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Attorney for Petitioner,
Charlene Van Deusen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

APPELLATE DEPARTMENT

Michael Keyes,

Plaintiff,

vs.

Charlene Van Deusen, Justin Marmor, and Does 1 through 10,

Defendants.

Charlene Van Deusen,

Petitioner,

vs.

Ventura County Superior Court,

Respondent.

Michael Keys,

Real Party in Interest.

Case No. CIV-242593

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF WITH RESPECT TO MOTION TO QUASH SERVICE OF SUMMONS

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PETITION

Petitioner alleges:

1. Petitioner is the defendant in the action hereinafter described, and is a party beneficially interested herein.

2. Respondent is the Superior Court of and for the County of Ventura.

3. Real party in interest is the plaintiff in the action hereinafter described and is a party beneficially interested in this proceeding.

4. On August 1, 2006, real party in interest filed in respondent court against this petitioner, as defendant, a complaint, numbered CIV242593 in the files and records of the respondent court, for unlawful detainer.

5. On August 1, 2006, petitioner, as defendant, was served with summons in the above-described action in Ojai, California, pursuant to the provisions of Section 1167 of the Code of Civil Procedure.

6. Petitioner has made no general appearance in respondent court. Rather, on August 18, 2006, petitioner appeared specially in respondent court and, pursuant to the provisions of Code of Civil Procedure § 418.10(a), moved for an order quashing service of summons and/or staying or dismissing the action on the ground that the court lacked jurisdiction of the person of the defendant.

7. Peitioner requests that the court take judicial notice of the complaint in this case, petitioner's motion for an order quashing service and supporting papers, real party in interest's opposition to the motion to quash, petitioner's reply, and the minute order of August 24, 2006, denying the motion to quash.

8. On September 1, 2006, petitioner filed with the Court of Appeal for the Second Appellate District a petition for writ of mandate directing respondent Superior Court to quash service of the summons in this case, along with certain related relief. On September 5, 2006, the Court of Appeal denied the petition without prejudice. The court stated that it did so because the complaint in this case was filed as a limited civil case. The court stated that petitioner should seek relief in the Appellate Department of the Superior Court. A copy of the order of the Court

of Appeal is attached hereto as Exhibit 1 and made a part hereof.

10. No transcript of the oral proceedings at the hearing on the motion is available for the reason that the proceedings were not reported. However, a fair summary of the proceedings is set forth in the declaration of Dennis J. Shea appended hereto and made a part hereof.

11. Respondent court lacks jurisdiction over the petitioner in the above-described action because the complaint for unlawful detainer does not state a cause for relief supporting the reduced time for response to summons. (See, *Delta Imports, Inc. v. Municipal Court* (1983) 146 Cal.App.3d 1033, 194 Cal.Rptr. 685.)

12. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel respondent court to quash the service of the summons in that this is the only proceeding authorized by statute to obtain the relief sought.

WHEREFORE, petitioner prays:

1. That this court issue an alternative writ of mandate directing respondent court to make and enter its order quashing the service of summons on this petitioner or to show cause before this court at a specified time and place why it has not done so;

2. That, on the hearing of this petition and the return to it, if any, this court issue a peremptory writ of mandate directing respondent court to so order;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Dated: September 8, 2006

Dennis J. Shea
Attorney for Defendants,
Charlene Van Deusen
and Justin Marmor

VERIFICATION

I, Dennis J. Shea, am the attorney for petitioner in the above-entitled proceeding. I have read the foregoing petition for writ of mandate and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 8, 2006

Dennis J. Shea

POINTS AND AUTHORITIES

I. INTRODUCTION.

This is an unlawful detainer case. Real party is seeking to evict his 70-year-old mother from the residence she has owned and resided in for the past 28 years. There is a related quiet-title case, in which the mother seeks to establish that the property is rightly hers. That case is entitled Charlene Van Deusen v. Michael Keys, Ventura County Superior Court Case No. CIV241924. Because these cases are intertwined, petitioner submits with this petition as Exhibit 7 a copy of her opposition to the pending motion to expunge the lis pendens in the related case (without the 173 pages of exhibits which were attached to the opposition). Petitioner requests that the court take judicial notice of the files and records in Case No. CIV241924.

II. TRAVEL OF THE CASE, AND DECISION OF TRIAL COURT.

This petition is before the Appellate Department because the trial court denied petitioner's motion to quash service of the five-day unlawful detainer summons. Petitioner had moved to quash service based on the court's lacking personal jurisdiction. Petitioner so moved based on a long-recognized exception to the general rule that an unlawful-detainer defendant may not set up a defense that the plaintiff lacks title to the property. Under that exception, a defendant may set up such a defense if the defendant was not put in possession of the property by the plaintiff. (*Strong v. Baldwin* (1908) 154 Cal. 150, 97 P. 178.)

The trial court denied the motion to quash, based on the following:

(A) The trial court concluded that title was not a legitimate defense to an

unlawful detainer claim.

(B) The trial court based its conclusion on the minimal and conclusory allegations set forth in the complaint. The court refused to require plaintiff to provide more substantial evidence in the form of declarations or the like.

On September 1, 2006, petitioner filed a petition for writ of mandate or other appropriate relief with the Court of Appeal (2d Civ. No. B193472). That petition was substantially the same as the present petition. On September 5, 2006, the Court of Appeal entered a *per curiam* order denying the petition without prejudice. The court stated that because the matter was filed as a limited civil case, petitioner should seek relief in the Appellate Department of the Superior Court. (Order, Exhibit 6.) Hence the present petition.

III. QUESTIONS PRESENTED.

There are two questions presented in this petition:

(A) Whether a defendant who in possession of real property, and who was not put into possession of the property by the plaintiff, may set up defendant's own title to the property as an affirmative defense to an unlawful detainer complaint.

(B) Whether a plaintiff who is opposing a motion to quash service of a summons may do so based merely on the conclusory allegations in a verified complaint, without providing more substantial evidence which would demonstrate that the court properly has jurisdiction.

IV. SHORT ANSWERS.

(A) A defendant who in possession of real property, and who was not put into possession of the property by the plaintiff, is not estopped to deny the title of the plaintiff and claim title for himself if the defendant was in possession of the property before the lease and was therefore not placed in possession by the landlord. (*Strong v. Baldwin* (1908) 154 Cal. 150, 97 P. 178.)

(B) A plaintiff who opposes a motion to quash service of a summons must do so based on more than the mere conclusory allegations set out in a verified complaint. (*Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 85 Cal.Rptr.2d 611.)

V. THE FACTS.

The verified first amended complaint in the related quiet-title case sets out in detail the family relationships of the parties, including the involvement of a third party, Mr. Roy Hargett. Ms. Van Deusen lived with Mr. Hargett from 1963 to 1996, as though husband and wife. Mr. Keys considers Mr. Hargett to be his stepfather. When the relationship between Ms. Van Deusen

and Mr. Hargett ended in 1996, Mr. Keys and Mr. Hargett both moved out of the family residence. It is that residence which is the subject of this lawsuit. Mr. Keys and Mr. Hargett have lived together elsewhere in the Ventura area ever since 1996.

In the related case, petitioner alleges that she conveyed title to her residence, which she has owned and lived from 1978 to the present, to her son, real party Michael Keys, in order to allow Mr. Keys to refinance and obtain a lower interest rate on the loan of approximately $300,000 which encumbered the property at that time. As part of that transaction, Mr. Keys promised to reconvey the property to Ms. Van Deusen after the refinancing had taken place.

During the time from 1999 to the present, in response to inquiries from his mother, Mr. Keys routinely assured her that he would reconvey the property to her. He never has done so. In 2006, Mr. Keys made it clear to petitioner that he had no intention of doing so. He then served notices to quit and filed this unlawful detainer case. In the meantime, after having been served with the notice to quit, Ms. Van Deusen brought the related case, seeking to quiet title to the residence in her name, along with certain other relief.

Plaintiff's allegation that his mother entered into possession of the premises with his permission is untrue. Ms. Van Deusen has owned the land on which the house located since 1975. She has lived in the house since she and Mr. Hargett built it in 1978. In truth, it is Ms. Van Deusen who allowed her son to live in the premises from 1979 to 1996. He left in 1996, along with Mr. Hargett, when his mother and Mr. Hargett separated. Mr. Keys was forty years old when he left his mother's house.

In 1997, Ms. Van Deusen, Mr. Hargett, and Mr. Keys all entered into what was essentially a marriage settlement agreement. (Although Mr. Hargett and Ms. Van Deusen had not been married for the thirty-three years they lived together). The 1997 agreement recited as part of its premises that there were six parcels of real estate in Mr. Keys' name at that time, and that all three of the parties asserted some interest in all of the properties. Ms. Van Deusen's residence was one of the six properties so listed.

In the 1997 agreement, the parties agreed to sell two of the properties, one of which was the residence, and to divide the proceeds. The other property to be sold was a lot adjacent to the

residence. At the time, and continuing to today, the adjacent lot generated significant rental income from several illegal rental units built on it.

The sale contemplated in the 1997 agreement never took place. As a result, the agreement essentially became a dead letter. Defendant has continued to live in the residence since that time, with exclusive possession of it. Also since that time, Mr. Keys and Mr. Hargett have had the exclusive use of the remaining property, including rents received from it.

Although the 1997 agreement became nothing more than an unperformed agreement, it is important to the present case. Its importance lies in the fact that it is a writing signed by all three of the persons involved in this dispute, which includes language acknowledging that all three of the signatories make some sort of claim to the residence and to the other five properties.

The reason why Mr. Keys had title to the residence in 1997 was that in 1993, Ms. Van Deusen conveyed title to him as an accommodation so that Mr. Keys could borrow money. The amount borrowed in 1993 was approximately $110,000. It was used partly to pay household bills of all three persons (who all lived together in the residence until 1996), and for certain other purposes, such as making additional illegal improvements to the lot adjacent to the residence.

In 1998, pursuant to Ms. Van Deusen's request, Mr. Keys conveyed title to the residence to Ms. Van Deusen. In 1999, Mr. Keys and Ms. Van Deusen agreed that Ms. Van Deusen would convey title to Mr. Keys for the purpose of refinancing the debt against the residence. The debt had increased from the $110,000 outstanding in 1993 to approximately $300,000 in 1999. As with the 1993 transaction, the conveyance was made subject to the oral promise of Mr. Keys to reconvey title to the residence to Ms. Van Deusen after the refinancing.

From time to time from 1999 to 2006, Ms. Van Deusen requested of Mr. Keys that he reconvey title to the residence to her. Mr. Keys constantly assured Ms. Van Deusen that he would do so, but he never did. Instead, unbeknownst to Ms. Van Deusen, Mr. Keys took out additional loans of approximately $200,000 against the residence, bringing the total amount of encumbrances to approximately $500,000.

Earlier this year, Mr. Keys made it clear to Ms. Van Deusen that he would not reconvey title to the residence to her. He did so by having a process server serve a notice to quit on his

mother.

Thus, the 1997 document recognizing a title dispute is signed by all of the parties concerned. The sale contemplated by that agreement never takes place. The title is reconveyed to Ms. Van Deusen in 1998, and back to Mr. Keys in 1999. Mr. Keys completes the 1999 refinancing, and then for good measure borrows an additional $200,000 without bothering to inform his mother. Mr. Keys then tops all of this off by commencing eviction proceedings against her.

Whatever else may be the arrangement among the parties with respect to Ms. Van Deusen's residence, it is decidedly *not* a landlord-tenant relationship. The Appellate Department should therefore issue a writ of mandate requiring the trial court to grant Ms. Van Deusen's motion to quash.

VI. THE PLEADINGS IN THE UNLAWFUL DETAINER CASE.

Plaintiff's complaint is made in the usual form, utilizing the unlawful detainer complaint form issued by the Judicial Council. Plaintiff states in Attachment 6 to his complaint that his mother entered into possession of the premises with his permission, but for no stated term, and without provision for the payment of rent. Plaintiff then alleges in the attachment that his mother is an at-will tenant, that no rental agreement exists between plaintiff and his mother, and that his mother has never paid rent during her occupancy of the premises.

On its face, the complaint (in Attachment 6) states that "no rental agreement exists between Plaintiff and VanDeusen." With this statement, by itself, plaintiff admits that the case is not a legitimate unlawful detainer case. Service should therefore be quashed on that basis alone. Beyond that, the pleadings, including Attachment 6 are in conclusory language. While such language may be appropriate for a complaint, it does not satisfy the requirements imposed on plaintiff to support the argument that defendant is properly before the court. (See, *Jewish Defense Organization*, supra.) It is the plaintiff who has the burden of proving facts which support jurisdiction. (*Ibid.*) He must do so through the use of affidavits with substantial evidence, and not merely by the use of a conclusory verified complaint. (*Ibid.*)

/ / /

VII. THE SUMMONS SERVED DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 412.20 OF THE CODE OF CIVIL PROCEDURE, AND WAS THEREFORE SUBSTANTIALLY DEFECTIVE, IN THAT IT SPECIFIED A RESPONSE TIME OF FIVE DAYS, WHICH IS LESS THAN THAT PROVIDED BY LAW.

The service of a substantially defective summons does not confer jurisdiction over the party served. (*Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 124 Cal.Rptr. 139.) A motion to quash service of summons is a proper method for determining whether a complaint for unlawful detainer states cause for relief supporting the reduced time for response to summons, and whether the court has acquired personal jurisdiction over the defendant through service of the five-day unlawful detainer summons. (*Delta Imports, Inc. v. Municipal Court* (1983) 146 Cal.App.3d 1033, 194 Cal.Rptr. 685.).

Under Code of Civil Procedure § 1161, an unlawful detainer complaint must allege the existence of a rental agreement or some other contractual relationship (see, *Francis v. West Virginia Oil Co.* (1917) 174 Cal. 168, 162 P. 394), that the tenant entered into possession pursuant to the rental agreement or other specified contractual relationship, and that the tenant is holding over after termination of the tenancy or other contractual relationship without the landlord's permission. (C.C.P. § 1161.) A complaint which omits the requisite relationship allegations is not a complaint for unlawful detainer and is subject to motion to quash. For example, a donee to whom a husband orally agreed to convey a life estate in community property without his wife's consent is not a tenant, and thus cannot be dispossessed by unlawful detainer. (*Harper v. Raya* (1984) 154 Cal.App.3d 908, 201 Cal.Rptr. 563.)

In this case, plaintiff states in Attachment 6 to his complaint that his mother entered into possession of the premises with his permission, but for no stated term, and without provision for the payment of rent. Such conclusory allegations in plaintiff's verified complaint are insufficient to sustain an unlawful detainer case as a matter of law. (See, *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S.* (1980) 105 Cal.App.3d 135, 164 Cal.Rptr. 181; *Jewish Defense Organization*, supra.) The allegation is also untrue. Ms. Van Deusen has owned the land since 1975. Ms. Van Deusen has lived in the premises since the house was built in 1978. The truth is that *Ms. Van Deusen* allowed *Mr. Keys* to live in the premises from 1978 to 1996.

VIII. ON A MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION, THE BURDEN OF PROOF IS ON THE PLAINTIFF TO ESTABLISH THE FACTS OF JURISDICTION BY A PREPONDERANCE OF THE EVIDENCE.

On a motion to quash service of summons for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. (*Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 85 Cal.Rptr.2d 611.) The plaintiff ordinarily seeks to carry this burden by the service and filing of opposing affidavits or declarations setting forth the probative facts of jurisdiction, and of opposing points and authorities. (*Ibid.*) Declarations, however, are insufficient to support the assertions for which they are offered if they consist primarily of vague assertions of ultimate facts rather then specific evidentiary facts permitting a court to form an independent conclusion on the issue. (Ibid.)

A verified complaint may be treated as a counteraffidavit or counterdeclaration, if it alleges the essential probative facts establishing jurisdiction. (*Arnesen v. Raymond Lee Organization, Inc.* (1973) 31 Cal.App.3d 991, 107 Cal.Rptr. 744; see, *Crea v. Busby* (1996) 48 Cal.App.4th 509, 55 Cal.Rptr.2d 513.) But because affidavits or declarations relied on as probative must state probative facts, and because affidavits or declarations which recite only ultimate facts or conclusions of law are insufficient, a complaint which alleges only ultimate facts, which is normally the case, and which any allegation of probative facts, cannot be used as a substitute for a counteraffidavit or counterdeclaration. (See, *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S.* (1980) 105 Cal.App.3d 135, 164 Cal.Rptr. 181.)

In the instant case, defendant Charlene Van Deusen has submitted with her motion to quash a detailed declaration setting forth the facts of the case. She has accompanied her declaration with a copy of a written agreement entered into, but not performed, in 1997. Plaintiff did not even submit a counterdeclaration with his opposition. Instead, plaintiff relied, and continues to rely, upon the most perfunctory and conclusory of allegations and legal conclusions stated in the complaint, to assert that he has set out an unlawful detainer cause of action.

Thus, plaintiff merely relies on the unsupported and conclusory allegations of the above-quoted language, to the effect that defendant entered into possession of the premises with permission of plaintiff. When did she do so? In 1975, when she bought the property? In 1978,

when she built a house on it and moved into it? In 1979, when she allowed plaintiff to move into it (which he did, and remained for the next 23 years until departing at the age of 40)? Plaintiff doesn't say. Plaintiff doesn't even try to say.

Plaintiff's allegation in the same paragraph that his mother is an at-will tenant is similarly devoid of factual support. It is merely a conclusory allegation of legal status. Where are the facts which demonstrate such a legal conclusion? Plaintiff doesn't say. The law is that the burden is on plaintiff to establish, by probative facts, that the court has jurisdiction. Plaintiff utterly fails to do so. Plaintiff doesn't even try to do so. As a result, the trial court should have ordered the complaint to be quashed.

IX. DEFENDANT IS *NOT* ESTOPPED FROM CONTESTING PLAINTIFF'S TITLE.

Plaintiff advances the argument that defendant is estopped from contesting plaintiff's title. The trial court accepted that argument. Its doing so was error. First, plaintiff has not demonstrated the existence of a landlord-tenant relationship. The existence of such a relationship is a basic premise of the law which plaintiff cites on this issue. Second, even if there were a landlord-tenant relationship, a tenant is not estopped to deny the title of the landlord and claim title for himself if the tenant was in possession of the property before the lease and was therefore not placed in possession by the landlord. (*Strong v. Baldwin* (1908) 154 Cal. 150, 97 P. 178.) In this case, as is discussed above, plaintiff doesn't allege when the purported landlord-tenant relationship began. In any event, Ms. Van Deusen has been in uninterrupted possession of the property ever since she and Mr. Hargett purchased the property 31 years ago.

X. CONCLUSION.

As is demonstrated above, plaintiff completely ignores the standards of proof which apply to a motion to quash, and improperly attempts to put the onus on defendant to disprove jurisdiction. Plaintiff has not even tried to meet the requirements described above that he introduce evidence of probative facts which would support a conclusion that the court has jurisdiction over this matter as an unlawful detainer case.

This entire case is nothing but a frivolous tactic and an extension of the elder abuse of his

mother in which plaintiff and his stepfather are engaged. The trial court should have grant the motion to quash. The Appellate Department should remedy that error, and thereby end at least one chapter of this dispute.

Dated: September 8, 2006

Dennis J. Shea

DECLARATION OF COUNSEL

I am the attorney for petitioner in this proceeding and represented the petitioner on the motion to quash service of summons in respondent court. No transcript of those proceedings is available for the reason that the proceedings were not reported. Nevertheless, a fair summary of those proceedings and the rationale of the decision of the superior court is set forth in the petition and points and authorities above.

Dated: September 8, 2006

Dennis J. Shea

CERTIFICATE OF WORD COUNT

I, Dennis J. Shea, declare:

1. I am the attorney of record for defendant Charlene Van Deusen in this case.

2. The within Petition for Writ of Mandate contains 4,255, including footnotes, as computed by Corel WordPerfect 12 software.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 8, 2006

Dennis J. Shea

EXHIBIT 1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CHARLENE VAN DEUSEN, Petitioner, v. THE SUPERIOR COURT OF VENTURA COUNTY, Respondent; MICHAEL KEYS, Real Party in Interest.	2d Civil No. B193472 (Super. Ct. No. CIV242593) (Ventura County) ORDER

THE COURT:

The petition for a writ of mandate filed by Charlene Van Deusen is denied without prejudice. A review of the exhibits attached to the petition reveals that this matter is a limited civil case. Petitioner should seek relief in the Appellate Department of the Superior Court.

Dennis J. Shea
903 State Street
Suite 208
Santa Barbara, CA 93101

Case Number B193472
Division 6
CHARLENE VAN DEUSEN,
Petitioner,
v
VENTURA COUNTY SUPERIOR COURT,
Respondent,

MICHAEL KEYS,
Real Party in Interest.

PROOF OF SERVICE

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

I, Dennis J. Shea, am over the age of eighteen years and am not a party to the within-entitled action. My business address is 903 State Street, Suite 208, Santa Barbara, California.

On September 8, 2006, I served a copy of the within **PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF WITH RESPECT TO MOTION TO QUASH SERVICE OF SUMMONS** on the interested parties at their last known address in this action by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail at Santa Barbara, California, addressed as follows:

Dennis LaRochelle, Esquire
300 Esplanade, Suite 2100
Oxnard, California 93036

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 8, 2006

Dennis J. Shea

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