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

JOINT REPLY BRIEF OF APPELLANTS WELLS FARGO BANK, N.A., AND KOHL'S DEPARTMENT STORES, INC.

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Introduction

Respondents' briefs misapprehend a number of appellants' contentions, attacking several arguments Wells Fargo and Kohl's do not make while ignoring a number of critical arguments that they do make. To

best address respondents' somewhat sprawling briefing and for ease of the court, Wells Fargo and Kohl's submit this joint reply brief. The brief is divided into sections for respondents' arguments applicable to both appellants, and for those that apply to each appellant separately.

As explained in the opening briefs, respondents Cass and R3 brought mechanic's lien foreclosure actions against Wells Fargo and Kohl's arising from a commercial development in Beaumont, California. Respondents did not name Wachovia (later absorbed by Wells Fargo) in their foreclosure complaints, even though they identified Wachovia as the "construction lender" on their preliminary notices and Wachovia was the beneficiary of a deed of trust to, and later came to own outright, parcels 1 and 3 of the development. Respondents did not name Kohl's in their mechanic's liens, foreclosure complaints, or other papers and filings, even though Kohl's owned parcel 2 of the development. Additionally, in its

mechanic's lien, R3 identified a specific address that did not include Kohl's parcel. (See Wells Fargo AOB at pp. 2-9; Kohl's AOB at pp. 4-14.)

After trial, the superior court held that respondents properly used the fictitious naming statute to amend their complaint to name Wells Fargo almost two years after the 90-day deadline to do so had passed, and that respondents did not need to name Kohl's or the address of its property in their mechanic's liens or other papers. The court also permitted Cass to include the work of its sub-subcontractor (a suspended corporation) in its own claim, and to obtain a foreclosure judgment significantly greater than the amount of the lien it foreclosed upon. Finally, the court refused to apportion the mechanic's lien between the Wells Fargo's and Kohl's parcels, and assessed prejudgment interest at a rate of 10% on its foreclosure judgment (the only issue that applies to Palomar). (See Wells Fargo AOB at pp. 9-18; Kohl's AOB at pp. 15-28; 4 AA 819-821 [statement of decision].)

For the reasons explained below and in the opening briefs, the superior court prejudicially erred by making each of these rulings, and respondents' briefs do not offer compelling rebuttals to appellants' contentions. Accordingly, this court should reverse the superior court's judgment.

Argument

I. Respondents' Arguments That Apply To Both Appellants Are Without Merit.

A. Cass's argument that its foreclosure judgment may exceed the amount of the lien it foreclosed upon misapprehends the critical distinctions between contract and foreclosure actions discussed in the opening briefs.

Although Cass recorded its mechanic's lien for $1,835,999.59 (1 AA 21), it sought (and obtained) a foreclosure judgment for $2,023,896.21 (4 AA 821), a nearly $190,000 discrepancy. Cass argues that there is "no . . . case law" that limits a foreclosure judgment to the amount of the lien foreclosed upon. (Cass Br. at pp. 24-26.) It further contends that such a

limitation is precluded by Civil Code section 3261,[1] which states that no "mistake or errors" in the amount recorded in a mechanic's lien "shall invalidate the lien," and by Civil Code section 3123, which states that a mechanic's lien may be for the lesser of "the reasonable value" of the work performed or the contract price. (Cass Br. at pp. 24-26.)

Cass's arguments have little merit. Cass's simple assertion that "no case law" limits a foreclosure judgment to the amount of the lien foreclosed upon ignores almost five pages of appellants' briefs that establish the opposite. (See Wells Fargo AOB at pp. 39-44.) Likewise, Cass's analysis of Civil Code section 3261, which provides that errors in the lien amount do not "invalidate" a mechanic's lien, glosses over the fact that appellants do not seek to "invalidate" Cass's lien based on the amount it recorded, but rather merely seek to limit the foreclosure judgment to that amount.

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[1] As in the opening briefs, all mechanic's lien statutory citations in this brief refer to the statutes in effect prior to 2012.

Similarly, Civil Code section 3123's provision that mechanic's liens shall be for the lesser of the reasonable value of the work or the contract price says nothing about a foreclosure judgment exceeding the recorded lien amount.

The only case Cass cites in support of its argument that a judgment in a foreclosure action may exceed the foreclosed lien is *Vowels v. Witt* (1957) 149 Cal.App.2d 257 (*Vowels*). However, Cass misreads the facts of *Vowels* in two critical ways. First, a careful reading of *Vowels* reveals the opinion does not discuss the amount secured by recorded *liens*, but rather only discusses the amounts sought in foreclosure *complaints*. (*Id.* at p. 258 [discussing only amount sought in litigation].) Thus, *Vowels* did *not* affirm a judgment greater than a recorded lien, as Cass asserts.

Second, even if we assume the amount sought in the *Vowels* complaints ($45,996.12) was equal to the amount in the recorded lien, the foreclosure judgment the court granted, $38,002.31, was *less* than that lien — not more, as here. (*Vowels*, *supra*, 149 Cal.App.2d at p. 258.)

Accordingly, *Vowels* is useless to Cass's argument. Cass cites no other authority for the proposition that a lien foreclosure judgment may exceed the amount of the lien foreclosed upon.

Finally, Cass contends Kohl's is "estopped" from challenging the judgment amount because, according to evidence proffered by Cass, a Kohl's representative told Cass to "go ahead and file" a lien knowing that Cass had not completed all its billing. (Cass Br. at p. 25.) This argument is pointless, because even if Kohl's is estopped from challenging the amount of Cass's judgment, Wells Fargo is not.

But Kohl's is not estopped from making this argument, in any event. Although Cass does not cite the law of equitable estoppel, it requires that "'(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon

the conduct to his injury.'" (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1359.) Absent here is element (3): Cass acknowledges that it was aware that its lien did not include the full amount it intended to demand, and thus it was not ignorant "of the true state of the facts." (Cass Br. at p. 25.) Rather, the choice was entirely Cass's whether to knowingly "go ahead and file" its lien in a smaller amount, rather than waiting and filing a lien in the amount it would seek at judgment. Kohl's is not estopped from challenging that decision in later litigation.

B. Cass fails to rebut appellants' argument that the superior court erred by including in Cass's foreclosure judgment funds purportedly owed to its sub-subcontractor, TNT Grading, Inc.

As explained in the opening briefs, during construction, Cass sub-subcontracted to TNT Grading, Inc. some of the grading work general contractor 361 Group hired Cass to perform. (See Kohl's AOB at pp. 17, 40-41.) The superior court included in its foreclosure judgment in favor of Cass $608,018.29 that Cass contended was the value of TNT's work. Cass

did not pay that amount to TNT, but rather contended TNT "assigned" its right to seek reimbursement for its work to Cass. (1 RT 38, 40, 230; 2 RT 364.) However, at trial, Cass did not submit any evidence of this assignment. Also, the Secretary of State had suspended TNT's corporate status so TNT did not, and could not, appear. (*Ibid.*)

In their opening briefs, appellants contended that the superior court erred in permitting Cass to obtain a foreclosure judgment that included the value of work TNT performed and that Cass never paid for, and to permit Cass to claim assignment of TNT's claims without evidence of assignment and while TNT was a suspended corporation. (Kohl's AOB at pp. 17, 40-41.) Cass's response fails to cite a single case to rebut this argument, instead contending only that Cass "is entitled to recover its contract price whether the price includes subcontractors or not." (Cass Br. at pp. 41-42.) This statement is incorrect, for three reasons.

First, Cass's assertion that it is "entitled to recover on its contract price" once again constitutes a misunderstanding of the difference between a breach of contract action and a mechanic's lien foreclosure action. (See Wells Fargo AOB at p. 43.) In a breach of contract action, a party may well be entitled to a judgment in the amount of the contract price, whatever it is. But in a mechanic's lien foreclosure action, which is the only claim respondents took to trial here, a claimant is entitled to "the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, *whichever is less*." (Civ. Code, § 3123, italics added.) The reasonable value of Cass's "labor, services, equipment, or materials furnished" cannot, by definition, include labor performed by a *different* entity than Cass and *which Cass never paid*. Such a result would constitute unjust enrichment to Cass, an inherently inequitable result. (See *Mortgage Guarantee Co. v. Hammond Lumber Co.* (1936) 13 Cal.App.2d 538, 544

["the object [of an equitable lien] is to prevent unconscionable and inequitable assertion of rights resulting in unjust enrichment"].) That is why, as appellants explained, Civil Code section 3140 prohibits duplicative claims by contractors and subcontractors. (See Kohl's AOB at p. 40.)

Second, Cass's brief fails to address appellants' assertion that the record contains no evidence — testimonial or documentary — that TNT actually assigned any rights to Cass. Cass thus appears to concede that the record does not contain substantial evidence of an assignment of rights from TNT. Although the parties once referenced a document during legal argument at trial that purported to be such an assignment, Cass never actually sought to admit that document into evidence. (See 1 RT 165; 4 AA 792.) Without substantial evidence in the record of TNT's purported assignment to Cass, the superior court erred in including work performed by TNT in a judgment for Cass. (See *Kimber v. Jones* (1954) 122 Cal.App.2d 914, 918-919 ["'There can be no question but that proof of the

assignment is essential to a recovery by the alleged assignee where the fact of assignment is put in issue by the pleadings'"]; *Brown v. Curtis* (1900) 128 Cal. 193, 196 ["It was incumbent upon Brown to establish his right to sue, and this necessitated proof of the assignment by which alone he had any such right"].)

Third, even if substantial evidence existed that TNT assigned its interests to Cass, TNT would still have been a suspended corporation at the time of both assignment and trial, a fact that is undisputed. Although Cass contends this should not matter because "[s]uspensions are not permanent" (Cass Br. at p. 42), the record contains no evidence that TNT intended to cure its suspension.

Further, Cass does not address the case law appellants cited establishing that an assignee steps directly into the shoes of an assignor, and that if the assignor is suspended and incapable of prosecuting a legal action, the assignee is similarly rendered incapacitated. In November 2013, the

Second District forcefully reaffirmed this principle, holding in *Cal-Western Business Services, Inc. v. Corning Capital Group* (Nov. 6, 2013, No. B241714) __ Cal.App.4th __ [2013 WL 5936628], that where an assignor of legal rights is a suspended corporation, the assignee is subject to the same incapacity as the suspended assignor, and cannot prosecute the action. (See *id.* at p. *4 ["because a defense based on lack of capacity to sue existed at the time of notice of the assignment and could have been asserted against [assignor] had it brought the action itself, [assignee] was subject to the same defense in suing to enforce the Judgment as [assignor's] assignee"].) Thus, this court should reverse the superior court's judgment for Cass by $608,018.29, the amount it claimed based on work performed by its sub-subcontractor TNT.

C. Cass's assertion that the superior court correctly awarded it prejudgment interest ignores virtually all the arguments and authority appellants raised in their opening briefs, and relies on inapposite authority in its place.

Cass contends the superior court correctly awarded it prejudgment interest under Civil Code section 3287, subdivision (a), because the appellants could have calculated the "amount due" by "adding the unpaid invoices." (Cass Br. at p. 39.) This argument fails for four independent reasons.

First, Cass's assertion that its mechanic's lien foreclosure claim was readily calculable based on its contractual invoices ignores appellants' lengthy explanations in their opening briefs why a claim for foreclosure does not sound in contract, but instead arises from a secured interest — in this case, a mechanic's lien. (Wells Fargo AOB at pp. 37-44; 53-54.) Although a mechanic's lien generally involves work performed pursuant to a contract, foreclosure on such a lien is an entirely different form of action

than a claim for breach of the underlying contract. In a foreclosure action, liability arises not from the underlying contractual invoices, on which a breach of contract action might conceivably be based, but from the lien foreclosed upon. In other words, because neither Wells Fargo nor Kohl's are in privity of contract with Cass, R3, or Palomar, breach of the contracts those subcontracting companies had with the general contractor do not themselves provide a cause of action against the property owners — rather, the recorded lien itself provides that cause of action.

Here, as appellants explained in their opening briefs (and as Cass ignored in its response), Cass knowingly recorded a mechanic's lien in an amount almost $200,000 less than it sought in its foreclosure action. (Wells Fargo AOB at pp. 12, 37-44.) That the lien Cass recorded was for so much less than the foreclosure judgment it sought defeats prejudgment interest because it establishes that Wells Fargo and Kohl's could *not* calculate the potential liability that respondents would seek by looking at

the lien, even though the lien forms the only basis for the foreclosure cause of action. Said differently, the fact that Cass was wrong to seek a foreclosure judgment greater than the lien it foreclosed upon undermines Cass's argument that calculating its invoices would have allowed Wells Fargo and Kohl's to determine their liability, because adding those invoices leads to a figure different than the lien amount.

Second, although Cass conclusorily asserts that it had no duty to apportion its lien under Civil Code section 3130 and therefore its failure to do so could not defeat its entitlement to prejudgment interest (Cass Br. at p. 40), it gives no reason or support for that assertion. Rather, as appellants explained, Cass's choice to record a single lien across all three parcels deprived Wells Fargo and Kohl's of any ability to calculate their *individual* potential foreclosure liabilities. (Wells Fargo AOB at pp. 52-53.) Lacking that ability, Wells Fargo and Kohl's had no way to calculate their separate damages. "The test for recovery of prejudgment interest under section

3287, subdivision (a) is whether defendant (1) actually knows the amount of damages owed plaintiff, or (2) could have computed that amount from reasonably available information. . . . 'If the defendant does not know or cannot readily compute the damages, the plaintiff must supply him with a statement and supporting data so *that defendant* can ascertain the damages.'" (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 391, italics added.) Here, there was no way for Wachovia or Kohl's to determine from Cass's unapportioned lien what their individual liabilities might be. Moreover, Cass did not provide Wachovia or Kohl's with any breakdown of its claim for each parcel (at least until well into the litigation process), and the proportional liability of each of the defendants was hotly contested at trial. (See Wells Fargo AOB at p. 15.) Accordingly, this is not an appropriate case for prejudgment interest.

Cass argues, without record citations, that at the time it recorded its mechanic's lien (which it alternatively lists in the same paragraph as "March

19, 2007" and "March 22, 2007"), LCG-Beaumont LLC was still the property's sole owner, so it had no reason to apportion its lien between the parcels at the time it recorded the lien. (Cass Br. at p 35.) However, the premise of Cass's contention is factually inaccurate — it did not, in fact, record its mechanic's lien until January 25, 2008. (1 AA 20-21). Kohl's took ownership of parcel 2 from LCG-Beaumont on May 17, 2007, when it publicly recorded its deed. (3 AA 663.) Thus, if Cass wanted prejudgment interest, it should have made certain to allow each of the owners to separately calculate their potential liability by apportioning its lien. (See also *post*, pp. 56-60 [discussing Cass's obligation to inquire into property's ownership status when it recorded its mechanic's lien].) Either way, it is incorrect to assert that all three parcels had a single owner at the time it recorded its mechanic's lien, or that that LCG-Beaumont transferred the parcel to Kohl's "secretly." (Cass Br. at p. 12.)

Third, Cass simply ignores authority Wells Fargo cites that a claim for foreclosure on a mechanic's lien against an owner of property who is not in privity of contract with the lien claimant must be subject to a trial for the "reasonable value" of the work performed. The cases Wells Fargo cited stand for the proposition that the necessity of such a trial *always* renders liability uncertain in those types of cases. (See Wells Fargo AOB at pp. 54-56.) This authority establishes that prejudgment interest is always inappropriate where a mechanic's lien claim lies against property belonging to an owner who never contracted directly with the lien claimant, at least where the reasonableness of the amount claimed must be determined at trial.

Finally, the cases Cass cites in support of its claim to prejudgment interest are distinguishable from this case in important respects. (Cass Br. at pp. 38-41.) *University Casework Systems, Inc. v. Superior Court* (1974) 41 Cal.App.3d 263, 266, discusses the liability of a "party to a contract," which

is not the situation here. *Bentz Plumbing & Heating v. Favaloro* (1982) 128 Cal.App.3d 145, 152 (*Bentz*), involved a case in which the parties stipulated the amount of their liability before trial, and their stipulation equaled exactly the contract price minus precisely calculable setoffs, again fundamentally different from this matter. *Roodenburg v. Pavestone Co., L.P.* (2009) 171 Cal.App.4th 185, 190-192, was not even a mechanic's lien case, but rather a breach of contract action in which the contract in the action specifically authorized prejudgment interest. Cass also cites *Vowels*, *supra*, 149 Cal.App.2d 257, 258, for this proposition, but that is another case in which the owner and contractor were the same party, and so the plaintiff and defendant were both in privity of a liquidated contract. Thus, none of Cass's authority on this issue is pertinent.

D. Cass and Palomar's argument that the superior court correctly assigned a 10% prejudgment interest rate, rather than 7%, once again erroneously conflates a foreclosure action with a breach of contract action.

Cass and Palomar do not contest that the Legislature set a 10% rate for prejudgment interest on breach of contract claims and a 7% rate on non-breach of contract claims. (Wells Fargo AOB at pp. 56-57; see Civ. Code, § 3289; *Children's Hosp. and Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 774-775.) Nor do Cass and Palomar contest that they did not obtain a breach of contract judgment against Wells Fargo and Kohl's, but only a judgment foreclosing on their mechanic's lien. Yet, while Cass prominently cites Civil Code section 3289, it fails to note that the plain text of the statute applies only to contract actions, referring to disputes over "obligations" arising from a "breach" of a contract.[2]

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[2] Civil Code section 3289 states: "(a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before,

(footnote continued on following page)

Nonetheless, Cass and Palomar contend that their mechanic's lien foreclosure judgments are entitled to the same 10% prejudgment interest rate as a breach of contract judgment. Cass admits that "no case . . . states [this] obvious fact" (Cass Br. at p. 41), but cites *Bentz*, *supra*, 128 Cal.App.3d 145 in support. However, as discussed above at page 20, *Bentz* involved a stipulation of liability and is inapposite on its facts. Moreover, *Bentz* did not identify *any* particular rate of prejudgment interest, rendering it even less relevant.

Cass relies on a 30-year-old edition of a treatise by Marsh in support of its 10% interest rate contention. However, Marsh's treatise cites *no* case law, reasoning, or policy in support of a 10% prejudgment interest rate in

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until the contract is superseded by a verdict or other new obligation. (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach. For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property."

equity based mechanic's lien cases. Nor does Marsh's treatise distinguish between those mechanic's lien cases in which the property owners are in privity of contract with the lien claimants and those, like this one, in which the owners are innocent and have no contractual relationship with the lien claimants. (See Marsh, California Mechanics' Lien Law and Construction Industry Practice (6th ed. 1996) § 4.75; Cass Br. at p. 41.) If an owner and claimants are in privity of contract, then applying the statutory contractual interest rate to a mechanic's lien claim may make more sense; but here, where there is no privity of contract between the parties, applying a prejudgment interest rate for breach of contract cases is irrational and inequitable. To the extent the Marsh treatise asserts that a 10% prejudgment interest applies to mechanic's liens, this court should rely on the well-worn principle that "a treatise [is] not binding law," and refuse to adopt its conclusion here. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1393; see *Levitz Furniture Co. v. Wingtip*

Communications, *Inc.* (2001) 86 Cal.App.4th 1035, 1042 ["our analysis of the . . . statutes and the policies underlying them leads us to a different conclusion" than the cited treatise]; see also *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 528, fn. 5 ["'authority,' without citation to a supporting statute or case law, is not binding upon this court"].)

Finally, Cass and Palomar contend that Wells Fargo "improperly" cited to portions of *Royster Construction Co. v. Urban West Communities* (1995) 40 Cal.App.4th 1158, 1164, 1171 (*Royster*), that discuss prejudgment interest, because much of that opinion's discussion of prejudgment interest is marked "not certified for publication." (Cass Br. at pp. 40-41; Palomar Br. at pp. 2-3.) However, once again respondents present an argument that is both factually and legally frivolous. As Wells Fargo pointed out directly in the text of its opening brief, while most of *Royster*'s analysis of prejudgment interest is contained in the unpublished portion of the opinion, the *Royster* court left both the issue presented and

its final holding in the "for publication" portions of that opinion. (See Wells Fargo AOB at p. 57; *Royster*, *supra*, 40 Cal.App.4th at p. 1164, 1171) That is all Wells Fargo cited. Indeed, as far as counsel is aware, the unpublished portions of published opinions are not even available through the electronic case reporting services Lexis and Westlaw.

Cass additionally argues that *Royster* is factually inapposite because the *Royster* court reduced the prejudgment interest award on the ground that the contract in that case was signed before 1986, when 10% contractual prejudgment interest came into effect. (Cass Br. at p. 41.) However, nothing in the available published portions of *Royster* indicates that Cass is correct about the court's reasoning. Instead, the published prejudgment interest holding of *Royster* expressly addressed the mechanic's lien foreclosure judgment as differentiated from the judgment for breach of contract. (See *Royster*, *supra*, 40 Cal.App.4th at p. 1171 ["The judgment is modified to award prejudgment interest of 7 percent on the mechanic's lien

claim from May 9, 1987, to the date of judgment. On the breach of contract claim, the judgment is modified to award . . ."].) Accordingly, while the lack of available analysis in *Royster* may limit its overall value as authority, there can be no question that the *Royster* court published its ultimate holding reducing the superior court's 10% prejudgment interest award to 7% (which Wells Fargo cited), and that that holding applied to prejudgment interest for a mechanic's lien foreclosure judgment as distinct from a breach of contract judgment.

E. Respondents' arguments that the superior court correctly refused to judicially apportion the liens have no merit.

At no point in their 83 pages of briefing do respondents question either the reasoning that Wells Fargo and Kohl's employed, or the evidence they identified, in explaining why the superior court erred in failing to judicially and equitably apportion its foreclosure judgment between the mechanic's lien defendants. (See Wells Fargo AOB at pp. 44-50; Kohl's

AOB at pp. 41-45.) Instead, respondents offer two indirect responses to Wells Fargo's and Kohl's contentions, both of which are new arguments that respondents did not raise in the superior court: that Wells Fargo and Kohl's cannot challenge the superior court's refusal to apportion its judgment because they failed to raise apportionment in their answers (Cass Br. at p. 7), and that the superior court lacked discretion to apportion the foreclosure judgment under Civil Code section 3130 (Cass Br. at p. 32; R3 Br. at pp. 23-26). As explained below, both arguments lack merit.

1. Respondents' argument that Wells Fargo and Kohl's may not seek judicial apportionment of the foreclosure judgment because they purportedly did not plead "apportionment" is frivolous.

Respondents contend that Wells Fargo and Kohl's cannot seek apportionment of the judgment from the superior court because they did not include "apportionment" as an affirmative defense in their answering pleadings. (Cass Br. at p. 7.) This argument is frivolous for three reasons.

First, respondents' assertion is factually false: Both Wells Fargo and Kohl's *did* expressly allege defenses of "apportionment" and "offset" in their answering pleadings. (See 2 AA 272 [Kohl's answer, alleging that the "liability of all responsible parties, named or unnamed, should be apportioned"]; 1 AA 117 [Wells Fargo's answer, alleging that its proportional liability should be "offset" against the liability attributable to other defendants].)

Second, even if Wells Fargo's and Kohl's apportionment-related affirmative defenses contain some defect, respondents waived any objection to their sufficiency by failing to demur to them pursuant to Code of Civil Procedure section 430.80. Courts hold that where a plaintiff is given notice of a potentially meritorious defense in an answer, he must demur to the answer or waive any argument that the defensive pleading is insufficient. (See *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1804-1805.)

Third, respondents made no similar objection in the trial court, and actively litigated the issue of how and whether they or the superior court should apportion the foreclosure judgment between Wells Fargo and Kohl's. (See Wells Fargo AOB at p. 15.) As a result, even if Wells Fargo and Kohl's failed to raise "apportionment" in their answers, respondents had an opportunity to fairly litigate the issue and suffered no prejudice, meaning any such error is not "material" to the judgment. (See Code Civ. Proc., § 469.[3]) Accordingly, respondents' argument that Wells Fargo and Kohl's cannot seek equitable apportionment of the judgment because their answers were insufficient is frivolous.

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[3] Code of Civil Procedure section 469 states: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

2. Respondents' argument that the superior court lacks discretion to judicially apportion the foreclosure judgment under Civil Code section 3130 is based on a misreading of the plain text of the statute.

The superior court held that the "work of improvement" by Cass, R3, and Palomar constituted "one unified project" that had "one owner" across "three parcels." (4 AA 819.) The court held that, therefore, "[a]llocation between the three parcels was not necessary" and "[Civil Code section] 3130 does not apply." (4 AA 821.) In doing so, the superior court rejected an argument Wells Fargo and Kohl's advanced at trial, that under section 3130, Cass and R3 should have apportioned their liens at the time they recorded them, on penalty of losing their lien priority. The superior court did not directly address an *alternative* request by Wells Fargo and Kohl's that it judicially apportion the liens at judgment pursuant to a different paragraph of section 3130. (3 RT 737, 740.)

Respondents contend that the superior court's ruling on the first part of section 3130, in which the court held respondents did not need to apportion their own liens, meant that the superior court could not judicially apportion the liens under a different part of section 3130, because the superior court's finding establishes that section 3130 "did not apply" in any way to this case. (Cass Br. at p. 32; R3 Br. at pp. 23-26.) As explained below, however, respondents are wrong.

Civil Code section 3130 is a confusingly worded statute, with two large paragraph blocks that address different, but related, situations. The first paragraph block governs mechanic's lien situations "in which one claim is filed against two or more buildings or other works of improvement . . . ." That paragraph provides that in such cases, "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." (Civ. Code, § 3130.) In other words, the *parties* must

apportion liens in which a single claim is filed against "two or more . . . works of improvement."

The second paragraph block governs a different situation in which "there is a single structure on more than one parcel of land owned by one or more different owners." (Civ. Code, § 3130.) In that case, "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." (*Ibid.*)

Respondents argue that because the superior court found the work performed by Cass, R3, and Palomar was on "one unified project," and comprised a single "work of improvement," theirs was not a claim "filed against two or more buildings or other works of improvement" under the first paragraph of the statute. Respondents go on to argue this means *none*

of Civil Code section 3130 applies, including the second paragraph that allows the superior court to apportion the lien amounts equitably.

However, the plain text of Civil Code section 3130's second paragraph does not limit its application only to situations in which the first paragraph also applies. Indeed, nothing about the second paragraph indicates that it applies to a claim against "two or more buildings or other works of improvement," as in the first paragraph. To the contrary, on its face, the second paragraph applies when "there is a *single* structure on more than one parcel of land owned by one or more different owners" (italics added). Because the terms "structure" and "work of improvement" are synonymous in the mechanic's lien statutes (see Civ. Code, § 3106 ["'work of improvement' means the entire structure"]), the first and second paragraphs of section 3130 apply in opposite situations — the first, where the property contains "two or more" works of improvement, and the

second, where the property contains a "single" work of improvement on more than one parcel of land.

If, as respondents urge, none of Civil Code section 3130 applies unless there are "two or more buildings or works of improvement," it would have made little sense for the Legislature to include the second paragraph, which on its face applies only when the property *does not* contain "two or more . . . works of improvement" but rather a "single structure" (or work of improvement). Indeed, respondents' reading of the statute would turn the second paragraph into mere surplusage, with no practical effect. This court does not, however, "presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

Additionally, respondents' purported construction of Civil Code section 3130 runs counter to all of the factual and policy grounds discussed in Wells Fargo's AOB at pages 47-50, that a court of equity does

substantial justice and furthers judicial economy by resolving all issues in the litigation together. Respondents offer no policy justification to support their preferred form of statutory interpretation. Instead, they suggest Wells Fargo and Kohl's litigate between one another (R3 Br. at p. 26) a solution that does not further judicial economy or equitable goals, but rather requires a *second* time-consuming lawsuit for contribution.

Accordingly, this court should reject respondents' interpretation of Civil Code section 3130, which essentially strikes out the second paragraph. Instead, this court should follow the plain text of the statute, and hold the superior court both had discretion to equitably apportion the lien amounts at judgment and, for the reasons discussed in appellants' opening briefs, abused that discretion in failing to do so. (See Wells Fargo AOB at pp. 44-50; Kohl's AOB at pp. 41-45)

II. Respondents' Arguments That Apply Only To Wells Fargo Are Weak At Best.

A. Respondents' procedural arguments that Wells Fargo lacks standing, failed to plead the "statute of limitations," and failed to show "unreasonable delay" are all frivolous.

1. Respondents' argument that Wells Fargo lacks standing to challenge the timeliness of their actions is frivolous.

Respondents contend, without citation, that Wells Fargo lacks "standing" to raise its argument that Cass and R3 failed to timely name Wachovia in their foreclosure complaints, because Wells Fargo's purchase of Wachovia rendered the argument "moot." (Cass Br. at pp. 6, 15, 23-24.) This argument is frivolous. Wells Fargo is the corporate successor of Wachovia, a fact to which the parties stipulated at trial. (2 RT 369-370.) Corporations Code section 1107, subdivision (d), establishes that when two corporations merge, "[a]ny action or proceeding pending by or against any disappearing corporation may be prosecuted to judgment, which shall bind

the surviving corporation, or the surviving corporation may be proceeded against or substituted in its place." Here, Wells Fargo's federally orchestrated purchase of Wachovia substituted Wells Fargo "in its place" for the purposes of this litigation. Standing in Wachovia's place, Wells Fargo is permitted to raise any claims, defenses, or arguments that Wachovia could have raised directly. (See, e.g., *J. C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 363, 369 [change in a plaintiff's name to the sole surviving corporation after a merger did not alter the litigation as the surviving corporation was, in effect, the real party in interest].)

2. Respondents' argument that Wells Fargo did not allege a "statute of limitations" defense in its answer, and is thus precluded from raising a defense based on Civil Code section 3144, is both factually and legally frivolous.

Respondents contend Wells Fargo cannot raise the argument that respondents failed to timely name Wells Fargo in their complaints, as required by Civil Code section 3144, because Wells Fargo did not allege

"statute of limitations" as an affirmative defense in its answer. (Cass Br. at pp. 8, 19-21.) This argument is both factually and legally frivolous.

First, Wells Fargo is not raising a "statute of limitations" argument. The question presented in Wells Fargo's argument on appeal is not whether Civil Code section 3144 operates as a limitations bar against respondents due to their failure to name Wachovia within 90 days of recording their liens, but whether the superior court erred in permitting respondents to invoke the fictitious naming statute when they had actual knowledge that Wachovia had an interest in the property by virtue of its role as the construction lender, a defined term under the Civil Code. Therefore this court need consider respondents' argument no further, because it is irrelevant.

Second, if this court deems Wells Fargo's contention to involve a "statute of limitations," respondents' argument is factually frivolous because Wells Fargo did, in fact, allege both the "statute of limitations" and Civil

Code section 3144 in its answer, as the eleventh and thirteenth affirmative defenses. (1 AA 116.) In doing so, Wells Fargo met all the requirements of Code of Civil Procedure section 458[4] for alleging statute of limitations defenses. Moreover, section 458 does not even apply to an argument based on Civil Code section 3144, because section 3144 is not a statute of limitations at all, but rather a substantive component of the right to a mechanic's lien. (See *Koudmani v. Ogle Enterprises, Inc.* (1996) 47 Cal.App.4th 1650, 1657 ["The significance of viewing section 3144, subdivision (b) as terminating a substantive right, as opposed to merely

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[4] Code of Civil Procedure section 458 states: "In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." Note that although Civil Code section 3144 is divided into (a) and (b) parts, they are not alternative limitations subdivisions, but rather (b) simply further explains (a).

constituting a statute of limitations, is that unlike a statute of limitations defense, the defense of a claimant's failure to commence a foreclosure action within the time limit of section 3144, subdivision (a) cannot be waived by a defendant's failure to plead it by demurrer or answer" (italics omitted)]; but see *id*. at p. 1657, fn. 6 [noting, but not following, contrary authority].)

Third, respondents' argument is legally frivolous because, as with their argument on apportionment, respondents waived this contention by failing to demur to Wells Fargo's purportedly insufficient eleventh and thirteenth affirmative defenses. (See *ante* pp. 27-28; *Hata v. Los Angeles County Harbor/UCLA Medical Center*, *supra*, 31 Cal.App.4th 1791, 1804.) Further, respondents fully litigated the question of the timeliness of their naming of Wells Fargo, and thus any pleading failure by Wells Fargo did not impact the litigation and thus is not "material." (Code Civ. Proc., § 469.) Accordingly, respondents' arguments that Wells Fargo did not

sufficiently plead the "statute of limitations" are factually and legally frivolous.

3. It is not clear why respondents spend several pages challenging the applicability of the equitable doctrine of "unreasonable delay," since Wells Fargo does not make an "unreasonable delay" argument on appeal.

Respondents stridently assert that Wells Fargo cannot succeed in an "unreasonable delay" argument because it cannot show practical injury from their failure to timely name it in their foreclosure complaints. (Cass Br. at pp. 7, 21.) This assertion might have more value if Wells Fargo or Kohl's had raised such an argument on appeal — but they did not. The "unreasonable delay" respondents address is an equitable doctrine and a type of laches, arising where a plaintiff in any type of action delayed bringing the action without good cause and to the significant prejudice of the opposing party. (See *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359-360.) The argument Wells Fargo makes is

entirely different: that the Legislature carefully balanced the due process interests of mechanic's lien claimants and innocent property owners, and strict compliance with the statutory procedural requirements for perfecting and foreclosing on a mechanic's lien is critical to the achievement of that balance. (See Wells Fargo AOB at pp. 21-34.) Practical prejudice to the opposing party arising from delay is irrelevant in this type of analysis, because the untimeliness of respondents' naming of Wells Fargo automatically defeats enforcement of the lien under Civil Code section 3144, subdivision (b). Thus, respondents' "unreasonable delay" arguments are not germane to this appeal.

B. Respondents' arguments regarding the definition of "construction lender" are unavailing.

The bulk of respondents' arguments regarding the definition of "construction lender" in Civil Code section 3087 — the heart of Wells Fargo's appeal of the superior court's finding that respondents properly

invoked the fictitious naming statute — serve merely to repeat the unanalyzed statement in *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1560, that one of the parties' status as "construction lender" was "irrelevant." (Cass Br. at pp. 22-23.) As Wells Fargo explained at length in its opening brief, however, the definition of a "construction lender" in section 3087 (which *Westfour* did not consider), as "any mortgagee or beneficiary under a deed of trust . . . or any escrow holder or other party holding any funds . . . to pay construction costs," provided respondents with *actual* knowledge that Wells Fargo was a party with an interest in the property sufficient to require it be timely sued in litigation involving the property. (See Wells Fargo AOB at pp. 24-34.)

Respondents' primary argument regarding Civil Code section 3087 is superficially appealing, but actually wrong. As Wells Fargo explained in its opening brief, California courts expressly hold that a "mortgagee" and "beneficiary under a deed of trust" are parties sufficiently interested in

property that they must be timely named as foreclosure defendants. (See Wells Fargo AOB at pp. 28-31.) Respondents contend that because section 3087 also includes an "escrow holder or other party holding any funds . . . to pay construction costs" — examples of which respondents suggest include a "fire damage insurance company" or a "fund control voucher company" (R3 Br. at pp. 15-16) — their knowledge that Wachovia was the construction lender did not establish it was a "mortgagee" or "beneficiary under a deed of trust," and thus that it had an interest in the property.

But Wachovia was not an "escrow company," a "fire damage insurance company," or a "fund control voucher company." Rather, as respondents reported in their statutory preliminary notices (1 AA 56, 2 AA 303), it was a "Bank" — at the time, the fourth-largest commercial bank in the United States. Banks are in the business of offering mortgages and lending money, not providing fire damage insurance, fund control vouchers,

or the like. Thus, respondents' knowledge that Wachovia was a "bank," combined with the definition of a construction lender in section 3087, provided respondents with *actual* knowledge that Wachovia was either a mortgagee or beneficiary under a deed of trust, parties courts have held are interested and must be timely named.

Additionally, respondents contend that Wachovia was not an "owner" of property while it was the construction lender, but instead its interest was merely one of "encumbrance," since it was a trust beneficiary and its ownership had not yet matured. (R3 Br at p. 17.) However, for the purpose of this appeal, it is a distinction without a difference. The Supreme Court and other courts have established that mortgagees, deed of trust beneficiaries, and other parties with a potential interest in the real property (including parties similar to escrow agents) must *all* be named in a complaint affecting the property in which they are interested. This is necessary to guarantee those with an interest in the property a due process-

compliant opportunity to protect that interest by appearing in or otherwise challenging the proceedings. (See Wells Fargo AOB at pp. 28-32; *Paramount Securities Co. v. Daze* (1933) 128 Cal.App. 515, 518 [interested parties include an "'owner, mortgagee, lien claimant, or otherwise, anyone who may defend against the lien'"].)

Finally, respondents contend, incorrectly and without any case citations, that even though they identified Wachovia as the "construction lender" on their preliminary notices pursuant to a statute that defines "construction lender" according to Civil Code section 3087, that did not establish they had actual knowledge of the definition of "construction lender" under section 3087. (Cass Br. at p. 23.) Respondents' argument is puzzling, because the term "construction lender" in a preliminary notice is defined by section 3087. Thus, respondents' description of Wachovia as the "construction lender" in their preliminary notices meant, ineluctably, that they concluded Wachovia met the section 3087 definition. (See Civ.

Code, § 3082 ["the provisions in this chapter govern the construction of this title"].) As Wells Fargo explained in its opening brief, that kind of knowledge is "actual" knowledge — as opposed to "constructive" knowledge, which arises when a party must perform additional factual investigation, like review public recordings or check a phone book, to gain access to the fact in question. (See Wells Fargo AOB at pp. 32-34.) Therefore, because respondents established their own actual knowledge that Wachovia was a "construction lender" under section 3087 when they included Wachovia in their preliminary notices, they had actual knowledge it was a party with an interest in the property that required it be named in their complaint.

C. Respondents' argument regarding the priority of their liens ignores appellants' authority and would create perverse results.

Respondents' argument regarding lien priority is exceedingly convenient for them. They contend a mechanic's lien claimant need never

name in a foreclosure complaint a party with an "interest" superior to its own — because a superior interest would not be bound by any judgment obtained on the mechanic's lien — but also that the claimant need never conduct any kind of search to determine the priority of other interests, even if it knows those interests exist. (R3 Br. at pp. 18-21.) Thus, respondents contend, a mechanic's lien claimant need never name in a foreclosure complaint any other party with a secured interest, because the claimant need never investigate to establish the priority of any other interests in the property with certainty.

However, as Wells Fargo previously explained, respondents' argument is too clever by half. (Wells Fargo AOB at pp. 34-37.) Many authorities recognize that because actions to foreclose property so deeply affect an owner's rights, an "interested" party for the purpose of a mechanics lien foreclosure complaint is broadly understood to include any party that could be impacted by the foreclosure, such as an "owner, mortgagee, lien

claimant, or otherwise, anyone who may defend against the lien." (*Paramount Securities Co. v. Daze*, *supra*, 128 Cal.App. 515, 518; see, e.g., *Barr Lumber Co. v. Old Ivy Homebuilders, Inc.* (1995) 34 Cal.App.4th Supp. 1, 4) The Supreme Court expressly held mortgagees and deed of trust beneficiaries are "interested" parties in foreclosure litigation, without considering the priority of those interests. (See *Whitney v. Higgins* (1858) 10 Cal. 547, 551 [mortgagee is interested party]; *Monterey S. P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 459-460 [beneficiary under a deed of trust is interested party].) Respondents do not challenge these authorities. Indeed, courts hold that "interested" parties for the purpose of a foreclosure complaint need only have an interest in the property in some fashion — for example, a trustee of a deed of trust is a party "interested" in property subject to the trust, even if the trustee merely oversees the trust and lacks any personal interest in the outcome of the suit. (See *Riley v. Peters* (1961) 194 Cal.App.2d 296, 297-298.)

Respondents cite *Sumitomo Bank v. Davis* (1992) 4 Cal.App.4th 1306, 1314, for the proposition that "'it is not necessary to make a prior or superior lienholder a party to the action to foreclose an inferior mortgage lien,'" because a senior interest is not affected by the foreclosure of a junior interest in property. (R3 Br. at pp. 18-19.) But in *Sumitomo* and the cases it cites (none of which involved the fictitious naming statute), there was no question that the party bringing the foreclosure action had *knowledge* that the other party held a senior, rather than junior, interest, and thus would remain unaffected by the lien. (*Sumitomo Bank v. Davis*, *supra*, 4 Cal.App.4th 1306, 1314.) Here, on the other hand, respondents had actual knowledge that Wachovia had an interest in the property, just not the priority of its interest. Also, unlike in the cases respondents cite, Wachovia never contracted with the claimants and has never been accused of withholding any funds it owed under any contracts with the general contractor. Thus, in the context of Code of Civil Procedure section 474

and the relevant mechanic's lien case law, respondents' knowledge of Wachovia's interest was sufficient to require naming Wachovia in their complaints.

Additionally, as a policy matter, the priority rule respondents propose would create perverse incentives for lien claimants to willfully blind themselves to the priority of other secured interests in property and employ Code of Civil Procedure section 474 strategically. A lien claimant that knows another party has an interest in property would be remiss to seek or accept knowledge of the other party's priority of interest, because without that knowledge it could put off naming other interested parties until its preferred, strategically optimal time. However, the Legislature established its 90-day deadline — a deadline that has remained constant since 1872 — with a purpose: "The choice of a period of limitation for the enforcement of mechanics' liens is purely legislative . . . [¶] . . . [and] the apparent statutory objective [of Civil Code section 3144] is to 'unbind' the property

at the end of 90 days, permitting owners, buyers, encumbrancers and title insurance companies to deal freely with the property in reliance upon expiration of the limitation period." (*States Shingle Co. v. Kaufman* (1964) 227 Cal.App.2d 830, 834-835.)

Respondents' statutory interpretation would directly thwart that legislative intent. Here, Wachovia had no other method to become informed the property in which it held a secured interest was in jeopardy of foreclosure, and nearly two years of litigation passed before respondents named its successor, Wells Fargo, as a foreclosure defendant — despite respondents' actual knowledge all along that Wachovia was the "construction lender" and had an interest in the property. The result of respondents' proposed interpretation of the interplay between the mechanic's lien and fictitious naming statutes undermines, rather than reinforces, the Legislature's careful balancing of the interests of mechanics with the due process rights of innocent property owners.

Accordingly, this court should find respondents' reliance on the priority of Wachovia's interest to escape the 90 day statutory mechanic's lien deadline unpersuasive.

III. Respondents' Arguments That Apply Only To Kohl's Fail To Address Kohl's Contentions Effectively.

A. R3 dodges the primary issue Kohl's raises, that by listing the street address for Wells Fargo's parcels to the exclusion of Kohl's parcel, R3's lien did not affect Kohl's parcel.

As Kohl's explained in its opening brief, R3's mechanic's lien specifically identified the property subject to the lien as "1491 E. Second Street Market Place." (1 AA 58; see Kohl's AOB at pp. 34-36.) As the superior court expressly recognized, this address applied only to parcels 1 and 3. (3 RT 488.) The address of Kohl's property, parcel 2, is 1479 E. Second Street (8 AA 1714), and was not mentioned in R3's mechanic's lien (1 AA 58). As Kohl's discussed, *D. I. Nofziger Lumber Co. v. Waters* (1909) 10 Cal.App. 89, 91, and related cases make clear that where a lien identifies

with particularity a *specific* piece of property as subject to the lien, the lien can only apply to the property it specifically named, and cannot apply to other property it did not name. (Kohl's AOB at pp. 34-36.)

R3 cites authority that a showing of fraud or prejudice to an innocent third-party purchaser is necessary before a court may invalidate a lien based on a flaw in the description of the lien. (R3 Br. at p. 28-32.) Courts have held, however, that a showing of fraud or prejudice to a third party is unnecessary where it is impossible to determine the true property subject to the lien from the face of the lien, and where there is no reason to investigate further because the lien *specifically* identifies a plausible, albeit incorrect, subject property. (See *Hayward Lumber & Investment Co. v. Pride of Mojave Mining Co.* (1941) 43 Cal.App.2d 146, 147 [mechanic's lien that described plot number for different, plausible mining plot instead of correct mining plot was fatally defective without showing of fraud or prejudice]; *Bishop v. Hayward Lumber & Investment Co.* (1937) 19

Cal.App.2d 234, 237 [where property description listed section "30" instead of section "3," error was "not one of defective description of the premises claimed and found to be owned by the plaintiff, but presents an instrument in which no description whatever is given of [the owner's] property"].) Courts have found holding lien claimants to their specific property descriptions particularly important where, as here, the owner was not named in the preliminary notice or lien, making it especially difficult to connect the incorrect lien address with the correct address based on the owner's name. (*H & L Supply, Inc. v. Ewing* (1967) 253 Cal.App.2d 283, 285 [where property description was too vague to determine precise property subject to lien, failure to identify owner was fatal to lien].)

R3 cites a line of cases that hold a property description is sufficient if "'it will enable a party familiar with the locality to identify the property with reasonable certainty to the exclusion of others.'" (R3 Br. at p. 29.) But that definition hurts R3 rather than helps it. Because R3 specifically identified

property that belonged to Wells Fargo, and did not identify Kohl's on its lien, a "party familiar with the locality" would know what 1491 E. Second Street corresponded to — parcels 1 and 3, owned by Wells Fargo. Likewise, given the specific, street address-level description R3 provided, a party "familiar with the locality" would have no reason to think that also included the different address for Kohl's property. Indeed, such a party would likely suspect the lienholder *intentionally* named the Wells Fargo properties and excluded the Kohl's property.

Although R3 highlights the superior court's finding that the work performed by the respondents constituted a single project, that finding is irrelevant to the sufficiency of R3's description of the property, which expressly limited the scope of the lien to a particular address that corresponded with different property that was also subject to the mechanic's lien. The scope of the "project" had nothing to do with it.

Finally, not one of the cases cited by respondents involved the situation here, in which a mechanic's lien named one specific piece of property reasonably subject to a lien to the exclusion of different property that also could be subject to the lien. (See R3 Br. at p. 31.) Therefore, this court should conclude the superior court erred when it found R3's mechanic's lien applied to the Kohl's property it did not name.

B. Respondents' arguments why they did not need to name Kohl's in their mechanic's liens miss the mark.

Respondents did not name Kohl's in their mechanic's liens. Mechanic's lien claimants are required to engage in a reasonable, good faith effort to learn a property owner's name before serving their preliminary notices and recording their liens. (See *Romak Iron Works v. Prudential Ins. Co.* (1980) 104 Cal.App.3d 767, 775-776 (*Romak*).) Respondents contend that as subcontractors, they could rely on information regarding ownership provided by the general contractor, pursuant to *Brown Co. v. Appellate*

Department (1983) 148 Cal.App.3d 891, 902-903 (*Brown*). (See Cass Br. at pp. 13-14.)

Respondents do not tell the whole story on *Brown*, however. There is currently a multi-pronged conflict within the Court of Appeal divisions concerning the inquiry a mechanic's lien claimant must undertake to hold a good faith belief in the identity of a party for whom notice is required under the mechanic's lien statutes. In *Romak*, *supra*, 104 Cal.App.3d at pp. 774–775, the court held that a good faith belief that the reputed lender was the actual lender should be proven by evidence the claimant examined county records to ascertain the identity of the construction lender, e.g., the building permit or construction deed of trust. Then, in *Brown*, *supra*, 148 Cal.App.3d at p. 901-903, the court held that a claimant did not need to check county records to demonstrate that he held a good faith belief that the reputed lender was the actual lender, but that a good faith belief could be proven by evidence the claimant relied on information supplied by the

general contractor. Later, in *Kodiak Industries, Inc. v. Ellis* (1986) 185 Cal.App.3d 75, 87, the court narrowed the *Brown* rule to hold that "the information on which a reasonable claimant should rely must be cloaked with sufficient indicia of reliability — such as statements from the owner, general contractor, or lender itself or their agents — so as to distinguish this information from a mere guess or some ill-founded conjecture." Finally, in *Force Framing, Inc. v. Chinatrust Bank (U.S.A.)* (2010) 187 Cal.App.4th 1368, 1378, the court distilled each of these three standards to hold that while a mechanic's lien claimant may generally rely on ownership information a general contractor gives, it must check official county records before issuing a stop notice if it has either (1) no information, (2) "untrustworthy" information, (3) unreliable information, or (4) a "reason to doubt" the information he has been given regarding the relevant mechanic's lien parties.

As Kohl's indicated in its opening brief, Cass had "reason to doubt" the information it had received regarding ownership of the property between the time it served its preliminary notice and the time it recorded its mechanic's liens. Cass served its preliminary notice on March 22, 2007, and had its assistant obtain the name of the owner at the time before that date. (1 RT 73; 2 AA 303.) But evidentiary e-mails from Cass representatives to Kohl's on January 24, 2008 — before Cass recorded its mechanic's lien on January 25, 2008 — established that Cass had at least some reason to think that Kohl's might be funding or partly funding the construction work, and that therefore it might have an ownership interest of some kind in the property. (See 1 RT 268-269; 1 AA 20-21; 8 AA 1702-1703.) In addition to the Kohl's signs throughout the property and the Kohl's name on the project, by the time it filed its mechanic's lien, Cass knew 361 Group, the general contractor, was going under, and that therefore ownership could be in flux anyway. These conditions, combined

with the year-plus that passed between requesting ownership information from the general contractor and recording its lien, gave Cass "reason to doubt" its earlier information that the property only belonged to LCG-Beaumont LLC. Therefore, under *Brown, Force Framing*, and related cases, Cass had an obligation to make at least some kind of inquiry into whether its earlier preliminary notice information remained valid.

Thus, Cass failed to meet its obligation to conduct a "reasonable" investigation of the ownership of the property before recording its mechanic's lien, and the superior court thus erred in finding the lien enforceable against Kohl's.

C. Respondents' procedural arguments against Kohl's, involving estoppel and the statute of limitations, are frivolous.

1. Respondents' argument that Kohl's is judicially and equitably estopped from contending Cass prematurely recorded its mechanic's lien is frivolous.

Cass argues Kohl's is judicially and equitably estopped from

contending Cass prematurely recorded its mechanic's lien. These arguments are frivolous for two reasons. (Cass Br. at pp. 29-31.)

First, Cass contends Kohl's should have been judicially estopped from arguing at trial that Cass prematurely recorded its mechanic's lien before the completion of construction because, in its motion for summary judgment, Kohl's argued Cass recorded its mechanic's lien too late, after completion of construction. (Cass Br. at p. 30.) Cass does not identify the elements of judicial estoppel, however, which are: "'(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449.) Cass does not mention that Kohl's *lost* its motion for summary judgment. Thus, element (3), that the

party to be judicially estopped was successful in asserting the first position, is not met. Also absent is element (4), that the two positions are "totally inconsistent," because Kohl's based its summary judgment motion on the premise that work was completed on its parcel separately from the other parcels, while its argument on appeal arises from a different premise. (See 3 AA 500-501.)

Second, Cass contends Kohl's is equitably estopped from challenging the date of its mechanic's lien recordation because a Kohl's agent purportedly told a Cass agent to "go ahead and file" its lien. (Cass Br. at pp. 30-31.) As discussed above with regard to the judgment amount, the doctrine of equitable estoppel requires the injured party be "ignorant of the true state of the facts." (See *ante*, pp. 7-8.) Because Cass knew it would issue later billings, it was not "ignorant" of that fact when it recorded its premature lien, and thus cannot invoke the doctrine of equitable estoppel.

2. Respondents' argument that Kohl's failed to plead the "statute of limitations" in its answer is frivolous.

Respondents argue that Kohl's failed to sufficiently allege the "statute of limitations" in its answering pleading, and that therefore, the superior court did not err in finding that respondents timely named Kohl's in their complaints. (Cass Br. at p. 20.) They raise the same contention regarding Wells Fargo, which, as discussed above, is factually and legally meritless. (See *ante*, pp. 37-40.) For much the same reasons, the contention is also meritless regarding Kohl's.

First, like Wells Fargo, Kohl's is not raising a "statute of limitations" argument, but rather, its contention on appeal is whether the superior court erred in allowing use of the fictitious naming statute. (See *ante*, pp. 37-38.)

Second, as Wells Fargo also explained, courts hold the statute of limitations rules articulated by Code of Civil Procedure section 458 do not apply to an argument based on Civil Code section 3144, because section

3144 is not a statute of limitations at all, but rather a substantive component of the right to a mechanic's lien. (*Koudmani v. Ogle Enterprises, Inc.*, *supra*, 47 Cal.App.4th 1650, 1657; see *ante*, pp. 38-39.)

Third, as with Wells Fargo, respondents waived this contention by failing to demur to Kohl's purportedly insufficient answer. (*Hata v. Los Angeles County Harbor/UCLA Medical Center*, *supra*, 31 Cal.App.4th 1791, 1804; see *ante*, pp. 39-40.) Likewise, because respondents fully litigated the question of the timeliness of their naming of Kohl's, any pleading error is not "material." (Code Civ. Proc., § 469; see *ante*, p. 40.) Thus, respondents' pleading arguments regarding Kohl's lack any merit.

Conclusion

Accordingly, for the reasons explained above and in the opening briefs, this court should reverse the superior court's foreclosure judgment in favor of Cass and R3 against Wells Fargo. The court should also reverse the superior court's foreclosure judgment against Kohl's.

If this court does not reverse the judgment outright, it should (a) reverse the judgment to the extent it included prejudgment interest, or at least reduce the rate of interest to 7%; (b) reduce Cass's maximum foreclosure judgment to, at most, the amount claimed in its mechanic's lien (a reduction of $187,896.62); (c) reduce the amount of Cass's foreclosure judgment for work performed by TNT (a reduction of $608,018.29); and (d) remand with an order that the superior court apportion the remaining foreclosure judgment equitably among the parcels.

Respectfully submitted,

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