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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

21ST CENTURY COMMUNITIES, INC.,
a Nevada Corporation,

Plaintiff,

v.

MUZLINK, LLC, a California Limited
Liability Company;

Defendants.

Case No. 2:09-cv-02458-LDG-VDF

ORDER

The plaintiff, 21st Century Communities, Inc. (21st Century) alleges that defendant Muzlink, LLC (Muzlink), Wayne Williams (Williams), and Phillip Bradley Parker (Parker) breached a loan agreement in which they agreed to allow 21st Century to be involved with decision making and are in default for repayment of loans. ECF No. 1. Defendants Williams and Parker move for summary judgment on two separate grounds. ECF No. 106. First, they argue that a choice of forum clause existed in Muzlink’s operating agreement designating California as the proper forum for lawsuits. Second, they assert that the matter was already litigated in California and res judicata precludes further suits. The Court will deny the motion.

1 Motion for Summary Judgment

2 In considering a motion for summary judgment, the court performs “the threshold
3 inquiry of determining whether there is the need for a trial—whether, in other words, there
4 are any genuine factual issues that properly can be resolved only by a finder of fact
5 because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty*
6 *Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir.
7 2012). To succeed on a motion for summary judgment, the moving party must show (1)
8 the lack of a genuine issue of any material fact, and (2) that the court may grant judgment
9 as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
10 (1986); *Arango*, 670 F.3d at 992.

11 A material fact is one required to prove a basic element of a claim. *Anderson*, 477
12 U.S. at 248. The failure to show a fact essential to one element, however, “necessarily
13 renders all other facts immaterial.” *Celotex*, 477 U.S. at 323. Additionally, “[t]he mere
14 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.”
15 *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (quoting
16 *Anderson*, 477 U.S. at 252).

17 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after
18 adequate time for discovery and upon motion, against a party who fails to make a showing
19 sufficient to establish the existence of an element essential to that party’s case, and on
20 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “Of
21 course, a party seeking summary judgment always bears the initial responsibility of
22 informing the district court of the basis for its motion, and identifying those portions of ‘the
23 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
24 affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material
25 fact.” *Id.*, at 323. As such, when the non-moving party bears the initial burden of proving,
26 at trial, the claim or defense that the motion for summary judgment places in issue, the

1 moving party can meet its initial burden on summary judgment "by 'showing'—that is,
2 pointing out to the district court—that there is an absence of evidence to support the
3 nonmoving party's case." *Id.*, at 325. Conversely, when the burden of proof at trial rests
4 on the party moving for summary judgment, then in moving for summary judgment the
5 party must establish each element of its case.

6 Once the moving party meets its initial burden on summary judgment, the non-
7 moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro.
8 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir.
9 2000). As summary judgment allows a court "to isolate and dispose of factually
10 unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24, the court construes the
11 evidence before it "in the light most favorable to the opposing party." *Adickes v. S. H.*
12 *Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however,
13 will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co.*
14 *v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). That is, the opposing party cannot
15 "rest upon the mere allegations or denials of [its] pleading' but must instead produce
16 evidence that 'sets forth specific facts showing that there is a genuine issue for trial.'" *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed.
17 R. Civ. Pro. 56(e)).

19 Background

20 21st Century commenced this suit in state court against Muzlink on December 10,
21 2009. Muzlink removed this matter to this Court on December 31, 2009. In January 2011,
22 21st Century moved to amend the complaint seeking, in part, to add Williams and Parker as
23 individual defendants. Following Muzlink's subsequent Notice of Automatic Stay and Filing
24 of Petition under Chapter 11 of the Bankruptcy Code in April 2011, the Court denied the
25 motion to amend without prejudice. After the bankruptcy stay was lifted, 21st Century
26 renewed its motion to amend the complaint, which the Court granted in March 2014.

1 Meanwhile, on August 30, 2013, 21st Century and other persons commenced an
2 action against Williams and Parker in California state court. The California defendants
3 sought dismissal of all California claims as barred by the statute of limitations. The
4 California court conducted a bifurcated trial, the first phase of which addressed whether the
5 claims were barred by the statute of limitations. Ultimately, the California court entered a
6 tentative ruling that the California plaintiffs' claims related to misrepresentation in regards
7 to intellectual property were not barred by the statute of limitations and would proceed, but
8 that all other remaining claims were barred by the statute of limitations. More particularly,
9 the California state court determined that the California plaintiffs had notice of their causes
10 of action by August 11, 2009. As such, the claims, filed on August 30, 2013, were barred
11 by California's four-year statute of limitations for claims arising from breach of contract.

12 Analysis

13 Williams and Parker seek summary judgment in their favor on the grounds that
14 Muzlink's operating agreement designated California as the proper forum for any litigation
15 against Muzlink. They also argue that 21st Century's claims against them are barred by the
16 doctrine of res judicata because the California court has ruled that the California plaintiffs'
17 breach of contract claims against them are barred by California's four-year statute of
18 limitations. Neither argument warrants a grant of summary judgment.

19 Choice of Forum

20 This court has previously ruled that 21st Century is not bound by Muzlink's operating
21 agreement to litigate its claims in California, when the argument was first raised by Muzlink
22 in seeking dismissal of 21st Century's complaint:

23 Muzlink also contends that 21st Century signed a choice of law clause
24 requiring that any disputes be governed by California law. However,
25 the document containing the alleged choice of law clause is a separate
26 and distinct agreement from those upon which 21st Century's action is
based. Furthermore, the document at issue is signed by Mr. Cohen in
his individual capacity, rather than on behalf of 21st Century.

1 ECF. No. 12 at 5. For similar reasons, Williams and Parker have not shown that
2 they, in their individual capacities, entered into an agreement with 21st Century that
3 requires 21st Century to litigate its claims against them in California.

4 Res Judicata

5 Res judicata applies when there is (1) an identity of claim, (2) a final judgment on the
6 merits, and (3) privity between the parties. *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l*
7 *Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). Williams and Parker argue that the
8 California court's determination that the California plaintiffs' breach of contract claims are
9 barred by California's statute of limitations constitutes a "final judgment on the merits."

10 The Supreme Court has stated that a dismissal on statute of limitations grounds is treated
11 as a judgment on the merits. *Plaut v Spendthrift Farm, In.*, 514 U.S. 211, 228, 115 S.Ct
12 1447, 131 L.Ed 2d 328 (1995). The Supreme Court has also stated that, with regard to
13 claim-preclusion issues, "the traditional rule is that expiration of the applicable statute of
14 limitations merely bars the remedy and does not extinguish the substantive right, so that
15 dismissal on that ground does not have claim-preclusive effect in other jurisdictions with
16 longer, unexpired limitations periods." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S.
17 497, 504, 121 S. Ct. 1021, 1026, 149 L. Ed. 2d 32 (2001).

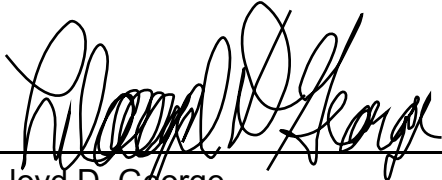
18 Williams' and Parker's res judicata argument rests solely upon the assertion that the
19 California court's decision that 21st Century's claims accrued on August 11, 2009, and thus
20 its August 30, 2013, filing of its California action is barred by the statute of limitations is a
21 ruling on the merits that this Court must apply. The argument fails, however, because the
22 California court did not decide the merits of whether 21st Century's December 2009 filing of
23 its claims in Nevada was barred by the statute of limitations. While 21st Century's claims
24 against Williams and Parker may be identical to those filed in California, the issue decided
25 by the California court on the "merits" was whether California's four-year statute of
26 limitations barred 21st Century's California claims because those claims were filed in

1 California on August 30, 2013. The California court did not address, much less rule on the
2 merits of, the issue for which Williams and Parker seek to apply the bar of res judicata:
3 whether 21st Century's December 2009 filing of its claims in Nevada are barred by
4 California's four-year statutes of limitations. As the California court did not decide that 21st
5 Century's Nevada action is barred by the statute of limitations, the Court will not apply the
6 doctrine of res judicata to dismiss 21st Century's Nevada action as barred by the statute of
7 limitations.

8 Accordingly,

9 THE COURT **ORDERS** that Defendants Wayne Williams' and Phillip Bradley
10 Parker's Motion for Summary Judgment (#106) is DENIED.

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12 DATED this 21 day of September, 2017.

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15 Lloyd D. George
United States District Judge

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