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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KRISTINE L. ADAMS,

Plaintiff and Appellant,

v.

NEWPORT CREST HOMEOWNERS  
ASSOCIATION et al.,

Defendants and Respondents.

G045590

(Super. Ct. Nos. 07CC01390,  
05CC05516)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Reversed and remanded.

Kristine L. Adams, in pro. per., for Plaintiff and Appellant.

Grant, Genovese & Baratta, James M. Baratta, Christopher S. Dunakin and Aaron J. Mortensen for Defendants and Respondents.

\* \* \*

We now reach the fourth appeal. Kristine Adams (Adams) challenges a judgment of dismissal after an order sustaining a demurrer in her second lawsuit against Newport Crest Homeowners Association and certain others (collectively, Newport Crest). She contends, inter alia, that her second lawsuit is not completely barred by either issue preclusion or the litigation privilege. We agree. We reverse and remand.

## I

### FACTS

#### A. APPELLATE HISTORY:

We described the history of the various appeals in our last opinion. (*Kristine L. Adams v. Newport Crest Homeowners Association* (Mar. 13, 2012, G044230) [nonpub.opn.]<sup>1</sup> (*Third Appeal*)). As we said therein: “Plaintiff and Appellant Kristine Adams (Adams) has filed two lawsuits against Newport Crest Homeowners Association and certain others . . . . The trial court dismissed the first lawsuit as having been settled, even though the parties continued to squabble. (*Adams v. Newport Crest Homeowners Association* (Super. Ct. Orange County, 2007, No. 05CC05516) (Case No. 05CC05516).) In our decision in the first appeal, we affirmed the dismissal. (*Adams v. Newport Crest Homeowners Association* (Sept. 9, 2009, G039956) [nonpub. opn.] [(*First Appeal*)].)

“Adams filed a second lawsuit having to do with the settlement agreement in Case No. 05CC05516, as well as certain related matters. (*Adams v. Newport Crest Homeowners Association* (Super. Ct. Orange County, 2008, No. 07CC01390) (Case No. 07CC01390).) In Case No. 07CC01390, the trial court granted a Code of Civil Procedure section 425.16 anti-SLAPP motion with respect to three out of the 15 defendants, and dismissed that lawsuit as against those three defendants. In her second appeal, Adams challenged the dismissal and we affirmed. (*Kristine L. Adams v. Scott L. Ghormley* (Feb.

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<sup>1</sup> By order of June 7, 2012, this court notified the parties of its intention to take judicial notice of the opinion filed in that case and gave them an opportunity to object. No party having objected, we took notice of that opinion by order filed June 14, 2012.

8, 2011, G040728) [nonpub. opn.] [(*Second Appeal*)].)

“After our decision in the first appeal was filed, the defendants in Case No. 05CC05516 returned to the trial court and filed a motion for attorney fees incurred in connection with the enforcement of the settlement agreement in that lawsuit. The court granted the motion, and awarded \$58,212 in attorney fees. The order granting those fees [was] the subject of . . . the third appeal. . . . We affirm[ed].” (*Third Appeal, supra*, G044230, fn. omitted.)

As noted at the outset, in this the fourth appeal, Adams challenges the judgment of dismissal after an order sustaining demurrer without leave to amend, filed in Case No. 07CC01390.

*B. SYNOPSIS OF CASE NO. 05CC05516:*

As we stated in the *First Appeal, supra*, G039956: “Plaintiff Kristine Adams (Adams) brought suit against Newport Crest Homeowners Association and certain others (collectively, Newport Crest), in connection with alleged mold, biological contamination, water intrusion, structural damage, termite and rat infestation, and other issues affecting her condominium unit . . . . The parties went to mediation and ultimately signed a settlement agreement, which entailed the payment to Adams of \$500,000 from Newport Crest’s insurance carrier, and a commitment to perform extensive remediation of her unit within an anticipated 90-day period. The insurance payment was made, but Adams claimed Newport Crest failed to comply with its nonmonetary performance obligations.

“Adams filed a Code of Civil Procedure section 664.6 motion to enforce the terms of the settlement agreement and to order Newport Crest to perform its obligations thereunder, and Newport Crest thereafter filed an ex parte application for an order enforcing the settlement agreement and compelling mediation. Finding that the settlement agreement required disputes thereunder to be returned to mediation, the court

denied Adams's motion and granted Newport Crest's application. However, Adams did not respond to Newport Crest's request to schedule a mediation. The court, on its own motion, set an order to show cause re dismissal. After a hearing on the order to show cause, the court ordered Adams's case dismissed.

“Adams appeal[ed] from the order denying her motion and granting the application of Newport Crest, from the order dismissing her case, and from an order imposing monetary discovery sanctions against her. In attacking the order denying her motion, she insist[ed] that the settlement agreement [was] binding and that, for a variety of reasons, the court erred in failing to convert it to judgment. But when it [came] to challenging the order granting Newport Crest's application, Adams paradoxically maintain[ed] that the settlement agreement [was] completely unenforceable, due to fraud in the inducement, failure of consideration, a lack of meeting of the minds, and the invalidity of what she characterize[d] as a ‘binding mediation’ provision. In other words, if the settlement agreement [was] construed to include the mediation provision that it clearly [did] contain, then she insist[ed] the settlement agreement [could not] be binding, but she desperately want[ed] the settlement agreement to be enforced, minus the mediation provision to which she agreed.” (*First Appeal, supra*, G039956, fn. omitted.)

In our opinion filed September 9, 2009, we held that substantial evidence supported the implied finding that the settlement agreement was binding and that the court had properly interpreted the settlement agreement to require disputes thereunder to be submitted first to the mediator, not the court. We affirmed the order denying Adams's motion and granting Newport Crest's application, the sanctions order, and the dismissal. (*First Appeal, supra*, G039956.)

*C. PROCEDURAL HISTORY OF CASE NO. 07CC01390:*

As we stated in our decision in the *Second Appeal, supra*, G040728: “In October 2007, Adams filed, in her second lawsuit, a first amended complaint against 15 parties . . . . The suit primarily arose out of the settlement agreement in the first lawsuit, but also folded in certain residual issues concerning continued mold and other problems in connection with her condominium unit and personal property. Adams asserted 15 causes of action . . . .

“The first five causes of action had to do with alleged fraud in the inducement or other misrepresentation in connection with the settlement agreement in the first lawsuit. The sixth, seventh, tenth and eleventh causes of action had to do with alleged breach or frustration of the settlement agreement. The eighth and ninth causes of action, for intentional and negligent infliction of emotional distress, also arose out of the inducement to enter into, or the performance of, the settlement agreement. The twelfth cause of action, for nuisance, had to do with, inter alia, the failure to remediate in accordance with the settlement agreement.” (*Second Appeal, supra*, G040728.) The thirteenth cause of action was for unjust enrichment, the fourteenth was for injunctive relief, and the fifteenth was for rescission of the settlement agreement.

In January 2008, Newport Crest filed a demurrer. Newport Crest argued that Adams’s many causes of action essentially boiled down to two legal claims—fraudulent inducement to enter into the settlement agreement and breach of the settlement agreement. The first set of claims, it argued, was barred by the litigation privilege. The second set of claims, Newport Crest asserted, had already been fully adjudicated in Case No. 05CC05516.

Although the court held a hearing on the demurrer in May 2008, it declined to rule thereon and instead stayed the action pending issuance of our decision in the *First Appeal, supra*, G039956.

In December 2009, Adams filed a status conference statement in which she requested an opportunity to file supplemental briefing given our decision in the *First Appeal, supra*, G039956. She argued, inter alia, that our opinion required the parties to attend mediation before proceeding with any judicial action. She stated that she had already contacted mediator Steven Kruis and arranged mediation dates, but that the other parties had failed to respond. Adams attached copies of letters to the mediator and to counsel for Newport Crest regarding mediation dates. She also attached her declaration under penalty of perjury stating that the copies of the letters were true and correct. Furthermore, Adams asked the court whether it would stay the litigation pending mediation.

In addition to the foregoing, Adams represented that she had lost her home through nonjudicial foreclosure in November 2009. She said she had been unable to obtain a loan modification because of a lien Newport Crest recorded against the property. Adams stated that the settlement agreement had obligated Newport Crest to remove the lien, but that Newport Crest had nonetheless refused to do so. She further stated that, given this and the resolution of certain issues in the *First Appeal, supra*, G039956, amendments to her complaint were necessary.

In March 2010, the trial court ordered that Adams's two lawsuits be consolidated.

In August 2010, the trial court ordered the litigation stayed pending the outcome of the *Second Appeal, supra*, G040728. We issued our decision in that case in February 2011. The trial court thereafter reset the hearing on Newport Crest's demurrer for April 11, 2011.

At the hearing, Adams represented to the court that she had lost her home and that Newport Crest had not returned her personal property. She further represented that after our decision in the *First Appeal, supra*, G039956 had been filed, the parties

went to mediation before mediator Steven Kruis and paid his fee, but the matter was not resolved. Given the changed facts, Adams argued that the demurrer was “outdated.”

At the conclusion of the hearing on April 11, 2011, the court sustained the demurrer without leave to amend. However, the following day, the court, sua sponte, vacated its order and took the matter under submission to further consider the parties’ written and oral arguments. In its minute order, the court stated: “Unless there is a specific request therefor, there will be no further briefing.”

On April 18, 2011, Adams filed a request for further briefing. In her request, she quoted at length from our decision in the *First Appeal, supra*, G039956, wherein we emphasized that the parties were required to submit any disputes under the settlement agreement to mediation before seeking a judicial remedy. She again represented to the court that, subsequent to the filing of our decision in the *First Appeal, supra*, G039956, she had attended mediation in January 2010. Having attended mediation, Adams argued to the trial court that she was entitled to seek a judicial resolution of what she characterized as Newport Crest’s noncompliance with the terms of the settlement agreement.

By minute order of April 20, 2011, the trial court stated: “The briefing process in this matter is not open-ended and endless. (That is never the case.) The court has not made a request for further briefing following the April 11, 2011 hearing in this case. Nor has it granted leave for any of the litigants to submit further material. Plaintiff will surely recall that the court specifically declined her request for additional briefing when the pending demurrer was placed back on calendar after the completion of appellate review earlier this year. The court will therefore not consider the written argument filed by the plaintiff on April 18, 2011.”

The court thereafter sustained the demurrer without leave to amend. It observed that Adams’s 15 causes of action were based on two general grievances—the negotiation of the settlement agreement and the performance of the settlement agreement.

It held that the causes of action based on the negotiation of the settlement agreement were barred by the litigation privilege. It further held that to permit Adams to proceed with her second lawsuit would be to reward her for ignoring the settlement agreement provision requiring her to submit any disputes to mediation before pursuing a judicial resolution. The court quoted the portion of our decision in the *First Appeal, supra*, G039956 wherein we stated: “In other words, the court correctly interpreted the agreement to mean that there would be no court litigation over whether Newport Crest had breached its obligations under the settlement agreement, without first giving the mediator an opportunity to resolve the dispute.” However, it would appear that the court interpreted our affirmance of the dismissal of Case No. 05CC05516 to mean that because Adams previously had failed to mediate the dispute before seeking a judicial resolution, she could not ever seek a judicial resolution, even if she ultimately did so after an unsuccessful mediation.

That is not what we said. Understanding this, Adams filed a notice of appeal.

## II

### DISCUSSION

#### A. *PRELIMINARY MATTERS:*

##### *(1) Notice of Appeal—*

On August 2, 2011, Adams filed a notice of appeal from what she characterized as a judgment of dismissal after an order sustaining a demurrer, entered on May 27, 2011. Shortly thereafter she filed her civil case information statement, to which she attached a copy of an order sustaining a demurrer without leave to amend, filed May 27, 2011. This court then ordered Adams to obtain a judgment from the trial court and file it with this court. Adams thereafter obtained a judgment of dismissal following order sustaining demurrer, filed in the trial court on August 23, 2011, and she filed a copy in this court.

As a technical matter, an order sustaining a demurrer without leave to amend is nonappealable. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) However, California Rules of Court, rule 8.104(d)(2) provides: “The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.” Despite Adams’s repeated failure to follow the rules of appellate procedure in her various appeals, we exercise our discretion to treat her notice of appeal as having been filed immediately after entry of the judgment of dismissal.

(2) *Motion to Take Evidence on Appeal or for Judicial Notice*—

On November 23, 2011, Adams filed a motion for this court either to take documentary evidence pertaining to the parties’ attendance at mediation, or to take judicial notice of such evidence. She attached to that motion copies of two documents—a copy of a January 21, 2010 meditation agreement and a copy of a check in the amount of \$1,405, payable to Steven Kruis. Adams says it is vital for this court to take evidence, because she needs to demonstrate to the court that the parties did attend mediation before Steven Kruis after we issued our decision in the *First Appeal, supra*, G039956.

Adams cites California Rules of Court, rule 8.252(c), which provides:

“(1) A party may move that the reviewing court take evidence. [¶] (2) An order granting the motion must: [¶] (A) State the issues on which evidence will be taken; [¶] (B) Specify whether the court, a justice, or a special master or referee will take the evidence; and [¶] (C) Give notice of the time and place for taking the evidence. [¶] (3) For documentary evidence, a party may offer the original, a certified copy, or a photocopy. The court may admit the document in evidence without a hearing.”

She requests that this court admit her documents in evidence without a hearing, pursuant to California Rules of Court, rule 8.252(c)(3). In the alternative, Adams requests that this court take judicial notice of the documents, pursuant to California Rules of Court, rule 8.252(a).

By order of June 6, 2012, we requested the parties to file supplemental letter briefs addressing a number of issues pertaining to evidence of a mediation. We asked, *inter alia*, whether copies of the documents attached to Adams’s motion were ever presented to the trial court. As it turns out, they were not. We do not make a practice of taking evidence of documents that were not put before the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Adams has cited no authority that would make us change that practice in this case. Moreover, she has cited no authority to show that it would be appropriate for us to take judicial notice of the documents. (*Ibid.*; Evid. Code, § 452.) Her motion is denied.

(3) *Motion to Augment and to Take Judicial Notice—*

On June 11, 2012, Adams filed a motion to augment the record on appeal with copies of 13 documents and to have this court to take judicial notice of two other documents. Most of the documents subject to her motion were pleadings or orders filed in either Case No. 07CC01390 or Case No. 05CC05516. However, one document was a copy of a computer printout showing a portion of a docket, with the case number written across the top by hand. Nine of the documents were already contained in the record on appeal.

Newport Crest filed objections to the motion. It stated that Adams was attempting to augment the record with documents that were never put before the trial court. Newport Crest also argued that Adams’s motion should be disregarded because of an inaccurate proof of service.

According to the proof of service attached to Adams’s motion, a copy was served on counsel for Newport Crest on June 11, 2012, by delivering the document “to the USPS, Priority Mail, with postage fully prepaid . . . .” However, according to the declaration of Attorney Christopher S. Dunakin, the envelope containing the copy of the motion bore a United States Postal Service postmark of June 13, 2012. A copy of the envelope reflecting the June 13, 2012 postmark was attached to the declaration.

We are greatly dismayed, to say the least, to see what appears to be an inaccurate proof of service. While Adams herself is not the one who signed the proof of service, she is cautioned that she should ensure the accuracy of the proofs of service attached to her motions.

In any event, we deny her motion. Most of the documents, as we have stated, are already contained in the record on appeal and we do not augment the record to contain duplicates. (Cf. *People v. Tiffith* (1970) 12 Cal.App.3d 1129, 1137.) We reject one document because it is an unauthenticated portion of a computer printout, not something that has been “filed or lodged in the case in superior court.” (Cal. Rules of Court, rule 8.155(a)(1)(A).) The remaining documents contain information that is essentially available in other portions of the record, and they are unnecessary for our determination of the case.

*(4) Contemplated Judicial Notice on Court’s Own Motion—*

By order of June 14, 2012, we informed the parties that this court, on its own motion, intended to take “judicial notice of two documents: (1) appellant’s Summary of Case for Status Conference, with Procedural Status and Special Circumstances, relating to Dismissed Case No. 05CC05516, filed in Case Nos. 07CC01390 and 05CC05516 on April 12, 2010; and (2) the Declaration of Kristine L. Adams in Opposition to Defendants’ Motion and Supplemental Papers of May 24, 2010, filed in Case No. 05CC05516 on June 8, 2010. (Evid. Code, §§ 452, subd. (d), 459.)”

Newport Crest filed objections to the proposed taking of judicial notice. On reflection, we have decided not to take notice of those documents, since they are unnecessary to the determination of the matter before us.

*(5) Adams’s Request for Judicial Notice—*

On June 15, 2012, Adams filed another request for judicial notice. She requested that we take notice of our opinion filed in the *First Appeal, supra*, G039556. We deny that request, inasmuch as the record on appeal already contains a copy of that

opinion. (Cf. *People v. Tiffith*, *supra*, 12 Cal.App.3d at p. 1137.)

*B. DEMURRER:*

*(1) Introduction—*

“We independently review the ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court’s stated reasons. [Citation.]”

*(Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 111.)*

In its demurrer, Newport Crest asserted that Adams’s causes of action were all based on either breach of the settlement agreement or fraud. We address the causes of action based on breach of the settlement agreement first.

*(2) Nonperformance of Settlement Agreement—*

*(a) Causes of action*

Six of Adams’s causes of action as framed in her first amended complaint arose out of, or otherwise related to, the purported nonperformance of the settlement agreement—the sixth, seventh, tenth, eleventh, fourteenth and fifteenth causes of action. Six other causes of action were based in part on presettlement conduct and in part on postsettlement conduct—the fourth, fifth, eighth, ninth, twelfth and thirteenth.<sup>2</sup> Adams now abandons any arguments with respect to her twelfth through fifteenth causes of action, pertaining to nuisance, unjust enrichment, injunctive relief and declaratory relief. This appears to be due in large part to the change in circumstances since she filed her first

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<sup>2</sup> We resist the temptation to comment on Adams’s tendency to split causes of action. We leave that discussion for another day.

amended complaint. For example, since Adams’s home purportedly has been lost through foreclosure, there remains no argument over what Newport Crest must do to remediate it. And, inasmuch as this court has already ruled that the settlement agreement is enforceable, Adams will no longer seek to rescind it.

That leaves the fourth through eleventh causes of action, collectively pertaining to concealment of the lack of participation of Anthony Salazar in the remediation, concealment of the participation in Angus Smith in the remediation, breach of the implied covenant of good faith and fair dealing in connection with the settlement agreement, conspiracy to frustrate the enjoyment of the benefits of the settlement agreement, intentional and negligent infliction of emotional distress due at least in part to nonperformance of the settlement agreement, and breach of contract—for the failure to remove a lien and the failure to return personal property, as required by the settlement agreement.

*(b) Res judicata*

In its demurrer, as noted previously, Newport Crest asserted that Adams’s claims concerning breach of the settlement agreement had been fully adjudicated in Case No. 05CC05516 and, thus, were barred by the doctrine of res judicata. We disagree.

“The doctrine [of res judicata] is applicable ‘if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the *same cause of action* as the prior proceeding; and (3) the parties in the present proceeding . . . were parties to the prior proceeding.’ [Citation.] ‘[R]es judicata will not be applied “if injustice would result . . . .” [Citation.]’ (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577.)

As Newport Crest points out, the doctrine of res judicata may apply when one lawsuit is resolved by way of settlement and another lawsuit is brought thereafter. (*Villacres v. ABM Industries Inc.*, *supra*, 189 Cal.App.4th at pp. 577, 592-593; *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1177.) For example, in *Eichman v.*

*Fotomat Corp., supra*, 147 Cal.App.3d 1170, a second lawsuit by franchisees against a franchisor was barred where judgment had been entered upon the parties' settlement in the first lawsuit and the second lawsuit was based upon acts which occurred before that judgment was entered. (*Id.* at pp. 1173, 1177.)

However, a judgment upon a settlement agreement in one lawsuit will not bar a second lawsuit based upon new wrongs committed after the settlement. (*Eichman v. Fotomat Corp., supra*, 147 Cal.App.3d at p. 1177.) This is so because a second lawsuit based on new wrongs committed after the settlement of the first lawsuit must necessarily be based on a different cause of action than the one on which the first lawsuit was based. That is exactly the case here. Adams's second lawsuit is based largely on wrongs committed after the settlement agreement was entered into—wronges that cannot have formed the basis of her first lawsuit.

In its demurrer, however, Newport Crest asserted that when the trial court in Case No. 05CC05516 denied Adams's motion to enforce the settlement agreement, granted Newport Crest's application to enforce the settlement agreement by compelling mediation, and ultimately dismissed Adams's lawsuit as settled, it had in effect adjudicated her claims concerning breach of the settlement agreement.

Before the court ruled on the demurrer, Adams filed her April 18, 2011 request for further briefing. She attached to her request a copy of our decision in the *First Appeal, supra*, G039956 and requested an opportunity to brief the significance of that opinion on the question raised in the demurrer—whether the court had already adjudicated her claims that Newport Crest had breached the settlement agreement. Adams argued that our opinion made clear her claims had not been adjudicated, and that we simply stated she would have to take her claims to mediation before she could take them to a judicial forum.

The trial court refused to consider the arguments contained in Adams’s April 18, 2011 request.<sup>3</sup> However, it did nonetheless consider our opinion. In sustaining the demurrer without leave to amend, the trial court construed our opinion as meaning that Adams, having previously refused to mediate, could not bring a second lawsuit to enforce her rights under the settlement agreement. Although we understand the frustration the trial courts may have suffered in this drawn-out process, and indeed acknowledge having expressed some frustration of our own, the trial court took our decision in the *First Appeal, supra*, G039956 one step farther than we intended.

(c) *First Appeal, supra*, G039956

In our decision in the *First Appeal, supra*, G039956, we said: “Substantial evidence supports the trial court’s implied finding that the parties entered into a binding settlement agreement. Moreover, the court properly interpreted the terms of the settlement agreement to require the parties to submit disputes to the mediator *before seeking judicial relief.*” (*Ibid.*, italics added.) We further stated with reference to paragraph 12 of attachment A to the settlement agreement: “This makes clear that issues of nonperformance are to be submitted (*first*) to the mediator.” (*Ibid.*, italics added.) In addition, we said that a judgment on the terms that Adams had requested “would require a determination of compliance with performance obligations, a matter the parties specifically agreed was to be submitted *first to the mediator.*” (*Ibid.*, italics added.) Of the trial court ruling in Case No. 05CC05516, we stated: “In other words, the court correctly interpreted the agreement to mean that there would be no court litigation over whether Newport Crest had breached its obligations under the settlement agreement, *without first giving the mediator an opportunity to resolve the dispute.*” (*First Appeal, supra*, G039956, italics added.)

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<sup>3</sup> In its June 13, 2012 supplemental letter brief, Newport Crest argues that the court did not err in refusing to consider the arguments contained in Adams’s April 18, 2011 request. This is a matter we need not decide.

We also said, “if, after the matter is submitted to the mediator, he does *not* issue a final and binding ruling, the court has jurisdiction to do so.” (*First Appeal, supra*, G039956.) As a concluding remark on the topic, we stated: “Adams insists that if the matter is ordered to mediation, no relief will ever be available from the trial court . . . , frustrating the express terms of the settlement agreement. This is not the case. If the mediator renders a final and binding ruling, it may be reduced to judgment. If the mediator does not do so, the court has the power to resolve the disputed issues, and thereafter reduce the matter to judgment.” (*Ibid.*)

In our decision in the *First Appeal, supra*, G039956, we addressed whether the trial court, given the peculiar procedural posture and the facts then before it, had properly granted Newport Crest’s application to enforce the settlement agreement by compelling mediation, had properly denied Adams’s motion to enforce all portions of the settlement agreement except the mediation provision, and had properly dismissed the settled case. We did not identify all the ramifications of the trial court’s orders—that task not being before us. We did not hold that because the settled case had been dismissed Adams would never have a method of enforcing the settlement agreement.

It would appear that Adams has not always understood this court’s directions to her. However, this time, her understanding was “spot on.” We told her she had no right to litigate the purported nonperformance of the settlement agreement before submitting the matter to mediation. If, as Adams represents, she has indeed submitted the matter to mediation, she may now seek her judicial remedy.

No doubt this holding will cause considerable consternation to Newport Crest. It surely had hoped and desired, when the settlement agreement was signed, that any performance issues would be resolved through mediation and no further litigation would ensue. Yet it took the risk that exactly what has happened would happen. Newport Crest agreed via the settlement agreement that the court retained jurisdiction to

enforce performance obligations if mediation did not resolve them. (*First Appeal, supra*, G039956.)

At oral argument in this fourth appeal, Newport Crest acknowledged that an unsuccessful mediation had taken place after we issued our decision in the *First Appeal, supra*, G039956. However, it emphasized that the mediation also had taken place *after* Adams filed her complaint in Case No. 07CC01390. It argued that to permit Case No. 07CC01390 to proceed would be to contravene the holding of our decision in the *First Appeal, supra*, G039956 to the effect that Adams must mediate *before* seeking judicial relief. We conclude it would serve no purpose to hold that Case No. 07CC01390 must be dismissed because Adams’s filing was premature. The corollary would be that the time was ripe for Adams to file a third lawsuit. In the interests of judicial economy, we do not proceed down that path.

In conclusion, the court erred in sustaining the demurrer as to the causes of action based on nonperformance of the settlement agreement. Those causes of action were not adjudicated in Case No. 05CC05516 and nothing we said in our decision in the *First Appeal, supra*, G039956 was intended to mean that Adams had forever and in all circumstances lost her ability to seek judicial redress for purported breaches of the settlement agreement.

(3) *Litigation Privilege*—

(a) *Introduction*

“Civil Code section 47, subdivision (b) states in relevant part: “A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . .” [Citation.] “The principal purpose of [Civil Code] section [47, subdivision (b)] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts

without fear of being harassed subsequently by derivative tort actions.” [Citation.]”  
(*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 616-617.)

In its demurrer, Newport Crest broadly asserted that all of Adams’s claims were barred by the litigation privilege. However, it primarily focused its argument on the claims concerning fraudulent inducement to enter the settlement agreement. The trial court agreed that the litigation privilege bars claims arising from the negotiation of the settlement agreement.

On appeal, Adams concedes that her first three causes of action are subject to the litigation privilege. Consequently, she abandons any argument with respect to those causes of action. Thus, where presettlement conduct is concerned, only the fourth and fifth causes of action remain at issue.

*(b) Allegations of complaint*

The fourth cause of action in Adams’s first amended complaint was based on the lack of participation of construction expert Salazar as promised in the settlement agreement.<sup>4</sup> One paragraph, paragraph 8.3, was based on the purported presettlement concealment of the fact that Salazar had never seen the settlement agreement, did not know that it contained performance obligations on his part, and did not agree to

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<sup>4</sup> In our decision in the *First Appeal, supra*, G039956, we described the settlement agreement provisions concerning the involvement of Salazar in Newport Crest’s postsettlement remediation obligations. As we stated: “The parties agreed that the remediation would ‘include the repairs and abatement measures advocated by the defendants’ construction expert, Anthony Salazar . . . .’ They further agreed: ‘Anthony Salazar shall be the supervisor and final authority of what must be done to stop current and further water/moisture intrusion to the HOME, and he is also the final authority on whether those necessary repairs and measures have been properly performed and completed.’ The settlement agreement enumerated 14 items to be investigated and addressed by Salazar.” (*Ibid.*) “In addition, paragraph 5 of attachment A provided in part: ‘The Defendants have represented that Mr. Salazar has agreed to his role as set forth in this agreement. If Mr. Salazar quits, is fired or is otherwise unavailable to perform his function pursuant to this agreement, Plaintiff will be notified immediately of said development and will have the right to approve any replacement.’” (*Ibid.*)

undertake such obligations. The remaining paragraphs, notably 8.4 through 8.6, were based on the purported postsettlement concealment of the fact that Salazar was not participating in the remediation of the property as agreed.

The fifth cause of action was based on Newport Crest's purported concealment of the fact that it had unilaterally substituted Smith to do the work required of Salazar and had not been pursuing remediation as required under the settlement agreement. Some of the allegations were based on presettlement concealment and some of the allegations were based on postsettlement concealment.

*(c) Law of the case*

In maintaining that Adams's causes of action are barred by the litigation privilege, Newport Crest relies in part on our decision in the *Second Appeal, supra*, G040728. In that decision, we affirmed the dismissal of Case No. 07CC01390 as to three defendants, allegedly the attorneys for Newport Crest in Case No. 05CC05516 (the legal counsel defendants). (*Second Appeal, supra*, G040728.) The legal counsel defendants had prevailed on a Code of Civil Procedure section 425.16 anti-SLAPP motion. We affirmed on the basis of the litigation privilege. (*Second Appeal, supra*, G040728.)

In our decision in the *Second Appeal, supra*, G040728, we observed that in the fourth and fifth causes of action Adams relied on both presettlement conduct, pertaining to alleged fraud in the inducement, and postsettlement conduct, pertaining to alleged concealment of the participation of Smith not Salazar. Claims based on the presettlement conduct, we observed, were barred by the litigation privilege of Civil Code section 47, subdivision (b). As we put it: "Where presettlement conduct is concerned, . . . the litigation privilege of Civil Code section 47, subdivision (b) applies. Postsettlement conduct is another thing." (*Second Appeal, supra*, G040728.)

In the context of the anti-SLAPP motion, we looked at whether Adams had met her burden to show a probability of prevailing on her fourth and fifth causes of action on the basis of postsettlement conduct. We examined the evidence she provided with

respect to the legal counsel defendants to make that determination. (*Second Appeal, supra*, G040728.) We held: “In short, Adams did not submit evidence of postsettlement conduct [of the legal counsel defendants] that would demonstrate a probability of success on the merits of the cause of action for fraudulent concealment. The trial court did not err in granting the anti-SLAPP motion with respect to the fourth and fifth causes of action.” (*Ibid.*)

In this fourth appeal, we must emphasize three things. First of all, in our decision in the *Second Appeal, supra*, G040728, we made clear that the litigation privilege did not necessarily bar the fourth and fifth causes of action to the extent they were based on postsettlement activity. Second, the context of the anti-SLAPP motion required us to address the probability that Adams would prevail on her claims, whereas that is not something we do in the analysis of a demurrer. Third, we examined the evidence Adams offered with respect to the legal counsel defendants, not with respect to Newport Crest. In sum, nothing we said in our decision in the *Second Appeal, supra*, G040728 bars the fourth and fifth causes of action against Newport Crest with respect to postsettlement activity.

We do not mean to imply that Adams has a probability of prevailing on those causes of action against Newport Crest. We only mean to say that our decision in the *Second Appeal, supra*, G040728 should not be read to mean that those causes of action, to the extent based on the postsettlement conduct of Newport Crest, are necessarily barred.

In our decision in the *Second Appeal, supra*, G040728, in addition to addressing the fourth and fifth causes of action based on fraudulent concealment, we addressed the causes of action for breach of the implied covenant of good faith and fair dealing (sixth cause of action), conspiracy (seventh cause of action), and intentional and negligent infliction of emotional distress (eighth and ninth causes of action). With respect to the breach of the covenant of good faith and fair dealing, we stated: “Any

postsettlement activities allegedly undertaken in furtherance of the fraudulent plan fail because the legal counsel defendants cannot be held liable for breaching, tortiously or otherwise, a contract to which they are not parties.” (*Ibid.*) Newport Crest, of course, is a party to the settlement agreement, so our analysis in the *Second Appeal, supra*, G040728 is no bar to the maintenance of the cause of action against Newport Crest.

With respect to the conspiracy cause of action, we stated that Adams did not meet her burden to show a probability of prevailing on her cause of action with respect to postsettlement conduct because she failed to cite to the record. (*Second Appeal, supra*, G040728.) As for the causes of action for intentional and negligent infliction of emotional distress, we held that Adams had waived any arguments she had for failure to address those causes of action in her briefing on appeal. Clearly our analysis, in the *Second Appeal, supra*, G040728, of the application of the litigation privilege to postsettlement conduct in the context of the causes of action for conspiracy and infliction of emotional distress has no bearing upon the present appeal.

The *Second Appeal, supra*, G040728 did not address Adams’s tenth and eleventh causes of action, each for breach of the settlement agreement. In the tenth cause of action, Adams alleged that Newport Crest had breached a settlement agreement obligation to remove a lien it recorded against her property. In the eleventh cause of action, she alleged that Newport Crest had failed to comply with its settlement agreement obligations with respect to the remediation of her personal property. Obviously, the alleged conduct is postsettlement conduct. However, just because the conduct arises out of a settlement agreement, that does not mean it is subject to the litigation privilege.

Newport Crest, citing our decision in the *Second Appeal, supra*, G040728, complains that Adams has, in her various causes of action, “intertwined” both presettlement conduct and postsettlement conduct. In that decision, we stated ““a plaintiff cannot frustrate the purposes of the anti-SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one

“cause of action.” (Footnote omitted.) [Citation.]” (*Ibid.*) However, the matter before us does not have to do with an anti-SLAPP motion. It has to do with a demurrer.

(d) *Leave to amend*

As we stated in *Kruss v. Booth* (2010) 185 Cal.App.4th 699, “‘When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.’” (*Id.* at pp. 712-713, fn. 13.) As we further observed: “‘A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend.’” (*Id.* at p. 712, fn. 13.)

In her opening brief on appeal, Adams now seeks leave to further amend her complaint. She says she will delete any references to the negotiation of the settlement agreement and “cleanse the remaining causes of action of any facts that might trigger the litigation privilege.”

Newport Crest insists that this language is simply too vague. It cites *People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, wherein the court stated, “the vague claim that ‘concerns’ could be ‘address[ed]’ by an amendment . . . does not satisfy an appellant’s duty to spell out in his brief the specific proposed amendments on appeal. [Citations.]” (*Id.* at p. 112.) Newport Crest says Adams has failed to meet her burden to propose specific amendments.

We disagree, for two reasons. For one, when the claimed defect is that the first amended complaint is based upon both presettlement and postsettlement conduct, the proposal to delete references to presettlement conduct and base a second amended complaint only on postsettlement conduct is sufficiently clear. Second, Newport Crest ignores the fact that Adams has proposed seven pages of specific revisions.

We bristle against the suggestion of cutting off a litigant’s claims because of inartful or sloppy pleading. (See, e.g., *Barquis v. Merchants Collection Assn.* (1972) 7

Cal.3d 94, 103; *MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 815-816.) Rather, we liberally construe his or her pleading with a view to achieving substantial justice. (*Yue v. City of Auburn* (1992) 3 Cal.App.4th 751, 757.) Even if a litigant is inarticulate with respect to the relief sought, he or she is “nevertheless entitled to any relief warranted by the facts pleaded, and [the] failure to ask for the proper relief is not fatal to [his or her] cause. [Citations.]” (*MacIsaac v. Pozzo, supra*, 26 Cal.2d at p. 815.)

“If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court . . . should, on his application so to do, permit him to amend.” (*MacIsaac v. Pozzo, supra*, 26 Cal.2d at p. 815.) “The granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits.” (*Id.* at p. 816.)

On remand, Adams shall be permitted to amend her complaint to frame causes of action based on postsettlement conduct and the current state of facts.

### C. ATTORNEY FEES:

In the judgment of dismissal filed August 23, 2011, the court awarded Newport Crest \$37,336 in attorney fees and \$8,972 in costs, plus interest thereon. Newport Crest maintains that it was entitled to this attorney fees award because the settlement agreement provides for an award of attorney fees to the prevailing party in any dispute concerning the enforcement of the settlement agreement. Indeed, Newport Crest reminds us that we have previously upheld an award of attorney fees under this provision of the settlement agreement, in the *Third Appeal, supra*, G044230. In this fourth appeal, however, because we reverse the judgment of dismissal, the award of attorney fees and costs must fall.

On a separate note, both parties remind us of the peculiar procedural posture with respect to the award of attorney fees and costs in this matter. The formal

order sustaining the demurrer was filed on May 27, 2011 and notice of entry of the order was served on June 15, 2011. Newport Crest filed its motion for attorney fees on July 15, 2011. On August 2, 2011, Adams filed her notice of appeal from a purported judgment of dismissal. Eight days later, this court ordered her to obtain a judgment.

The trial court held a hearing on the attorney fees motion on August 15, 2011, and awarded attorney fees at that time. The formal order awarding attorney fees was filed on August 23, 2011, the same date as the judgment of dismissal.

Newport Crest aptly observes that the attorney fees award was not identified in Adams's notice of appeal. It also states that Adams failed to provide a record supporting an appeal of the attorney fees award and failed to cite legal authority supporting her argument that the award should be reversed. All in all, Newport Crest contends that the purported appeal from the attorney fees award should be dismissed or deemed waived. Newport Crest has some good points. Nevertheless, we are not persuaded.

To the extent that Newport Crest's argument is construed as a motion to dismiss, it is defective for failure to comply with California Rules of Court, rule 8.54. (*Thompson v. Boyd* (1963) 217 Cal.App.2d 365, 387; cf. *Kinney v. Overton* (2007) 153 Cal.App.4th 482, 497, fn. 7.) Moreover, the actions of this court inadvertently placed Adams in an awkward procedural situation. This court ordered Adams to obtain a judgment of dismissal after an order sustaining the demurrer without leave to amend. The judgment that was entered thereafter included an attorney fees award, when Adams had already filed her notice of appeal. It would be a curious thing to hold that Adams was required to file a second notice of appeal from the same judgment in order to challenge the portion thereof containing the attorney fees award. Newport Crest cites no legal authority for the proposition that Adams's challenge to the attorney fees award must be dismissed under the peculiar procedural posture of this appeal. That being the case, we decline the invitation to dismiss.

Where the waiver argument is concerned, the record on appeal is sufficient for our determination. We need only see the judgment containing an attorney fees award and our decision in the *Third Appeal, supra*, G044230, wherein we addressed the settlement agreement provision containing the attorney fees clause. It is axiomatic that if Newport Crest is not the prevailing party, it is not entitled to attorney fees under the settlement agreement. Adams need not cite legal authorities in support of this point.

Inasmuch as we reverse the judgment in this matter, we also reject Newport Crest's request for attorney fees on appeal.

### III

#### DISPOSITION

The November 23, 2011 motion to take evidence on appeal or to take judicial notice is denied. The June 11, 2012 motion to augment and to take judicial notice is denied. The June 15, 2012 request for judicial notice is denied. The judgment is reversed. The matter is remanded for further proceedings consistent with this opinion. Adams shall recover her costs on appeal.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.