

**United States Bankruptcy Court  
Central District of California  
Santa Ana  
Judge Theodor Albert, Presiding  
Courtroom 5B Calendar**

**Thursday, April 1, 2021**

**Hearing Room 5B**

10:00 AM

**8: -**

**Chapter**

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Docket 0

**Tentative Ruling:**

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**8:18-10969 Luminance Recovery Center, LLC**

**Chapter 7**

Adv#: 8:18-01064 Marshack v. Castanon et al

- #1.00 PRE-TRIAL CONFERENCE RE: Complaint For Declaratory Relief Regarding Property Of The Estate Pursuant To 11 USC § 541 (set from s/c hrg held on 12-5-19) (rescheduled from 5-7-2020 at 10:00 a.m.) (cont'd from 1-28-21 per order approving stip. to extend dates in modified scheduling order entered 12-18-20)**

Docket 1

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 6-03-21 AT 10:00 A.M. PER ORDER APPROVING STIPULATION TO EXTEND DATES IN MODIFIED SCHEDULING ORDER ENTERED 3-19-21**

**Tentative Ruling:**

Tentative for 12/5/19:  
Status conference continued to May 7, 2020 at 10:00AM  
Deadline for completing discovery: March 30, 2020  
Last date for filing pre-trial motions: April 17, 2020  
Pre-trial conference on:  
Joint pre-trial order due per local rules.

-----  
Tentative for 10/3/19:  
See #16. Should the 5/15 scheduling order be revisited?

**Party Information**

**Debtor(s):**

Luminance Recovery Center, LLC

Represented By  
Jeffrey I Golden  
Beth Gaschen

**Defendant(s):**

Michael Edward Castanon

Represented By  
Rhonda Walker

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**CONT... Luminance Recovery Center, LLC**

**Chapter 7**

Carlos A De La Paz

BeachPointe Investments, Inc.

Represented By  
Evan C Borges

George Bawuah

Represented By  
Evan C Borges

Jerry Bolnick

Represented By  
Evan C Borges

Jonathan Blau

Represented By  
Evan C Borges

Joseph Bolnick

Represented By  
Evan C Borges

Maria Castanon

Pro Se

Kenneth Miller

Represented By  
Evan C Borges

Peter Van Petten

Represented By  
Evan C Borges

Raymond Midley

Represented By  
Evan C Borges

Veronica Marfori

Represented By  
Evan C Borges

Dennis Hartmann

Represented By  
Thomas W. Dressler

**Plaintiff(s):**

Richard A. Marshack

Represented By  
Sharon Oh-Kubisch  
Robert S Marticello

**Trustee(s):**

Richard A Marshack (TR)

Represented By  
D Edward Hays

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**CONT... Luminance Recovery Center, LLC**

**Chapter 7**

David Wood  
Kyra E Andrassy  
Jeffrey I Golden  
Beth Gaschen  
Matthew Grimshaw

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**8:19-14912 Igor Shabanets**

**Chapter 11**

Adv#: 8:20-01002 Remares Global, LLC v. Olga Shabanets, as trustee of the 2012 Irrevocable

**#2.00 PRE-TRIAL CONFERENCE RE: Notice of Removal of Civil Action to United States Bankruptcy Court  
(set from 5-13-20 s/c hrg held)  
(cont'd from 2-25-21)**

Docket 1

**Tentative Ruling:**

Tentative for 4/1/21:  
Continue to April 29, 2021 @ 2:00 p.m. to coincide with summary judgment motion.

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Tentative for 2/25/21:  
What is status of stipulation to consolidate adversary proceedings? Continue SC about 30 days for that to occur.

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Tentative for 5/13/20:  
Deadline for completing discovery: Dec. 11, 2020  
Last date for filing pre-trial motions: Jan. 25, 2021  
Pre-trial conference on: Feb. 18, 2021 @ 10 a.m.  
Joint pre-trial order due per local rules.  
Refer to mediation. Order appointing mediator to be lodged by n/a within n/a days.  
One day of mediation to be completed by n/a.

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Tentative for 2/27/20:  
Deadline for completing discovery: August 1, 2020  
Last date for filing pre-trial motions: August 24, 2020

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**CONT... Igor Shabanets**

**Chapter 11**

Pre-trial conference on: September 10, 2020 at 10:00AM  
Joint pre-trial order due per local rules.

<b>Party Information</b>
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**Debtor(s):**

Igor Shabanets

Represented By  
Bruce A Boice

**Defendant(s):**

Olga Shabanets, as trustee of the

Pro Se

Olga Shabanets

Pro Se

Igor Shabanets

Pro Se

Merrill Lynch, Pierce, Fenner &

Pro Se

**Plaintiff(s):**

Remares Global, LLC

Represented By  
Bob Benjy



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**8:19-14912 Igor Shabanets**

**Chapter 7**

Adv#: 8:20-01066 Remares Global LLC v. Marshack et al

**#3.00** PRE-TRIAL CONFERENCE RE: First Amended Complaint for Declaratory Relief Regarding Validity, Extent and Priority of Judgment Lien as to 9875 Rimmele Dr., Beverly Hills CA  
**(another summons issued on 5-8-2020)  
(cont'd from 1-14-21)**

Docket 5

**Tentative Ruling:**

Tentative for 4/1/21:  
Status?

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Tentative for 1/14/21:  
How long of a continuance is needed to document the settlement and provide any 9019 notice (if required)?

Appearance: required

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Tentative for 7/23/20:  
Same schedule as #9.

**Party Information**

**Debtor(s):**

Igor Shabanets

Represented By  
Bruce A Boice

**Defendant(s):**

Richard A Marshack

Pro Se

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**CONT...      Igor Shabanets      Chapter 7**

Igor Shabanets      Pro Se

IOS PROPERTIES, LLC      Pro Se

**Plaintiff(s):**

Remares Global LLC      Represented By  
Alan W Forsley

**Trustee(s):**

Richard A Marshack (TR)      Represented By  
D Edward Hays

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**8:18-11154 i.i. Fuels, Inc.**

**Chapter 7**

Adv#: 8:20-01089 Marshack v. Supreme Oil Company

**#4.00 PRE-TRIAL CONFERENCE RE: Complaint for (1) Avoidance of Preferential Transfers; (2) Recovery of Preferential Transfers; (3) Preservation of Preferential Transfers; and (4) Disallowance of Claims  
(set from s/c hrg held on 8-06-20)  
(cont'd from 1-28-21 per order granting stip. to cont. the pre-trial conf entered 1-14-21)**

Docket 1

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 6-03-21 AT 10:00 A.M.  
PER ORDER GRANTING STIPULATION TO CONTINUE THE PRE-TRIAL CONFERENCE ENTERED 3-08-21**

**Tentative Ruling:**

Tentative for 8/6/20:

Deadline for completing discovery: December 30, 2020  
Last date for filing pre-trial motions: January 15, 2021  
Pre-trial conference on: January 28, 2021 @ 10:00AM  
Joint pre-trial order due per local rules.

**Party Information**

**Debtor(s):**

i.i. Fuels, Inc.

Represented By  
Leonard M Shulman

**Defendant(s):**

Supreme Oil Company

Pro Se

**Plaintiff(s):**

Richard A Marshack

Represented By  
Robert P Goe

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**CONT... i.i. Fuels, Inc.**

**Chapter 7**

**Trustee(s):**

Richard A Marshack (TR)

Represented By  
Robert P Goe

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**8:18-10582 David R. Garcia**

**Chapter 7**

Adv#: 8:18-01105 Jafarinejad v. Garcia

**#5.00 Defendant's Motion for Summary Judgment**

Docket 81

**Tentative Ruling:**

Tentative for 4/1/21:

This is Defendant/Debtor, David R. Garcia's ("Defendant"), Rule 56 motion for summary judgment against Plaintiff, Mandana Jafarinejad ("Plaintiff"). Defendant seeks summary judgment on both of Plaintiff's claims of non-dischargeability in this adversary proceeding, which claims are: (1) for the \$111,459.26 State Court judgment against Hans-Drake International, a corporation partly owned by Debtor, for unpaid wages, accrued interest, liquidated damages, and statutory penalties ("State Court Judgment"); and (2) a promissory note consisting of a loan of \$60,000 from Plaintiff to Debtor ("Note"). The argument is that both claims are time-barred under statutes of limitation.

**1. Background**

The following facts are not contested in any material part.

On August 23, 2012, Plaintiff entered into a written employment agreement to fulfil the position of Intellectual Property-Patent Attorney for Hans-Drake with an annual salary of \$100,000, plus quarterly nondiscretionary bonuses of \$12,500 beginning in the second quarter of employment. Plaintiff was employed as in-house counsel for Hans-Drake from September 4, 2012 to July 28, 2014. Plaintiff alleges that Defendant lived a lavish lifestyle during Plaintiff's employment, owning several luxury vehicles including a Lamborghini, Bentley, Mercedes, Ferrari and Range Rover, and often described his yacht and vacations to places such as Fiji.

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On December 17, 2012, Plaintiff agreed to make Defendant a personal loan and executed a promissory note for \$60,000, plus interest of 1%, to be paid in full on or before February 15, 2013, with a \$15/day penalty for late payment.

Defendant failed to pay the loan when it came due. From around September 3, 2013 through Plaintiff's termination from Hans-Drake on July 28, 2014, Plaintiff was not paid some of her wages at all and was otherwise paid reduced wages. Defendant requested that Plaintiff not negotiate the checks that were issued against insufficient funds; made several promises to reimburse her; and Defendant offered Plaintiff stock options in lieu of the unpaid wages, which Plaintiff refused. Plaintiff continued to work for Hans-Drake during this time, until her termination.

In or about January 2014, Defendant approached Plaintiff to co-sign a business loan Defendant was seeking from Quick Bridge and promised the loan would be used in part to repay her. Plaintiff agreed to co-sign the January 2014 loan to Hans-Drake from Quick Bridge, as well as a second Quick Bridge Loan made in April 2014, thereby personally guaranteeing the loans.

On the morning of July 28, 2014, Plaintiff was terminated from Hans-Drake by Michael Lyles, a minority owner of Hans-Drake.

On August 4, 2014, Plaintiff filed a complaint against Hans-Drake with the State Labor Commissioner pertaining to her unpaid wages. After a hearing on February 28, 2015, an award was granted by the Labor Commissioner and on April 30, 2015, a Default Judgment was entered against Hans-Drake in the Orange County Superior Court in the amount of \$111,459.26. Plaintiff never received any payment toward the amount owed on the judgment.

On June 13, 2017, Plaintiff filed a Breach of Contract claim against Defendant, Hans-Drake, and Musclederks, Inc. in Orange County Superior Court for failure to pay the \$60,000 loan. In that lawsuit against Defendant and his entities, Plaintiff alleged alter ego liability. However, Plaintiff claims that she did not allege fraud at that time because she did not discover the

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necessary evidence for alleging Defendant's lack of intent to repay the loan until discovery was ongoing in the present bankruptcy action.

On December 19, 2017, the Superior Court in the pending breach of contract case granted Plaintiff Right to Attach Orders, referring to the prior order from the State Court judgment against Hans-Drake, for no other purpose than to secure Plaintiff's claim for the \$62,831.49 unpaid balance on the promissory note.

On February 21, 2018, Defendant filed a voluntary chapter 7 petition.

On June 11, 2018, Plaintiff filed this adversary proceeding against Defendant requesting that the court find the State Court Judgment for her unpaid wages a non-dischargeable debt of Debtor under 11 U.S.C. 523(a)(6) [willful and malicious injury], and the balance of the unpaid \$60,000 promissory note a non-dischargeable debt owed by Debtor under 11 U.S.C. 523(a)(2)(A) [actual fraud].

## 2. Summary Judgment Standards

LBR 7056-1 makes Fed. R. Civ. P. 56 applicable in bankruptcy proceedings. Courts may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "As to materiality, substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

The moving party always bears the initial burden of proof of demonstrating to the court the absence of a material fact. *Celotex* at 323. Furthermore, "the burden on the moving party may be discharged by

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'showing'... that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. The evidence presented "must be viewed in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Accordingly, if the moving party "does not discharge that burden then the [moving party] is not entitled to judgment." *Adickes* at 161. If the moving party meets their burden, then "the nonmoving party must come forward 'with specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

**3. Is Plaintiff's First Claim for Relief Subject to Summary Judgment?**

Summary Judgment will be granted as to Plaintiff's first claim regarding the State Court Judgment for unpaid wages.

"[T]here are two distinct issues to consider in the dischargeability analysis: first, the establishment of the debt itself, which is subject to the applicable state statute of limitations; and, second, a determination as to the nature of that debt, an issue within the exclusive jurisdiction of the bankruptcy court and thus governed by Bankruptcy Rule 4007. A debt barred by the applicable state statute of limitations will not support a dischargeability action." *In re Moore*, No. 12-10802-A-7, 2014 WL 3570600, at \*5 (Bankr. E.D. Cal. July 18, 2014) (citing *Banks v. Gill Distributions Ctrs., Inc.*, 263 F.3d 862, 868 (9th Cir.2001)).

Here, Defendant's argument is essentially that he is not personally liable for this debt and Plaintiff is now time-barred under CCP § 338(a) from making a claim as to his liability. Thus, any determination as to whether the character of the obligation is dischargeable or not is moot, because Plaintiff is barred from establishing that Defendant is personally liable for the debt.

**a. The State Court Judgment and alter ego**



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In her Complaint, under Plaintiff's first claim for relief she alleges in part that, "[a]ll or part of the debt owed to Plaintiff, as evidenced by the State Court Judgment entered against the Debtor, is non-dischargeable . . ." (AP Complaint, 3:13–14). Plaintiff incorrectly states that the judgment was entered against Defendant, when it is undisputed that the State Court Judgment for Plaintiff's unpaid wages was entered against Hans-Drake only, the sole defendant in the case. (See Opposition – Plaintiff's Statement, Exhibit 13). Furthermore, the Labor Commissioner's Order and State Court Judgment were entered in default because no answer or defense was ever put forth by Hans-Drake and no appearance was made by Hans-Drake. (Motion, 2:9–13). While Plaintiff was seemingly relying on the State Court Judgment to establish the debt against Defendant in her first claim for relief, she is now raising the alter-ego theory to establish the debt in her Opposition to this Motion. (Opposition, 14–15.)

At times, courts have allowed injured plaintiffs to amend a judgment under CCP §187 by adding a judgment debtor when the plaintiff can prove the alter ego theory. However, it has been well established that, when a default judgment has been entered, courts will not add a new judgment debtor based on the alter ego theory when to do so violates due process.

In default judgments, the application of the alter ego doctrine is subject to a limitation arising from considerations of due process. Under Code of Civil Procedure §187, "to amend a judgment to add a defendant, thereby imposing liability on the new defendant without trial, requires both (1) that the new party be the alter ego of the old party and (2) that the new party ... controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns. The due process considerations are in addition to, not in lieu of, the threshold alter ego issues." *Triplett v. Farmers Ins. Exchange*, 24 Cal.App.4th 1415, 1421(1994).

The due process-related requirement was first recognized by California's Supreme Court in *Motores de Mexicali v. Superior Court*, 51 Cal.2d 172 (1958). There, three individuals formed a corporation that engaged in the sale of used cars. (*Id.* at 173–174). When the plaintiff sued the corporation for failure to pay some loans, neither the corporation nor the

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individuals operating it appeared in the action, and a default judgment was entered against the corporation. When the plaintiff sought to modify the default judgment to include the three individuals as judgment debtors on an alter ego theory, the trial court declined to do so. *Id.* at 176. Affirming that ruling, the court concluded that the Fourteenth Amendment of the United States Constitution precluded the modification, stating: "That constitutional provision guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses. [Citations.] To summarily add [the three individuals] to the judgment heretofore running only against [the corporation] without allowing them to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate this constitutional safeguard.... They were under no duty to appear and defend personally in that action, since no claim had been made against them personally." *Motores*, at 176; See also *Wolf Metals Inc. v. Rand Pacific Sales Inc.*, 4 Cal. App. 5th 698, 703 (Cal. 2d Dist. 2016); *NEC Electronics Inc. v. Hurt*, 208 Cal.App.3d 772, 775–781 (1989).

Here, because the State Court Judgment was a default judgment against Hans-Drake, Plaintiff cannot simply add Defendant as a judgment debtor under CCP §187 now to establish the debt against Defendant as if he were Hans-Drake and no claim for relief in this action as currently pled can be read that way. Moreover, this court is in no position to amend the Superior Court's judgment at this late date some six years later; so, to establish direct liability against Defendant she would have to amend her complaint and perhaps also overcome statutes of limitation.

**b. Statute of Limitations under CCP §§338 or 337**

Since Plaintiff cannot establish the debt against Defendant through the State Court Judgment, Plaintiff must show that Defendant is personally liable for her unpaid wages based on a new cause of action against Defendant. However, Defendant argues that Plaintiff is barred from doing so under the three-year statute of limitations set forth in CCP §338(a), which applies to actions upon a liability created by statute.

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In a new cause of action against Defendant to establish the debt, Plaintiff would again have to assert a claim for her unpaid wages grounded by a plausible theory such as the appropriate section of the CA Labor Code (as in the State Court Judgment), or another theory such as breach of contract. However, a claim based on statute such as the Labor Code is restricted by the three-year statute of limitation under CCP §338(a), and a claim based on breach of contract is restricted by the four-year statute of limitations set forth in CCP §337(a). For unpaid wages, the statute of limitations generally begins running at the time of the last breach, and thus the statute of limitations would have started at the time of Plaintiff's termination, on July 28, 2014. Therefore, the statute of limitations for Plaintiff to bring her claim on this theory against a new defendant has long expired, so it seems that there are no actionable unpaid wages claims pertaining directly to Defendant as a personal liability of debtor. See e.g. *Barth v. Roberts (In re Roberts)*, Nos. 15-22434-B-7, 15-2115, 2017 Bankr. LEXIS 1790, at \*13-14 (Bankr. E.D. Cal. June 26, 2017).

**c. Plaintiff's Opposition**

In Plaintiff's opposition she argues that the "First Claim for Relief is based upon a Judgment entered by the California Labor Commissioner on April 15, 2015 for the willful failure to pay Ms. Jafarinejad wages she earned by working for Defendant Garcia's company, Hans Drake. (AMF No. 36). Judgments under California state law are enforceable for ten (10) years before they need to be renewed. Cal. Code of Civil Procedure § 683.120. Thus, she argues, there is no time bar under state law for pursuing the Labor Commissioner Judgment." (Opposition, 14:8–13). But enforceability of the default judgment based on the Labor Commissioner's order is not really the issue. The real issue is whether she can now, six years later, amend that judgment to assert liability as against the Debtor. She goes on to raise the alter-ego theory but does not provide any rebuttal to Defendant's previously discussed argument nor does she explain how these new allegations which would have to be proven in order to obtain an alter ego judgment are not themselves time barred.

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Plaintiff also relies on *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001) in both the First Claim for Relief and the Opposition, as an example that supports her claim. However, while the facts are superficially similar, one glaringly distinguishable fact is that the Plaintiff in *Jercich* filed the state court action *and received a judgment against* Jercich, the actual debtor in the subsequent bankruptcy—not the corporation as in this case. *Jercich*, at 1204. Thus, this case does not help Plaintiff in establishing Defendant's personal liability for her unpaid wages.

One other response worth discussing, although not proposed by the Plaintiff's opposition, is whether Defendant waived his right to the defense of statute of limitations by not explicitly raising it in his answer. "It is well established, however, that failure to raise an affirmative defense by responsive pleading does not always result in waiver." *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993).

Our circuit liberalized the requirement that affirmative defenses be raised in a defendant's initial pleading in *Healy Tibbitts Construction Co. v. Insurance Co. of North America*, 679 F.2d 803 (9th Cir.1982). There the defendant insurance company was allowed to raise the affirmative defense that the insurance policy exclusion clause precluded recovery by way of a motion for summary judgment despite the fact that this defense was not among the seven affirmative defenses that the defendant raised in its answer to the plaintiff's initial complaint. The *Healy Tibbitts'* holding that, absent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment for the first time is controlling here. No prejudice has been claimed by appellants nor can the court discern any. See *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984); affirmed by *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993).

Plaintiff did not raise this opposition to Defendant's Motion, and thus has not claimed any prejudice pertaining to Defendant's use of the defense now. Furthermore, Plaintiff was given notice and an opportunity to respond to Defendant's Motion, therefore it is unlikely that prejudice to the Plaintiff would be found. Thus, Defendant's failure to explicitly raise the statute of limitations defense in his answer does not bar him from asserting it in this motion.

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**d. *Hennessey's Tavern, Inc. v. American Air Filter* and limitations regarding alter ego liability**

But there *may* still be a path for Plaintiff. In *Hennessey's Tavern Inc. v. American Air Filter Co., Inc.*, 204 Cal. App. 3d 1351 (1988), the court held that an action may still be maintained against an alter ego defendant after the statute of limitations on the underlying claim had expired. *Id.* at 1359. The *Hennessey's* court reasoned that the alter ego defendant has no separate primary liability to the plaintiff but is in the eyes of equity identical to that of the already-named corporation. *Id.* at 1358. Rather, the claim is only to procedurally disregard the corporate entity to hold the alter ego liable for the already established obligation. See also *Most Worshipful sons of Light etc. v. Sons of Light, etc.*, 160 Cal App. 2d 560, 566 (1958) citing *Taylor v. Newton*, 117 Cal. App. 2d 752, 757 (1953). But the *Hennessey's* court at 1358 also with caution cited *Motores, supra*, suggesting this cannot be done by simple post-trial motion unless the case was tried (not by mere default). As a corollary, it was also made clear in *Dow Jones, Inc. v Avenel*, 151 Cal. App. 3d 144 (1984) that the alleged alter ego defendant must be given a due process opportunity to meet the factual allegations underlying an equitable conclusion of alter ego, even if not at a full blown trial. *Id.* at 150.

Furthermore, the appellate court in *NEC Elecs., Inc. v. Hurt*, 208 Cal. App. 3d at 780 decided not to extend the ruling in *Dow Jones, Inc.* when the court reversed the trial court's amendment that named Hurt as an additional judgment debtor to a previous judgment. Because the previous trial court judgment was obtained by default, similar to the instant case, the court in *NEC* found that *Motores* controlled instead:

In *Dow Jones Co., Farenbaugh* and *Mirabito*, the underlying action was contested and therefore the alter ego's interests were effectively represented by the defense presented by the corporate defendant. By contrast, in *Motores*, where the judgment was obtained by default, the court stressed that the alter ego's interests were not represented in the underlying action and also emphasized that adding them as additional judgment debtors would violate due process. We believe

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that *Motores* should control the result here. Ph did not appear at trial and did not make any attempt to defend the NEC lawsuit. As a consequence, we do not believe that Hurt's interests were represented in the underlying action.

*NEC Elecs. Inc. v. Hurt*, 208 Cal. App. 3d at 780.

**4. Conclusion on the First Claim of Relief**

So, where does this leave us? On the pleadings as they now stand Defendant's argument based on the statute of limitations as to the First Claim for Relief is well taken. But there might still be a way to revive the claim based upon the Labor Commissioner's order if the issue of alter ego can be properly raised. This court is not prepared to opine as to whether that issue must be raised by reopening the Superior court action, or by some new process in equity. However, a due process opportunity of Defendant to meet the factual allegations supporting the theory must be afforded.

**5. Is Plaintiff's Second Claim for Relief Subject to Summary Judgment?**

Defendant's only claim for summary judgment as to the second claim is that Plaintiff is time-barred under the three-year statute of limitations CCP § 338(d), and thus the pending state court action filed on 06/13/2017 establishing the debt was untimely. Summary Judgment will be denied as to Plaintiff's second claim regarding the \$60,000 unpaid promissory note, because this was a personal loan between Plaintiff and Defendant on which Plaintiff filed a state court action against Defendant personally (along with Hans-Drake and Musciewerks), and a material issue of fact exists as to when Plaintiff first suspected fraud; thereby creating a triable question of fact as to whether the Delayed Discovery Rule applies and when the statute of limitations for fraud under CCP §338(d) should have begun running.

CCP §338(d) provides that "[t]he cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the

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facts constituting the fraud or mistake." To better explain this language Defendant cites *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 803 (2005), which states, "under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." In his Motion, Defendant argues that "the delayed discovery rule does not apply because Plaintiff had reason to suspect an injury and some wrongful cause not later than the breach of contract on February 15, 2013," the date that the loan became due and Defendant failed to pay it. He also points out in his Reply that Plaintiff testified to seeing large amounts of money coming into the business while employed at Hans-Drake, while also observing Defendant's luxurious lifestyle, and thus she had ample reason to suspect that Defendant had committed fraud. (Reply, 6–8). But this is merely inferential evidence to support a theory, however, and does not negate the possibility that a jury could well find otherwise, which is all that is needed to defeat the motion.

To defeat the summary judgment motion, Plaintiff need only show that there is a triable issue, as previously discussed in the Summary Judgment Standards. As Plaintiff argues in her Opposition, "[i]n evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The nonmoving party may rely on circumstantial and inferential evidence to defeat motion for summary judgment. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 151 (6th Cir. 1995). "A [party's] sworn statements cannot be disbelieved at the summary judgment stage simply because his statements are in his interest and in conflict with other evidence." *United States v. Arango*, 670 F.3d 988, 994 (9th Cir. 2012)."

In her Opposition, Plaintiff states other reasons for why Defendant may not have been able to pay back the loan, implying that she did not assume fraud immediately after the loan became due nor necessarily should she have. "Cashflow troubles, pandemics, and third-party intervention are

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amongst many reasons for contracts to not be performed. Therefore, it was not unreasonable, at the time of the initial failure to pay, for Ms. Jafarinejad to not assume that Defendant Garcia's failure to pay was due to lack of intent necessary for fraud." (Opposition, 27–28). Further inferential evidence to create a triable issue is the fact that Plaintiff co-signed and personally guaranteed two business loans for Defendant in 2014—over a year *after* the \$60,000 loan became due— which arguably demonstrates that Plaintiff still, surprisingly perhaps, had some level of trust in Defendant and believed that he would pay her back as promised. Additionally, Plaintiff did not allege fraud in the pending state court action against Defendant pertaining to the \$60,000 loan, filed on June 13, 2017, from which one might infer that Plaintiff did not have good reason to suspect fraud at that time. Thus, at very least there is a triable issue as to when the statute of limitations for fraud started to run, thereby defeating Defendant's summary judgment claim.

Moreover, Defendant may be applying the incorrect statute of limitations by assuming that CCP §338(d) is the applicable statute, and a triable issue may exist as to which statute of limitations applies here. See *Banks v. Gill Distribution Centers, Inc.*, 263 F.3d 862, 868–69 (9th Cir. 2001) ("Although the state statute of limitation for fraud had run by the time Gill filed the timely state court contract action, Gill is not prevented from raising these issues in the dischargeability proceeding. Gill did not assert a fraud claim in state court, but certain non-fraud-based state claims may form the basis for a finding of nondischargeability under § 523(a)(2).").

In our case, Plaintiff filed the pending state court action under California Commercial Code § 3118(a), which provides that "an action to enforce the obligation of a party to pay a note payable at a definite time shall be commenced within six years after the due date or dates stated in the note . . ." Therefore, under *Banks*, the applicable statute of limitations may be six years, which would completely negate Defendant's argument that the pending state court action was untimely, at least as to §523(a)(2)(A) theories not barred under CCP§338(d).



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Defendant's claim of summary judgment as to Plaintiff's first claim of relief will be granted for the claim as it is currently pled, because Plaintiff is barred from establishing that Defendant is personally liable for the debt directly by statutes of limitation. However, this will be without prejudice to either a Rule 15 motion to amend, or perhaps leave to reopen the matter in Superior Court based on the Labor Commissioner's order to essentially adopt the already established liability of Hans-Drake as his own. Defendant's claim of summary judgment as to Plaintiff's second claim of relief will be denied because triable issues exist regarding which statute of limitations applies and when such statute of limitation began running.

*Grant in part (First Claim) and deny in part (Second Claim) but without prejudice to a Rule 15 amendment motion to establish liability on First Claim through the established liability of Hans-Drake.*

**Party Information**

**Debtor(s):**

David R. Garcia

Represented By  
Thomas J Tedesco

**Defendant(s):**

David R. Garcia

Represented By  
Donald W Reid

**Plaintiff(s):**

Mandana Jafarinejad

Represented By  
Melissa Fulgencio

**Trustee(s):**

Weneta M Kosmala (TR)

Pro Se