**PRELIMINARY ANALYSIS**

**Contreras v. The Waterford Association**

Prepared By

SS

May 17, 2024

# SHORT SUMMARY OF CASE

Client Rafael Contreras (the "Client") owns the real property located at 6154 Honeysuckle Dr., Newark, CA 94560 (the "Property"), situated with the Waterford Association (the "HOA"). He used to serve as the president of the HOA. In 2022, a water intrusion occurred from his neighboring unit, causing water damage to his Property. Client received double recovery from both his own insurance company and the HOA’s insurance company. In 2024, Client didn’t run the election and the HOA has a new president. The HOA is going after Client to return the $29k he received, as well as a special assessment of $45k legal fee and administrative fee.

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# Parties / Significant Figures

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| Rafael Contreras (“Client”) | Client / HOA Member |
| The Waterford Association  | The HOA |

This table may be amended from time to time as new information/evidence comes in regarding new “parties” and/or witnesses.

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# Statement of Facts / Evidentiary Support

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| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. Client closed escrow on the property. | Client Timeline |
| N/A | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.Client notified HOA of sprinkler leak into Client’s unit. | Email from Client to Mgmt. Co. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. | \*\* |
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This table may be amended from time to time as new information/evidence comes in that require significant revisions to Client’s pre-litigation strategy.

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# Notable Provisions of the Governing Documents

|  |  |
| --- | --- |
| **Document****Article / Section No.** | **Text of the Selected Article/Sections No.****(if none, put “N/A”; delete rows that you didn’t use; maintain formatting)** |
| CC&RsSection 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. The HOA shall paint, maintain, repair and make necessary improvements to the common areas, as well as the exteriors of the garage, deck, and balcony elements of the Units, in good condition and repair. |
| Operating RulesP. 20 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.[I]n the event of any water damage, mold infestation, or related damage arising from an owner’s negligence, or arising from any pipe leak or similar failure for which this owner has the maintenance responsibility, the owner shall be responsible for all repairs and resulting damage. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. |
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The table may or may not contain all the significant provisions of Client’s governing documents. Its sole purpose, in fact, is to help make the Firm’s analysis of Client’s pre-litigation case more convenient. The provisions contained in the table, therefore, should neither be viewed as an exhaustive list of key provisions/evidence, nor be used as a measure of what provisions of the governing documents might strengthen (or weaken) Client’s pre-litigation case.

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# Additional Information/Clarification Needed From Client

The Firm should follow up with Client regarding the following items/issues:

— TBD

This section of the Preliminary Analysis may be amended from time to time as new information becomes known.

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# Civil Code § 5200 Document Demand

Although a Civil Code section 5200 demand went out, the HOA has not yet produced the documents. Once that occurs, the Firm will complete a thorough review of those documents to determine whether any that should’ve been produced are missing.

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# Additional Documents Needed From Client

The Firm needs to ask Client for the following documents:

— TBD

This section of the Preliminary Analysis may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

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# Must NOT Use HOA’s Privileged Documents

If Client provides the Firm with documents that appear to be privileged (HOA’s attorney-client privilege)—e.g., communications/opinions between the HOA’s prior attorneys and the Board, etc.—such documents:

— May not be cited, or even *referenced*, at all during the pre-litigation or litigation phases of the cases.

— Must be stored in a separate folder in “Client Docs” called “HOA Privileged Docs.”

Because Client was a member of the HOA’s board, or otherwise obtained access to documents supplied by a board member, it’s very likely that Client possesses documents that are protected from disclosure by the attorney-client privilege (the HOA’s). This raises three important issues: (i) can Client waive the attorney-client privilege on behalf of the HOA; (ii) does the CRPC mandate the Firm to return the privileged docs; and (iii) does Client violate his or her fiduciary duty to the HOA by providing the privileged docs to the Firm?

## Can Client Waive the Privilege?

— Where the client is a corporation, it alone (through its officers and directors) is the holder of the privilege and it alone may waive the privilege. (*Titmas v. Sup.Ct. (Iavarone)* (2001) 87 Cal.App.4th 738, fn. 1.)

— The authority to waive the attorney-client privilege rests with the corporation’s officers and directors. When control of the corporation passes to new people, so too does the authority to assert or waive the privilege. (*Commodity Futures Trading Com’n v. Weintraub* (1985) 471 U.S. 343.) When control passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes, and new management may waive the attorney-client privilege with respect to communications made by former officers and directors. (*Id. at* 349.) A former director has no power to assert or waive the corporation’s privilege, and a former officer cannot assert the protection if the corporation as waived it. (*Ibid*.)

— The HOA may waive the privilege, but in cases where two or more people are joint holders of a privilege, the waiver of that privilege by one does NOT affect the rights of the other(s) to claim the privilege. (*American Mut. Liab. Ins. Co v. Superior Court* (1974) 38 Cal.App.3d 579; Ev. Code, §912b.)

### Does the CRPC Require the Firm to Return the Privileged Documents?

— CRPC 4.4 requires attorneys to return privileged documents that were “inadvertently sent or produced.” CRPC 4.4, however, does *not* seem to apply. Not only did Client intentionally produce the documents to the Firm, but Client had a valid right to receive the documents in the first place. Notwithstanding that fact, for now the Firm doesn’t believe it’s wise to rest on technicalities when dealing with the ethical rules.

— The official Comment to the Rule states that CRPC 4.4 does not address the “legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately disclosed by the sending person.” The Comment then cites to *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, in which the Court of Appeal broadly held that a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged must (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and (2) immediately notify the sender that he or she possesses material that appears to be privileged.

— *Keep in mind that in Clark, the court disqualified the attorney in question* (who represented an employee of a company) for excessively reviewing the employer’s (i.e., the opposing side’s) privileged materials, *despite the fact that (a) the employee intentionally transmitted the documents to the attorney, and (b) the employee had a right to receive the privileged materials during the course of his employment*. This is precisely the scenario that we’re facing.

— While there are some distinguishing facts in *Clark*—e.g., the employee was contractually obligated to return all privileged materials upon termination of his employment—the point of the case is clear: attorneys are prohibited from “excessively” reviewing certain documents covered by another party’s attorney-client privilege. This rule makes sense given the privilege’s sacred status under California law.

— The Firm has, therefore, decided to proceed with caution at the current time, at least until and unless further research calls for a different take on the issue.

## Does Providing Privileged Documents to the Firm Constitute a Fiduciary Breach by Client?

— The Firm is in the process of completing research on this issue, but it *appears* that the answer is yes—former board members cannot make unauthorized disclosures of privileged materials.

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Potential Affirmative Defenses

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Based upon the allegations made against Client thus far, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the affirmative defenses discussed below appear to be applicable.

## Unclean Hands

— If the plaintiff’s bad conduct or bad faith causes/is related to his or her own underlying harm, then that plaintiff is barred from obtaining equitable relief—i.e., a plaintiff cannot take advantage of his or her own wrong. (Civ. Code, § 3517; *Lynn v. Duckel* (1956) 46 Cal.2d 845, 850.)

## Laches

— A plaintiff’s claim is barred under the doctrine of laches if: (i) the plaintiff delayed in bringing his or her claim; (ii) the delay was unreasonable or inexcusable; and (iii) the defendant is prejudiced because of the delay. (*In re Marriage of Parker* (2017) 14 Cal.App.5th 681, 688.)

## Assumption of Risk

— Prior to the harm occurring, the plaintiff expressly agreed to not hold the defendant liable for any harm that might occur, including harm resulting from the defendant’s negligence. (*Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1304.) This type of “assumption of risk” is *contractual* in nature.

• The doctrine of assumption of risk in the context of a *negligence* claim has been subsumed under the doctrine of comparative fault. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 826.)

## Contract (Mistake of Law)

— If the parties to a contract are mistaken as to the law, that mistake may act as a defense to a claim for breach. The mistake of law defense is available in cases where: (i) all parties to the contract misunderstood the law but thought that they understood it; or (ii) one party to the contract misunderstood the law and the other party to the contract was aware of the first party’s mistake at the time of contracting. (Civ. Code, § 1578.)

## Contract (Mistake of Fact)

— If the parties to a contract are mistaken as to a fact, a party may defend a claim for breach of contract if the mistake was not caused by the mistaken party’s neglect, and if the mistake consists of: (i) an unconscious ignorance or forgetfulness of a material past or present fact; or (ii) a belief in the present existence of a thing material to the contract that does not exist (or in the past existence of such a thing, which has not existed). (Civ. Code, § 1577.)

## Contract (Statute of Frauds)

— The following types of agreements are invalid unless they are in a writing (subject to the exceptions contained in Civil Code section 1624(b)):

• An agreement that, by its terms, can’t be performed within a year of its making. (Civ. Code, § 1624(a)(1).)

• A promise to answer for the debt, default, or miscarriage of another (except those listed in Civ. Code, § 2794). (Civ. Code, § 1624(a)(2).)

• Leases for periods longer than one year. (Civ. Code, § 1624(a)(3).)

• An agreement authorizing or employing someone to purchase or sell real estate. (Civ. Code, § 1624(a)(4).)

• An agreement that, by its terms, can’t be performed during the promisor’s lifetime. (Civ. Code, § 1624(a)(5).)

• An agreement for the purchase of real property secured by a deed of trust (unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property). (Civ. Code, § 1624(a)(6).)

• A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than $100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. (Civ. Code, § 1624(a)(7).)

## Contract (Accord and Satisfaction)

— The defense of accord and satisfaction may be used when: (i) there is a dispute between the parties; (ii) the debtor tenders a certain sum of money to the creditor on the express condition that the creditor’s acceptance of the payment will constitute payment in full; and (iii) the creditor agrees to accept the payment as payment in full. (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058; Civ. Code, §§ 1521, 1523.)

## Waiver

— As an affirmative defense, waiver is a type of estoppel. It prevents a plaintiff from relying on a right (typically contractual) that the plaintiff would otherwise have no problem being able to enforce. Often, such a waiver exists because the plaintiff did or said something that made the defendant believe that the provision in question was no longer in effect, and defendant relied upon that action/statement. (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78.)

## Failure to Mitigate

— A plaintiff has a duty to take steps to mitigate damages and is therefore not entitled to damages that could have been avoided had the plaintiff taken those steps. (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111.)

## Justification

— Because of the defendant’s legally protected interest, the defendant’s appropriate conduct was justified in protecting that interest. (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73.) How this affirmative defense is applied, however, depends upon the nature of the claims alleged. For example, in response to an invasion of privacy claim, a defendant may be justified in violating a plaintiff’s privacy interest if the reason for the invasion outweighs the plaintiff’s privacy interest. (*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573.) In an assault case, however, justification means that the defendant’s force was necessary to protect the defendant or others from wrongful injury. (Civ. Code, § 50.)

## Ratification

— The defendant is not liable for the plaintiff’s harm because the plaintiff ratified the defendant’s conduct after the conduct occurred. (Civ. Code, §§ 1588, 2307, 2310, 2311; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1111, [“[T]he ratification relates back to the time the tortious act occurred.”].)

## Consent

— The defendant is not liable for the plaintiff’s harm if the plaintiff consented to the conduct prior to the harm-producing conduct’s occurrence. (Civ. Code, §§ 3515, 3516; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 875; *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498.)

This section of the Preliminary Analysis may be amended from time to time if new information/evidence comes to light that supports additional affirmative defenses.

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# Strategic Considerations

## Applicability of Davis-Stirling Act

The Davis-Stirling Act applies to the facts of this dispute.

## Attorneys’ Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under the Davis-Stirling Act. In addition, the prevailing party in any such litigation will also be entitled to their attorneys’ fees and costs under Article III, Section 3.17 of the CC&Rs.

## Jurisdiction and Venue

Since there is no binding arbitration provision in the CC&Rs, any litigation related to the dispute must take place in superior court of the county in which Client’s property is located.

## Standing

Based upon the information/evidence that Client has provided thus far, it appears that the opposing party has standing to pursue each of the claims alleged against Client.

## Secondary Conflicts Check

No new potential or actual conflict of interest between the parties and/or significant figures came to light during the Firm’s preparation of this Preliminary Analysis.

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# Final Thoughts / Issues / Concerns / Comments

None at this time.

This section of the Preliminary Analysis might be amended from time to time to reflect new information, strategies, or concerns that arise during the course of the litigation.

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