

APPENDIX

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APPENDIX A

CALIFORNIA SUPREME COURT

No. S267741

HOLLY HILL INVESTMENTS, LLC
Plaintiff and Respondent,

v.

VINCE FLAHERTY, ET AL.
Defendant and Petitioner.

Filed May 26, 2021

**ORDER REGARDING
PETITION FOR REVIEW**

The petition for review is denied.

2a

APPENDIX B

COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 5

No. B292261

HOLLY HILL INVESTMENTS, LLC
Plaintiff and Respondent,

v.

VINCE FLAHERTY, ET AL.
Defendant and Petitioner.

Filed February 8, 2021

ORDER

BY THE COURT:

Defendant and appellant Vincent Flaherty filed a
notice of appeal from a judgment entered in favor of

plaintiff and respondent Holly Hill Investments, LLC, in this unlawful detainer action. Holly Hill moved to dismiss the appeal as untimely. We agree that the appeal is untimely, and therefore, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Unlawful Detainer Proceedings before Judgment

On December 20, 2017, Holly Hill filed an unlawful detainer complaint against Flaherty, his adult son Michael Flaherty, and his former wife Loriann Hart, seeking possession of real property known as 17470 Tramonto Drive in Pacific Palisades, California, as well as the reasonable rental value of the property and appointment of a receiver until such time as possession and control of the property was delivered to Holly Hill. Flaherty originally executed a deed of trust on the property in 2006 in favor of Countrywide Home Loans, Inc., to secure payment of a promissory note. The property was eventually purchased at a trustee's sale by U.S. Bank, N.A., successor trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as trustee to the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Pass-Through Certificates, Series 2006-OA-1 (the Trust). Holly Hill purchased the property from the Trust by way of a grant deed recorded on October 13, 2017. Holly Hill requested, and the court entered, the default of Flaherty's son on January 18, 2018.

On March 14, 2018, Holly Hill filed a motion for summary judgment, or alternatively summary

adjudication, on the ground that all of the requirements for unlawful detainer had been met. If summary adjudication of possession were granted, Holly Hill would dismiss the remainder of the complaint. In support of the motion, Holly Hill submitted evidence showing a three-day notice to quit was served on the defendants by a registered California process server on November 15, 2017, a second three-day notice to quit was served on November 28, 2018, and a third three-day notice to quit was served on December 8, 2017, all by mailing and posting at 17470 and 17474 Tramonto Drive, and supported by the process server's declaration of due diligence.

On March 22, 2018, Flaherty, acting in pro per, filed an opposition to the motion for summary judgment. Among other arguments, Flaherty stated that he and Hart were not served with a three-day notice to quit. In support of the opposition, Flaherty submitted Hart's declaration that she had never been served with a three-day notice to quit by mail or posting. She declared that the statements in the proofs of service relating to November 15 and 28, 2017, about attempts to serve her were false. Hart did not, however, specifically address the proof of service for December 8, 2017. She stated that she was present and could easily have been found at either 17470 or 17474 Tramonto Drive during November and December 2017. She was out of town briefly at the end of December 2017. Flaherty submitted his own declaration, which contained the same information that he had not been served with a three-day notice to quit and the November proofs of service were false, but did not address the proof of service dated December 8,

2017.

A hearing was held on the motion for summary judgment on March 30, 2018. The trial court had reviewed Hart's declaration. Flaherty's declaration appeared to have been omitted, because he had misfiled the declaration within the exhibits submitted to the court. The court's tentative ruling was to grant summary judgment as to Flaherty and his son, but deny the motion as to Hart because her declaration raised a triable issue of fact about service of a three-day notice to quit. Holly Hill argued Hart had not denied receiving the controlling three-day notice to quit dated December 8, 2017.

Flaherty asserted that he had filed his own declaration. Flaherty was given 30 minutes to retrieve his conformed copy of his exhibits from his car, but he did not return to the courtroom at the time appointed to resume the hearing. Hart returned and told the court clerk that Flaherty could not find the declaration in his car and had to go home to get it. At 11:35 a.m., with neither Hart nor Flaherty present, the trial court continued the hearing to 1:30 p.m. Shortly before noon, Flaherty returned and was advised that the hearing had been continued to 1:30 p.m. He did not file any additional documents with the court at that time. The matter was called for hearing at 1:40 p.m. Hart was present, but Flaherty was not. Hart stated that Flaherty was parking the car, but he did not appear at any time during the hearing.

The trial court asked Hart if she received the third notice to quit dated December 8, 2017. Hart explained that due to an emergency situation with her son, she

was not at the property for most of December. Because of her absence, she could not say whether the notice was posted or received in the mail, but she was not aware of the case until late in December.

After the hearing concluded, the court clerk noticed Flaherty's declaration behind the tab of another exhibit. The minute order reflects that after Flaherty's declaration was discovered, the trial court read and considered his declaration. Flaherty's declaration mirrored Hart's declaration: he stated that he had not received the first two notices to quit, but he did not address the third and controlling notice to quit dated December 8, 2017. The court found Holly Hill established each element of the first cause of action for unlawful detainer. Defendants had presented no admissible evidence to rebut the proof of service from the registered process server as to the December 8, 2017 notice to quit. The minute order reflects that the motion for summary adjudication of possession was granted as to all defendants. The order directed Holly Hill's counsel to prepare an order and a judgment in conformance with the ruling. The court took the trial off calendar and vacated all future hearing dates in the case. That same day, Holly Hill dismissed its requests for monetary damages and appointment of a receiver.

Holly Hill filed a document, which the trial court signed and entered on April 3, 2018, reflecting that the motion for summary adjudication was granted on March 26, 2018, and entering judgment in favor of Holly Hill as against Flaherty, Hart, and Flaherty's son. Holly Hill filed a document with the trial court, which was file-stamped on April 4, 2018, showing

service of a document entitled "Notice of Entry of Judgment" on the defendants on April 4, 2018, including a file-stamped copy of the April 3, 2018 judgment. The notice states that it was served on Flaherty by mail at 17470 Tramonto Drive, and on Hart and Flaherty's son by mail at 17474 Tramonto Drive. The court's case summary also shows that a document entitled "Notice of Entry of Judgment" was filed with the court on April 4, 2018.

Trial Court Proceedings after Judgment

On April 9, 2018, Flaherty filed a motion for relief from the judgment pursuant to Code of Civil Procedure section 473, subdivision (b), or issuance of an alternative judgment. Flaherty argued that he was unable to provide argument at the hearing on the motion for summary judgment due to excusable neglect, because he left the courtroom to retrieve a copy of his declaration at the direction of the court, and when he returned to the courtroom, the hearing had already concluded.

Holly Hill filed an application for issuance of a writ of possession on April 12, 2018, and a writ of possession was issued on April 19, 2018. On April 24, 2018, Flaherty filed an ex parte application for a stay of enforcement of the judgment and writ of possession pending the hearing on his motion for relief from the judgment or alternate judgment, and/or pending appeal from the judgment. Holly Hill opposed the ex parte application to stay enforcement of the judgment. After a hearing on April 24, 2018, the trial court granted the ex parte application and ordered a stay of enforcement of judgment and writ of possession. On

May 16, 2018, Holly Hill opposed the motion for relief from the judgment on the ground that it did not contain new or different facts, circumstances, or law, and Flaherty's failure to file his declaration or return to the courtroom within the time frame allowed by the court did not constitute excusable neglect.

A hearing on the motion for relief from judgment was held on May 30, 2018, and the court took the matter under submission. On June 4, 2018, the trial court ruled on the motion. The court found judgment was not entered against Flaherty on the ground that he failed to present his declaration in opposition to the motion, and he was never prevented from presenting argument in opposition to the motion for summary judgment. Although Flaherty's failure to tab the declaration in his papers was the result of inadvertence and excusable neglect, his failure to produce the declaration on the day of the hearing when given two opportunities, or to appear at the hearing after it was continued at his request, was not excusable neglect or a reasonable mistake. The trial court enumerated other circumstances which showed the failure to present his case was not due to excusable neglect or reasonable mistake. The court noted that Flaherty's declaration had been discovered and considered in connection with the summary adjudication ruling, and the court determined that Flaherty's new arguments were unavailing on the merits. The motion for relief from the summary judgment entered on March 26, 2018, was denied.

Holly Hill filed a proposed order which stated the motion for summary adjudication was granted, the motion for relief from the judgment under Code of

Civil Procedure section 473, subdivision (b), was denied, the stay of execution on the writ of possession was terminated, and Flaherty's deposit was to be returned. The order referred to the minute orders entered on March 26 and June 4, 2018. The trial court entered the order on June 22, 2018.

On June 27, 2018, the trial court denied a motion by Flaherty to consolidate the unlawful detainer action with Flaherty's quiet title action against Holly Hill's purported predecessor in interest, U.S. Bank. The trial court noted that the unlawful detainer action had been resolved and was in the process of being enforced. The stay of enforcement issued on April 24, 2018, was lifted on June 4, 2018, and Flaherty's request to impose a second stay of enforcement was denied on June 11, 2018. Holly Hill filed a copy of a notice of entry of the June 22, 2018 order with the trial court on June 29, 2018, with proof of service on the defendants on June 28, 2018. On August 21, 2018, Flaherty filed a notice of appeal from a judgment or order entered on June 29, 2018. He checked the box for a judgment after an order granting a summary judgment motion, as well as a box for "Other," for which he listed "Intermediate rulings 6/22/18 and 6/4/2018 not served appellant; 4/3/18 not served; 3/26/2018 served respondent 5/15/18 (not served appellant); to the extent they involve the merits or affect judgment or rights of party. Code Civ. Proc. § 906."

Motion to Dismiss Appeal

On June 19, 2019, Holly Hill filed a motion in this court to dismiss the appeal on the grounds that it was

untimely. The notice of appeal was filed more than 60 days after service of the notice of entry of judgment, which had included a file-stamped copy of the April 3, 2018 judgment. It was also filed more than 30 days after the order denying the motion to vacate the judgment.

Flaherty made the following arguments in opposition to the motion to dismiss the appeal: He filed a timely appeal from the June 22, 2018 order, because the June 22, 2018 ruling was the final judgment in the case. He filed his appeal based on seeing the notice of entry of the June 22, 2018 ruling posted on the court website, which was the only notice of entry of judgment posted on the court website at the time. The April 3, 2018 judgment and the April 4, 2018 notice of entry of judgment were not posted to the online case summary until July 24, 2018. Prior to a change in the court's computer system in August 2018, the clerks at the filing window could provide the date that documents were posted to the court's electronic system. The clerk at the window provided him with the date that the notice of entry of judgment in the unlawful detainer action was posted to the court system. He claimed the court clerk or the trial court judge manipulated the dates shown in the court system and the online case summary to make it appear the documents were posted on the date reflected by the file stamp.

In addition, he argued that his April 9, 2018 motion was not a motion to vacate the judgment, but an "excusable neglect motion" asking the trial court not to enter judgment. He did not receive notice of entry of the April 3, 2018, or the June 22, 2018, rulings from

Holly Hill, and he accused Holly Hill of not serving the notices of entry of judgment that were filed with the court. He speculated that a proof of service regarding notice of entry of judgment could be falsified. He claimed that he had objected in the proceedings below because documents and judgments were not timely posted to the online system to his detriment. In addition, the California Rules of Court were not jurisdictional, but merely claim processing rules, and equitable considerations required his appeal be determined on the merits concerning underlying title issues. He argued that this court's ruling on the motion to dismiss should be suspended until the clerk's transcript was completed, allowing him to provide citations to the record, and depositions could be taken of knowledgeable court clerks.

Flaherty attached his own declaration to his opposition. In pertinent part, he stated that he filed his notice of appeal at the first opportunity after seeing the notice of entry of judgment dated June 29, 2018, on the court website, which was the only notice of judgment that he had seen on the website. He did not file, and could not have filed, a motion to vacate or reconsider the April 3, 2018 judgment, because the judgment and the notice of entry of that judgment were not entered in the online case summary until July 24, 2018. The court clerk for Department O, who he believed was named Nancy Lee, said it did not matter if he received a copy of the judgment because it would be sent to Holly Hill, who had a duty to serve him. Holly Hill did not serve notice of entry of the April 3, 2018 judgment, which was a tactic honed through thousands of home takeovers in non-judicial foreclosure sales across the country. Therefore,

Flaherty had asked the trial court not to enter judgment until his motion for relief under Code of Civil Procedure section 473, subdivision (b), could be heard.

On August 30, 2019, we notified the parties that the motion to dismiss had been deferred, and they could address issues relating to the motion to dismiss in their briefing on the merits of the appeal.¹

DISCUSSION

In the motion to dismiss, Holly Hill contends that Flaherty did not file a timely notice of appeal from the April 2018 judgment, even allowing for the extension of time to appeal provided by law following a motion to vacate the judgment. We agree.

A. Entry of Judgment

The trial court granted Holly Hill's motion for summary adjudication in a minute order dated March 26, 2018, which directed Holly Hill to prepare a written order and a judgment. The trial court vacated all future hearing dates and the trial in the matter. Holly Hill dismissed the remainder of the action and prepared a document which reflected that summary adjudication had been granted and ordered judgment in favor of Holly Hill. The trial court entered the order and judgment on April 3, 2018. ¹ Flaherty's requests for judicial notice filed on July 5, 2019, March 4, 2020, and September 2, 2020, are denied, because they consist of documents that were not before the trial court, reporter's transcripts from other cases, and documents that are not relevant to the issue of the timeliness of the appeal.

Under the “one final judgment” rule, interlocutory or interim orders are not directly appealable, but may be reviewed on appeal from the final judgment. (Wilson v. County of San Joaquin (2019) 38 Cal.App.5th 1, 7 (Wilson).) “It is the substance and effect of the adjudication, and not the form, which determines if the order is interlocutory and nonappealable, or final and appealable. [Citation.] If no issues in the action remain for further consideration, the decree is final and appealable. But if further judicial action is required for a final determination of the rights of the parties, the decree is interlocutory. [Citation.]’ (Jacobs-Zorne[v. Superior Court (1996)] 46 Cal.App.4th [1064,] 1070.) ‘Generally, an order granting summary adjudication is an intermediate order which is “reviewable on appeal from the final judgment in the action.” [Citation.] However, such an order is appealable if it effectively disposes of the entire matter. [Citation.]’ (Id. at pp. 1070–1071.)” (Wilson, supra, 38 Cal.App.5th at p. 7.)

In counties like Los Angeles that do not maintain judgment books, but instead record judgments through one of the methods authorized in Code of Civil Procedure section 668.5 (microfilming them, entering them in a register of actions, or entering them in the court’s electronic dataprocessing system, before placing the judgment in the file of actions), the date of filing of the judgment with the clerk is the date of entry.² (Code Civ. Proc., § 668.5; Ten Eyck v. 2 Code of Civil Procedure, section 668.5 provides: “In those counties where the clerk of the court places individual Industrial Forklifts Co. (1989) 216 Cal.App.3d 540, 543–545 (Ten Eyck).) “Filing” requires simply that

“the judgment be signed by the judge and file stamped by the clerk.” (Ten Eyck, *supra*, at p. 544.) “Once a judgment is filed with the clerk, it is entered, and no subsequent action is required to effect entry of judgment.” (County of Los Angeles v. Ranger Ins. Co. (1994) 26 Cal.App.4th 61, 65.)

In this case, the trial court entered a written judgment that stated summary adjudication had been granted and ordered judgment in favor of Holly Hill. The April 3, 2018 judgment was clearly a final judgment that disposed of the entire matter, and all future proceedings that were contemplated at that time were taken off calendar. The date of entry of judgment was April 3, 2018, when the judgment in favor of Holly Hill was signed by the trial court judge and file stamped by the court clerk.

We note that after the April 3, 2018 judgment was entered, Flaherty initiated multiple proceedings that show he was aware judgment had been entered in favor of Holly Hill in the unlawful detainer action. On April 9, 2018, he filed a motion under Code of Civil Procedure section 473, judgments in the file of actions and either a microfilm copy of the individual judgment is made, or the judgment is entered in the register of actions, or into the court's electronic data-processing system, prior to placement of the judgment in the file of actions, the clerk shall not be required to enter judgments in a judgment book, and the date of filing the judgment with the clerk shall constitute the date of its entry.” subdivision (b), which sought relief from the judgment. After Holly Hill obtained a writ of possession to enforce the judgment in April 2018, Flaherty sought and obtained a stay of execution of the

judgment and the writ of possession. In light of these actions, Flaherty's belated contention on appeal that the order entered on June 22, 2018, was the final, appealable judgment in this case, simultaneously granting the motion for summary adjudication and denying his motion for relief from that order under Code of Civil Procedure section 473, subdivision (b), is not persuasive. The fact that the order entered on June 22, 2018, reiterated the trial court's ruling on the summary adjudication motion did not restart the time to file an appeal. "Once a final, appealable order or judgment has been entered, the time to appeal begins to run. The Rules of Court do not provide, once a judgment or appealable order has been entered, that the time to appeal can be restarted or extended by the filing of a subsequent judgment or appealable order making the same decision." (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.) Once the April 3, 2018 judgment had been entered, the time to file a notice of appeal from the judgment began to run, and it could not be restarted by relabeling the trial court's earlier decision and entering the order again at a later date.

B. Time to Appeal the April 2018 Judgment

Unless a statute or court rule provides otherwise, a notice of appeal must be filed on or before the earliest of: "(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a

filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment.” (Cal. Rules of Court, rule 8.104(a)(1).) In this case, Holly Hill filed a document with the trial court showing service of notice of entry of judgment on defendants on April 4, 2018, along with a file stamped copy of the April 3, 2018 judgment. Flaherty had 60 days to file a notice of appeal after the notice of entry of judgment was served, until June 3, 2018. If the notice of entry of judgment was properly served on Flaherty, unless the time to appeal was extended, his notice of appeal filed August 21, 2018, was untimely.

Flaherty contends that notice of entry of the April 3, 2018 judgment was not served on him. He has not presented any evidence, however, that the document was not filed with the court as shown by the file-stamped copy in the trial court record. The act of filing a copy of the served document with a proof of service ensured that the date on which the notice of entry was served appeared of record in the superior court file, triggering the statutory periods for posttrial motions and appeal. (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1279–1280.) Flaherty’s declaration that he did not receive the notice of entry of judgment and his speculation that the notice was not served is not sufficient to rebut the statements attested to in the proof of service. (Cf. *McKeon v. Sambrano* (1927) 200 Cal. 739, 741 [“The mere circumstance that the appellant might not have received said notice of motion through the mail cannot lend support to his claim that the affidavit of mailing is false and fraudulent”]; *Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357, 360 [plaintiff’s appeal was untimely even though attorney’s secretary declared notice of

entry of judgment was not received, because service is complete under Code of Civil Procedure section 1013, subdivision (a), when document is deposited in the mail, and sender does not have burden to show notice was received]; *Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1008–1009 [issue of whether notice of entry of judgment was served was raised on the face of documents filed with the trial court, because date of proof of service was prior to date of entry of judgment, requiring evidentiary hearing].)

Flaherty also has not shown that the judgment and the file-stamped copy of the notice of entry of judgment were not accessible to the public in either paper or electronic form. This case is distinguishable from *In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096 (Mosley), in which an appealable order was signed and file-stamped, but the order was not served on the litigants, placed in the court file, or entered into the computerized case management system, until after the time to appeal had expired. (Id. at p. 1099.) The Mosley court acknowledged that “[a]ppellants have a maximum of 180 days to come to a judgment, and cannot wait for a judgment to come to them.” (Ibid.) The court found, however, the outside time limit of 180 days to appeal from entry of judgment “presupposes that so-called ‘filed’ documents in the official record are open and available to the public, in accordance with California’s ‘long standing tradition of open civil proceedings.’ [Citation.]” (Id. at p. 1102.) “To implement these principles of public access, the court rules require court records to be ‘public’ and available for inspection to the public at a court facility or in electronic form. [Citation.]” (Id. at pp. 1102–1103.) “As a result, the presumption about when a document is

'filed,' for purposes of the 180-day time limit, may be rebutted by evidence that the document was not a public record on the file-stamped date." (Id. at p. 1103.)

In Mosley, the wife repeatedly telephoned the clerk's office to find out if any orders had been signed and was told that no order had been filed. Wife personally went to the court to inquire about the case status, and was told there was no record of anything being signed and nothing waiting to be signed, so to resubmit the papers. Wife arranged with husband to resubmit husband's proposed order and wife's objections, which wife delivered to the clerk. After resubmission, the file-stamped order was located, entered into the computerized case management system, and received by husband with a handwritten notation that it had been relocated. Wife addressed the issue of timeliness in the appellate court, including submission of her declaration, copies of her telephone records, and copies of email exchanges with husband's counsel. A superior court supervisor filed a clerk's declaration that the appealable order, although file-stamped, had been misplaced due to clerical error, and as a result, conformed copies were not provided to the parties and the document was not entered into the court's case management system. Husband did not submit a responsive letter on the issue of timeliness. In contrast, Flaherty has not provided evidence that the judgment and the document showing notice of entry of judgment were not available to the public for inspection at a court facility. He provided his declaration establishing that the judgment and the notice of entry of judgment were not available in electronic form through the court's online case

summary, but his declaration does not establish that the documents were not available as part of the public record had he inquired personally. Flaherty was aware that a judgment had been entered, as shown by the multiple postjudgment proceedings, but his declaration does not establish vigilance.

C. Effect of April 9, 2018 Motion

When a party files a motion to vacate the judgment, the time to appeal may be extended under California Rules of Court, rule 8.108(c), as follows: "If, within the time prescribed by rule 8.104 to appeal from the judgment, any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first notice of intention to move—or motion—is filed; or [¶] (3) 180 days after entry of judgment."

In this case, Flaherty filed a motion on April 9, 2018, entitled "Motion for Relief from Judgment Pursuant to Code Civ. Proc. 473 (b); or Issuance of Alternative Judgment; Supplemental Declarations of Vince Flaherty and Loriann Hart." The plain language of the motion established that Flaherty was seeking to vacate the judgment entered by the trial court. The trial court denied Flaherty's motion on June 22, 2018. Holly Hill filed a document with the trial court that showed service on June 28, 2018, of notice of entry of the June 22, 2018 order. 90 days after the motion was filed was July 8, 2018, while 30 days after service of

the notice of entry was July 28, 2018. The time for Flaherty to appeal the April 3, 2018 judgment was extended until the earlier of the two dates, which was July 8, 2018. Flaherty's notice of appeal filed on August 21, 2018, was untimely.

Flaherty contends his April 9, 2018 motion was not a "motion to vacate" the judgment, but simply a motion for relief from the court's ruling under Code of Civil Procedure section 473, subdivision (b). If the motion was not seeking to vacate the judgment, however, there was no extension of the time to appeal the April 3, 2018 judgment and the appeal was untimely. Further, we note that when a party files a motion to reconsider an appealable order, California Rules of Court, rule 8.108(e), provides the same extension of time to file a notice of appeal from the appealable order as after a motion to vacate.

Flaherty states that his appeal was filed within 30 days of the date that the June 22, 2018 order and notice of entry of the June 22, 2018 order were entered in the court's electronic system. As stated above, the time to appeal is calculated based on the filing date of the judgment and the date of service of notice of entry of judgment, not the date that the documents are entered into the court's electronic database.

Even if the June 22, 2018 order were construed as an appealable post-judgment order denying a motion for relief under Code of Civil Procedure section 473, subdivision (b), Flaherty raises no issues on appeal that apply solely to the trial court's June 22, 2018 ruling. All of the issues that Flaherty raises on appeal concern the trial court's ruling on the motion for

summary adjudication and the merits of the unlawful detainer action which were determined by the April 3, 2018 judgment. (*Laraway v. Pasadena Unified School Dist.*, supra, 98 Cal.App.4th at p. 583 [time to appeal not restarted or extended by a subsequent order making the same decision].)

D. Other Considerations

Flaherty contends the time limits imposed under the California Rules of Court to file a notice of appeal from a final judgment are not jurisdictional. This is incorrect. “If a notice of appeal is filed late, the reviewing court must dismiss the appeal.” (Cal. Rules of Court, rule 8.104(b).) “The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal. [Citation.]” (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Thus, “an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review.” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46, italics omitted.)” (*Marshall v. Webster* (2020) 54 Cal.App.5th 275, 279, fn. omitted.)

Flaherty also contends equitable considerations require that the appeal be decided on the merits, including a determination of issues related to title to the property. Flaherty pursued several causes of action related to title, however, in a separate action that he filed on October 19, 2012, against multiple defendants. (*Flaherty v. U.S. Bank, et al.* (Super Ct. L.A. County, 2012, No. SC118787.) This appellate court affirmed judgment in favor of the last remaining

defendant in the title action as against Flaherty in an unpublished opinion issued on July 29, 2019. (Flaherty v. J.P. Morgan Chase Bank, N.A. (Jul. 29, 2019, B282415).)

DISPOSITION

The motion to dismiss the appeal is granted, and the appeal is dismissed. Respondent Holly Hill Investments, LLC, is awarded its costs on appeal.

IT IS SO ORDERED.

RUBIN, P. J. MOOR, J. KIM, J.

APPENDIX C

SUPERIOR COURT CALIFORNIA
COUNTY OF LOS ANGELES
WEST DISTRICT

Case No. SC128569

HOLLY HILL INVESTMENTS, LLC
Plaintiff and Respondent,

v.

VINCE FLAHERTY, ET AL.
Defendant and Petitioner.

Filed June 22, 2018

**ORDERS: (1) GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
ADJUDICATION OF FIRST CAUSE OF
ACTION-UNLAWFUL DETAINER; and
(2) DENYING DEFENDANTS MOTION TO
FOR RELIEF FROM JUDGMENT PER
CCP§473(b)**

BY THE COURT:

Plaintiff Holly Hill Investments, LLC's Motion for Summary Adjudication of the First Cause of Action for Plaintiffs Unlawful Detainer Complaint as against Defendants Vincent Flaherty aka Vince Flaherty ("Vince Flaherty"), Loriann Hart, aka Loriann Hart Flaherty ("Loriann Hart") and Michael Flaherty was regularly called for hearing on March 26, 2018 in Department WEO of the above-entitled Court, the Honorable Lisa Hart Cole, Judge Presiding. Plaintiff Holly Hill Investments, LLC ("Plaintiff") appeared by Bruce Cornelius, of counsel to the Law Firm, of Belzer & Murray LLP. Defendant Vince Flaherty appeared in propria persona; Defendant Loriann Hart appeared in propria persona; Defendant Michael Flaherty did not appear, in person or by legal counsel. The Court issued a tentative ruling and delivered copies of the tentative ruling to all parties. The Court then heard oral argument at approximately 10:30 a.m. from Vince Flaherty and Plaintiff, then adjourned the proceedings and recalled the matter for further hearing at 1:40 p.m. At the further hearing, Loriann Hart and Plaintiff appeared; Vince Flaherty did not appear. The Court heard further argument from Plaintiff and Ms. Hart, the matter was submitted for decision, and good cause appearing,

IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Adjudication as to the First Cause of Action of Plaintiff's Complaint is GRANTED, for possession only, as to 17470 Tramonto Drive, Pacific Palisades, CA 90272, aka 17470 Tramonto Drive, Los Angeles, CA 90272 with respect to defendants Vince Flaherty, Michael Flaherty and

Loriann Hart. The Court's Minute Order with respect to the Motion for Summary Adjudication entered on March 26, 2018, a true and correct copy of which is annexed to this Order as Exhibit A, is hereby incorporated into this Order and made a part hereof by this reference.

* * * * *

On or about April 9, 2018 Defendants Vince Flaherty and Loriann Hart filed their Motion for Relief from [Unlawful Detainer] Judgment Pursuant to Code of Civil Procedure §473(b); or Issuance of Alternative Judgment ("Motion for Relief"). Defendants' Motion for Relief came on for hearing in Department "WEO" of this Court on May 30, 2018 at 9:00 a.m., before the Honorable Lisa Hart Cole, Judge Presiding, pursuant to an Order Shortening Time issued by this Court upon Defendants' application therefor. Plaintiff Holly Hill Investments, LLC ("Plaintiff") appeared by Bruce Cornelius, of counsel to the Law Firm of Belzer & Murray LLP. Defendant Vince Flaherty appeared in propria persona; Defendant Loriann Hart appeared in propria persona. The Court heard arguments for and against the Motion for Relief by the parties, and the Court having taken the Motion for Relief under submission, and good cause appearing, the Court makes the following orders:

IT IS HEREBY ORDERED that Defendants' Motion for Relief is DENIED.

IT IS FURTHER ORDERED that the Stay of Execution on this Court's Writ of Possession with respect to 1 7470 Tramonto Drive, Pacific Palisades, CA 90272, aka 17470 Tramonto Drive, Los Angeles, CA 90272 is terminated forthwith.

IT IS FURTHER ORDERED that Defendant Vince Flaherty's \$12,000 Civil Deposit made with this Court on May 7, 2018 shall be returned to Vince Flaherty.

The Court's Minute Order entered on June 4, 2018 with respect to the Motion for Relief, a true and correct copy of which is annexed to this Order as Exhibit B, is hereby incorporated into this Order and made a part hereof by this reference.

Said Minute Orders having been entered as of March 26, 2018, and June 4, 2018, respectively.

Dated: June 22, 2018.

The Honorable Lisa Hart Cole
Judge of the Superior Court

Exhibit A

[Minute Order dated and filed 3/26/2018; entered 4/24/2018]

U.D.

PLAINTIFF'S (HOLLY HILL INVESTMENTS, LLC)
MOTION FOR SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY ADJUDICATION OF
PLAINTIFF'S COMPLAINT FOR UNLAWFUL
DETAINER;

The Court has posted a tentative ruling as follows,
said tentative ruling not being stated verbatim on the
record.

Plaintiff's Motion for Summary Adjudication of the 1st cause of Action for Unlawful Detainer as to Vince Flaherty and Michael Vince Flaherty is GRANTED. Plaintiff establishes all elements of an unlawful detainer action after a trustee's sale in 2012 in full compliance with CC §2924. Plaintiff's Motion for Summary Adjudication of the 1st cause of Action for Unlawful Detainer as to Loriann Hart is DENIED; Loriann has raised a triable issue of fact as to service of the ThreeDay Notice to Quit.

ANALYSIS: Procedural Issues: Pursuant to CCP §1170.7, a UD MSJ may be made at any time after the answer is filed upon giving five days' notice. The MSJ was timely served. The oppositions were filed on the date of the hearing. The hearing was continued one day, to the date of the trial, for the court to

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read and consider the oppositions. Michael Vincent Flaherty is in default.

Plaintiff's Request for Judicial Notice:

RJN is granted as to #1 -5; granted for the limited purpose that such documents were filed as to #6-10; granted as to #11-14.

Defendants' Request for Judicial Notice:

RJN granted as to ex. A-F, J; granted for the limited purpose that such documents were filed as to ex. H, I; denied as to ex. G, K.

Plaintiff argues that there are no triable issues of material fact as to all issues regarding possession of 17470 Tramonto Drive, LA 90272, and Plaintiff has stated that upon a finding of summary adjudication as to possession, it will dismiss its claim for monetary damages as to the first cause of action. The second cause of action for appointment of a receiver will be rendered moot and will be dismissed.

Plaintiff alleges that it has established the US Bank acquired title to the property in compliance with the then-existing provisions of CC §2924 following its successful bid at a Trustee's Sale conducted in July 2012. Since that time, Vince Flaherty pursued a separate lawsuit against US Bank (SC118787) regarding the same property and the same Trustees sale as is the

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subject of this UD. SC118787 was dismissed against US Bank, on its merits and with prejudice, on July 22, 2016. That judgment was appealed by Vince Flaherty, which was dismissed on September 11, 2017. On May 17, 2017, the Lis Pendens that Vince Flaherty had recorded against the property shortly after the commencement of the action was expunged.

Plaintiff provides several POS of three day notices to quit, dated 11/15/17, 11/28/17 and 12/8/17. All Defendants have continued in actual or constructive possession of the property, according to Plaintiff.

Defendants Vince Flaherty and Loriann Hart filed identical oppositions to the motion so they will be addressed together. Defendants assert that that the requirements of CC §2924 have not been met. Defendants deny that SC118787 has any preclusive effect on this motion and cannot be used as res judicata because that action did not result in a dismissal on the merits of the action and involves a different "primary right." Defendants detail several defects in the underlying notice of default and trustees' sale, all of which they claim are affirmative defenses to this action. Both Vince and Loriann claim none of the three-day notices were served, but only Loriann attaches a declaration to that effect. (Exh. 9.)

Summary judgment is proper "if all the

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papers submitted show that there is no triable issue, as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code of Civil Procedure §437c(c).) From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to a judgment as a matter of law. There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. See *Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 855.

Pursuant to Code of Civil Procedure §437c(f)(1), a party may properly seek summary adjudication of one or more causes of action, one or more affirmative defenses, the issue of punitive damages or the issue of duty. See Code of Civil Procedure §437c(f)(1). "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim of damages or an issue of duty." *Id.*

Where the plaintiff seeks summary judgment, the burden is to produce admissible evidence on each element of a cause of action entitling him or her to judgment. See CCP

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§437c(p)(1). "The burden of the moving party is to persuade the court that there is no material fact for a reasonable trier of fact to find. (Citations omitted) All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." See *LLP Mortgage v. Bizar* (2005) 126 Cal.App.4th 773, 776. It is not plaintiff's initial burden to disprove affirmative defenses and x—complaints asserted by the defendant. See CCP §437c(p)(1).

Once plaintiff has established each element of his or her causes of action, the burden shifts to the defendant to raise one or more triable issues of material fact as to that cause of action. *Id.* The opposing party may not rely upon the allegations or denials in its pleadings. *Id.*

A party can prevail on an unlawful detainer action if it proves (1) the property was sold in compliance with Civil Code section 2924; title under the sale is duly perfected; and (3) the party gave the tenant a proper three-day written notice to quit the property. (Code Civ. Proc., § 1161a, subd. (b)(3).)

Plaintiff has proven by admissible evidence that CCP §1161a(b)(3) have been satisfied. The property was sold in accordance with CC §2924 under the power of sale contained in the Deed of Trust, and title under the sale was duly perfected.

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(SSUMF #3, 4, 5, 6.) Pursuant to CCP §405.61, the expungement of the lis pendens recorded on July 25, 2017, Holly Hill's purchase of the property was free of all competing claims to title made against the property in SC118789, which is the subject property in this UD action. Holly Hill is a bona fide purchaser and is insulated from attack by any claims asserted in the US Bank lawsuit. see, *Lewis v. Superior Court* (1994) 30 Cal 11850; *Knapp Development v. Pal-Mal Properties* (1987) 195 CA3d 786.)

Plaintiff correctly notes that the US Bank lawsuit was fully adjudicated on the merits, was dismissed with prejudice, and the subsequent appeal was dismissed. A final judgment on the merits precluded the parties from raising issues that were or could have been, raised in the prior action. See, *Cal. Coastal Comm. v. Superior Court* (1989) 210 CA3rd 1488. Lorian Hart was not a party to the US Bank

lawsuit, probably because she was never on title to the property. (Vince alone took title of the property, "as a single man." See, Pl. Exh. D, E.) Regardless, she is a party in privity with Vince due to her assertion of action or constructive possession of the property. Even if only Vince, as a single man, was on title to the property, Her relationship is sufficiently close such that Loriann should reasonably have expected to be bound by the US Bank lawsuit. As such, Loriann is collaterally estopped from re-litigating the same claims as

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affirmative defenses in this case. See, *Evans v. Celotex Corp.* (1987) 194 CA3d 741.

Even if the above analysis did not completely resolve the issue, it is clear that Defendants' affirmative defenses are barred by the statute of limitations. Claims involving a non-judicial foreclosure under CC §2924 et seq., are subject to a three-year statute of limitations pursuant to CCP §338(a). Said statute begins to run when the creditor acts to enforce its security interest. The trustee's sale of the property was completed on or about July 23, 2012. More than five years have passed since the accrual of Defendants' [sic] claims, which are alleged as affirmative defenses in this case. The only issue of triable fact that has been raised by either Defendant is service of the Three-day Notice to Quit on Loriann. Although Defendants' list of exhibits references a declaration from Vince regarding the Three-Day notice, Exhibit 8, no such tab nor declaration is included. Only Loriann has executed an

exhibit stating under the penalty of perjury that she did not receive the Three-Day Notice. Although the declaration is self-serving and is reminiscent of her previously filed Motion to Quash Service of the Summons and Complaint, it is sufficient to raise a triable issue of fact as to that single issue.

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The Order Appointing Court Approved Reporter Audrey Lehman, license number 12738, as Official Reporter Pro Tempore is signed and filed this date.

Matter is called for hearing.

The Court has posted a tentative ruling.

The Court hears oral argument.

At the hearing, Plaintiff's counsel directed the court's attention to Loriann's declaration (Defts. Ex. 9) regarding non-receipt of a Three-Day Notice, noting that she denied receiving the first two Three-Day Notices (Pltf. Ex. Q, R) but never denied receiving the third and Controlling Three-Day Notice dated December 8, 2017 (Pltf. Ex. S).

Vince Flaherty insisted that he had filed a declaration as Exhibit 8. At approximate 10:30 a.m, Defendant Flaherty asked for, and was granted, an opportunity to go to his car to retrieve his conformed copy of his exhibits, and was told to return at 11:05. Loriann returned at approximately 11:25, but Vince did not return until shortly before noon, at which time he was

advised that we continued his hearing to 1:30. No additional documents were filed at that time.

The matter was recalled at 1:40, but only Loriann

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appeared. She stated Vince was parking the car, however he did not appear at that time or at any time during the hearing. The court inquired of Loriann if she had received the third Three-Day 3 Notice dated December 8, 2017. She explained that due to an emergency situation with her son out of town, she was not at the property for most of December. Due to her absence, she could not say whether the notice was posted or whether it was received in the mail, but re-asserted the claim she made in her Motion to Quash that she was not aware of the case until late in December.

After the hearing, the court clerk noticed that Vince Flaherty's declaration was stuck behind Defendants' Exhibit 7 without a tab and was therefore overlooked by the court. Vince's declaration was read and considered. It mirrored Loriann's declaration in that he declared only that he had not received the first two Three-Day Notices (Pltf. Ex. Q, R) but did not address the third and controlling three-Day Notice dated December 8, 2017.

Had Mr. Flaherty appeared at the hearing, he would have been provided an opportunity to address the issue orally as Loriann had been.

As stated above, where the plaintiff seeks summary judgment, the burden is to produce admissible evidence on each element of a cause of action entitling him or her to judgment. See CCP §437c(p)(1). "The burden of the moving party is to

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persuade the court that there is no material fact for a reasonable trier of fact to find. (Citations omitted) All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." See *LLP Mortgage v. Bizar* (2005) 126 Cal.App.4th 773, 776. It is not plaintiff's initial burden to disprove affirmative defenses and x—complaints asserted by the defendant. See CCP §437c(p)(1). Once plaintiff has established each element of his or her causes of action, the burden shifts to the defendant to raise one or more triable issues of material fact as to that cause of action. *Id.* The opposing party may not rely upon the allegations or denials in its pleadings. *Id.*

Here, Plaintiff has established each element of its first cause of action for Unlawful Detainer, as previously discussed. Plaintiff has shown by the proof of service from the process server that the Three-Day Notice was posted on December 8, 2017 and mailed thereafter. The burden shifted to the Defendants to raise a triable issue of material fact, which they have failed to do. Defendants presented no admissible evidence to rebut the POS signed by a registered process server regarding service of the December 8, 2017 notice. Loriann was given an

opportunity to present additional evidence orally at the hearing to clarify any aspect of her declaration, which she failed to do. Had Vince appeared at the hearing after being

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given an opportunity to locate his declaration, either in the morning or the afternoon, he would have been granted the same opportunity. Plaintiff's Motion for Summary Adjudication as to the first cause of action for possession only is granted. Plaintiff to prepare an order and a judgment in conformance with this ruling.

The above referenced tentative ruling is adopted as to Vince Flaherty and Michael Vincent Flaherty in its entirety as to possession only. Plaintiff's motion for summary adjudication as to Loriann Hart as to the first cause of action as to possession only is granted.

The trial is off calendar.

Any future hearing dates currently scheduled are advanced and vacated.

Counsel for plaintiff is to give notice.

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Exhibit B

Date: 6/4/2018

**RULING ON SUBMITTED MATTER:
DEFENDANT'S (VINCE FLAHERY) MOTION FOR
RELIEF FROM JUDGMENT PURSUANT
TO CODE OF CIVIL PROCEDURE SECTION
473(b); ISSUANCE OF ALTERNATIVE JUDGMENT**

The Motion for Relief From Judgment Pursuant to Code of Civil Procedure Section 473(b) or Issuance of Alternative Judgment, filed by Defendant, Vince Flaherty, came on before this court for hearing on May 30, 2018. Following oral arguments, the court took the matter under submission. The Court now rules as follow.

Defendant's Motion for Relief from Judgment pursuant to CCP §473(b) is DENIED.

ANALYSIS: A default may be set aside under CCP §473(b) based on the defendant's excusable neglect, mistake, surprise or inadvertence. A court has power within six months after judgment entry to grant relief from the judgment on the grounds of "mistake, inadvertence, surprise or excusable neglect. See CCP §473(b). "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or

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proceeding was taken." All doubts in connection with a CCP 473(b) motion should be resolved in favor of relief and a weak showing suffices. See *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 and *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136.

Defendant asks that the Court set aside the 3/26/18 motion for summary judgment and re-set it for hearing. Defendant argues that the Court did not have his declaration in opposition when it granted the MSJ. Defendant states he submitted his declaration but for some reason, the Court never received it for consideration in connection with the 3/26/18 MSJ hearing. Defendant's missing declaration denied that a proper 3-day notice had ever been posted or mailed to the subject properties.

A key issue to the ruling on the MSJ was whether the 3-day notice was properly served. While the Court's tentative ruling indicates that Loriann Hart's declaration was sufficient to raise a triable issue of material fact on the issue of whether Plaintiff properly served a 3-day Notice to Quit, Plaintiff pointed out that the Hart declaration never address receipt of the third 12/8/17 3-day notice and turned to Flaherty regarding the issue. See Decl. of B. Cornelius, 15; see Motion, Ex. H. Flaherty claimed he filed the declaration, but the court was unable to locate the document among his exhibits. Flaherty

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However, he did not even give it to the courtroom assistant or the clerk when he saw the court was engaged in another matter. The Court told Flaherty to return after lunch at 1:30. Flaherty not only failed to appear at 1:30 but failed to provide the declaration to his wife to give to the Court. Flaherty claimed he was late due to the parking situation and sent Hart up to the courtroom so that he could park the car. Flaherty did not give Hart the declaration to take with her. Id. at 1,19-10. Mr. Flaherty did not appear in Department O at all until the end of the court day, in informal clothing, to ask the court clerk what had happened. Even then, he did not produce the declaration.

In light of these facts, the failure to present the declaration and appear in court was not due to reasonable mistake or excusable negligence. It was unreasonable for Flaherty to be tardy to the 1:30 hearing after the Court specifically continued the hearing to that time for Flaherty's benefit. Flaherty testifies that despite knowing that the Court set the hearing for 1:30, he decided to leave

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to building for lunch, drive to some unidentified location and only returned at 1:25 to the parking lot. Similarly, it is not credible that Flaherty could not find a parking space in 15 minutes, given the proximity of parking to the courthouse and number of available spots. In addition, Hart was unable to reach him by phone, and Flaherty never walked into the courtroom until several hours later, in a change of clothes, to find out what happened. This is unreasonable given

Flaherty's knowledge that his last chance to present the declaration and argue against summary judgment was at the 1:30pm hearing.

Finally, the court indicated in its 3/26/2018 minute order that the court ultimately located the missing declaration, reviewed it and found it was identical to Lorian Hart's declaration and therefore failed to account for the 12/8/17 3-day notice. As such, the Court's decision accounted for the declaration. Flaherty's failure to present it at 11:05 am or 1:30 pm did not cause the entry of judgment against him. At the hearing, Flaherty argued issues raised in a late-filed "Supplemental Brief re: New Evidence" filed at 4:28 p.m. the afternoon before the hearing. Plaintiff's counsel was served with the Supplemental Brief the morning of the May 30 hearing. At the hearing, and in the Supplemental Brief, Flaherty argues that Plaintiff is not a bona fide purchaser relying on his claims against US Bank in SC118787. Further, Flaherty claims the court

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erred in not consolidating the cases or including Holly Hill as a party in SC118787. (It should be noted that Flaherty has reserved 5 court dates on CRS to "join a necessary party" but has never filed the papers or appeared on the motion.)

Aside from being untimely, Flaherty's new arguments are without merit. First, the dismissal of the appeal (B282415) in SC118787, including US Bank and other

financial institution, was finally dismissed per rule 8.140(b) on 5/30/18, after his 11/28/17 motion to vacate dismissal was denied. As of the date of this hearing, there is no active claim against US Bank. Therefore, Flaherty has no basis to challenge to Plaintiff in this action, or to seek consolidation, based on US Bank's non-compliance with Civil Code §2924. Second, the allegations of malfeasance made against the Holly Hill's principal have no bearing on the issues before the court and cannot negate its status as a bona fide purchaser.

The motion for relief from the summary judgment entered on 3/26/18 is denied. Flaherty fails to present a reasonable mistake or excusable neglect that caused entry of the summary judgment against him and Loriann Hart. Plaintiff's request for monetary damages is ordered dismissed. The previously imposed stay of enforcement of judgment and on the writ of possession is lifted. Funds held

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are to be returned to the Defendant.

Counsel for Plaintiff shall prepare a new order, which shall encompass this ruling and the previous ruling regarding the previously heard motion for summary judgment.