

DEPARTMENT C 25 LAW AND MOTION
Judge Thierry Patrick Colaw
Law and Motion Hearing, Friday August 26, 2011
TENTATIVE RULING

12. Wittenberg v. Beachwalk Homeowners Association OCSC Case No. 30-2010-00416477

Motion by Plaintiffs Paul Wittenberg and Raymond Dukellis for Clarification of the Previously Entered Preliminary Injunction: the motion will be granted clarifying but the relief requested by the plaintiffs is denied. While the Moving Parties are correct, the injunction did not prohibit maintenance, but it did not order such mandatory relief either. The injunction was prohibitory and it discussed and prohibited demolition , modification, or improvements.

Routine pool maintenance was not discussed, mentioned or ordered in the injunction. To order Beachwalk HOA however, to perform maintenance now is not prohibitory, but mandatory in nature and form regarding relief.

Such unusual and rare mandatory injunctions were discussed in *Shoemaker v . County of Los Angeles* (1995) 37 Cal. App. 4th 618. The *Shoemaker* court explained that a preliminary *mandatory* injunction “is not permitted except in extreme cases where the right thereto is clearly established.” See *Shoemaker*, at 625, citing *Hagen v. Beth* (1897) 118 Cal. 330,331. See also Weil & Brown, California Civil Procedure Before Trial (2009 The Rutter Group) sections 9:459 and 9: 552.

The court grants the Moving Party request and clarifies that no mandatory injunction was issued on 11-10-10. None, of course will be issued now as no showing is made.

Whether or not plaintiffs have another claim for breach of section 9(g) of the C.C.& R.s by defendant Beachwalk is not before the court at this time.

The Request for Judicial Notice by Moving Parties is granted to the extent that the Court takes notice that the documents were filed and that the filings included exhibits that were declarations. The Court cannot take judicial notice of the truth of the matters contained in the declarations or within the motions unless they are indisputably true. That is not the case here. [See Weil & Brown Civil Procedure Before Trial § 7:15 citing *Fremont Indemnity Co. v. Fremont Gene. Corp.* (2007) 148 Cal. App. 4th 97,113; see also *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal. App. 4th 471, 482.]

Defendant Beachwalk’s request for judicial notice is granted also as to Exhibits 1-4, but not as to the truth of the contents of hearsay statements in any exhibit [except for Exhibit 4 the injunction issued by the court].

Responding Party Beachwalk shall give Notice.