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Attorney for Defendants
Troy Isom, Shirley Isom, Mischelynn Scarlatelli and "Armie Troy Isom and Shirley Isom, trustees Armie Troy Isom and Shirley Isom Family Trust u/d/t dated December 28, 2004" *erroneously sued as* "Isom Armie T. & Shirley Trust, a California Trust"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – POMONA COURTHOUSE

MARK SCARLATELLI, an individual,

Plaintiff,

vs.

TROY ISOM, an individual; SHIRLEY ISOM; an individual; MISCHELYNN SCARLATELLI, an individual; ISOM ARMIE T. & SHIRLEY TRUST, a California Trust; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the Complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto; and DOES 1 to 25 inclusive,

Defendants.

Case No. KC066078
Judge: Honorable Bruce Minto, Dept. H

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SANCTIONS AGAINST PLAINTIFF MARK SCARLATELLI AND HIS ATTORNEYS DARREL C. MENTHE, ADAM I. MILLER AND MILLER MILLER MENTHE, LLP PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 128.7

Hearing:
Date: August 19, 2013
Time: 8:30 a.m.
Dept.: H

Action Filed: June 6, 2013
Trial Date: None set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Aug. 19, 2013, at 8:30 a.m., or as soon as thereafter as the matter may be heard in Department H of the above-entitled Court, located at 400 Civic Center Plaza, Pomona, California 91766, Defendants Troy Isom, Shirley Isom, Mischelynn Scarlatelli and "Armie Troy Isom and Shirley Isom, trustees Armie Troy Isom and Shirley Isom Family Trust u/d/t dated December 28, 2004" *erroneously sued as* "Isom Armie T. & Shirley Trust, a California Trust" (collectively, "Defendants") will move this Court to impose monetary and non-monetary sanctions, including striking the complaint and dismissing the action and assessing reasonable attorneys' fees and costs, jointly and severally, against Plaintiff Mark Scarlatelli ("Plaintiff") and his attorneys Darrel C. Menthe, Adam I. Miller and Miller Miller Menthe, LLP, in the amount of $9,280.00 as well as such other sum and/or sanction as the court may find just and reasonable.

This Motion is made pursuant to *Code of Civil Procedure* section 128.7 on the ground that the Complaint is without factual or legal merit and was filed primarily for an improper purpose to harass Defendants.

This Motion will be based upon this Notice, Memorandum of Points and Authorities, the declarations of Jerry R. Dagrella, Mischelynn Scarlatelli, Armie Troy Isom and Shirley Isom, and the pleadings and records on file in this action, and upon such further documents and evidence as may be presented at the hearing of this motion.

Dated: June 24, 2013

DAGRELLA LAW FIRM, PLC

By: _____
JERRY R. DAGRELLA
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 4, 2009, defendant Mischelynn Scarlatelli ("Mischelynn") filed for divorce against plaintiff Mark Scarlatelli ("Mark"). On September 18, 2012 and October 3, 2012, two civil lawsuits were filed against Mischelynn's parents, defendants Troy and Shirley Isom ("the Isoms").[1] (*See* Dagrella Decl., ¶ 2.) The plaintiffs in those lawsuits were business entities controlled by Mark. (*Ibid.*) Both of those lawsuits were frivolous and filed to harass Mark's estranged wife and in-laws during the pending divorce. (*See* Mischelynn Scaralatelli Decl, ¶ 3.)

After conducting discovery, the Isoms served 128.7 motions on Mark's attorney, Darrel Menthe, which presented evidence demonstrating that there is no good faith basis for the claims alleged in each of the two cases. (Dagrella Decl., ¶ 6.) In response, Attorney Menthe dismissed those lawsuits, thereby avoiding a hearing on the 128.7 motions.[2] (*Id.*, ¶ 7.) Then, only a few weeks later, on June 6, 2013, Attorney Menthe filed three more lawsuits, including this action, which raise the same allegations and contain much of the same defects as the previous two lawsuits that he just dismissed. (*Ibid.*) In these new lawsuits, Mark is identified as the plaintiff, suing both individually and derivatively for the very same business entities that were the plaintiffs in the previous two cases.

Attorney Menthe's continued advocacy of these claims is frivolous and indicative of bad faith, warranting the imposition of sanctions under *Code of Civil Procedure* section 128.7. **Remarkably, Attorney Menthe has even ignored the procedural and substantive defects that were disclosed to him in the previous 128.7 motions and has essentially proceeded with the same baseless complaint.** (Dagrella Decl., ¶ 5.) By way of example,

- The previous 128.7 motions alerted Attorney Menthe that a quiet title complaint must be verified per *Code of Civil Procedure* § 761.020. Nonetheless, Attorney Menthe has re-filed a quiet title complaint that is not verified.

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[1] *Gamut Construction Company, Inc. v. Isom, et al.* (LASC Case No. KC063680) and *Bella Piazza, LLC v. Isom, et al.* (LASC Case No. KC064781).

[2] *Code of Civil Procedure* section 128.7 requires 21 days advance notice before filing a motion for sanctions with the court. Mr. Menthe dismissed the aforementioned lawsuits during the 21-day safe harbor period.

- The previous 128.7 motions alerted Attorney Menthe that the Isoms' living trust owns the subject real estate, that the Isoms *individually* do not own the real estate and are, therefore, not proper parties to a quiet title action. Nonetheless, Attorney Menthe has re-filed a quiet title complaint that names the Isoms as defendants in their *individual* capacity.
- The previous 128.7 motions alerted Attorney Menthe that a quiet title action cannot be maintained against the legal owner of record, except where there is clear and convincing evidence of fraudulent procurement[3], and his client admitted in discovery that he has no such evidence.[4] Nonetheless, Attorney Menthe has re-filed the quiet title action, willfully ignoring the legal standard and his client's previous discovery admissions.
- The previous 128.7 motions alerted Attorney Menthe that a quiet title action based on an oral agreement is barred by California's Statute of Frauds, *Civil Code* § 1624. Nonetheless, Attorney Menthe has re-filed the quiet title action, willfully ignoring the Statute of Frauds.
- The previous 128.7 motions alerted Attorney Menthe that his client's quiet title action that is founded upon an alleged oral agreement from year 2005 is barred by statute of limitations. Nonetheless, Attorney Menthe has re-filed the quiet title action, and attempted to reframe the allegations to avoid the two-year statute of limitations.

To add insult to injury, Attorney Menthe elected to split Mark's claims into three separate actions. Now, Mark's estranged wife and in-laws must pay $4,785.00 in court costs to file an

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[3] *See e.g., G.R. Holcomb Estate Co. v. Burke* (1935) 4 Cal.2d 289, 297 ("[i]t has been repeatedly held in this state that an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title."); 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 667, p. 93 ("plaintiff who attacks the legal title on equitable grounds is in effect contending that the defendant obtained legal title by fraud or similar inequitable conduct, and must specifically allege the facts constituting that conduct."); *Evidence Code* § 662 ("The owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.")

[4] Plaintiff's responses to Request for Admissions Nos. 6-9 in Case No. KC064781. These discovery responses were verified, under penalty of perjury, by Mark Scarlatelli.

Answer in all three actions, not to mention the increased attorney's fees. There was no reason for Mark to file three separate lawsuits with the same parties on each side, unless the intent was to compound the harassment by tripling the number of depositions and increase the cost of defense.

Moreover, Attorney Menthe has now added Mischelynn as an additional defendant, which means **Mark is now pursuing the same claims against his estranged wife in two separate courts: family court and civil court.** This is completely inappropriate. Attorney Menthe is well aware of the fact that the family court has exclusive jurisdiction over these claims. In a remarkably similar case, the appeals court in *Burkle v. Burkle* (2006) 144 Cal.App.4th 387 affirmed a trial judge's order sanctioning the attorney under section 128.7 for filing a civil action against the spouse and other third parties while the divorce case was still pending.

II. LEGAL ANALYSIS

By filing and serving a complaint, and then later advocating the claims therein, an attorney certifies that the allegations and other factual contentions have evidentiary support. (Code Civ. Proc. § 128.7(b)(3).) The attorney also certifies that the matter is not being presented or pursued for an improper purpose, such as to harass or cause needless increase in the cost of litigation. (*Id.* § 128.7(b)(1).)

After proper notice of facts demonstrating that the complaint is without merit, if the pleading is not then withdrawn, the Court may strike the claims and award reasonable attorney's fees and costs incurred in presenting the motion. (*Id.* § 128.7(c)(1).) Continuing to advocate claims against a defendant that are manifestly without merit is abusive, grossly wasteful (to defendants, and the Court), and in direct violation of *Code of Civil Procedure* section 128.7(b), which requires an ongoing reasonable inquiry that the claims are warranted by existing law and have evidentiary support. (*Id* § 128.7(b)(3).) Such is the case before this Court.

Attorney Menthe has filed a complaint containing causes of action that have no evidentiary support or legal merit and is pursuing same for the primary purpose of harassing Mark's estranged wife and in-laws during a pending divorce. The standard for violating the certification requirement of section 128.7 is an objective standard, requiring a well-founded belief. (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 82.) In this case, an objective

view of the facts known to Attorney Menthe (indeed any view of the facts) reveals that there is insufficient factual or legal ground for continuing to advocate the claims in this action against the Isoms, *individually*, against their living trust, or separately against Mischelynn outside of, and simultaneous with, the pending divorce action.

A. <u>The Family Court Has Exclusive Jurisdiction Over The Claims Against Mischelynn – The *Burkle* Court Held That Re-Filing Such Claims In Civil Court Is Sanctionable Misconduct Under Section 128.7</u>

Mischelynn is named as a defendant in the first, second and third causes of action relating to Mark's claim against the property. This claim is already the subject of litigation in the family court, which has exclusive jurisdiction over the division of community property. (*See* Mischelynn Scaralatelli Decl, ¶ 2.) In a remarkably similar case, the court in *Burkle v. Burkle* (2006) 144 Cal.App.4th 387 affirmed an award of 128.7 sanctions finding it inappropriate for the wife to have filed a civil action against the husband and other third parties while the divorce case was still pending:

> "While a marital dissolution proceeding was pending, a wife brought a separate civil action against her husband and two accounting firms… Under well-established precedent precluding parties to dissolution proceedings from engaging in "family law waged by other means" (*Neal v. Superior Court* (2001) 90 Cal.App.4th 22, 27), we affirm the trial court's judgment of dismissal.
>
> After the trial court in the civil action sustained the husband's demurrer, the husband sought sanctions… ordering the wife to pay $32,950.. under Code of Civil Procedure section 128.7. We affirm the trial court's order" (*Id.* at 388.)

In *Burkle,* as well as the cases cited by *Burkle,* it was made it clear that family law cases should not be allowed to spill over into civil law. (*Id.* at 393-394.) The courts have observed that almost all events occurring in family law litigation can be re-framed as civil law actions and that it is incumbent on courts to examine the substance of the claims and not just their nominal headings. (*Id.* at 394.) "A recurring theme in the family law opinions of this court is the disfavoring of civil actions which are really nothing more than reruns of a family law case." (*Neal v. Superior Court* (2001) 90 Cal.App.4th 22, 25-26; see also, *Askew v. Askew (1994) 22*

Cal.App.4th 942, 965-966 [trial court erred in failing to dismiss husband's civil action, which "sought to preempt the family law court from determining issues it already had jurisdiction to determine" and which "were the province of the family law court in the first place"]; *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal. App.3d 781, 786-788 [under the rule of exclusive concurrent jurisdiction, when two superior courts have concurrent jurisdiction over the subject matter and parties, the first to assume jurisdiction has exclusive and continuing jurisdiction; the rule does not require absolute identity of parties, causes of action or remedies sought; if the first court has the power to bring before it all the necessary parties, application of the rule is not precluded merely because the parties in the second action are not identical].)

B. <u>There Is No Merit To The Claims Filed Against Troy & Shirley Isom In Their *Individual* Capacities</u>

The Isoms are not, *individually*, the owners of the property. (Isom Decls., ¶ 3.) Thus, they are not proper parties to the lawsuit. They should be named only in their capacity as trustees, but are sued individually on all cause of action. (Complaint ¶¶ 3-4; see e.g., *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646, 650 & fn. 1 [a trustee sued an insurer for property insurance benefits with respect to the trust's interest in property, and the court referred only to the trust as the relevant party because the trustee's involvement was only in a representative capacity.].)

C. <u>There Is No Merit To The Claims Filed Against The Isoms' Living Trust</u>

1. <u>The Quiet Title Cause of Action</u>

(i). <u>Complaint Is Not Verified</u>

Like the predecessor lawsuits, this complaint for quiet title is again <u>not</u> <u>verified</u>, which is mandated by statute on all quiet title claims. (*Code of Civil Procedure* § 761.020.)

(ii). <u>Quiet Title Cannot Be Maintained Against The Owner Of Record</u>

The general rule is that the holder of equitable title cannot maintain a quiet title action against a legal owner of record. (*G.R. Holcomb Estate Co. v. Burke* (1935) 4 Cal.2d 289, 297 ["[i]t has been repeatedly held in this state that an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title."].) The limited exception

permitting the holder of an equitable interest to maintain a quiet title action against a legal owner is quite narrow and has been recognized only in cases involving fraudulent procurement by the holder of legal title. (*See, e.g., Strong v. Strong* (1943) 22 Cal.2d 540, 545-546 [equitable rights could not be established in quiet title action absent finding of fraud]; *Warren v. Merrill* (2006) 143 Cal.App.4th 96, 111-112 [judgment quieting title in condominium purchaser and imposing constructive trust were proper remedies in light of real estate agent's breach of fiduciary duty to purchaser arising from agent's fraudulent procurement of title to property]; see generally, 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 667, p. 93 ["plaintiff who attacks the legal title on equitable grounds is in effect contending that the defendant obtained legal title by fraud or similar inequitable conduct, and must specifically allege the facts constituting that conduct"].)

Further, the law provides that where title is held in the name of the defendant, there is a presumption of ownership, which can only be overcome with clear and convincing evidence. In that regard, Evidence Code section 662 provides as follows:

> "The owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

The heightened "clear and convincing" standard is a most difficult burden. The evidence must be "so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind." (*Shade Foods, Inc. v. Innovative Products Sales & Mkg* (2000) 78 Cal. App. 4th 847, 891.) Under that standard, Mark cannot possibly prevail on his quiet title action because the Isoms have been the legal owners of the property, without interruption, since 1977. (Isom Decls., ¶ 2.) Further, Mark admitted in discovery in the prior case that he has no evidence that the Isoms committed fraud in the procurement of their ownership interest in the property. (Dagrella Decl, ¶ 3; Plaintiff's responses to Request for Admissions Nos. 6-9.)

(iii). The Claim Is Barred By Statute of Frauds

Mark alleges that the Isoms agreed to transfer title to their property to Mark, but that the Isoms ultimately failed to do so. In the prior case, Mark admitted in discovery that there was no writing to support this claimed agreement; in fact, he did not produce a single document that remotely refers or relates to the Isoms. (*Ibid.*) California's Statute of Frauds, *Civil Code* § 1624,

and related case law, holds that oral agreements to transfer an interest in real property are unenforceable. (*See, e.g. Kirkegaard v. McLain* (1962) Cal.App.2d 484, 492; *see also, Civ. Code* § 1091 [estate in real property can be transferred only by operation of law or by instrument in writing].)

(iv). The Claim Is Barred By Statute of Limitations

The statute of limitations for quiet title is 2 years if based on oral contract. (*Ankoanda v. Walker-Smith* (1996) 44 Cal. App. 4th 610, 616.) According to the complaint, construction began in 2005 and completed in late 2009 or early 2010. (Complaint, ¶ 9.) Logically, the Isoms' obligation to transfer title should have arisen either in 2005, when Gamut began construction, or, at the very latest, early 2010, when construction finished. In that case, the Complaint—filed on June 6, 2013—is clearly time-barred. *(In truth, a residence was completed and a Certificate of Occupancy issued on the property in 2007—nearly six years ago! See Troy Isom Dec. ¶ 3.)*

2. Declaratory Relief Is Not Available To Address Past Wrongs

"[T]here is no basis for declaratory relief where only past wrongs are involved." (*See Baldwin v. Maria City Properties* (1978) 79 Cal.App.3d 393, 407.) This is especially true if there is no continuing relationship between the parties. (*Ibid.*; see also *Travers v. Louden* (1967) 254 Cal. App. 2d 926, 931 ["There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them."]; *Patterson v. Insurance Co. of North America* (1970) 6 Cal.App. 3d 310, 315 [**"**Courts will not permit the declaratory action to be used as a device to circumvent the right to a jury trial.].) Since Mark's complaint only alleges past wrongs, a declaratory relief claim is improper. In that the declaratory relief claim is predicated on the same facts—and essentially the same claim for relief—as the cause of action for quiet title, the defenses of (i) lack of a verified complaint, (ii) absence of clear and convincing evidence that the Isoms fraudulently procured title in 1977, (iii) statute of frauds and (iv) statute of limitations, are all equally applicable here as well.

3. There Is No Such Thing As Conversion Of Real Property, And Even If There Were, The Claim Would Be Barred By Statute Of Limitations

The Complaint alleges that the Isoms converted the home and the permanent improvements built thereon. However, it is hornbook law that real property cannot be the subject of an action for conversion. (*Munger v. Moore* (1970) 11 Cal. App. 3d 1, 6 ["it is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property."].)

To the extent Mark attempts to make out a claim of conversion with respect to the funds *he* allegedly spent to improve the real property, such a claim will also fail because Mark admits he willingly spent the money to allegedly construct improvements. (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 ["[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property."]; *Tavernier v. Maes* (1966) 242 Cal.App.2d 532 ["As to intentional invasions of the plaintiffs interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. `The absence of lawful consent,' said Mr. Justice Holmes, `is part of the definition of an assault.' The same is true of . . . conversion. . . ."].)

Moreover, "Code of Civil Procedure section 338, subdivision (c) provides for a three-year statute of limitations for actions alleging conversion." (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 915.) The three year statute begins to run the day the wrongful taking occurred. (*See, e.g., Bennett v. Hibernia Bank* (1956) 47 Cal. 2d 540, 561 ["the statute of limitations applying in conversion actions (Code Civ. Proc., § 388, subd. 3 [now subdivision (c)]) begins to run from the date of the conversion even though the injured person is ignorant of his rights"]; *Coy v. E.F. Hutton & Co.* (1941) 44 Cal. App. 2d 386, 390 [plaintiff's cause of action accrued the day of the alleged conversion of his stock and suit against stockbroker filed more than four years later was time-barred]; *First National Bank v. Thompson* (1943) 60 Cal. App. 2d 79 [suit to recover shovel from person who purchased it from one who had not satisfied the terms of his conditional sales contract barred because filed more than three years after conversion].) Since, according to the complaint, the residence was completed in late 2009 or early 2010, the

statute of limitations would also act as a bar to any claim for conversion. (Complaint ¶ 9.) *(In truth, a residence was completed and a Certificate of Occupancy issued on the property in 2007—nearly six years ago! See Troy Isom Dec. ¶ 3.)*

4. Restitution Is A Remedy, *Not A Stand-Alone Cause of Action*

There is no freestanding cause of action for restitution in California. (*See Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 387 [explaining that there is no cause of action in California for unjust enrichment and "[u]njust enrichment is synonymous with restitution."); *Robinson v. HSBC Bank USA* (N.D. Cal. 2010) 732 F.Supp.2d 976 ["There is no cause of action for restitution, but there are various causes of action that give rise to restitution as a remedy."].)

III. CONCLUSION

As set forth *supra*, Mark and his attorneys have pursued a frivolous lawsuit against Defendants, which has caused them to incur unnecessary fees and costs. Defendants request monetary sanctions in the amount of $9,280.00 and nonmonetary sanctions in the form of striking the complaint and dismissing this unmeritorious action. (*See* Dagrella Decl, ¶¶ 6-7.)

Dated: June 24, 2013

DAGRELLA LAW FIRM, PLC

By: _____
JERRY R. DAGRELLA
Attorney for Defendants