclosure actions be commenced in 'a proper court' within 90 days after lien filing" (citations omitted)].)

Here, the superior court permitted Cass and R3 to substitute Wells Fargo as a "Doe" defendant in their mechanic's lien foreclosure causes of action more than 800 days after they served their preliminary notices, despite the strict 90-day statutory time limit set in Civil Code section 3144. (1 AA 112; 2 AA 452.) It did so based on Cass and R3's contention that their substitution "relate[d] back" to their initial timely filing of their complaints pursuant to Code of Civil Procedure section 474. (4 AA 821.) That statute allows a plaintiff to relate back an untimely naming of a defendant if the plaintiff is "ignorant" of the potential defendant's "true name" at the time of filing. (Code of Civ. Proc., § 474; see *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 180 (*Woo*).)

In so holding, the court held that Cass and R3 did not know Wachovia had an ownership interest in the property when they filed their complaints, but instead that "the

interests of [Kohl's] and [Wells Fargo] were first identified during the statutory discovery process." (4 AA 821.) To reach that conclusion, the superior court rejected Wells Fargo's contention that Cass's and R3's listing of Wachovia as the "construction lender" on their preliminary notices meant they knew *before filing their complaints* that Wachovia had an interest in the property sufficient to require that a plaintiff name Wachovia in a foreclosure lawsuit. (3 AA 474-478, 485-489.)

Cass and R3 offered two explanations why they were "ignorant" of Wachovia's interest despite knowing it was a construction lender on the project. *First*, they contended that *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, stands for the propositions that knowledge of a construction lender's identity does not establish knowledge that the construction lender has an interest in the property necessitating it be sued in a foreclosure action. *Second*, they contended that a mechanic's lien foreclosure plaintiff need only name parties with "junior" priority interests, and that they had no way of knowing the priority of any interest Wachovia might have had because a mechanic's

lien plaintiff need not conduct a records search to discover those with recorded interests in the property. (See 2 AA 279-286, 385-393.)

For the reasons explained below, both of these arguments are critically flawed. Cass's and R3's undisputed factual knowledge that Wachovia was the construction lender at the time they filed their complaints meant they must have named Wachovia in those complaints because, pursuant to Civil Code section 3087, they knew it had an interest in the property being foreclosed upon. Thus, the trial court erred by allowing Cass and R3 to relate back their untimely naming of Wells Fargo to the date they filed their complaints. Likewise, Supreme Court precedent forecloses any argument that only "junior" interests need be named in a mechanic's lien foreclosure action.

A. Civil Code section 3087, which Westfour *did not consider, establishes that Cass and R3 had "actual knowledge" of Wachovia's interest in the property at the time of filing sufficient to require that it be timely named in their foreclosure suit.*

For a plaintiff to relate a "Doe" substitution back to the date the complaint was filed, it must be "actually ignorant" of the defendant's identity at the time it files its complaint. (*Woo*, *supra*, 75 Cal.App.4th 169, 177, 180; Code of Civ. Proc., § 474.) In

other words, the plaintiff must have "actual knowledge" of a defendant's identity when filing its complaint to be denied the privileges of section 474 — "constructive" knowledge, or knowledge that could be gained from "exercise[ing] reasonable diligence" (i.e. making a reasonable inquiry) is not enough. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 371, 376 ["Under section 474 a plaintiff is considered to be 'ignorant of the name' of a defendant not only when he lacks knowledge of the defendant's identity but also when he knew the identity of the person but was ignorant of the facts giving him a cause of action against the person. Moreover, there is no requirement under section 474 that a plaintiff exercise reasonable diligence in discovering either the true identity of fictitious defendants or the facts giving him a cause of action against such persons"]; see *I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285 [differentiating actual knowledge (knowing a person's name constitutes actual knowledge of the person's name) from constructive knowledge (knowing a person's name constitutes constructive knowledge of the person's address, which must be looked up)] (*I. E. Associates*).)

Thus, in *Grinnell Fire Protection System Co. v. American Sav. & Loan Assn.* (1986) 183 Cal.App.3d 352, 359 (*Grinnell*), the court applied these principles to hold that a mechanic's lien plaintiff "is charged only with actual knowledge rather than information the plaintiff could have obtained by reasonable diligence." The *Grinnell* court held that under section 474, a plaintiff has no duty to conduct a title records search for deed of trust beneficiaries to relate back the later naming of one of those beneficiaries in a foreclosure complaint using section 474's fictitious naming device. (*Ibid.*)

Similarly, in *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1560 — a case that at first blush may seem on point with this one, but is not — the court held that a mechanic's lien claimant properly substituted a construction lender, under section 474, as a fictitious foreclosure defendant more than 90 days after the claimant recorded its mechanic's lien. Even though the construction lender had recorded a deed of trust, following *Grinell*, the court found only actual knowledge of the construction lender's interest via the deed of trust, not constructive knowledge or knowledge discoverable after a reasonable inquiry via a records search, could preclude use of section

474's fictitious naming device. The court further concluded that because the plaintiffs did not have actual knowledge of the deed of trust, the fact that the plaintiffs knew the bank was the "probable . . . construction lender" was "irrelevant." (*Ibid.*) *Westfour* did not otherwise address the meaning of the term "construction lender."

Westfour differs from this case in two critical respects. First, unlike in *Westfour*, Cass and R3 listed Wachovia as the construction lender in their preliminary notices months before they filed their foreclosure complaints. Thus, there is no dispute that Cass and R3 had "actual knowledge" that Wachovia was the construction lender long before they filed their complaints. This raises the question whether a construction lender, by its very nature, has an "interest" in property sufficient to require that it be named in a foreclosure complaint. *Westfour* said no, calling it "irrelevant," but without any explanation why.

It's a question the court should have considered carefully. California courts have consistently, for the past three-quarters of a century, defined the class of "interested" parties that must be sued in mechanic's lien foreclosure actions exceedingly broadly:

"'anyone interested, whether as owner, mortgagee, lien claimant, or otherwise, anyone who may defend against the lien, or show by competent evidence that it is not a lien as against his interest, has the right to invoke the [limitations] statute, if the action be not commenced as against him within the statutory period.'" (*Paramount Securities Co. v. Daze* (1933) 128 Cal.App. 515, 518 [adopting holding of Washington Supreme Court on identical statute] (*Paramount*).) Likewise, in *Riley v. Peters* (1961) 194 Cal.App.2d 296, 297-298, the court held mechanic's lien claimants who sued property owners but failed to join, among others, a trustee of a deed of trust, could not foreclose because the trustee — who was not even a beneficiary — was still an "interested part[y]" who was not timely sued.

Modern courts continue to rely on the broad interpretation of "interested" parties for mechanic's lien foreclosure purposes laid down in *Paramount*. "The term 'owner' is otherwise undefined in the mechanic's lien laws; case law has interpreted 'owner' in these cases to mean 'anyone interested, whether as owner, mortgagee, lien claimant, or otherwise, anyone who may defend against the lien . . . .' [A] judgment foreclosing a lien

must name all parties having an interest in the subject property, and is not enforceable against any party who has an interest in the property who is not named as a defendant." (*Barr Lumber Co. v. Old Ivy Homebuilders, Inc.* (1995) 34 Cal.App.4th Supp. 1, 6, italics omitted [citing *Paramount*] (*Barr Lumber*).)

Yet despite this broad language, that "anyone who may defend against the lien" has an "interest" and should be named, the *Westfour* court held it "irrelevant" whether a party is a construction lender. (*Westfour*, *supra*, 3 Cal.App.4th at p. 1560.) The *Westfour* court offered no authority for this assertion.

Critically — and this is the second major difference between this case and *Westfour* — the *Westfour* court did not address the directly relevant, on-point statute that defines what a "construction lender" is: Civil Code section 3087. Section 3087 defines a "construction lender" as "any *mortgagee* or *beneficiary under a deed of trust* lending funds with which the cost of the work of improvement is, wholly or in part, to be defrayed, or any assignee or successor in interest of either, or any escrow holder or other party holding any funds furnished or to be furnished by the owner or lender or any other person as a

fund from which to pay construction costs." (Italics added.) Thus, a construction lender is always, by definition, one of three things: (1) a "mortgagee," (2) a "beneficiary under a deed of trust," or (3) an "escrow holder or other party holding any funds furnished or to be furnished by the owner or lender or any other person as a fund from which to pay construction costs." (*Ibid.*)

Courts have *expressly* held that a "mortgagee" and a "beneficiary under a deed of trust" are "interested" parties that *must* be named in mechanic's lien foreclosure actions. (See *Paramount*, *supra*, 128 Cal.App. at p. 518 [mortgagee]; *Whitney v. Higgins* (1858) 10 Cal. 547, 551 [mortgagee] (*Whitney*); *Monterey S. P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 459 [beneficiary under a deed of trust].)

Courts have not directly addressed whether an "escrow holder or other party holding any funds furnished or to be furnished by the owner or lender or any other person as a fund from which to pay construction costs" has an interest in property in the mechanic's lien context. But an escrow agent is like the trustee in *Riley v. Peters*, *supra*, 194 Cal.App.2d at pp. 297-298, overseeing the disposition of property for a principal,

and the *Riley* court found the trustee was an "interested" party that the plaintiffs failed to timely sue. (See *Los Angeles Trust and Savings Bank v. Ward* (1925) 197 Cal. 103, 109 [noting that while an escrow agent is not technically a trustee, there are many similarities between the escrow agent's duties and those of a trustee].) Also, it makes sense that a construction lender escrow is a necessary party to a mechanic's lien complaint because the escrow would need instructions from the court on the disposition of the funds.

Further, here, Cass and R3 had actual knowledge that Wachovia Bank — a bank, not an escrow or other type of entity — was the construction lender. Banks are in the business of lending money, not disbursing funds for third parties. The only money-lending, bank-like construction lenders specified by section 3087 are mortgagees and beneficiaries under deeds of trust, which the *Paramount*, *Whitney*, and *Monterey* courts made clear *must* be named in mechanic's lien foreclosure actions. The *Westfour* court never considered these arguments. Additionally, in this case, Cass's president Kyle Nelson was specifically asked at trial "based upon your own understanding, what is a

construction lender?" (1 RT 274.) He replied: "A lender that puts a mortgage on a piece of property." (*Ibid.*)

Thus, pursuant to Civil Code section 3087, Cass and R3 had actual knowledge Wachovia was a "mortgagee or beneficiary under deed of trust," and thus an interested party, the moment they knew it was the "construction lender." (So did their co-plaintiff, Palomar — and, accordingly, Palomar *named* Wachovia in its mechanic's lien foreclosure cause of action in the complaint it filed at virtually the same time as Cass and R3.)

Moreover, Cass and R3's knowledge was "actual knowledge," as opposed to "constructive knowledge." Constructive knowledge "means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person' . . . ." (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1190.) Said differently, knowledge of "circumstances [that] might have put [the plaintiff] on inquiry" about certain facts "is by definition constructive . . . knowledge." (*I. E. Associates*, *supra*, 39 Cal.3d at p. 285; see *Romak Iron Works v. Prudential Ins. Co*. (1980) 104 Cal.App.3d 767, 775 [constructive knowledge is the kind of knowledge that would be learned from a title

records search when the construction lender had recorded a deed of trust]; compare Civ. Code, § 18 [differentiating between "actual" notice, which is made up of "express information," with "constructive" notice, which is "imputed by law"] with Civ. Code, § 19 [defining that legal imputation to mean: "[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact"].)

Cass and R3's knowledge of Wachovia's interest in the property is *not* constructive knowledge. Here, there is no "inquiry" Cass and R3 needed to undertake, nor "reasonable diligence" they needed to perform, to have actual knowledge of Wachovia's interest. Because it is undisputed that Cass and R3 had actual knowledge Wachovia was the construction lender from their preliminary notices, Cass and R3 did not need to do anything to "discover" that Wachovia held an ownership interest in the property. They simply had to know the law, which is itself a fundamental presumption of all law. (See

Stark v. Superior Court (2011) 52 Cal.4th 368, 396 ["'It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for violation thereof'"].)

Accordingly, because Cass and R3 had actual knowledge pursuant to Civil Code section 3087 that Wachovia was an "interested" party when they identified it as the construction lender in their preliminary notices before they filed their complaints, they could not employ the fictitious name procedures of Code of Civil Procedure section 474. Their inexplicable failure to follow Palomar's example and name Wachovia within 90 days of recording their mechanic's liens means the superior court erred in finding their foreclosure claims against Wells Fargo timely filed.

B. Contrary to Cass and R3's arguments in the trial court, a mechanic's lien plaintiff must file its foreclosure action against all interested parties, not merely those it knows have a "junior" interest.

Cass and R3 argued in the trial court that even if they had actual knowledge of Wachovia's interest in the property by way of Civil Code section 3087, they still did not have actual knowledge that Wachovia was a necessary party to sue because only interests in the property "junior" to their own are affected by their lien, and they could never know

the priority of Wachovia's interest because they have no duty to conduct a title search. This argument is, however, directly foreclosed by Supreme Court precedent.

In *Whitney*, *supra*, 10 Cal. 547, 551, the Supreme Court considered the question whether a party foreclosing on a mechanic's lien need name parties with interests acquired after the commencement of the foreclosure suit. The court found no, interests acquired after *suit* is filed need not be named in the suit. However, the court held that for interests existing before suit is filed, a mechanic's lien foreclosure plaintiff must "make all incumbrancers, prior and junior, existing at the filing of the [lawsuit], parties," and "[i]f such purchasers or incumbrancers are not made parties, they are, in no respect, bound by the decree or proceedings thereunder." (*Ibid.*)

This principle tracks the broad understanding of "interests" identified in *Paramount*, *supra* 128 Cal.App. at p. 518, and *Barr Lumber*, *supra*, 34 Cal.App.4th Supp. at p. 6, that "anyone interested, whether as owner, mortgagee, lien claimant, or otherwise, anyone who may defend against the lien" be named in the suit. Few if any other due process protections exist for innocent property owners who never signed nor violated any

contract with the construction subcontractors. Accordingly, it does not matter whether Wachovia's interest in the property was senior or junior to Cass's and R3's mechanic's liens, because its interest (which, as explained *ante* section I.A, they had actual knowledge of) unquestionably existed before they filed suit.

Further, as a policy matter, Cass and R3 invite a rule that is too clever by half, because it would eviscerate one of the legislature's few requirements that protect property owners' due process rights — the requirement that mechanic's lien claimants name all parties with known interests. (*Barr Lumber*, *supra*, 34 Cal.App.4th Supp. at p. 4 [as a matter of due process, "[c]ourts have reached the conclusion that *all parties to be bound by the judgment* must be joined in the foreclosure action within 90 days of the filing of the mechanic's lien" (italics added)].) Their rule would allow a foreclosure plaintiff to claim ignorance of the priority of *every* interest in property, using its "uncertainty" about priority to avoid timely naming interested parties until, as here, years after litigation initially commenced. Such a rule would also increase uncertainties in the real property market beyond the Legislature's intent, because construction lenders with ownership

interests might not have any notice their property has become party to foreclosure proceedings. This court should reject that invitation.

Accordingly, for all these reasons, the superior court erred in finding that Cass and R3's years-late naming of Wachovia / Wells Fargo related back to their initial complaint, because Civil Code section 3087 makes clear that a construction lender bank is an interested party that must be named in a foreclosure complaint regardless of the priority of its interests. Therefore, this court should reverse the judgment against Wells Fargo. Notably, this result would not leave Cass and R3 wholly without remedy, because Kohl's *was* timely named so cannot make a similar argument.

II. The Superior Court Erred In Granting Cass's Foreclosure Judgment In An Amount Greater Than The Value Of The Lien On Which It Foreclosed.

Cass recorded its mechanic's lien on January 25, 2008, for $1,835,999.59. (1 AA 20-21.) Although Cass acknowledged at trial that it knew ahead of time it would claim contractual debts greater than that amount, based on unbilled work it knew it had completed before filing the lien, it still recorded the lien. (2 RT 299-300; 3 RT 693.) At

trial, Cass sought a foreclosure judgment of $2,023,896.21 on its lien, which is $187,896.62 more than the amount stated in the lien that Cass recorded. (1 RT 265-266.)

The superior court granted judgment in the amount Cass requested, on the ground that Cass's evidence showed it had billed the larger amount under its contract with 361 Group. (4 AA 821.) Wells Fargo and Kohl's challenged this conclusion in their post-trial motions, arguing that the maximum amount one can obtain by foreclosing on a lien is the amount stated in the lien. (4 AA 923-924, 934-943; 5 AA 997-998.) The superior court denied those motions, relying on Civil Code section 3261 for the proposition that mistakes in a lien do not invalidate the lien, and *Nason v. John* (1905) 1 Cal.App. 538 (*Nason*), for the proposition that a lien claimant is entitled to recover the amount owed when the lien was recorded. (5 AA 1032.)

The superior court misanalyzed both propositions. While Civil Code section 3261 states that "[n]o mistake or errors in the statement of the demand . . . shall

invalidate the lien," Wells Fargo does not seek to invalidate the lien on this ground. It merely seeks to limit foreclosure of the lien to the amount stated in the lien. The superior court's citation of *Nason v. John* is likewise perplexing, because the case does not appear to support the proposition for which the court cited it in any way. *Nason* simply reversed a judgment for foreclosure of a mechanic's lien because the complaint did not allege that the claimant was owed any money. (*Nason*, *supra*, 1 Cal.App. at p. 540 ["[t]here is in the complaint no attempt to allege that at the time of filing the notice of lien or of bringing the action there was anything owing from the owner (appellant) to the contractor . . . [t]hat such an allegation is necessary to state a cause of action in this class of cases is well settled . . ."].) It had nothing to do with whether a lien claimant can foreclose on a lien in an amount greater than the lien.

To the contrary, a mechanic's lien "is in the nature of a mortgage and an action for its foreclosure resembles a proceeding to foreclose a mortgage; the same procedural and substantive principles are generally appropriate in both cases." (*Laubisch v. Roberdo* (1954) 43 Cal.2d 702, 708-709.) In a mortgage foreclosure action, there is little question

that "'the recovery must be limited to the amount secured by the mortgage.'" (*Service v. Trombetta* (1963) 212 Cal.App.2d 313, 317 (quoting *Lackenbach v. Finn* (1915) 26 Cal.App. 482, 485).) So, for example, when a bank issues a mortgage on a house, it fixes the amount of the mortgage principal in the mortgage instrument. Should the bank foreclose on the mortgage, it cannot demand a judgment greater than the amount owed on the mortgage on the ground that, say, inflation has lowered the relative value of the mortgage over time. To the contrary, the bank's interest is secured only to the extent of the mortgage amount actually recorded.

Here, however, instead of following the mortgage example, the superior court incorrectly conflated the *right* to a mechanic's lien, and the rules defining its scope and extent, with the *lien itself*, which once recorded, creates the separate, fixed charge on a piece of property. "'The California Constitution gives materialmen . . . an inchoate right to a lien. However, this inchoate right is meaningless unless it is exercised by the recording of a claim of lien. Unless and until a claim of lien is recorded, there is no lien, because there is no charge imposed upon the subject property to secure the owner's

performance of the act of payment to the claimant.'" (*Solit v. Tokai Bank, Ltd. New York Branch* (1999) 68 Cal.App.4th 1435, 1446, original ellipses (quoting *Koudmani v. Ogle Enterprises, Inc.* (1996) 47 Cal. App.4th 1650, 1655-1656) (*Solit*).) "A lien is a *charge* imposed upon *specific property*, by which it is made security for the performance of an act." (Code of Civ. Proc., § 1180, emphasis added.)

In other words, the moment Cass recorded its lien, a formal lien came into existence as a charge on the property in the specific amount recorded. Simply because a claimant might have been able to record a lien in a greater amount than it did does not entitle the claimant to a foreclosure judgment greater than the amount of the lien. That is why Civil Code section 3123, which Cass cited in the trial court and which states "[mechanic's] liens . . . shall be for the reasonable value of the labor, services, equipment, or materials furnished," is inapposite. As in *Solit*, while Civil Code section 3123 gives a claimant a "right" to record a lien for the reasonable value of its labor and services (as well as an avenue by which a defendant might attack the amount claimed in the lien), if the

claimant creates its lien in a lower amount than it could, that lower amount is still the amount of the lien and the most the claimant can foreclose on that lien.

In effect, issuing a foreclosure judgment greater than the lien converts the excess judgment from one *in rem*, on the property, into a judgment *in personam*, against the owners personally. But, "[i]n the absence of a contract between a lien claimant and the property owner, the right to enforce a mechanic's lien against real property does not give rise to personal liability of the owner." (*R. D. Reeder Lathing Co. v. Allen* (1967) 66 Cal.2d 373, 376; see Miller & Starr, 10 Cal. Real Estate (3d ed. 2001) § 28:4, pp. 18-19 ["The purpose of the mechanic's lien law is merely to impose a lien on the property improved by the mechanic's labor and materials as security for payment of the sums due the mechanic. An unpaid mechanic may enforce a mechanic's lien . . . even though there is no privity of contract with the owner. However, in absence of privity of contract with the owner or the owner's voluntary assumption of liability, the owner does not become personally obligated to pay . . . "]; *Booth v. Pendola* (1891) 88 Cal. 36, 44 ["An action to

enforce a mechanic's lien is of the nature of a proceeding *in rem* [and] no personal judgment can be recovered in it . . ."].)

Only in situations in which the contractor and owner are the same entity — undisputedly not the case here — can a court lay a personal judgment against the owner in addition to a foreclosure judgment on the mechanic's lien itself. (See *Golden Gate Bldg. Materials Co. v. Fireman* (1928) 205 Cal. 174, 177-178 ["A lien claimant who has furnished material at the instance of a contractor is entitled to a personal or deficiency judgment against the contractor but not against the owner, unless the complaint shows the existence of a contract, express or implied, between said owner and the claimant . . ."]; see also *Goss v. Strelitz* (1880) 54 Cal. 640, 644 [a "claim of lien is not an instrument in the nature of a written contract" (italics omitted)] (*Goss*).)

Accordingly, the superior court's foreclosure judgment on Cass's mechanic lien in an amount greater than the recorded lien itself effectively violated the basic principles of lien instruments and operated as an improper personal judgment against Wells Fargo, which is not personally liable to Cass. The trial court thus erred. This court should cap

Cass's maximum potential recovery under its mechanic's lien at the amount stated in the lien.

III. The Superior Court Erred In Refusing To Judicially Apportion Cass's and R3's Liens Between Wells Fargo and Kohl's.

Civil Code section 3130 states:

> In every case in which one claim is filed against two or more buildings or other works of improvement owned or reputed to be owned by the same person or on which the claimant has been employed by the same person to do his work or furnish his materials, whether such works of improvement are owned by one or more owners, the person filing such claim must at the same time designate the amount due to him on each of such works of improvement; otherwise the lien of such claim is postponed to other liens . . . .
>
> For all purposes of this section, if there is a single structure on more than one parcel of land owned by one or more different owners, it shall not be the duty of the claimant to segregate the proportion of material or labor entering into the structure on any one of such parcels; but upon the trial thereof the court may, when it deems it equitable so to do, distribute the lien equitably as between the several parcels involved.

Cass and R3 performed supporting work like grading, paving, signage, and piping across all three parcels of the Beaumont development project — both Wells Fargo's

parcels 1 and 3, which do not have any buildings or parking lots on them, as well as Kohl's parcel 2, on which the Kohl's store and parking lot sit. (1 RT 70; 2 RT 447.) At trial, Wells Fargo argued that because the Kohl's structure was on parcel 2, and the rest of the parcels were undeveloped, the grading, signage, piping and other work by Cass and R3 that affected both the developed and undeveloped parcels stretched across "two or more . . . works of improvement," and thus they should have apportioned their liens pursuant to Civil Code section 3130. (3 AA 567-572; 3 RT 735.) The statute prescribes a penalty for failing to apportion such liens whereby the liens lose their priority.

The superior court rejected this argument, holding without additional explanation that Cass's and R3's work was part of "one unified project," thus "[a]llocation between the three parcels was not necessary" and Civil Code section 3130 "does not apply." (4 AA 819, 821.) Wells Fargo and Kohl's argued, in the alternative, for judicial apportionment, but the superior court refused to apportion the liens judicially, offering no explanation why. (3 RT 737; 4 AA 821.)

While Wells Fargo continues to believe Cass and R3 should have apportioned their liens at the outset, because their unapportioned liens created a greater cloud on the title of each parcel than was warranted, it recognizes that given the conflicting evidence presented at trial regarding whether the work Cass and R3 performed was part of a single or multiple "structures" under Civil Code section 3130, the substantial evidence standard of review would make such an argument on appeal difficult. Therefore, it abandons that argument on appeal.

However, Wells Fargo maintains its contention on appeal that the superior court abused its discretion in failing to judicially apportion the lien amounts at judgment. In relevant part, Civil Code section 3130 states that a court trying a foreclosure claim on a mechanic's lien that stretches across multiple parcels "may, when it deems it equitable so to do, distribute the lien equitably as between the several parcels involved."

At trial, each of the parties presented as much evidence as the superior court could need to decide how the liens should be apportioned. This included proposed apportionment calculuses prepared by each party to the suit: Cass (1 RT 96-100; 7 AA

1623-1626), R3 (2 RT 455; 9 AA 1990-1993), Kohl's (1 RT 187; 6 AA 1235-1238), and Wells Fargo (3 RT 558; 8 AA 1887-1891). The court was already familiar with all the other facts and equities of the case, and all the other parties and documents. The superior court articulated no sound basis to refuse to conduct an apportionment.

Moreover, the superior court's refusal to apportion effectively permits Cass and R3 to choose which parcel or parcels they wish to foreclose and force a sale on — and therefore which defendant to collect from. That would be a particularly inequitable result where, as the proposed allocations submitted by all parties make clear here, there is no question that the lien claimants performed work on all the parcels. Should one defendant become bankrupt (and thus immune to an action for contribution), the remaining defendant will be forced to pay the full amount of the foreclosure judgment, a highly inequitable result given that it did not benefit from some of the work.

While the language of Civil Code section 3130 appears to grant the superior court a measure of discretion whether to apportion liens, "'[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call

such action an 'abuse' of discretion.'" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.) While "[i]t is often said that a trial court's exercise of discretion will be reversed only if its decision is 'beyond the bounds of reason' . . . judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion." (*Ibid.*) "'In its discretion,' therefore, is not the equivalent of 'if it wants to' or 'if it feels like it.'" (*Id.* at p. 394.)

Along those lines, this court has reversed unapportioned lien foreclosure judgments where the superior court's refusal to judicially apportion led to inequitable results. Thus in *A. J. Raisch Paving Co. v. Mountain View Sav. & Loan Assn*. (1972) 28 Cal.App.3d 832, 839, where a construction company built a sewer under two adjoining subdivision tracts but timely recorded a mechanic's lien only on one, this court reversed and remanded for the superior court to apportion the liens between the two tracts that equally benefitted from the work (even though the construction company could not

foreclose on one of the tracts because it did not timely record a lien and thus waived its right to lien).

Here, the trial court did not identify a single reason why it would be inequitable or problematic to simply apportion the liens based on the evidence the parties submitted, even though "'[w]hen a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case.'" (*Hendrickson v. Bertelson* (1934) 1 Cal.2d 430, 434.) Meanwhile, its refusal to apportion the liens may force Wells Fargo and Kohl's to needlessly litigate liability or reimbursement in a separate proceeding, before a new judge who must be educated about the complexities of the case, presenting the same evidence the superior court here already reviewed. Given the principles on which a trial court's discretion is based, the superior court's failure to apportion the liens pointlessly defies judicial economy and thus constitutes an abuse of that discretion. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 913 [affirming trial court's consolidation of two proceedings because "[a] separate trial of this issue before a different jury would involve duplicative adjudications with a consequent waste of

judicial time. Though considerations of judicial economy should not dictate an unfair procedure, they are entitled to some consideration in the trial court's exercise of discretion"]; *Schneider v. Vennard* (1986) 183 Cal.App.3d 1340, 1350 [judicial economy was relevant consideration for class certification because it "prevented duplicative class actions, eliminated inconsistent results and avoided undue burdens on the parties and the judiciary"]; cf. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 213 ["Flat Rock's assertion on appeal that the trial court abused its discretion by incorrectly denying it leave to intervene is unsupported by authority or public policies such as judicial economy"].)

Accordingly, this court should reverse and remand with instructions for the superior court to apportion the foreclosure judgment between Wells Fargo and Kohl's.

IV. The Superior Court Erred In Assessing Prejudgment Interest On Unapportioned and Indefinite Liens, and In Granting That Interest at a Rate of 10%.

The superior court incorrectly granted Cass prejudgment interest, and at a rate of 10%. (The court found R3 had waived any claim for prejudgment interest by listing the

interest rate as "0%" on its mechanic's lien, and R3, which did not file a notice of cross-appeal, cannot contest that ruling.) (4 AA 821.)

Prejudgment interest is available on claims that have "damages certain, or capable of being made certain by calculation" before judgment. (Civ. Code, § 3287, subd. (a).) Damages are considered "certain" for purposes of prejudgment interest when a defendant would know, *without a trial*, how much is owed. "'Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages . . . .'" (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173 [holding section 3287, subdivision (a), does not authorize pre-judgment interest where the amount of damages "'depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor'"] (*Fireman's Fund*); see also *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 721 ["prejudgment interest is authorized only if the damages were 'certain, or capable of being made certain by calculation.' 'Damages that must be

determined by the trier of fact based on conflicting evidence . . . do not satisfy this requirement,'" and thus where "the trial court was required to determine the property values [and] was presented with conflicting evidence of those values . . . the requirements under Civil Code section 3287 were not met"] (*Jamison*).)

Here, the superior court erred in granting prejudgment interest for four reasons.

First, Cass and R3's decision not to apportion their liens precluded Wells Fargo from calculating with "certainty" its potential damages before trial, as separate from Kohl's damages. In *Forsgren Associates, Inc. v. Pacific Golf Community Development LLC* (2010) 182 Cal.App.4th 135, 159, this court reversed a superior court's grant of prejudgment interest on a mechanic's lien claim because the construction company failed to apportion its lien between a golf course and adjoining property, both of which benefitted from the work. "Since [the adjoining property owners] did not own the entire property subject to the mechanic's lien and thus were not responsible for payment of the entire amount owed [to the construction company] for work and materials, [the adjoining property owners] should not be required to pay the entire amount of interest on the

mechanic's lien claim . . . [thus t]here was thus no liquidated claim from which interest could be calculated." (*Id.* at pp. 159-160.) Under *Forsgren*, because Cass did not apportion its lien here, it is not entitled to any prejudgment interest, as neither Wells Fargo nor Kohl's are "responsible for payment of the entire amount owed" and so there is no "liquidated" claim applicable to each. Indeed, the judgment amount as to each defendant is *still* uncertain.

Second, by a similar token, Cass's effort to obtain a judgment nearly $200,000 more than the amount stated in its mechanic's lien provides yet another reason that prejudgment interest is inappropriate here, because Wells Fargo could not know with "certainty" what its potential liability under the mechanic's lien would be as of the lien's recordation. (See *Jamison*, *supra*, 164 Cal.App.4th at p. 721 [prejudgment interest appropriate only where liability is "'certain, or capable of being made certain by calculation'"].) To the extent Cass provided Wells Fargo with a statement of its claim by recording in its lien, that statement was at best inaccurate (as established by the judgment Cass sought) or at worst not "truthful" within the meaning of *Fireman's Fund*, *supra*, 234

Cal.App.3d at p. 1173 (as established by Cass's admission during trial that it knew before recordation that its mechanic's lien was for less than the amount it would later seek). Either way, it would have been impossible for Wells Fargo to calculate with "certainty" the exact amount of damages Cass would seek, as would be needed for prejudgment interest to apply.

Third, the amount of Cass's and R3's "damages" was one of the primary issues addressed at trial, because most of Cass's and R3's trial testimony and exhibits were directed to whether their bills were "reasonable." (See, e.g., 1 RT 84-88; 2 RT 414-415, 437-440; 3 RT 524.) The court also considered the reasonableness of Cass's and R3's various "change orders," expressly finding in its statement of decision that "[t]he evidence established that all change orders reflected the reasonable value of labor and materials supplied to the project . . . ." (4 AA 820; see also 1 AA 32 [Cass complaint alleging work was for "reasonable value"].)

Where a mechanic's lien claim is not based on a set contractual amount between two parties in privity of contract, the amount claimed may not exceed "the reasonable

value of their services, which might or might not be the same as the charges agreed upon between [them] and [the general contractor]." (*Rodoni v. Harbor Engineers* (1961) 191 Cal.App.2d 560, 564 [finding prejudgment interest "was improperly awarded" where court adjudicated reasonableness of amount claimed]; see Civil Code, § 3123 [the maximum amount of a mechanic's lien is the lesser of the contract price or the "reasonable value" of work and material].) Therefore, because "the liability of the owner, i.e., the amount of the lien imposed upon its property, is for the reasonable value of the labor done and materials furnished, and such reasonable value (although in this case it was found to be the same as the contract price) cannot be determined until the matter has been adjudicated by the court, interest can be allowed only from the date of judgment." (*Associated Wholesale Elec. Co. v. S. H. Kress & Co.* (1936) 11 Cal.App.2d 592, 593; see also *Jamison*, *supra*, 164 Cal.App.4th at p. 721 ["Damages that must be determined by the trier of fact based on conflicting evidence" are by their nature not entitled to prejudgment interest].) Unlike this matter, the mechanic's lien cases in which courts have awarded prejudgment interest involved certain, liquidated claims for which only

liability, rather than the amount recoverable through foreclosure, was in dispute. (See, e.g., *Sukut-Coulson, Inc. v. Allied Canon Co*. (1978) 85 Cal.App.3d 648, 656 [in a mechanic's lien case, "[w]here there is no dispute over the basis for computation of damages, the fact that one party denies liability does not make the damages unascertainable . . ."].)

Finally, even if this court concludes Cass is entitled to prejudgment interest, the superior court erred in assigning interest at 10% rather than 7%. (Please note this is the only argument Wells Fargo raises that applies to Palomar.) The Legislature has set a prejudgment interest rate for breach of contract actions of 10%. (Civ. Code, § 3289). For non-contract actions, however, the rate for prejudgment interest is 7%. (See *Children's Hosp. and Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 775 [where the action "is not based on contract, the rate of prejudgment interest should be that fixed by article XV, section 1 of the California Constitution; namely, 7 percent per annum"].) There is no question that a mechanic's lien "is not an instrument in the nature of a

written contract" and that an action for foreclosure on a mechanic's lien does not sound in contract. (*Goss*, *supra*, 54 Cal. at p. 644, italics omitted.)

Further, *Royster Construction Co. v. Urban West Communities* (1995) 40 Cal.App.4th 1158, 1164, appears to be the only published opinion addressing the rate of prejudgment interest for mechanic's lien foreclosure claims, and most of its analysis on the subject is in an unpublished portion of the opinion. However, in the published portion, the *Royster* court held clearly that "as for the mechanic's lien claim," although the trial court awarded the plaintiff "interest at 10 percent" from the date of the claimed contractual breach, the judgment should be "modified to award prejudgment interest of 7 percent on the mechanic's lien claim . . . ." (*Id.* at pp. 1164, 1171.)

Here, the superior court, without explanation or analysis, set the prejudgment interest rate owed on the mechanic's lien at 10%. If this court concludes prejudgment interest applies, it should reduce that figure to 7% — but it should find that interest does not apply at all.

Conclusion

Accordingly, for the reasons explained above, this court should reverse the superior court's foreclosure judgment in favor of Cass and R3 and against Wells Fargo because Cass and R3 did not timely name Wells Fargo in their mechanic's lien causes of action. Failing that, this court should (a) reverse the judgment to the extent it included prejudgment interest (especially at 10%), (b) reduce Cass's judgment to, at most, the amount claimed in its mechanic's lien, and (c) remand with an order that the superior court apportion its foreclosure judgment among the parcels.[8]

Respectfully submitted,

California Appellate Law Group
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By: _____
Ben Feuer

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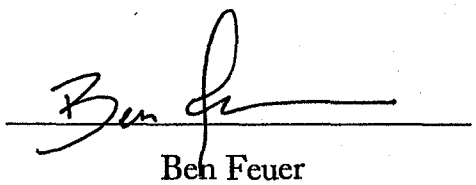
[8] To the extent Kohl's raises an argument on appeal that Cass prematurely recorded its mechanic's lien before it ceased work or the contract terminated, Wells Fargo also joins that argument pursuant to California Rules of Court, rule 8.200, subdivision (a)(5).

Certificate of Word Count

(California Rule of Court 8.204(c)(1))

The text of this double-spaced brief consists of 11,343 words as counted by the Microsoft Word word-processing program used to generate this brief.



Ben Feuer

PROOF OF SERVICE

I, A. Kathryn Parker, declare as follows:

I am employed in the County of San Francisco, State of California and am over the age of eighteen years. I am not a party to the within action. My business address is One Sansome Street, Suite 3670, San Francisco, California 94104. I am readily familiar with the practice of the California Appellate Law Group for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On August 8, 2013, I served the within document entitled:

APPELLANT'S OPENING BRIEF

on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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and electronically on the Supreme Court pursuant to rule 8.212(c)(2), and following ordinary business practices of the California Appellate Law Group by sealing said envelope and

depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at One Sansome Street, San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 8, 2013 at San Francisco, California.

/s/
A. Kathryn Parker