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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES**
12

13 DONAHUE L. WILDMAN,)
14 Plaintiff,)
15 vs.)
16 CALIFORNIA COASTAL)
COMMISSION; STATE)
17 COASTAL CONSERVANCY;)
and DOES 1-30, Inclusive,)
18 Defendants.)
19

CASE NO. SC 111748
Honorable Jacqueline A. Connor, Judge

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEMURRER TO COMPLAINT**

DATE: June 20, 2011
TIME: 8:30 a.m.
DEPT.: WE I

20
21 **I. INTRODUCTION**
22

23 The parties appear to agree about the basic factual background. Plaintiff Donahue
24 L. Wildman ("Wildman") purchased a home at 27910 Pacific Coast Highway in Malibu
25 ("the property") in July 1984. The previous owners of the property had executed an offer
26 to dedicate an easement for a parking lot on the property, which stated that the "offer
27 shall run for a period of 21 years from the date of recordation". This offer was recorded
28 on January 6, 1982. This offer was rerecorded with no new signatures on January 26,

1 1983. Wildman contends that the rerecorded offer did not change any of the terms of the
2 offer to dedicate, and did not change the facts that the original offer had already been
3 recorded and that such prior recording had started the running of the 21-year acceptance
4 period. A purported acceptance of the offer was not recorded until December 23, 2003,
5 which was more than 21 years after the date of the original recordation of the offer, and
6 Wildman contends the purported acceptance was untimely and therefore had no legal
7 effect. See paragraphs 6-12 of Wildman's complaint, incorporated by reference herein.
8 Wildman filed this action, for quiet title and declaratory relief, on March 7, 2011.

9 Defendants California Coastal Commission and State Coastal Conservancy
10 (hereafter referred to as "Defendants") demur to Wildman's complaint on the basis of the
11 five-year statutes of limitation in Code of Civil Procedure ("CCP") Sections 318, 319,
12 and 322, and on the basis of laches. However, such demurrers are totally meritless.

13 First, it is undisputable that Wildman has been in possession of the property at all
14 times since he purchased it in 1984. And it is fundamental that "no statute of limitations
15 runs against a plaintiff seeking to quiet title while he is in possession of the property".

16 Second, Defendants' demurrers presuppose that they have already won the case on
17 the merits. This is not an action for "recovery of real property". And Wildman has not
18 only been seized and possessed of this property for the last five years, but has been at all
19 times since 1984, and is now. And Defendants have not acquired Wildman's property
20 by adverse possession; among other things, they have not occupied, taken possession of,
21 or paid taxes on, the property, all of which are prerequisites. Accordingly, the statutes
22 of limitations cited by Defendants have no applicability here.

23 Third, even a recorded claim of title, if unaccompanied by an adverse court
24 holding, will not start the running of the statute of limitations. An outstanding adverse
25 claim which is a cloud on title leads to a continuing cause of action; as long as it is
26 dormant or inactive, the owner of superior title need not address it and can allow the
27 claim to stand indefinitely, and the cause of action arises anew every day until an action
28 is brought.

1 Defendants' laches assertion fails for the same reasons. Such assertion also fails
2 because this is a demurrer, and the allegations of the complaint do not show any prejudice
3 to Defendants due to the lapse of time (and in fact there is none, as Defendants have not
4 taken any actions to construct the parking lot involved in the underlying easement, or
5 otherwise related to the easement), and there are other factual disputes related to any
6 assertion of laches which cannot be determined on demurrer.

7 Accordingly, the demurrers should be overruled in their entirety, as they are
8 completely meritless under the applicable law.

9
10 **II. NO STATUTE OF LIMITATIONS RUNS AGAINST**
11 **A PLAINTIFF SEEKING TO QUIET TITLE WHILE**
12 **HE OR SHE IS IN POSSESSION OF THE PROPERTY**
13

14 Wildman purchased the property as his personal residence in 1984, and has lived
15 there since then as the sole owner. His possession of the property is exclusive and
16 undisputed.

17 In Muktarian v. Barmby, 63 Cal.2d 558 (1965), cited in Defendants' moving
18 papers, the Supreme Court stated at page 560: "In the present case, however, it is
19 unnecessary to determine which statute would otherwise apply, for no statute of
20 limitations runs against a plaintiff seeking to quiet title while he is in possession of the
21 property."

22 In Smith v. Matthews, 81 Cal. 120 (1889), a mistake in a deed purported to grant
23 more land than was intended, but the holder of the deed never took possession of this
24 land, which "remained in the actual possession of the plaintiffs". The Supreme Court
25 held that plaintiffs' quiet title action brought "many years" later was not barred by the
26 statute of limitations, stating: "The right of the plaintiffs to have their title to the land
27 quieted, as against a claim asserted by the defendant under this deed, was not barred, and
28 could not be, while the plaintiffs and their grantors remained in the actual possession of

1 the land . . .”

2 In Tannhauser v. Adams, 21 Cal.2d 169 (1947), the Supreme Court stated at page
3 175:

4 “Other instances of the general principle that a limitation statute will
5 not run against one in possession of land are found in 34 American
6 Jurisprudence, where it is said (p. 29), ‘A person in the possession of
7 property cannot be required under penalty of forfeiture to bring an action
8 against one claiming an adverse interest or title to such property . . . [p. 296]
9 [A] statute cannot be sustained as one of limitation where it requires one in
10 possession of property to bring an action within a given time or forfeit it,
11 and it is laid down in a number of cases that as a general rule, the statute of
12 limitations does not run against one in possession of land.’”

13 12 Miller & Starr, California Real Estate Third Edition §34:106 states: “As a
14 general rule, the period of limitations for an action to quiet title does not run while the
15 plaintiff is in exclusive and undisputed possession of the property.”

16 43 California Jurisprudence 3d (21st Century Edition), Limitation of Actions §106
17 states: “However, no statute of limitations runs against a plaintiff seeking to quiet title
18 while he or she is in possession of the property . . .”

19 No statute of limitations has even started to run against Wildman on his claims,
20 and so Defendants’ demurrers based upon the statute of limitations must be denied.

21
22 **III. THE STATUTES OF LIMITATIONS RELIED UPON**
23 **BY DEFENDANTS ARE INAPPLICABLE HERE**
24

25 Defendants’ statute of limitations demurrers presuppose that Defendants have
26 already won the case on the merits (i.e., their untimely acceptance of the offer to dedicate
27 was valid).

28 If their acceptance was valid, then Wildman might now be trying to recover his

1 property. But if their untimely acceptance was invalid (as contended by Wildman, and
2 which is the core issue in this lawsuit), then Wildman is not trying to recover anything,
3 but is just attempting to remove a cloud on his title. At this stage of the lawsuit, it has
4 not yet been determined if Wildman is trying to recover any real property. However,
5 since this is a demurrer, and all factual disputes relating thereto must be found in
6 Wildman's favor, this action cannot properly now be deemed as one whereby Wildman
7 is attempting to recover real property – as distinguished from one where he is trying to
8 remove a cloud on his title.

9 Defendants appear to rely primarily on the statute of limitations set forth in CCP
10 Section 318. That section reads in its entirety: “No action for the recovery of real
11 property, or for the recovery of the possession thereof, can be maintained, unless it
12 appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed
13 of the property in question, within five years before the commencement of the action.”
14 However, this statute is inapplicable here, for many reasons.

15 First, this is not an action for the recovery of real property; as discussed above, this
16 point could not be determined unless and until Defendants win this case on the merits;
17 this case is instead more that Wildman is trying to remove a cloud on his title.

18 Second, this is not an action for the recovery of possession of real property;
19 Wildman still has possession of his property, and Defendants do not.

20 Third, Wildman has been seized and possessed of the property for the last five
21 years – and at all times since 1984, and now. “From what has been said regarding the
22 possession of this property during the entire period of the present thirty-five-year lease
23 it is clear that the action is not barred by the *Code of Civil Procedure, section 318*, since
24 plaintiff not only has been seised and possessed of this property through its tenant, within
25 five years of the commencement of this action, but still has such seisin and possession.”
26 San Francisco Unified School District v. City and County of San Francisco, 54
27 Cal.App.2d 105, 112 (1942).

28 Thus, CCP Section 318 does not bar Wildman's claims.

1 Defendants also rely on CCP Section 319. CCP Section 319, similar to CCP
2 Section 318, precludes an action unless the party “was seized or possessed of the
3 premises in question within five years of the act in respect to which such action is
4 prosecuted”. While this is somewhat uncertain (regarding what the “act” is), the section
5 clearly does not bar Wildman’s claims, for the same reasons set forth in the third point
6 immediately above – Wildman has been seized and possessed of the property from 1984
7 to the present time.

8 Finally, Defendants rely on CCP Section 322, which is an adverse possession
9 statute that has nothing whatsoever to do with this case. Defendants are not “occupying”
10 Wildman’s property, and they certainly do not have adverse possession of his property
11 (which, among other things, requires possession and payment of taxes). In Safwenberg
12 v. Marquez, 50 Cal.App.3d 301 (1975), cited in Defendants’ moving papers, the Court
13 stated, at page 309: “To acquire title by adverse possession, the claimant must establish
14 five elements: (1) hostile acts to the true owner’s title, (2) actual, open, and notorious
15 occupancy of the land, (3) possession under a claim of right or a color of title, (4)
16 continuous and uninterrupted possession for five years and (5) payment of all the taxes
17 levied and assessed for the possession period.”

18 Indeed, Defendants’ own authority establishes that Wildman’s right to bring suit
19 will never expire, under the circumstances here. In Harrison v. Welch, 116 Cal.App.4th
20 1084 (2004), cited in Defendants’ moving papers, the Court stated, at page 1096:

21 “. . . As one court has written with respect to a claim of title by
22 adverse possession, ‘to start the statute to running against the legal owner
23 of the land, there must be an avowed claim of ownership by the party
24 relying upon the statute *and substantially all the elements essential to the*
25 *establishment of title by adverse possession shown to exist.*’ The same rule
26 applies to a claim of a prescriptive easement. Thus, unless and until the
27 encroacher’s use of the property ripens into title by adverse possession or
28 a valid prescriptive easement, the legal title holder’s right to bring an action

1 to recover his or her property from the encroacher never expires. . . .

2 “With the law thus properly understood, it follows that because
3 Welch’s encroachment on the Harrisons’ property never ripened into either
4 title by adverse possession or a prescriptive easement (for reasons we have
5 previously explained), the limitations period for the Harrisons to bring an
6 action to recover their property from Welch had not expired when they filed
7 their complaint in December 2001, even though Welch had been
8 encroaching on their property for more than seven years. Thus, the trial
9 court was not barred by the statute of limitations . . .” (Internal citations
10 omitted; emphasis in italics in original; underlined emphasis added.)

11 Thus, Wildman’s claims are not barred by any statute of limitations cited by
12 Defendants, nor by any other statute of limitations.

13
14 **IV. A CLAIM WHICH IS A CLOUD ON TITLE CREATES A**
15 **CONTINUING CAUSE OF ACTION, ARISING ANEW EVERY**
16 **DAY, WHILE THE CLAIM IS DORMANT OR INACTIVE**
17

18 43 California Jurisprudence 3d (21st Century Edition), Limitation of Actions §106
19 states:

20 “To start the statute of limitations running against the quiet title
21 action of the legal owner of land, there must be an avowed claim of
22 ownership by the party relying on the statute, and substantially all of the
23 elements essential to the establishment of title by adverse possession must
24 be shown to exist. . . . A mere claim of title, even of record, unaccompanied
25 by an adverse holding, will not start the statute running.

26 “An outstanding adverse claim amounting only to a cloud on title is
27 a continuing cause of action, and a quiet title action is not barred by lapse
28 of time until the hostile claim is asserted in some manner to jeopardize the

1 superior title. So long as the adverse claim lies dormant and inactive, the
2 owner of the superior title may not be incommoded by it and has the
3 privilege of allowing it to stand indefinitely. Every day's assertion of the
4 adverse claim gives a renewed cause of action to quiet title until the action
5 is brought."

6 The preceding paragraph is copied virtually verbatim from the Supreme Court's
7 holding in Secret Valley Land Company v. Perry, 187 Ca. 420 (1921), at page 426. On
8 the page before, the Supreme Court stated:

9 " One cannot acquire title to the land of another by paying the
10 taxes on it, nor will a claim of title under a void deed, although recorded,
11 ripen into a fee by lapse of time, nor will limitations run against the owner
12 of record in favor of a claimant not in possession, nor is it incumbent upon
13 the owner to sue for cancellation of a void deed, or to take steps to remove
14 a cloud upon his title If he desires to have the cloud removed the law
15 affords a remedy, but he is not compelled to go to that expense, and his
16 failure to do so cannot be considered laches, nor will it operate as an
17 estoppel against him. A mere claim of title even of record, unaccompanied
18 by adverse holding, will not start the statute." (Emphasis added.)

19 12 Miller & Starr, California Real Estate Third Edition §34:106 states: "An
20 outstanding claim that amounts only to a cloud on title is a *continuing* cause of action and
21 is not barred by lapse of time until the hostile claim is asserted in some manner so as to
22 jeopardize the superior title. Accordingly, so long as the adverse claim lies dormant and
23 inactive, the owner of the superior title may allow it to stand indefinitely. Where the
24 plaintiff remains in possession of the property, the dormant adverse claim does not trigger
25 the statute of limitations." (Emphasis in italics in original.)

26 Defendants' invalid claim, based upon their untimely acceptance of the offer after
27 it expired, is a cloud on Wildman's title. Since their untimely acceptance of the offer,
28 Defendants' claim has remained dormant and inactive; Defendants have taken no actions

1 to construct the parking lot on Wildman's property during this time period, or to
2 otherwise restrict his use of this portion of his property, and Defendants have initiated
3 no court proceedings (let alone obtained any holdings adverse to Wildman). Wildman
4 accordingly had a continuing cause of action for quiet title which was renewed daily.
5 Wildman could allow the claim to stand indefinitely while it remained dormant, and the
6 statute of limitations did not run.

7 Thus, Defendants' statute of limitations demurrers should be denied for these
8 further reasons also.

9

10 **V. DEFENDANTS' LACHES DEMURRERS ARE ALSO MERITLESS**

11

12 Defendants' laches arguments fail for the same many reasons that their statute of
13 limitations arguments fail, as discussed above. Among other things, the statute of
14 limitations never started to run, and Wildman could properly allow his claim to stand
15 indefinitely. As the Supreme Court stated in the excerpt from Secret Valley, supra,
16 quoted above: "If he desires to have the cloud removed the law affords a remedy, but he
17 is not compelled to go to that expense, and his failure to do so cannot be considered
18 laches." (Emphasis added.)

19 In Hyde v. Redding, 74 Cal. 493 (1888), the Supreme Court stated at page 500:
20 "And where a plaintiff has been in possession of land, he cannot be guilty of laches in the
21 bringing of a suit to remove a cloud at any time before an action has been brought to
22 disturb his possession, or to deprive him of any enjoyment of his right. (*Liebrand v. Otts*,
23 56 Cal. 248.) The continued assertion of the adverse claim constitutes from day to day
24 a new cause of action." (Emphasis added.)

25 Defendants' laches demurrer also fails for other reasons. Laches requires proof of
26 prejudice. The Court is considering a demurrer, so the prejudice to Defendants must be
27 affirmatively shown in the complaint. Needless to say, that does not remotely exist here.
28 Instead Defendants' moving papers merely make self-serving, overgeneralized,

1 conclusory statements as to prejudice which are nowhere to be found in the complaint.
2 In fact, there was no prejudice whatsoever, as Defendants have done nothing relating to
3 this parking lot easement in the almost eight years since their untimely purported
4 acceptance of the offer, and virtually nothing in the nearly 30 years since the original
5 offer was recorded. In addition to the lack of any affirmative showing of prejudice in the
6 complaint, any claim of prejudice to Defendants is strongly disputed factually and would
7 have to be determined at trial.

8 As stated in 5 Witkin, California Procedure 5th, Pleading §963:

9 “. . . [I]t should be remembered that laches consists of unreasonable
10 delay that results in some prejudice to the defendant; delay alone, apart from
11 the statute of limitations, is not a bar. If the complaint merely discloses the
12 lapse of a long period of time without affirmatively showing or necessarily
13 implying injury to the defendant, it does not show laches on its face, and a
14 demurrer should not be sustained.”

15 Accordingly, the laches demurrer is patently meritless, and should be denied.

17 VI. CONCLUSION

18
19 Defendants’ demurrers are totally meritless on all of their grounds for multiple
20 reasons, and such demurrers should accordingly be overruled in their entirety.

21
22 DATED: June 7, 2011

Respectfully submitted,

23 THE DODELL LAW CORPORATION
24 LAW OFFICE OF BURTON MARK SENKFOR

25
26 By: Burton Mark Senkfor
27 Burton Mark Senkfor, Esq.
28 Attorneys for Plaintiff DONAHUE L. WILDMAN

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

4 I am employed in the aforesaid County, State of California; I am over the age of 18
5 years and not a party to the within action; my business address is 12121 Wilshire Boulevard,
6 Suite 600, Los Angeles, California 90025.

7 On June 7, 2011 I served the foregoing **MEMORANDUM OF POINTS AND**
8 **AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT** on the
9 interested parties in the foregoing action by placing a true copy thereof, enclosed in a sealed
10 envelope, addressed as follows:

11 Department of Justice
12 Office of the Attorney General of California
13 Laurie R. Pearlman, Esq., Deputy Atty. General
14 300 South Spring Street, Suite 1702
15 Los Angeles, CA 90013
16 Laurie.Pearlman@doj.ca.gov

17 (BY MAIL)

18 I placed such envelope for deposit in the U.S. Mail for service by the United
19 States Postal Service, with postage thereon fully prepaid.

20 As follows: I am "readily familiar" with the firm's practice of collection and
21 processing correspondence for mailing. Under that practice it would be
22 deposited with the U.S. Postal Service on that same day with postage thereon
23 fully prepaid at Los Angeles, California in the ordinary course of business. I
24 am aware that on motion of the party served, service is presumed invalid if
25 postal cancellation date or postage meter date is more than one day after date
26 of deposit for mailing in affidavit.

27 (BY EMAIL) On June 7, 2011, I transmitted the foregoing document(s) by email to
28 the above-listed email address.

(STATE) I declare under penalty of perjury under the laws of the State of California
that the foregoing is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this
court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

Executed on June 7, 2011 at Los Angeles, California.

Julie Peppard