

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

LAND LOT 1, LLC,

Plaintiff and Appellant,

v.

CITY OF BAKERSFIELD,

Defendant and Respondent.

F061621

(Super. Ct. No. S-1500-CV 263357
WDP)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Neil S. Tardiff for Plaintiff and Appellant.

Clifford & Brown, Arnold J. Anchordoquy and Daniel T. Clifford for Defendant and Respondent.

-ooOoo-

Plaintiff, Land Lot 1, LLC (Land Lot), appeals from the judgment entered after the trial court granted a motion for judgment on the pleadings in favor of defendant, City of Bakersfield (the city), which was made on the first day of trial. The motion was granted on the ground Land Lot had assigned its interest in the litigation to certain individuals in violation of a provision in the contract between Land Lot and the city that prohibited

assignment of the agreement or any interest in it without the consent of the other party. We conclude that the assignment of Land Lot's causes of action alleged in the complaint was not an assignment of an interest in the contract and was not barred by the nonassignment clause. Therefore, there was no defect on the face of the complaint and no ground on which to grant judgment on the pleadings. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The complaint alleges that Land Lot and the city entered into a contract for the exchange of real property. Land Lot was to transfer two 20-acre parcels it owned (the Planz Property) to the city in exchange for 40 acres the city owned (the Berkshire Property). Land Lot agreed to fill and grade the Planz Property, which had been used for mining sand, to put it in farmable condition in accordance with a grading plan approved by the city. Land Lot also agreed to a general plan amendment and zone change, changing the zoning of the Planz Property from M-3 to open space. The city, at the expense of Land Lot, agreed to process a general plan amendment and zone change for the Berkshire Property to change it to R-2 or PUD zoning. Land Lot performed, grading the Planz Property in conformance with the approved grading plan. The city arbitrarily determined the grading was insufficient and demanded that Land Lot import 400,000 to 500,000 cubic yards of dirt at a cost in excess of \$2,000,000. Land Lot requested that the city perform its obligations under the contract and complete the exchange, but the city refused to close escrow. On March 21, 2008, Land Lot filed its complaint, which included six causes of action: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) declaratory relief, (4) specific performance, (5) inverse condemnation, and (6) violation of civil rights (42 U.S.C. § 1983 (hereafter § 1983)).

On August 6, 2009, Land Lot and Ricardo Huelga, Lee Vincent LaVelle, Laurette Marie LaVelle, William R. Tuculet and Katherine L. Tuculet (collectively the Huelga group), filed a motion for leave to amend the complaint to substitute the Huelga group as plaintiff in lieu of Land Lot with respect to one 20-acre parcel of the Planz Property.

Land Lot had defaulted on a loan made by the Huelga group, which was secured by a deed of trust on the 20-acre parcel; the Huelga group had purchased the parcel at a trustee's sale. On September 1, 2009, the court granted the motion. On November 30, 2009, the city and the Huelga group stipulated to entry of judgment between them. A partial judgment was entered in accordance with the stipulation.

On October 28, 2009, Land Lot filed a notice of transfer of interest in the action. It notified the court and all parties that "the interest of Land Lot 1, LLC in all causes of action that are the subject of this litigation" had been transferred to S. Brett Whitaker and Kathy L. Whitaker, as trustees of the Whitaker Family Trust; Newton Construction, Inc.; Mike Buzzetti; Forrest D. Martin and Eleanor Frances Martin, as trustees of the Martin Family Revocable Trust; Craig Painter; and Julianne Painter (collectively, the Whitaker group). The notice stated: "Pursuant to California Code of Civil Procedure § 368.5, this transfer does not cause the action to abate, and the action may be continued in the name of the original party."

On January 5, 2010, the first day of trial, the city filed a motion for judgment on the pleadings. The city contended the property exchange agreement contained a nonassignment clause, which precluded Land Lot's assignment of its rights in the agreement to the Whitaker group. The city contended this clause prevented the Whitaker group from recovering any damages on any claims arising out of the contract; it sought judgment in its favor. The court continued argument on the motion to permit Land Lot to file opposition, and eventually heard the matter on May 7, 2010. At that hearing, Land Lot presented an agreement in which it contended Land Lot and the Whitaker group had rescinded the transfer of Land Lot's interest in the action to the Whitaker group. Land Lot contended the rescission rendered the city's motion for judgment on the pleadings moot, since the motion was based on the rescinded transfer; it argued the motion should therefore be denied. After further briefing, on July 14, 2010, the court granted the city's

motion for judgment on the pleadings. On November 1, 2010, the court entered judgment in favor of the city and against Land Lot. Land Lot appeals.

DISCUSSION

I. Judgment on the Pleadings

A motion for judgment on the pleadings by a defendant may be made on the ground “[t]he complaint does not state facts sufficient to constitute a cause of action against that defendant.” (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) The grounds for the motion must appear on the face of the challenged pleading or from matter of which the court is required to, or may, take judicial notice. (Code Civ. Proc., § 438, subd. (d).) “In determining whether the pleadings, together with matters that may be judicially noticed, entitle a party to judgment, a reviewing court can itself conduct the appropriate analysis and need not defer to the trial court.” (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216 (*Schabarum*).) The decision is governed by the de novo standard of review. (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) The reviewing court is ““required to render [its] independent judgment on whether a cause of action has been stated”” [citation], without regard for the trial court’s reasons for granting the motion. [Citation.]” (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32.) Thus, we review the matter de novo.

“Matters which are subject to permissive judicial notice must be specified in the notice of motion, the supporting points and authorities, or as the court otherwise permits.” (*Schabarum, supra*, 60 Cal.App.4th at p. 1216, citing Code Civ. Proc., § 438, subd. (d).) The city’s motion for judgment on the pleadings argued that Land Lot’s complaint was rendered defective by Land Lot’s notice, filed with the trial court, that it had transferred its interest in this action to the Whitaker group. The notice of motion for judgment on the pleadings did not mention any request for judicial notice. The caption of the city’s memorandum of points and authorities indicated a request for judicial notice was being

filed concurrently, but that request is not part of the record on appeal. The city's points and authorities identified the notice of transfer, noted that it had been filed with the trial court, and stated it was attached as an exhibit to the request for judicial notice. Land Lot's opposition acknowledged it had filed a notice of transfer of interest with the court; Land Lot did not oppose any request for judicial notice of that document. The trial court noted, at the first hearing, that it had received a request for judicial notice of "the court's files." It obtained the parties' agreement that the transfer reflected in the notice of transfer had occurred. Thus, the trial court effectively took judicial notice of the notice of transfer and considered the effect of the transfer on the claims alleged in the complaint. Because the parties agreed the transfer took place, we will give it the same consideration.¹

II. Effect of Assignment on Claims against the City

"An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." (Rest.2d Contracts, § 317, subd. (1).) A right arising out of an obligation may be transferred by the person to whom the obligation is due; "[t]he burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise." (Civ. Code, §§ 1457, 1458.) This state has a strong policy in favor of the free transferability of all types of property, including rights under contracts. (*Farmland Irrigation Co. v. Dopplmaier* (1957) 48 Cal.2d 208, 222; *Benton v. Hofmann Plastering Co.* (1962) 207 Cal.App.2d 61, 68 (*Benton*).

¹ Ordinarily, the court may take judicial notice of the existence of material in the court records, but may not take judicial notice of the truth of the facts stated therein. (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 473 (*Columbia*)). Here, however, the parties essentially stipulated that the transfer occurred and could be considered for purposes of the motion for judgment on the pleadings. On that basis, we consider the transfer to have been established by the notice.

Contract provisions prohibiting assignment of the contract, or of rights or interests in the contract, without the consent of the other party are generally valid and enforceable. (*Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934, 943 (*Henkel*); *Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Assn.* (1966) 247 Cal.App.2d 1, 6-7.) Such restrictions on assignment, however, are strictly construed. (*Benton, supra*, 207 Cal.App.2d at p. 68.) In *Benton*, Hofmann and Coelho entered into agreements by which Hofmann, a plastering contractor, subcontracted lathing work to Coelho. (*Benton, supra*, 207 Cal.App.2d at p. 65.) Plaintiff and Coelho contracted for plaintiff to finance these lathing jobs; Coelho assigned to plaintiff the proceeds of all subcontracts for which plaintiff had advanced it money. (*Id.* at pp. 64-66.) The Hofmann-Coelho subcontracts contained a provision “[t]hat no assignment of this Subcontract, nor of any money due or which may become due hereunder shall be made without the written consent of the Contractor [Hofmann].” (*Id.* at pp. 66-67.) The court observed that, by clear language, the parties to a contract may provide that the contract rights are not assignable. (*Id.* at p. 67.) However, “[t]here is a distinction between an assignment of a contract and an assignment of the proceeds of the contract.” (*Ibid.*) Ordinarily, a nonassignment provision does not preclude the assignment of money due or to become due under the contract. But in this case, the nonassignment provision expressly prohibited assigning either the contract or the money due under it. (*Ibid.*) “The area of limitations on assignments is, of course, one in which the courts strictly construe such restrictions just as they jealously guard the right to transfer property in general. However, explicit language will be followed in cases of this kind.” (*Id.* at p. 68.) Accordingly, the nonassignment provision was valid and enforceable, precluding recovery of proceeds of the subcontracts by the assignee (plaintiff) against the nonassigning party (Hofmann). (*Id.* at p. 69.)

A nonassignment clause prohibiting assignment of the contract, or the rights or interests under the contract, does not preclude assignment of a cause of action for breach

of the contract. “In California a ‘chase in action,’ also known as a ‘thing in action,’ is statutorily defined as ‘a right to recover money or other personal property by a judicial proceeding.’” (*Baum v. Duckor, Spradling & Metger* (1999) 72 Cal.App.4th 54, 64, citing Civ. Code, § 953 (*Baum*)). “A thing in action, arising ... out of an obligation, may be transferred by the owner.” (Civ. Code, § 954.) Thus, a cause of action for breach of contract is a thing in action and may be transferred or assigned. Assignability of things in action is the rule, and nonassignability the exception. (*Baum, supra*, 72 Cal.App.4th at p. 65.) The Restatement Second of Contracts provides:

“(1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of ‘the contract’ bars only the delegation to an assignee of the performance by the assignor of a duty or condition.

“(2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,

“(a) *does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor’s due performance of his entire obligation;*

“(b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;

“(c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.” (Rest.2d Contracts, § 322, italics added.)

In *Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal.2d 335 (*Trubowitch*), the defendant and Pan American Food Corporation entered into a contract by which the defendant was to sell tomato paste to Pan American. Pan American dissolved and assigned its assets to the plaintiffs, its shareholders; the plaintiffs formed a partnership and carried on the business of Pan American. The plaintiffs sought arbitration of their claim that the defendant failed to make deliveries under the contract. The defendant contended the plaintiffs could not invoke the arbitration provision in the contract, because

they were purported assignees, but the contract contained a provision prohibiting assignment of the contract without consent of the defendant. (*Id.* at p. 338.) The plaintiffs contended they were assigned only a claim for money damages for nonperformance, which was not within the scope of the provision prohibiting assignment of the contract. (*Id.* at p. 339.)

“Where a bilateral contract in terms forbids assignment, it becomes a matter of interpretation as to what is meant. Is it intended that a duty under the contract shall not be delegated, or is it intended that a right shall not be assigned, or are both prohibitions intended?” [Citation.] Even if it is assumed that the prohibition against assignments relates to rights rather than duties, it does not necessarily apply to all claims under the contract or to all transfers of the contract rights. *It is established that in the absence of language to the contrary in the contract, a provision against assignment does not govern claims for money due or claims for money damages for nonperformance*; [citation] ... that a provision against assignment in a contract or lease does not preclude a transfer of the rights thereunder by operation of law [citations]; and that if an assignment results merely from a change in the legal form of ownership of a business, its validity depends upon whether it affects the interests of the parties protected by the nonassignability of the contract. [Citations.]” (*Trubowitch, supra*, 30 Cal.2d at pp. 344-345, italics added.)

The court concluded the defendant had refused to make deliveries under the contract prior to the time the assignment to the plaintiffs was made, giving Pan American a claim for money damages for nonperformance. (*Trubowitch, supra*, 30 Cal.2d at p. 342.) “The assignment of the contract rights related clearly to the claim for nonperformance of the contract, for when it made the assignment Pan American Food Corporation could not reasonably expect that the goods would be delivered.” (*Ibid.*) Additionally, assignment of the contract rights to the shareholders of the corporation, who continued the business after dissolution of the corporation and distribution of its assets to the shareholders, was not a prohibited assignment. (*Id.* at pp. 344-345.) The defendant’s interests would not be served by preventing such an assignment. The assets of the corporation were distributed to the shareholders subject to the rights of creditors of

the corporation, and dissolution of the corporation did not terminate its ability to enforce a contract for the delivery of goods. (*Id.* at p. 345.) The court reversed the trial court's determination that the plaintiffs could not enforce the contract by compelling defendant to arbitrate the dispute.

In *Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, Southwest Storage Company hired Hansen to build 10 silos on its property. Hansen secured a performance bond from Pacific Indemnity. (*Id.* at p. 175.) After the silos were built, Southwest sold them to Hill, who sold them to Balfour. About seven years after completion of the silos, Balfour observed pieces of concrete breaking loose inside the silos. Investigation revealed that the reinforcing steel in the silos did not comply with the specifications. Balfour settled its claims against Southwest and received an assignment of Southwest's claims; Balfour, as assignee, sued Hansen and Pacific Indemnity for fraudulently representing that the silos had been built in accordance with the construction contract. (*Id.* at pp. 181-182.) The defendants contended Balfour had no cause of action against Pacific Indemnity because of a restriction in the bond which stated: "No right of action shall accrue under this bond to or for the use of any person other than the said Obligee." (*Id.* at pp. 177, 187.) The trial court found Hansen breached the construction contract and was guilty of fraud, and Pacific Indemnity was liable on the performance bond. (*Id.* at p. 184.) On appeal, the defendants challenged the finding that Southwest's causes of action for breach of contract and on the performance bond were validly assigned to Balfour. (*Id.* at pp. 184-185.)

In determining the effect of the restrictive clause in the bond, the court distinguished "between a contract (the bond) and rights coming into existence after breach of that contract." (*Balfour, supra*, 227 Cal.App.2d at p. 187.) Citing *Trubowitch*, the court stated that "a provision in a contract ... against assignment does not preclude the assignment ... of money damages for the breach of the contract." (*Balfour*, at p. 187.) "[I]f such an interpretation of a policy is possible, an assignment of a right

which has already accrued under the policy is held not to be within prohibition against assignment; and even though the policy clearly forbids assignment after as well as before loss, it has been held that the provision is void.’ [Citation.]” (*Id.* at pp. 187-188.)

Accordingly, the court affirmed the judgment against Pacific Indemnity.

The contract between Land Lot and the city provided: “Neither this Agreement, nor any interest in it, may be assigned or transferred by either party without the prior written consent of the other party.” Land Lot’s notice of transfer stated that its “interest ... in all causes of action that are the subject of this litigation” had been transferred to the Whitaker group. Thus, Land Lot did not transfer or assign its interest in the contract itself; it transferred the already existing alleged causes of action against the city being prosecuted in this action, including the cause of action for breach of the property exchange contract. Assignment of Land Lot’s accrued causes of action was not barred by the provision prohibiting assignment of the contract.

The city argues that the phrase “this Agreement [or] any interest in it” includes an interest in a cause of action for breach of the agreement. We disagree. In *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, the insurer invoked a clause in an insurance policy it issued, which provided that an assignment of an interest under the policy would be binding only with the insurer’s consent; the court applied the “well settled [rule] that such a provision does not preclude the transfer of a cause of action for damages for breach of a contract.” (*Id.* at pp. 661-662.) *Balfour* indicates that, where a cause of action for breach of contract has already accrued, a nonassignment clause does not preclude assignment of that cause of action. (*Balfour, supra*, 227 Cal.App.2d at pp. 187-188.)

The rationale for permitting assignment of a cause of action for money damages for breach of contract even in the face of a nonassignment clause “is that, on breach (or anticipatory breach) of the contract, the nonassignability clause ceases to bind the other party, because that party may then elect his or her remedy of damages for breach, and the

assignment will be treated as a transfer of an accrued cause of action.” (1 Witkin, Summary of Cal. Law (10th ed. 2010) Contracts, § 716.) Additionally, prohibiting assignment of the rights and duties due under the contract preserves the parties’ right to choose with whom to contract; once a cause of action for breach has accrued, however, no further performance under the contract is expected and no interest of a contracting party is served by prohibiting assignment of the cause of action.

In *Folgers Architects Limited v. Kerns* (2001) 262 Neb. 530, 633 N.W.2d 114 (*Folgers*), the court concluded a nonassignment clause applying to “any interest” in the contract did not bar assignment of a cause of action for its breach. There, the contracts between a property owner and the architect that designed apartment complexes for the owner contained a provision that “‘Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.’” (*Id.* at p. 544.) The court discussed other cases with similar nonassignment provisions. In one case involving a dispute between a construction company and an architect, “the architect ... argued that the contract prohibited the assignment of ‘any interest,’ which necessarily included a cause of action for breach of contract. [Citation.] Reasoning that the contractual language at issue was ‘a boilerplate provision intended to prohibit the exchange of contractual performances’ and that the architect had completed the terms of the contract prior to the assignment, the court held that the clause did not prohibit the assignment of a cause of action for breach of contract. [Citation.]” (*Id.* at p. 545.) Another case discussed in *Folgers* reasoned: “The law draws a distinction between the right to assign performance under a contract and the right to receive damages for its breach. The nonassignability clause prohibits the assignment or transfer of any ‘interest in this agreement.’ This ‘any interest’ language must be construed to mean any interest in the performance of the *executory* contract. [¶] Plaintiffs contend, and we agree, that this is a suit for damages for breach of a fully *executed* contract and is not a suit for performance by the Architects of an *executory* contract. What the plaintiffs

acquired by the assignment was any claim that [the owner] had against the Architects for money damages for nonperformance and such a claim is not within the scope of the clause prohibiting assignment of ‘any interest in this agreement.’” (*Folgers, supra*, 262 Neb. at p. 546.)

The *Folgers* court concluded that “[a]ssigning an interest in a [contract] directly affects the parties’ actual performance of the contract, whereas the assignment of a right to collect damages for a breach of contract, as in the instant case, does not. Therefore, the intent of the provision against assignment of rights under a contract, *which generally is to allow the parties to choose with whom they contract*, is not affected by allowing an assignment of a right to collect damages for breach of contract.” (*Folgers, supra*, 262 Neb. at pp. 546-547, italics added.) Consequently, because the assignment in issue occurred after the contracts were breached, the assignment of a cause of action for breach of the contracts was valid and not barred by the nonassignment clause. (*Id.* at p. 547.)

We find *Folgers*’ reasoning persuasive. Land Lot’s complaint alleges both that Land Lot fully performed its obligations under the property exchange contract and that the city breached the contract prior to commencement of this action. Land Lot’s notice of transfer indicates Land Lot assigned to the Whitaker group its causes of action asserted in this action, including the cause of action for breach of contract. Land Lot did not assign its rights or interests in the contract itself. The specific performance cause of action having been dismissed previously, the complaint does not seek any performance under the contract, but seeks only damages for breach of the property exchange agreement. The assignment of Land Lot’s causes of action to the Whitaker group is not barred by the nonassignment clause of that contract. Consequently, nothing on the face of the complaint or in the matters considered by the trial court bars the Whitaker group as assignee from pursuing the claims asserted in the complaint.

Henkel, by which the trial court apparently was persuaded to grant the motion, does not support a contrary result. (*Henkel, supra*, 29 Cal.4th 934.) In *Henkel*, Amchem

No. 1, a chemical manufacturer insured by the defendants, transferred all of its right, title and interest in the assets of its metallic chemical business to Amchem No. 2. (*Id.* at p. 938.) Henkel subsequently purchased all the stock of Amchem No. 2, acquiring its assets and liabilities. (*Id.* at p. 939.) Henkel was sued for injuries resulting from the claimants' exposure to metallic chemicals prior to its purchase of Amchem No. 2. Henkel tendered the defense of the action to the defendants, who denied coverage. (*Ibid.*) Henkel settled with the claimants, the defendants refused to contribute to the settlement, and Henkel sued the defendants for declaratory relief. (*Id.* at p. 940.)

The insurance policies issued to Amchem No. 1 provided that there could be no assignment of interest under the policy without the insurer's consent. (*Henkel, supra*, 29 Cal.4th at p. 943.) The defendants did not consent when Amchem No. 2 acquired Amchem No. 1. Henkel contended consent to assignment was not required under an occurrence-based policy when the event giving rise to liability had already occurred. (*Id.* at p. 944.) The court observed that "a provision in a contract ... against assignment does not preclude the assignment ... of money damages for the breach of the contract." (*Ibid.*) But "when Amchem No. 2 assumed the liabilities of Amchem No. 1, the duty of defendant insurers to defend and indemnify Amchem No. 1 from claims of the [claimants] had not become an assignable chose in action. Those claims had not been reduced to a sum of money due or to become due under the policy. Defendants had not breached any duty to defend or indemnify Amchem No. 1, so Amchem No. 1 could not assign any cause of action for breach of such duty. [Citation.] Consequently, Amchem No. 1 could not assign the right to defense and indemnity against such claims without the insurers' consent." (*Ibid.*)

Here, in contrast, Land Lot assigned its causes of action to the Whitaker group after the alleged breach of contract had occurred and litigation of that claim was in progress. Nothing in *Henkel* supports a conclusion that Land Lot was precluded by the

nonassignment provision in the property exchange contract from assigning its accrued causes of action to the Whitaker group.

A nonassignability clause is for the benefit of the obligor and does not prevent the assignee from acquiring rights against the assignor by an assignment apparently prohibited by the terms of the contract. (*Benton, supra*, 207 Cal.App.2d at p. 68.) “In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the [obligor].” (*Johnston v. Landucci* (1942) 21 Cal.2d 63, 68.) This rule applies while the contract is still being performed. Once a party has materially breached the contract, the nonbreaching party may make a valid, enforceable assignment of its cause of action for damages for breach of contract, regardless of any nonassignment clause in the contract.

Citing *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225, the city asserts that, once a party makes an absolute assignment of a claim to a third party, it cannot maintain an action on that claim; the assignee acquires the right to demand performance, and the assignor’s right to performance is extinguished. The city adds that, if the contract contains a provision prohibiting assignment without consent of the other party, and the other party does not give its consent, the assignee cannot enforce the contract against the other contracting party. From these rules the city concludes that neither the assignor nor the assignee may prosecute the causes of action alleged in the complaint against the city. *McCown*, however, did not address a situation in which the contract contained a contractual provision prohibiting assignment. Further, neither rule presented by the city addressed assignment of an existing cause of action for damages for breach of contract as opposed to assignment of a party’s interest in an executory contract.

The rule advocated by the city and adopted by the trial court would result in a complete forfeiture of the cause of action for a breach of the contract by the nonassigning party. Neither the assignor nor the assignee would be permitted to enforce the contract;

both would forfeit any remedy for the city's alleged breach of the contract. Such a result is not justified by the case authorities relied on by the city.

III. Defect on the Face of the Pleading

“An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.” (Code Civ. Proc., § 368.5.) This action was initiated by Land Lot. In the course of the litigation, Land Lot assigned its causes of action to the Whitaker group. Land Lot gave notice of the assignment, but indicated the assignor and assignee intended to continue the action in the name of the original party, Land Lot, as permitted by Code of Civil Procedure section 368.5. Consequently, the assignment of Land Lot's causes of action to the Whitaker group did not result in a defect on the face of the complaint; the assignment was not a valid ground for granting judgment on the pleadings.

IV. Civil Rights Cause of Action

The city contends that, even if assignment was not precluded by the nonassignment clause of the property exchange agreement, the cause of action for violation of Land Lot's civil rights under section 1983 was not assignable. The city asserts that civil rights claims under section 1983 are construed as tort claims for personal injury, which are not assignable under California law. We disagree.

The United States Supreme Court cases on which the city relies refer to civil rights claims as tort claims. They do not characterize them as tort claims “for personal injury.” (See *City of Monterey v. Del Monte Dunes* (1999) 526 U.S. 687, 717 (*Monterey*), referring to a government taking of property for public use without compensation as unconstitutional and tortious; *Heck v. Humphrey* (1994) 512 U.S. 477, 483 (*Heck*), noting “that 42 U.S.C. § 1983 creates a species of tort liability”; *Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 305 (*Memphis*), same.) The only case the city

cites that refers to civil rights claims as tort claims for personal injury is *Pony v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1138 (*Pony*). *Pony* involved claims “arising out of medical procedures” and causes of action for traditional torts and constitutional violations. (*Id.* at p. 1140.) Thus, the claims in that case included torts for personal injury. The court stated: “The Supreme Court has construed claims brought under Section 1983 as tort claims for personal injury.” (*Id.* at p. 1143.) In support, it cited *Monterey*, *Memphis*, and *Heck*, none of which mentioned tort claims for personal injury.

The *Pony* court also cited *Wilson v. Garcia* (1985) 471 U.S. 261 (*Wilson*), in which the court determined that the appropriate statute of limitations for all claims for violation of section 1983 was the particular state’s statute of limitations for personal injury claims. The court concluded that, for the sake of uniformity and certainty, and to minimize litigation, the courts should “select, in each State, the one most appropriate statute of limitations for all § 1983 claims.” (*Wilson, supra*, at p. 275.) Although “[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations,” (*id.* at pp. 272-273) the court concluded “that the tort action for the recovery of damages for personal injuries is the best alternative available.” (*Id.* at p. 276.) The *Wilson* court did not address assignability of section 1983 claims or determine the nature of such claims for purposes of assignability. “An opinion is not authority for a point not raised, considered, or resolved therein. [Citations.]” (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57-58.)

In California, “[a]ssignability of things in action is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage.”” (*Balfour, supra*, 227 Cal.App.2d at p. 188.) Nonassignable causes of action include “slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise,

malicious prosecution, and others of like nature.” (*Wikstrom v. Yolo Fliers Club* (1929) 206 Cal. 461, 463.) Assignable causes of action include: “causes of action arising from the breach of a contract of any kind (except the breach of a promise to marry); causes of action arising from torts which affect the estate rather than the person of the individual who is injured. Under the latter head are claims arising from the carrying away or conversion, of personal property, from the fraudulent misapplication of funds by the officer of a bank, from negligent or intentional injury done to personal property or upon real estate.” (*Ibid.*) ““Assignable are choses in action arising out of an obligation or breach of contract as are those arising out of the violation of a right of property [citation] or a wrong involving injury to personal or real property.’ [Citations.]” (*Baum, supra*, 72 Cal.App.4th at p. 65.)

We conclude a cause of action for violation of civil rights, which alleges a taking of real property by a public entity without compensation, falls within the category of assignable choses in action. It is not based on a personal injury or a purely personal wrong. It seeks redress for a violation of property rights, or for a wrong affecting property rights, similar to a tort action for injury to real property, which is assignable. Accordingly, there is no defect on the face of the sixth cause of action, taking into account the notice of the assignment to the Whitaker group that would support judgment on the pleadings in favor of the city on that cause of action.

V. Effect of Attempted Rescission

We need not consider whether the attempted rescission of the assignment was effective. The rescission was not properly before the trial court when it considered and ruled on the motion for judgment on the pleadings. Land Lot and the Whitaker group attempted to rescind the assignment after the motion for judgment on the pleadings was filed. Thus, the rescission was not alleged in the complaint, nor was it a trial court record at the time the motion was filed. Judicial notice was not requested and could not have been taken of the content of the documents reflecting the rescission. (*Columbia, supra*,

231 Cal.App.3d at p. 473.) The parties did not stipulate to the rescission as they did to the assignment.

Additionally, if the rescission was effective, Land Lot would be the proper plaintiff, and the complaint names it as such. If, as the trial court found, the rescission was ineffective, the Whitaker group would be the real party in interest, but the action may be continued in the name of the original plaintiff, Land Lot. (Code Civ. Proc., § 368.5.) Either way, there is no defect on the face of the complaint; therefore there is no ground for granting judgment on the pleadings.

DISPOSITION

The judgment is reversed with directions to the trial court to vacate the order granting the motion for judgment on the pleadings and to enter a new and different order denying that motion. Appellant is entitled to its costs on appeal.

HILL, P. J.

WE CONCUR:

LEVY, J.

FRANSON, J.