PARTIES/ATTORNEYS

Plaintiff	Heidi De Mayo	Daniel Knight
Defendant	Alfred Oseguera	Adrian Andrade

TENTATIVE RULING

For the reasons stated below, the request is denied without prejudice.

This is an action for partition and damages. As is relevant for this motion, plaintiff Heidi De Mayo alleges that in June 2020, she owned property at 1148 Pino Solo Drive in Santa Maria without encumbrance. On August 6, 2020, to fund improvements to the property, plaintiff executed a grant deed conveying 1% interest in the Property to Oseguera, who took a loan secured by a deed of trust in the Property signed by both plaintiff and Oseguera, with the intention that on completion of the project, Oseguera would take a loan to buy plaintiff's 99 % interest in the Property and pay her the appreciation plus any remaining costs that De Mayo had carried to that point. On December 14, 2020, a deed of trust encumbering the Property in favor of Flagstar Bank in the principal sum of $450,000.00 was recorded. The studio on the property was rented and Oseguera began renting the 3-bedroom house and collecting rents thereon. De Mayo and Oseguera allegedly agreed that all rents would be used to pay the note secured by Flagstar.

De Mayo continued to fund Oseguera's improvements to the Property, specifically the construction of an ADU. On July 27, 2021, Oseguera executed a promissory note in favor of plaintiff in the amount of $76,942.02. Oseguera subsequently damaged and misappropriated property belonging to plaintiff. On March 14, 2022, Oseguera agreed to pay plaintiff $20,000 by March 28, 2022, in settlement of that claim.

In May of 2023, Oseguera stopped making payments on the loan from Flagstar Bank, converting the rent generated by the property to his own use. On December 22, 2023, Flagstar initiated a nonjudicial foreclosure on the Property.[1]

De Mayo filed her second amended complaint against Oseguera for partition and injunction, breach of promissory notes, accounting and disgorgement of profits. She alleges that as the owner of 99% of the Property, she will incur the greater share of the costs of partition and is presumably exposed to the greater share of costs associated with foreclosure, should it be completed.

[1] In a related action, *Flagstar Bank v. De Mayo* (24CV05188), Flagstar alleges there was a scrivener's error in the deed of trust and requests reformation. This presumably has prevented nonjudicial foreclosure to be completed.

Oseguera cross-complained, alleging that he and De Mayo were in a business partnership in which De Mayo would finance properties and Oseguera would undertake reconstruction/repairs to ready the property for resale. In June 2020, De Mayo and Oseguera selected property located at 1148 Pino Solo in Santa Maria with the intention that De Mayo would purchase the property for Oseguera to reside in with his daughters. Oseguera would have a one percent (1%) interest and De Mayo would have ninety-nine (99%) per cent interest in the Property while Oseguera performed all repairs and needed construction. De Mayo would then sell her 99% interest to Oseguera for $395,000, plus reimbursement of $20,000 advanced for renovations upon the close of his purchase. Oseguera alleges that he paid DeMayo the sum of $440,000. De Mayo refuses to convey her 99% interest to Oseguera.

The following two motions are on calendar: (1) motion to consolidate; and (2) application for right to attach the rental proceeds collected by Oseguera "since May 2023 which are $162,000 and for those amounts received in rental income until this matter is adjudicated."

Motion to Consolidate

The court incorporates its tentative ruling on the motion to consolidate in Case No. 25CV05188 in full.

Right to Attach Order

Attachment is an ancillary or provisional remedy to aid in the collection of a money demand or seizure of property in advance of trial and judgment. California Attachment Law (Code Civ. Proc. § 482.010. et seq.) is purely statutory and is strictly construed, i.e., unless specifically provided for by the attachment law, no attachment procedure may be ordered by the court. (*Kemp Bros. Construction v. Titan Electric Corp*. (2007) 146 Cal.App.4th 1474, 1476; *Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 761.)

Attachment may issue only if the claim sued upon is:

- a claim for money based upon a contract, express or implied;
- of a "fixed or readily ascertainable amount no less than $500;"
- that is either unsecured or secured by personal property; and
- which is a commercial claim.

(Code Civ. Proc. § 483.010.)

The damages sought need not be liquidated but must be measurable "by reference to the contract itself." (*Kemp, supra*, at p. 1481, fn. 5.) That is, the

contract sued upon must itself furnish a standard by which the amount due may be clearly ascertained and there must exist a basis upon which damages can be determined by proof. (*CIT Group/Equipment Financing, Inc. v. Super DV, Inc.* (2004) 115 Cal.App.4th 537, 540.)

At the hearing, plaintiff as the moving party must show the claim is one on which attachment may issue; the probable validity of the claim; that attachment is not sought for any other purpose other than to secure recovery on the claim; and the amount/ is greater than zero. (Code Civ. Proc. § 484.090). A claim has "probable validity" whether it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim. (Code Civ. Proc. § 481.190.) Finally, a writ of attachment cannot issue until plaintiff files an undertaking in an amount for wrongful attachment. (Code Civ. Proc. §§ 484.090(b); 489.210.)

1. Application Form Not Used (Judicial Council form AT-115),

Pursuant to statute, the Judicial Council has promulgated forms implementing the attachment law. (Code Civ. Proc. § 482.030.) Use of these forms is optional, however; if the form is not used, the application must nevertheless provide the required information.

A writ of attachment is issued after the court grants an application for a right to attach order. The process is initiated by filing an application for a right to attach order. (Code Civ. Proc., § 484.010—"plaintiff may apply [ ] for a right to attach order and a writ of attachment by filing an application for the order and writ with the court . . .") The Judicial Council has promulgated form (AT-105) for that purpose. Here, De Mayo has not filed this form. She filed the *notice* of the application (Notice of Application and Hearing for Right to Attach Order and Writ of Attachment) (Judicial Council form AT-115), but not the application itself.

Thus, the court must examine the points and authorities to ascertain if all the required allegations are present. Section 484.020 provides: "The application shall be executed under oath and shall include all of the following:

(a) A statement showing that the attachment is sought to secure the recovery on a claim upon which an attachment may be issued.
(b) A statement of the amount to be secured by the attachment.
(c) A statement that the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
(d) A statement that the applicant has no information or belief that the claim is discharged in a proceeding under Title 11 of the United States Code (Bankruptcy) or that the prosecution of the action is stayed in a proceeding under Title 11 of the United States Code (Bankruptcy).

(e) A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment."

Here, the memorandum fails to state whether De Mayo has no information that the claim was discharged in bankruptcy or that the prosecution of this action might be stayed by a proceeding in bankruptcy court. This alone is sufficient reason to deny the application.

2. Evidentiary Showing

Although official forms may be used for almost every attachment procedure, the applicant must support the application by a detailed evidentiary showing. Technically, individual plaintiffs may use a verified complaint in lieu of an affidavit or declaration. (§ 482.040.) However, attachment applications must be supported by declarations containing evidentiary facts, not the ultimate facts usually set forth in pleadings. (See *Pos-A-Traction, Inc. v. Kelly-Springfield Tire Co.* (CD CA 2000) 112 F.Supp.2d 1178, 1182—"declarant must show actual, personal knowledge of the relevant facts, rather than the ultimate facts commonly found in pleadings.") Verified pleadings are usually too general and conclusory to meet the evidentiary requirements of *particularity* and *personal knowledge*. Instead, defendants should produce detailed, factual declarations to support their claims. (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2025) ¶ 4:251.)

Here, plaintiff has requested the court to take judicial notice of her verified complaint and each exhibit attached to the complaint (the first four of which are recorded documents and two of which are promissory notes from Oseguera to De Mayo.) While the court may take judicial notice of these documents under Evidence Code section 452 subdivision (d), not all matters contained in court records are indisputably true. While the *existence* of any document in a court file may be judicially noticed, the *truth* of matters asserted in such documents is *not necessarily* subject to judicial notice. (*Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 483-484; see *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 14; *Dominguez v. Bonta* (2022) 87 Cal.App.5th 389, 400-401.) Nor may the court consider the contents of exhibits attached to pleadings that have been controverted by general denials. (*Fiorito v. Sup.Ct. (State Farm Fire & Cas. Co.)* (1990) 226 Cal.App.3d 433, 438.) Here, Oseguera specifically denies executing a promissory note in favor of De Mayo in the amount of $76,942.02 or that he agreed to settle damages suffered in the amount of $20,000.00. (Answer filed 3/19/25.) Thus, it does not appear the court can take judicial notice of Exhibits E or F.

In any event, it appears that the verified pleadings are the only evidence offered in support of the request. The declaration submitted by attorney Knight

addresses his fees and affirms the motion for a Writ of Attachment is brought in good faith, with the genuine intent to secure assets to satisfy a potential judgment in favor of his client, and not for any improper purpose or to harass the defendant. No other declarations are offered to support the required detailed evidentiary showing. It is as if plaintiff assumes the court will sort through the complaint and exhibits to discern on its own how the requested attachment is supported. De Mayo has thus failed in her burden to show support for the amount sought in the request.

Even if these defects could be overcome, it remains unclear to the court how De Mayo calculated $162,000 as the amount of rents paid since May 2023. There is no allegation in the complaint that specifies monthly rental rate, and without ***other*** evidence outside the contract, the court is without any guidance to determine the adequacy of that number. (See SAC, ¶ 27: "Thereafter on or about September 2020 the studio in the subject property was rented, in December 2020, Defendant Oseguera began renting Subject Property 3-bedroom house and collecting rents thereon and only after a year of fumbled construction the ADU. Despite the agreement to use the rents to pay the note secured by the Flagstar Bank FSB deed of trust, Defendant Oseguera converted some or all of the rents for his own use.") It is fatal when the court has to look beyond the formula in the promissory note to determine the amount owed.

Moreover, an attachment ordinarily may issue only upon a claim for money based upon an express or implied contract. (See § 483.010, subd. (a).) It is unclear what contract the claim is based on. De Mayo asserts in her memo of points and authorities that:

> "Plaintiff pleads breach of contract against Defendant Oseguera based on his nonpayment of the promissory note against Subject Property with the rental funds Plaintiff seeks to attach. The implied contract being the regular and continued payment of said promissory note he took out with the rental income that would otherwise mostly go to plaintiff as 99% owner of Subject Property. This is a readily ascertainable amount above the $500 required threshold because it is based on the exact amount Defendant Oseguera was supposed to be paying toward the Flagstar note. Therefore, because Plaintiff has plead breach of an existing contract between herself and Defendant Oseguera and the damages associated with this amount are readily ascertainable, Plaintiff has a requisite claim that attachment may be based upon."
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> (Memo of Points and Authorities, p. 4, ll. 6-14.)

To the extent De Mayo asserts she can attach funds to pay for the contractual obligation between Flagstar and Oseguera, she has provided no authority in support of that proposition and will likely run afoul of section 483.010. To the extent De

Mayo asserts she and Oseguera entered into a contract in which he agreed to pay the Flagstar mortgage with the rental income generated by the property, no such claim has been alleged. Instead, De Mayo only alleges two contracts in her second cause of action in the SAC:

- a promissory note dated July 27, 2021 in the amount of $76,942.02 on which no payments have been made (SAC, ¶¶ 54-55); and
- a promissory note of uncertain date in the amount of $20,000.00, on which no payments have been made. (SAC, ¶¶ 58-59.)

The other causes of action request a partition and injunction against Oseguera (first cause of action), an accounting (fourth cause of action), fraudulent concealment (sixth cause of action), disgorgement for Oseguera's failure to maintain proper licensure (seventh cause of action), and ouster (eight cause of action). None of these involve a contract claim.

Assuming the attachment is based on the second cause of action, damages are alleged to amount to only $96,942.02 without interest. The request is silent on how the request for $160,000 plus collection of all future rents is warranted based on this record.

As a result of the above evidentiary deficiencies and failure to supply all the information required by section 484.020, the request is denied without prejudice.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)