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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 9826 LFRCA, LLC,
11 Plaintiff,
12 v.
13 ROBERT A. HURWITZ, et al.,
14 Defendants.

Case No.: 3:13-cv-01042-L-JMA

**ORDER DISMISSING THIRD
PARTY DEFENDANT DONALD A.
BURNS**

15 ROBERT A HURWITZ, et al.,
16 Third Party Plaintiffs,
17 v.
18 DONALD A BURNS,
19 Third Party Defendant.
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22 This case arises out of a dispute between a real estate purchaser and a selling real
23 estate agent. Third Party Defendant Donald A. Burns (“Burns”) purchased a property
24 offered for sale by real estate agent Robert A. Hurwitz (“Defendant”). After executing
25 the purchase contract, Burns assigned the contract to 9826 LFRCA, LLC (“Plaintiff”), an
26 LLC whose sole member is a trust for which Burns is settlor and trustee. Plaintiff alleges
27 that when Burns executed the purchase he reasonably relied on Defendant’s
28 representations that the property featured private beach access. After the contingency

1 period ended and the contract became fully executed, Plaintiff alleges it discovered that
2 these representations were false and that, in reliance upon them, Plaintiff overpaid for the
3 property.

4 Defendant filed a third party complaint against Burns, seeking indemnification
5 from Burns in the event that Defendant is found liable to Plaintiff. The gist of the third
6 party complaint is that any harm Plaintiff may have suffered stems from Burns' alleged
7 negligent failure to investigate the nature of the private beach access. Burns filed a
8 motion to dismiss the third party complaint against him, arguing, *inter alia*, that it failed
9 to state a claim because if Burns is found to have been negligent in performing due
10 diligence, that finding would eliminate Defendant's liability to Plaintiff in the first
11 instance by way of Defendant's defenses. By order dated July 31, 2014, the Court found
12 this argument unpersuasive and denied Burns' motion to dismiss the third party
13 complaint as to him. (Doc. 32).

14 On January 5, 2018, the Court indicated it was inclined to reconsider the denial of
15 Burns' motion to dismiss and ordered the parties to show cause as to why the Court
16 should not dismiss Burns from this case. (Doc. 112.) Burns, Plaintiff, and Defendant
17 have all filed responses to the Court's order to show cause. (Docs. 113–15.) In his
18 response, Defendant argues that “so long as the obligations and/or liabilities under the
19 subject purchase agreement are retained by Burns individually, Mr. Burns must be
20 included in this matter as an individual party, if not as a Third Party Defendant, than [sic]
21 as an involuntary Plaintiff.” (Doc. 113 2:18–21.)


22 Defendant's argument is not persuasive. Defendant does not cite any supporting
23 authority or present any explanation as to how the non-assignment of Burns' alleged
24 “obligations and / or liabilities” carries any relevance here given that Burns assigned to
25 Plaintiff all of his rights in the subject transaction. Under the law of assignments,
26 Plaintiff (as assignee) stands in Burns' (the assignor's) shoes with respect to any right it
27 has to recover against Defendant for the alleged misrepresentation regarding private
28 beach access. Cal. Civ. Code § 1459. Any defenses that Defendant would have had as to

1 Burns are therefore preserved as to Plaintiff. To illustrate, if a jury finds that Burns'
2 alleged negligence in conducting due diligence was the legal cause of any loss suffered
3 by Plaintiff, such a finding would necessarily offset Defendant's liability to Plaintiff in
4 the first instance by way of Defendant's defenses that (1) any reliance by Plaintiff
5 (standing in Burns' shoes) on Defendant's alleged misrepresentations was unreasonable
6 and (2) Plaintiff did not conduct the required due diligence and thus failed to mitigate
7 damages.

8 Because any negligence on the part of Burns would thus offset liability in the first
9 instance, there is no possibility of Defendant obtaining secondary relief from Burns. It
10 follows that the only feasible purpose keeping Burns as a third party defendant could
11 accomplish is to unnecessarily complicate the issues and confuse the jury. Accordingly,
12 pursuant to Federal Rule of Civil Procedure 54(b), the Court hereby reconsiders its denial
13 of Burns' Fed. R. 12(b)(6) motion and dismisses Burns as third party defendant.

14 **IT IS SO ORDERED.**

15 Dated: January 23, 2018

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17 Hon. M. James Lorenz
18 United States District Judge
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