SUPREME COURT
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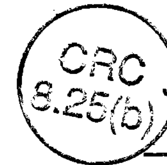

Case Number S241324

IN THE SUPREME COURT OF CALIFONRIA

♦

DR. LEEVIL, LLC,
Plaintiff and Respondent

VS.

WESTLAKE HEALTH CARE CENTER, a California corporation,
Defendant-Petitioner and Appellant

♦

AFTER A DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX
COURT OF APPEAL CASE NO. B266931
SUPERIOR COURT, COUNTY OF VENTURA CASE NO. 56-2015-000465793-CU-UD-VTA
THE HONORABLE VINCENT O'NEILL JR., JUDGE

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ANSWER TO PETITION

Plaintiff/Respondent Dr. Leevil, LLC ("Respondent") submits this answer to Defendant-Petitioner and Appellant Westlake Health Care Center's ("Petitioner") Petition for Review. Petitioner has not presented any grounds for review by this Court. There is no split in authority and there are no important questions of law that must be settled. No grounds exist for this Court to utilize its limited resources. This is not a case that warrants review by this Court. This case is a fact-specific rare unlawful detainer action. It is the wrong vehicle for this Court to grant review because the issues were unique and uncommon. It is better to see if these issues are addressed by a sister district of the Court of Appeal and a real conflict is created. The issue needs to incubate. It may never come up again. This Court would then get the benefit of the competing opinions and research. It could then realistically gauge the lack of impact of this issue. The opinion only requires the filing of a UD after title is perfected by a recording. The arguments relating to the service of the three day notice have little policy impact and do not rise to the level of a case this Court should consider.

Petitioner is also wrong when it argues there is a split in authority between the opinion of the California Court of Appeal, Second Appellate District, in this case (*Dr. Leevil, LLC v. Westlake Health Care Center*

(2017) 9 Cal.App.5th 450) and the opinion of the San Diego County Superior Court, Appellate Division, in *U.S. Financial, L.P. v. McLitus* (2016) 6 Cal.App.5th Supp. 1 (Cal. App. Dep't Super. Ct. 2016). The California Court of Appeal's decision in *Dr. Leevil, LLC* is the binding precedent in California. The opinion by the San Diego County Superior Court, Appellate Division has no value after the Court of Appeal ruled, and was only binding in San Diego County before the Court of Appeal ruled. It only had limited persuasive value, but was not binding precedent. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 782 n. 9; *San Diego White Truck Co. v. Swift* (1979) 96 Cal.App.3d 88, 91; *People v. Lazanis* (1989) 209 Cal.App.3d 49, 61; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 671, p. 4584. It has been overruled by a higher court, and has no value now and is not a conflict that triggers review. Petitioner argued an inaccurate interpretation of this Court's rules for petitions for review.

Moreover, the issue of timing of service of a three-day notice to quit pursuant to *Code of Civil Procedure,* section 1161a(b)(3), in relation to perfection of title following a non-judicial foreclosure sale is not an important question of law that must be settled. It is a rare event used by very few litigants. Most people wait until after title is recorded due to the logistics of getting the title and then getting unlawful detainer counsel. The novel but rare issue is now settled. The Court of Appeal has provided clear guidance for unlawful detainer procedure as it concerns service of a three-

day notice to quit, perfecting title, and filing an unlawful detainer complaint following a non-judicial foreclosure sale. This issue relates to pre-litigation unlawful detainer procedure following a non-judicial foreclosure sale pursuant to *Civil Code,* section 2924. The issue has limited scope and application to a narrow class of unlawful detainer actions following non-judicial foreclosure sales, and is now clearly settled.

Next, the interpretation of the Lease Agreement does not present an important question of law that this Court must settle. It is a simple matter of contract interpretation. The interpretation of the Lease Agreement was a legal issue for the trial court to decide. The interpretation was based on specific provisions in the subject Lease Agreement and other facts unique to this case, including the automatic subordination clause which automatically subordinated the Lease Agreement to any subsequent lien, an integration clause, and the fact that the lessor and lessee were controlled by the same individuals and any ambiguity in the Lease Agreement would be interpreted against Petitioner. Neither the trial court's decision nor the Court of Appeal's opinion relied on the permissive subordination clause and its nondisturbance provision. Moreover, there is no important question of law relating to the interplay of subordination, nondisturbance, and attornment clauses that requires review and utilization of this Court's valuable and limited resources. Particularly when that permissive

subordination clause was not the basis of any decision or opinion in this case.

Finally, Petitioner's various complaints regarding the trial procedure and evidentiary rulings do not present important questions of law that must be settled. The trial court exercised its discretion to bifurcate trial and try the legal issue relating to the effect of the Lease Agreement's automatic subordination clause first. The exercise of that discretion avoided over a week of jury trial on other contracts that were irrelevant based on the effectiveness of the automatic subordination clause.

Similarly, the trial court's exclusion of extrinsic, parole evidence from Petitioner regarding lessee and lessor's intent with respect to the permissive subordination clause is not an important question of law. That evidence was inadmissible parole evidence to the fully-integrated Lease Agreement, and the Court of Appeal agreed there was no ambiguity. Moreover, because the trial court and the Court of Appeal relied on the automatic subordination clause, and not the permissible subordination clause, that parole evidence regarding the intent behind the permissible subordination clause was irrelevant. In any event, such evidentiary rulings do not constitute important questions of law that would require this Court to review the Court of Appeal opinion.

None of these issues come close to the extremely high hurdle Petitioner must meet for this Court to push aside many other high profile

and wide reaching Petitions to decide an issue on an obscure statute that receives very little attention on a finite issue that now has a published Court of Appeal opinion. Waiting for the intermediate courts to issue unpublished and published opinions on the matter is appropriate. This case is too ripe and not had any time to percolate be a proper vehicle for this Court to decide. Presently, the opinion is not cited in a single treatise for the unlawful detainer issue, and merely repeats well-established law in a few other treatises.

II. ADDITIONAL FACTS RELEVANT TO THE PETITION FOR REVIEW

Respondent provides the following limited additional facts which are relevant to the Petition for Review.

Petitioner previously was the tenant at 250 Fairview Road, Thousand Oaks, California (the "Premises"). (2AA at T49, p. 402.) Until February 2015, the Premises were owned by Westlake Village Property, L.P. ("Westlake Village"). Westlake Village, as lessor, and Petitioner, as lessee, previously entered into a Lease Agreement dated March 12, 2002. (2AA at T37, pp. 301-307.) Both Westlake Village and Petitioner were owned and controlled by the same principals—Mrs. Jeoung Lee and her husband Il Hie Lee. (2AA at T37, p. 307; 2AA at T34, p. 276 lines 6-9.) Therefore, the Lease Agreement was drafted and entered into by and between the same

principals as lessor and lessee. The Lease Agreement is a fully-integrated contract. (2AA at T37, p. 306 at ¶ 21.8.)

The Lease Agreement contains a standalone automatic subordination clause which states, "[t]his lease is and shall be subordinated to all existing and future liens and encumbrances against the Premises" ("Automatic Subordination Clause"). (2AA at T37, p. 306 at ¶ 21.6 (emphasis added).) Pursuant to the Automatic Subordination Clause, the Lease Agreement was automatically subordinated to the subsequently recorded Deed of Trust on the Premises given in connection with the loan from TomatoBank, N.A.

In 2008, Westlake Village obtained a loan from TomatoBank, N.A. ("TomatoBank") to refinance the debt on the Premises ("Loan"). (1AA at T25, pp. 184-186.) In July 2014, TomatoBank sold and assigned, *inter alia,* the Loan, Promissory Note, and Deed of Trust to Respondent. (1AA at T25, pp. 198-200.) Westlake Village was in default on the Loan, Promissory Note, and Deed of Trust by, *inter alia,* failing to pay the total indebtedness by the maturity date and filing for bankruptcy.

After obtaining relief from the automatic stay from the United States Bankruptcy Court for the Central District of California, Northern Division, Respondent foreclosed on the Premises via the power of sale contained in the Deed of Trust. (1AA at T2, pp. 11-12 ¶¶1, 4.) Respondent acquired the Premises at the trustee sale conducted on February 19, 2015. (1AA at T2, pp. 11-12 ¶¶1, 4.) The Trustee's Deed Upon Sale was duly recorded on

February 25, 2015. (*Id.* at ¶1.) Pursuant to *Civil Code*, section 2924h(c), Respondent's title in the Premises was perfected as of the time of the trustee's sale, February 19, 2015, since the Trustee's Deed Upon Sale was recorded within 15 days of the trustee sale.

As a result, the Lease Agreement, which was subordinate to the Deed of Trust due to the Automatic Subordination Clause, was automatically extinguished by the foreclosure and trustee sale. *McDermott v. Burke* (1860) 16 Cal. 580, 590; *Dover Mobile Estates v. Fiber Form Products, Inc.* (1990) 220 Cal.App.3d 1494, 1499.

III. LEGAL ARGUMENT

A. There Is No Split in Authority on the Issue of Whether Title Must Be Perfected Before a Three-Notice to Quit Is Served; Nor Is this an Important Question of Law.

In a fallacious and misleading attempt to create a ground for review by this Supreme Court under California Rule of Court, rule 8.500(b)(1), Petitioner incorrectly argues that there is a **split of authority** on the issue of whether title must be perfected prior to service of a three-day notice to quit pursuant to *Code of Civil Procedure,* section 1161a(b)(3). Without citing any authority, Petitioner argues there is a split in authority because the California Court of Appeal, Second Appellate District's March 7, 2017 Opinion and Order in this case (*Dr. Leevil, LLC, supra*, 9 Cal.App.5th 450) criticizes and overrules the opinion of the San Diego County Superior

Court, Appellate Division, *U.S. Financial, L.P., supra*, 6 Cal.App.5th Supp. 1 (Cal. App. Dep't Super. Ct. 2016). Petitioner is wrong.

Had Petitioner conducted basic research regarding the precedential weight of an opinion from the appellate department of the California Superior Court versus that of the California Court of Appeal, it would have discovered there is no split of authority, and no ground for review by this Court. The California Court of Appeal opinion in this case is the controlling and binding precedent.

It is well-established, including by this Court, that decisions by appellate departments of the Superior Court have only persuasive value, are not binding precedent, and do not create conflicts with the Court of Appeal. *Suastez, supra*, 31 Cal. 3d 774. "[A]lthough decisions of the appellate department have persuasive value, they are 'of debatable strength as precedents,' and 'are not, of course, binding on . . . the higher reviewing courts ....'" *Id.* at 782 n. 9 (quoting 6 Witkin, Cal. Procedure Appeal, § 671, p. 4584); *San Diego White Truck Co., supra*, 96 Cal.App.3d at 91 (citing *Cotton v. Municipal Court* (1976) 59 Cal.App.3d 601, 604-605; 6 Witkin, Cal. Procedure, Appeal, § 671, pp. 4584-4585). The California Court of Appeal's opinion in this case is the binding precedent on all California Superior Courts, including all appellate departments of the Superior Court, and not the *McLitus* opinion. *People v. Lazanis*, 209 Cal.App.3d at 61; *see also, People v. Cowles* (1956) 142 Cal.App.2d Supp.

865, 867 (the appellate department of the superior court of one county is not bound by a decision of the appellate department of the superior court of a neighboring county, though such decision is persuasive). Nor does the fact that *McLitus* was ordered published create precedential value. *People v. Moore* (1994) 31 Cal.App.4th 489, 492 n. 2 ("an opinion published by the superior court appellate department, is not, of course, binding precedent"). It is disturbing that this representation was made to this Court. It should be corrected immediately in a reply. *McLitus* is no longer even binding on limited jurisdiction courts in San Diego County.

Therefore, there is no split of authority, and California Rule of Court, rule 8.500(b)(1), does not provide the basis for review by this Court. This Court need not waste its limited resources reviewing this issue. There is clear and binding precedent by the California Court of Appeal that presently is unchallenged by any other district of the Court of Appeal.

Nor is the issue of whether a three-day notice to quit must be served only after the perfection of title following a foreclosure sale an important question of law that needs to be settled by this Court. This is a very limited pre-litigation procedural issue under *Code of Civil Procedure,* section 1161a(b)3), that rarely is in dispute. Its application is limited to holdover tenants after foreclosure sales under *Civil Code,* section 2924, under a power of sale in a deed of trust. That is why there was no Court of Appeal opinion analyzing it prior to this case.

It is not an important question of law that is unsettled. Rather, it is a very simple procedure to apply based on the Court of Appeal's opinion—title must be perfected prior to filing of an unlawful detainer action, but not prior to service of the three day notice to quit because filing of the complaint is the beginning of the unlawful detainer action by which the court acquires jurisdiction over the parties. *Code of Civil Procedure,* section 1161a(b)(3), only requires perfection of title prior to filing the unlawful detainer action in court. It is black and white. The procedure was followed here, and there is clear law for future unlawful detainer litigants.

B. Interpretation of the Lease Agreement Is Not an Important Question of Law Because It Was Based on Specific Facts and Provisions of this Lease Agreement.

Petitioner argues, "[w]hether or not a nondisturbance clause can be enforced against a purchaser after foreclosure in a lease purported to be extinguished by virtue of a subordination clause in that same lease is an important issue of law which should be adjudicated by this Court. The issue is one of first impression for the California Courts." (Petition for Review, at p. 14.) To the contrary, there is a plethora of well-settled case authority and treatises analyzing subordination, nondisturbance, and attornment clauses, and the interplay between the three. As explained by the Court of Appeal:

> A lease made before the execution of a deed of trust survives a subsequent foreclosure and requires that the purchaser take the property subject to the lease. (*Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1478.) A tenant can, however, agree to subordinate its lease to a future deed of trust. (*Id.* at pp. 1478–1479.) This is usually done through an automatic subordination clause, which provides that the lease will be subordinate to encumbrances on the property that later attach. (*Id.* at p. 1479.) It can also be done through a permissible subordination clause, which permits the deed holder to compel the lessee to subordinate its interest. (*Miscione v. Barton Development Co.* (1997) 52 Cal.App.4th 1320, 1328.) If the lease contains both a permissible subordination clause and a nondisturbance provision, the lessee can compel the new owner to abide by the terms of the lease. (*Ibid.*)

Dr. Leevil, LLC, supra, 9 Cal.App.5 at 454. There is no unsettled law in connection with subordination and nondisturbance clauses, particularly in connection with the permissible subordination clause and nondisturbance provision in this Lease Agreement. *Dover, Miscione, Principal Mutual Life Insurance Co.*, and *McDermott*, along with treatises analyzing these long-

standing opinions, have thoroughly analyzed and ruled on the enforceability of these types of lease provisions.

The opinion by the Court of Appeal in this case was based on the unique contract provisions in the sweetheart Lease Agreement Petitioner and its principle gave itself as well as other specific facts present in this case. The Lease Agreement was entered between two related entities—Westlake Village, lessor, and Petitioner, lessee—both of whom were owned and controlled by Jeoung Hie Lee and Il Hie Lee. *Dr. Leevil, LLC*, 9 Cal.App.5 at 452.

The Lease Agreement contains both the Automatic Subordination Clause and a permissible subordination clause which also contains nondisturbance and attornment provisions. *Id.* at 455 and n. 2. There was no evidence that the permissible subordination clause was ever invoked by TomatoBank because the separate, stand-alone Automatic Subordination Clause automatically subordinated the Lease Agreement to any subsequent lien. *Id.* "Under that clause, Westlake Health's lease was automatically subordinate to TomatoBank's deed of trust." Id. (citing *Miscione, supra*, 52 Cal.App.4th at 1328). Because the permissible subordination clause was never invoked, the nondisturbance provision in that clause never came into play. *Dr. Leevil, LLC*, 9 Cal.App.5 at 455. The Lease Agreement was automatically subordinated to any subsequent lien, and that automatic subordination was agreed to by Westlake Health when it entered into the

Lease Agreement. No further act, agreement or writing was required for the Lease Agreement to be automatically subordinated. Because of the Automatic Subordination Clause, the permissible subordination clause and its nondisturbance provision never were at issue.

Petitioner argues that the presence of both the permissible subordination clause with the nondisturbance provision and the Automatic Subordination Clause creates an ambiguity in the Lease Agreement that required a factual interpretation. Petitioner does not explain what the required factual interpretation is. Moreover, the Court of Appeal held, "Westlake Health's interpretation fails to reconcile the lease's automatic subordination clause with the permissible subordination clause." *Id.* at 455. The Court of Appeal held that the interpretation of the Lease Agreement is a legal question for the court. The Court of Appeal affirmed the trial court's application of the well-established rule of contract interpretation that any ambiguity in a contract is construed against the drafter, Westlake Health. *Id.* This Lease Agreement was between two related entities who are owned and controlled by the same two individuals.

Petitioner also argues that review is necessary to determine "whether a lender who seeks to enforce certain clauses in a lease as a third party beneficiary is thus bound by limitations in that lease." (Petition for Review, at p. 18, subheading V.B.2.) This is not an important unsettled question so law. Rather, it is a fact-specific issue in this case, and the third-

party beneficiary argument is moot due the Automatic Subordination Clause in the Lease Agreement.

The Court of Appeal held that because the Automatic Subordination Clause automatically subordinated the Lease Agreement to any subsequent lien, Petitioner's third party beneficiary argument is moot. "Given our conclusion [that the Lease Agreement was automatically subordinated], there is no need to consider Westlake Health's claim that the trial court erred in finding that Leevil was not bound by the nondisturbance clause as a third party beneficiary." *Id.* at 455 n. 4 (citing *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216).

Moreover, Respondent never was acting as a third-party beneficiary of the Lease Agreement, and, on the contrary, argued it was not bound by the Lease Agreement because it was automatically subordinated. That was the basis of the unlawful detainer action—Petitioner was a trespasser after the subordinate Lease Agreement was extinguished by operation of the law following the non-judicial foreclosure sale. As explained by the Court of Appeal, Respondent did not need to invoke the Lease Agreement because it was automatically subordinated the moment when Westlake Health executed the Lease Agreement and agreed to the Automatic Subordination Clause.

C. The Trial Procedure and Evidentiary Rulings Do Not Present Important Questions of Law that this Court Must Settle.

Finally, Petitioner argues, "[t]he issue of whether Petitioner was denied the right to present its case is an important issue of law." (Petition for Review, at p. 20.) In support of this argument, Petitioner presents a litany of complaints about the procedure in the trial court, but does not identify a specific question of law that this Court must settle. There is no important question of law relating to the trial procedure or evidentiary rulings that this Court must settle.

Petitioner argues that the trial court failed to consider extrinsic evidence in connection with its interpretation of the Lease Agreement. The extrinsic evidence was inadmissible and not relevant, and certainly such an evidentiary ruling does not warrant review by this Court.

The Court of Appeal held:

> Westlake Health complains that it was denied the opportunity to present extrinsic evidence concerning the intent and purpose behind the lease's subordination clauses. We are not persuaded.
>
> During the proceedings below, Westlake Health made offers of proof as to the testimony that would be provided: (1) testimony from Ms. Lee, who "would simply say that [the

> lease] was negotiated on behalf of, yes, her as the principal of the lessee, as well as the principal of the landlord" and that "[o]bviously the lender was not a party to the contract at that time," and (2) testimony from the attorney who drafted the lease to explain why the subordination and nondisturbance clauses were included. The court then indicated how it intended to rule, and asked Westlake Health whether it intended to submit additional evidence. Westlake Health stated that it did not.
>
> (1) In the absence of disputed facts, interpretation of lease provisions presents a question of law for the court to decide. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 396 (City of Hope).) Westlake Health has made no showing that the trial court failed to consider any relevant facts. There was thus no need for it to consider extrinsic evidence.

Dr. Leevil, LLC, 9 Cal.App.5 at 454. There was no need to consider extrinsic evidence because the Lease Agreement is a fully-integrated contract, and there is no ambiguity. The intent of the drafting parties was irrelevant and inadmissible parole evidence. Moreover, as the trial court held and the Court of Appeal affirmed, any ambiguity in the Lease Agreement is construed against the drafting party—Westlake Health.

Petitioner's other argument concerning the trial procedure relates to the fact that the trial court exercised its sound discretion to hold a separate bench trial on the issue of the Automatic Subordination Clause in the Lease Agreement. The separate trial was held to conserve judicial resources and in the interests of judicial economy. Indeed, as held by the trial court and affirmed by the Court of Appeal, the case was decided upon that very Automatic Subordination Clause in the Lease Agreement. After that decision, Petitioner stipulated to entry of judgment and possession in favor of Respondent. The trial court's discretion to bifurcate a legal issue of contract interpretation is not an important question of law that warrants this Court's review.

Therefore, there is no important question of law that this Court need settle in connection with the trial procedure and evidentiary rulings. This was a simple case about contract interpretation properly tried to the trial court.

IV. CONCLUSION

For all the foregoing reasons, Respondent respectfully submits that the Petition for Review should be denied. There are no valid grounds under the Court's rules for review of the California Court of Appeal's opinion.

May 18, 2017

Respectfully submitted,
LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, A.P.C.

By ______________________
RONALD RICHARDS
Attorneys for Plaintiff/Respondent
DR. LEEVIL, LLC

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT 8.504

Pursuant to California Rules of Court, rule 8.504(d), Respondent Dr. Leevil, LLC hereby certifies that the text of this RESPONDENT'S ANSWER TO PETITION FOR REVIEW is double spaced, uses a proportionately spaced typeface, contains a total of 3948 words, based on the word count program in Microsoft Word, and complies in all other respects with Rule 8.504.

Respectfully submitted.

May 18, 2017

LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, A.P.C.

By ______________________
RONALD RICHARDS
Attorneys for Plaintiff/Respondent
DR. LEEVIL, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is P.O. Box 11480, Beverly Hills, CA 90213.

On May 18, 2017, I served the following described as **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** on the interested parties in this action.

[XX] U.S. MAIL - by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Teri T. Pham, Esq.
Courtney Havens, Esq.
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12121 Wilshire Boulevard, Suite 600
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Attorneys for Defendant/Appellant/Petitioner Westlake Health Care Center

Superior Court of California, County of Ventura
Honorable Vincent J. O'Neill, Jr., Dept. 41
C/O Superior Court Clerk
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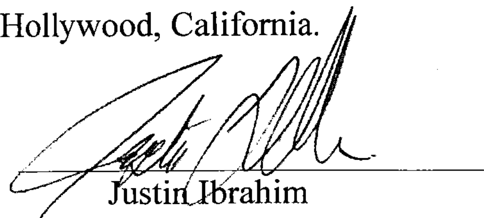
Ventura, CA 93009

California Court of Appeal, 2nd Appellate District, Division 6
Court Place
200 East Santa Clara Street
Ventura, CA 93001

[xx] I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on the same day with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business.

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed May 18, 2017, at West Hollywood, California.



Justin Ibrahim