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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN T. KENDALL, as Trustee in Bankruptcy, etc., et al., Plaintiffs and Respondents, v. PAULL C. WALKER et al., Defendants and Appellants.	A105981 (Contra Costa County Super. Ct. No. C9804322)

Paull C. Walker and Margery F. Walker (collectively "defendants") appeal after the trial court granted Alvin H. Luckenbach and Maria E. Luckenbach's (collectively "plaintiffs")[1] motion for summary judgment. On appeal, defendants challenge the trial court's (1) denial of their motions for leave to amend and supplement their answer and cross-complaint, and (2)grant of plaintiffs' motions for summary adjudication of issues and summary judgment. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs own a residential subdivision lot (Lot 102) in the town of Bethel Island, California. Defendants own the residential subdivision parcel (comprised of Lot 103 and a small portion of Lot 104), adjacent to plaintiffs' lot. Both lots have frontage on Taylor

[1] Pursuant to our order of June 19, 2009, John T. Kendall, as Trustee in Bankruptcy, etc., has substituted for the late Alvin H. Luckenbach as a respondent in this appeal. Any reference in this opinion to "plaintiffs" shall refer interchangeably to the Bankruptcy Trustee, Alvin Luckenbach, and Maria Luckenbach.

Slough, a navigable waterway. This matter involves the question of the proper boundary line between the parties' areas of littoral rights[2] for use of the water adjacent to their upland property.

On September 29, 1998, plaintiffs filed a complaint for damages for trespass to real property and for a temporary restraining order, preliminary injunction, and permanent injunction. The complaint alleged that a houseboat moored to defendants' dock extended onto plaintiffs' property.

On August 26, 1999, plaintiffs filed a first amended complaint, in which they added Victor and Alicia Levchenko, plaintiffs' neighbors to the south and owners of Lot 101, as defendants, so that in the event correction of an alleged survey error altered the dividing line between the properties of plaintiffs and the Walker defendants, the dividing line between plaintiffs and the Levchenkos would also be changed.[3] In addition to the cause of action for trespass, the first amended complaint also added causes of action for declaratory relief regarding the location of the dividing lines between the parties' littoral rights; declaratory relief acknowledging plaintiffs' paramount rights conferred by a U.S. Department of the Army, Corps of Engineers, authorization to relocate their dock; declaratory relief stating that defendants' mooring of their houseboat partially in front of plaintiffs' parcel violated covenants, so-called "CC&Rs," that encumbered their parcel; relief from nuisance due to defendants' mooring of their houseboat partially in the area of littoral rights belonging to plaintiffs; and relief from nuisance due to defendants' violation of the CC&Rs.

On December 27, 2000, defendants filed a motion for summary judgment or, in the alternative, summary adjudication of issues, claiming, inter alia, that the area in

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[2] Littoral rights are water rights in the foreshore adjacent to an owner's upland property. (See *Marks v. Whitney* (1971) 6 Cal.3d 251, 262.)

[3] The Levchenkos then filed a cross-complaint against plaintiffs, but plaintiffs later settled with the Levchenkos, with the stipulation that if defendants prevail on this appeal, that settlement is null and void.

question was within the area of navigable water owned by the State of California and that the parties' rights were governed under leases and permits issued by the state.

Also on December 27, 2000, plaintiffs filed a motion for summary judgment or, in the alternative, summary adjudication of issues ("summary adjudication motion").[4]

On January 29, 2001, the trial court issued its tentative ruling denying defendants' motion for summary judgment and granting plaintiffs' request for summary adjudication on all but one cause of action.

Also on January 29, 2001, defendants filed a cross-complaint to quiet title to the disputed portion of Taylor Slough, pursuant to a lease they had obtained from the State Lands Commission (Commission) on August 12, 1991. Then, on January 30, 2001, defendants requested and the trial court granted a continuance for discovery, which the court ordered reopened "only with regard to the State Lands Comm[ission]."

On May 18, 2001, the Commission submitted a letter brief to the trial court, in which it stated that it had used the "Colonial Method" to determine the sideline property projections on the curved shoreline. Using that method, the Commission concluded "it is apparent that the Walkers' houseboat does extend over the sideline so determined. And drawing the Luckenbach-Walker sideline in this manner demonstrates that the Walkers will have more than sufficient shoreline to support the houseboat and pier if the structures are relocated upstream." In light of this determination, the Commission indicated that it would not be renewing defendants' lease, which would be up for renewal in August 2001, as to the area beyond their sideline.

On October 5, 2001, defendants served notice that they were dropping their summary judgment motion on the grounds that (1) their lease had expired, (2) they had learned that the state may not own the submerged land, and (3) discovery that certain facts in the parties' joint stipulation of facts were not true.

[4] Plaintiffs had previously filed a motion for summary judgment, which was denied on July 29, 1999, and a motion for summary adjudication of issues, which was vacated at plaintiffs' request on September 26, 2000.

On February 5, 2002, over one year after the first hearing on plaintiffs' summary adjudication motion, the trial court held another hearing on plaintiffs' motion and took the matter under submission.

On February 8, 2002, defendants filed a motion seeking leave to amend their answer and cross-complaint. In their motion, defendants stated: "The amended pleadings are designed to take into account facts uncovered in October 2001 as to the ownership of the subject portion of Taylor Slough." In particular, the motion asserted that "it has become apparent that the area of the current configuration of Taylor Slough at issue in this action is not a part of the original portion of Taylor Slough that existed, circa 1850, when California received title to submerged lands upon achieving statehood." Based on these facts, defendants' proposed amendments would add defenses and causes of action for adverse possession and a prescriptive easement.[5]

On March 26, 2002, the trial court denied defendants' motion to amend.

On May 4, 2002, the trial court filed an informal ruling—followed by an order on February 3, 2003—granting in part plaintiffs' summary adjudication motion. In its order, the trial court granted summary adjudication as to all causes of action except for the third cause of action for declaratory relief regarding defendants' violation of the CC&Rs.

On March 4, 2003, plaintiffs filed a final motion for summary adjudication of issues or, in the alternative, summary judgment. In that motion, plaintiffs requested summary judgment as to defendants' cross-complaint, asserting that no issues raised in the cross-complaint remained unresolved. Plaintiffs also offered to have the trial court dismiss the third cause of action in their first amended complaint, in order to completely resolve the case.

On May5, 2003, defendants filed a motion seeking leave to file a supplemental answer and cross-complaint to allege that the submerged land was not owned by the state and to assert causes of action for a prescriptive easement and adverse possession.

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[5] Defendants also attempted to add a cause of action for "Agreed Boundary Line," under which they claimed that the predecessor in title to defendants' and plaintiffs' properties intended to convey the disputed area to defendants.

On July 14, 2003, the trial court entered an order denying defendants' motion to supplement their answer and cross-complaint.

On September 19, 2003, the trial court granted plaintiffs' motion for summary judgment and entered judgment thereon. On, February 17, 2004, plaintiffs filed a notice of entry of judgment.

On March 11, 2004, defendants filed a notice of appeal.

On November 8, 2005, this court ordered that all proceedings in this appeal be stayed, in light of bankruptcy proceedings initiated by plaintiffs on October 12, 2005. On March 10, 2008, plaintiffs advised the court that the U.S. Bankruptcy Court, Northern District of California, had filed an order lifting the stay as to this appeal. On June 19, 2009, we therefore ordered that the stay previously imposed be lifted, and this appeal was restored to active status. We also granted plaintiffs' motion to substitute John T. Kendall, United States Bankruptcy Trustee, etc., as respondent, in place of Alvin H. Luckenbach.[6]

DISCUSSION

I. *Denial of Defendants' Motion to Amend Their Answer and Cross-Complaint*

Defendants contend the trial court abused its discretion when it denied their motion to file an amended answer and cross-complaint, based on the allegedly newly discovered fact that the State of California might not own the land underlying the disputed area of littoral rights.

A. *Trial Court Background*

Plaintiffs first raised the issue whether the state in fact owned the underlying land in their memorandum of points and authorities in support of their second motion for summary adjudication, filed with the trial court on June 14, 2000 (and later vacated at plaintiffs' request). In that brief, plaintiffs stated that they did "not concede that the State owns the submerged land, and have been attempting to investigate the possible existence of a Patent from the State to a private party, covering the submerged land. However, for the purposes of this summary adjudication motion only, it can be assumed that the State

[6] Alvin H. Luckenbach died on December 7, 2006.

has title to the submerged land." Plaintiffs repeated this statement in their memorandum of points and authorities filed in support of their summary adjudication motion, filed on December 27, 2000.[7]

Later, on January 29, 2001, the trial court (Hon. Maria Rivera) issued its tentative ruling granting plaintiffs' summary adjudication motion. At the subsequent hearing on the motion, on January 30, 2001, the trial court granted the defendants' request for a continuance and ordered that "[d]iscovery will be reopened only with regard to the State Lands Comm[ission]."

In May 2001, the Commission filed a letter brief with the court, in which it concluded that defendants' houseboat encroached on plaintiffs' littoral rights and indicated that it would not be renewing defendants' lease as to the overlapping area.

On August 9, 2001, the Commission wrote a letter to defendants that stated: "Please be aware also that not all property owners need obtain a lease from the State Lands Commission to place a dock on a waterway. This is due to the fact that the State does not own the beds of all of the rivers and sloughs and it may issue leases only on those lands it does own." This is the date defendants claimed they became aware of a possible issue regarding state ownership.

On October 11, 2001, the trial court (Hon. Maria Rivera) granted plaintiffs' motion to advance the hearing date on the parties' cross-motions for summary judgment and/or summary adjudication from December 11, 2001 to November 6, 2001.

On October 16, 2001, defendants filed their opposition to plaintiffs' summary adjudication motion, arguing that the motion should be denied or continued, under Code of Civil Procedure section 437c, subdivision (h),[8] due to the recent discovery of questions regarding state ownership of the underlying land. The opposition also stated that, by

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[7] In their cross-complaint to quiet title, as well as in their answer to the first amended complaint, defendants stated that the owner of fee title to the underlying land was the State of California.

[8] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

advancing the hearing date on the summary adjudication motion, the court had not allowed time for either a review of documents defendants had requested from the state or for a complete study by defendants' expert.[9]

In his declaration in support of defendants' opposition, defendants' expert, Roy Minnick, stated that, "in October 2001, I undertook a preliminary review of historical title and boundary documents, both public and private, relating to Taylor Slough, with emphasis on location of the original 1850 shoreline in relation to the Walker property. At this time I have not yet had the opportunity to complete this investigation and additional preparation [and] analysis will be necessary. I will also be reviewing materials at the State Lands Commission, which I am informed will be available after October 17, 2001." Minnick further stated that his preliminary opinion was that the original location of Taylor Slough as of 1850 is closer to the opposite shore from the Walker property and that, if his analysis was confirmed by further work, it would "mean that the State of California does not own fee title to the area currently under water adjacent to the Walker property . . . ."

On February 5, 2002, following the hearing on plaintiffs' summary adjudication motion, the trial court (Hon. Richard S. Flier) took the motion under submission. Three days later, on February 8, 2002, defendants filed their motion seeking leave to file an amended answer and cross-complaint to allege that the submerged land was not owned by the state and to assert causes of action for a prescriptive easement and adverse possession. In his declaration in support of the motion to amend, defendants' attorney stated that "it has become clear since August 2001 that the State of California lacks evidence of ownership of the subject portion of Taylor Slough occupied by the Walker Dock and Houseboat . . . ." In its reply memorandum of points and authorities in support of their motion to amend, defendants stated: "Luckenbach, and Walker's present counsel

[9] In its subsequent order, filed on February 3, 2003, granting in part plaintiffs' summary adjudication motion, the trial court also denied defendants' request for a continuance.

have always been aware that there was uncertainty as to the proper line of the State ownership in 1850 . . . ."

On March 26, 2002, the trial court (Hon. John F. Van De Poel) denied defendants' motion to amend and, on April 15, 2002, the court entered an order denying the motion, explaining: "The proposed amendments are contrary to the moving parties' previously filed pleadings and declaration testimony, with no explanation for the contradiction or for the delay in pursuing the issue so long after it was originally raised in June 2000."

B. *Analysis*

" '[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]' [Citation.] [¶] . . . [¶] Moreover, 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' [Citation.]" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

In addition, although courts are required to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, "this policy should be applied only '[w]here no prejudice is shown to the adverse party . . . .' [Citation.] A different result is indicated '[w]here inexcusable delay and probable prejudice to the opposing party' is shown. [Citation.]" (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.)[10]

[10] In *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18 (*580 Folsom*), a panel of this Division stated that, if a cross-complainant wishes "to offer a different factual assertion from that alleged in the cross-complaint, it must move to amend the cross-complaint prior to the hearing on the summary adjudication motion. [Citations.]" (Accord, *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699 [plaintiff who wishes to rely on unpleaded theories to defeat summary judgment must move to amend complaint prior to hearing on defendant's motion].) *580 Folsom* has since been criticized in *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1069, footnote 7 (*Kirby*), in which Division One of this District stated that the cases relied on in *580 Folsom* did not support the dicta regarding the timing of motions to amend. (See also Weil & Brown, Cal.

In the present case, the preceding chronology demonstrates that defendants had been alerted to a potential issue regarding state ownership of the submerged land as early as June 2000 and, on January 30, 2001, were granted a continuance to conduct additional discovery concerning the Commission. Nonetheless, defendants' expert, Roy Minnick, stated that he did not begin investigating the question of state ownership until October 2001. Moreover, defendants filed no declarations explaining the reason for the delay in moving to amend and, in a declaration filed in support of the motion to amend, defendants' counsel merely stated that it had "become clear since August 2001 that the State of California lacks evidence of ownership of the subject portion of Taylor Slough occupied by the Walker Dock and Houseboat . . . ." The declaration further stated these facts were fully discovered by late October 2001 and that, from early December 2001 to late January 2002, the parties had been involved in settlement efforts. Counsel's declaration does nothing to explain the significant delay in moving to amend once the issue was first raised in June 2000. Moreover, the declaration of Roy Minnick demonstrates that defendants waited until October 2001 to have an expert even begin to investigate the state ownership question.

This unexplained delay in filing the motion to amend, in itself, justified the trial court's denial of defendants' motion. (See *Record v. Reason*, *supra*, 73 Cal.App.4th at p. 486.) In addition, granting the motion to amend at such a late date would necessarily have prejudiced plaintiffs, who had prepared and argued their summary adjudication motion with no expectation of having to address the tardy allegations and entirely new causes of action and defenses contained in defendants' proposed pleadings. (See

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Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 10:22.7, pp. 10-7 to 10-8 (Cal. Practice Guide); but see *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175-176 [distinguishing *Kirby* and finding that plaintiffs' attempt to add a new claim at the summary judgment hearing "would be patently unfair" by "allowing them to present a 'moving target' unbounded by the pleadings"].)

We need not attempt to resolve this question because, as we shall discuss *post*, the circumstances of this case justified the denial of defendants' motion to amend on the basis of unwarranted delay regardless of whether there is a blanket rule regarding the timing of a motion to amend when new facts or theories are asserted.

Magpali v. Farmers Group, Inc., *supra*, 48Cal.App.4th at p. 487.) Indeed, defendants' requested changes could have drastically changed the focus of the action. (See *ibid.*, quoting *Estate of Murphy* (1978) 82Cal.App.3d 304, 311 [leave to amend properly denied where " 'the proposed amendment opened up an entirely new field of inquiry without any satisfactory explanation as to why this major change in point of attack had not been made long before trial' "]; compare *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 966 [tardy motion to amend granted where opposing party not prejudiced thereby].)[11] We find no abuse of discretion.[12]

Defendants further argue that, under section 426.50, the trial court was required to permit them to amend their answer and cross-complaint to add new causes of action, absent a showing of bad faith.[13] (See *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 99 [where panel of this Division held that trial court's decision to deny motion to file compulsory cross-complaint under section 426.50 due to bad faith must be supported by substantial evidence]; accord, *Foot's Transfer & Storage Co. v. Superior Court* (1980) 114 Cal.App.3d 897, 901-902.)

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[11] Defendants' reliance on *Kirby*, *supra*, 11 Cal.App.4th 1059, in which Division One of this District reversed the trial court's denial of the appellants' late motion to amend, is misplaced. In that case, unlike the present one, the appellants' requested amendment did not contradict "the broad allegations of the complaint," but merely "sought to clarify an issue already raised by the pleadings." (*Id*. at pp. 1068, 1069, fn. 7.)

[12] Because this ground alone is sufficient to support the trial court's denial of defendants' motion to amend, we need not address the trial court's other grounds for denying the motion.

[13] Section 426.50 provides: "A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action."

Section 426.50, however, concerns only *compulsory* cross-complaints. "To be considered a compulsory cross-complaint, the related cause of action must have existed at the time defendant served its answer to the complaint. [(See § 426.30, subd. (a).)] [¶] Claims arising *thereafter* are *permissive*, not compulsory . . . even if subject-matter related to the complaint. [Citation.]" (Cal. Practice Guide, *supra*, ¶ 6:516, p. 6-134; see §§ 428. 50, subd. (c), 473.)[14]

Here, defendants have claimed that the state non-ownership issue was a *new* fact and that that is why it was not raised in their earlier answers and cross-complaint. Thus, according to defendants' theory of the case, their requested amendments involved later-arising permissive claims, and section 426.50's bad faith requirement is not applicable.

In any event, even if the proposed causes of action related to the state's possible non-ownership of the underlying land did involve a fact existing at the time the original pleadings were filed, rather than a new fact, we find that the trial court's denial of the motion to amend was proper in light of the evidence of defendants' bad faith. (See *Silver Organizations Ltd. v. Frank*, *supra*, 217 Cal.App.3d at p. 99.)

Where, as here, the trial court's finding of bad faith is implied in its order denying the motion to amend, that implied finding is reviewed for substantial evidence. (See

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[14] Section 428.50 provides: "(a) A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint.

"(b) Any other cross-complaint may be filed at any time before the court has set a date for trial.

"(c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). Leave may be granted in the interest of justice at any time during the course of the action."

Section 473, subdivision (a)(1), provides: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."

Silver Organizations Ltd. v. Frank, *supra*, 217 Cal.App.3d at pp. 99-100, citing *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 559-560.) As we have already discussed, and as the trial court found, defendants unreasonably delayed the filing of their motion to amend over 18 months after the issue was first raised and, in fact, did not file the motion until three days after the hearing on plaintiffs' summary adjudication motion. Defendants offered no satisfactory explanation for the delay. Moreover, the causes of action in their proposed amended pleadings were based on facts contrary to their prior pleadings and would have changed the course of the litigation, which necessarily would have prejudiced plaintiffs. Thus, the trial court's implied finding of bad faith is supported by substantial evidence. (See *Gherman v. Colburn*, *supra*, 72 Cal.App.3d at p. 559 [finding bad faith where, "[a]t the last minute defendants changed their position and sought to establish an alternative defense . . . which was diametrically opposed to the position which they had taken throughout all of the pretrial stages of the case," where defendants were chargeable with knowledge from the outset of possible actions by plaintiffs, and noting that "a cautious pleader would anticipate such a possibility and take a forthright position from the outset"].)

II. *Denial of Defendants' Motion to Supplement Their Answer and Cross-Complaint*

Defendants further contend the trial court abused its discretion when it denied their motion to file a supplemental answer and cross-complaint, based on the allegedly new fact, set forth in the Commission's March 21, 2002 letter, that the state was unsure whether it owned the underlying land in question.

A. *Trial Court Background*

On March 21, 2002, the Commission wrote a letter to the parties and their counsel, informing them that "the State does claim a sovereign interest in the bed of the natural portion of Taylor Slough, but . . . the Commission is uncertain as to the extent and location of that interest. This is due primarily to the fact that the Slough has been subject to artificial influences such as dredging and levee construction and the lack of records for such events. [¶] After further consideration, Commission staff has concluded that, based

on the uncertainty of the extent of the State's interest, it will not require a lease from any of the parties at this time. [¶] This letter does not constitute, nor shall it be construed as a waiver of any right, title or interest of the State of California in the bed of Taylor Slough or any other lands under its jurisdiction."[15]

On February 3, 2003, the trial court (Hon. Richard S. Flier) granted in part plaintiffs' summary adjudication motion, which had been pending for almost a year. The trial court also granted plaintiffs' request for a preliminary injunction, ordering defendants to move their houseboat to their side of the boundary line determined in the order granting summary adjudication.

Then, on May 5, 2003, defendants filed a motion seeking leave to file a supplemental answer and cross-complaint to allege that the submerged land was not owned by the state and to assert causes of action for a prescriptive easement and adverse possession.

On July 14, 2003, the trial court (Hon. Barbara Zuniga) entered an order denying defendants' motion to file supplemental pleadings on the following grounds: "(A) The Court sees the Motion for Leave as an attempt by defendants . . . to take advantage of the fact that several judges have handled this case.

"(B) The Motion for Leave is an improper motion to reconsider issues previously decided by other judges.

"(C) As alternate grounds, the Motion for Leave is not timely. The Motion for Leave was filed in May 2003. The issue of possible State non-ownership of the submerged land was first raised in June of 2000, and again in December of 2000. . . . Filing the motion in May of 2003 for an issue which surfaced in June of 2000, and which defendants admit they had clear knowledge of in August of 2001, is not timely. Assuming, arguendo, that the State's letter of March 21, 2002 was a trigger event, filing a

[15] In a May 7, 2003 letter, the Commission confirmed that its March 21, 2002 letter was in no way a disclaimer of the state's ownership of the bed of Taylor Slough.

motion in May, 2003 is not timely, even if the amount of time covered by Judge Flier's stay order [from June 27, 2002 through November 13, 2002] is deducted. . . .

"(D) The argument of defendants . . . that they only recently became aware of the State's 'disclaimer' of ownership of the submerged land is disingenuous. . . .

"(E) Defendants . . . are totally misreading the State's March 21, 2002 letter, which allegedly contained the disclaimer.

"(F) The possible issue raised by the State's March 21, 2002 letter (State non-ownership of submerged land) was previously found not relevant to the issues. . . .

"(G) The supposedly 'new' theories of adverse possession and prescriptive easement have also previously been rejected by the Court. . . .

"(H) It is apparent to the Court that defendants . . . are unhappy with Judge Flier's rulings and believe he is in error. The remedy is to appeal his decisions at the appropriate time and not file repetitive motions on the same issues."

B. *Analysis*

"The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer." (§ 464, subd. (a).) "It is the general policy that courts should exercise liberality in permitting the filing of supplemental pleadings when the alleged 'occurring-after' facts are pertinent to the case. [Citations.] Nonetheless, the motion to file a supplemental pleading is addressed to the sound legal discretion of the court, and its ruling will not be disturbed on appeal in the absence of a showing of a manifest abuse of that discretion. [Citations.]" (*Flood v. Simpson* (1975) 45 Cal.App.3d 644, 647.)

Moreover, a supplemental pleading does not supersede the original but, instead, merely adds new allegations to be considered together with the existing pleading. (Cal. Practice Guide, *supra*, ¶ 6:795, p. 6-184.) A motion to supplement the pleadings is therefore properly denied when it seeks to introduce new causes of action. (*Flood v. Simpson*, *supra*, 45 Cal.App.3d at p. 647; *Gonzales v. Arbelbide* (1957) 155 Cal.App.2d 721, 726, 727; Cal. Practice Guide, *supra*, ¶ 6:797, p. 6-199.)

Here, as the preceding chronology—and the trial court's findings—show, defendants plainly had notice, since at least June 2000, that there was a question regarding whether the state owned the submerged land. (See pt. II.A., *ante*: see also pt. I, *ante*.) Moreover, even if we were to assume—as defendants urge—that the March 21, 2002 letter from the Commission, stating that it would no longer require leases due to uncertainty regarding its ownership of the underlying land**,** constituted a new fact justifying the filing of supplemental pleadings, defendants still waited until May 5, 2003—over one year after receipt of the Commission's letter—to file their motion to supplement the pleadings.[16] Even with the several-month stay order during that period, this lengthy delay was unreasonable.

In addition, the proposed supplemental pleadings did not merely add facts to be considered with the existing pleadings. Instead, with their new pleadings, defendants improperly sought to introduce new defenses and causes of action, which would have superseded the original answer and cross-complaint. (*Flood v. Simpson*, *supra*, 45 Cal.App.3d at p. 647; *Gonzales v. Arbelbide*, *supra*, 155 Cal.App.at pp. 726, 727; Cal. Practice Guide, *supra*, ¶¶ 6:795, 6:797, pp. 6-184, 6-199.)

The trial court did not abuse its discretion when it denied defendants' motion to file a supplemental answer and cross-complaint. (See *Flood v. Simpson*, *supra*, 45 Cal.App.3d at p. 647.)[17]

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[16] Defendants describe the letter as containing a disclaimer of ownership or jurisdiction of the submerged land. The letter in fact contains no such disclaimer. Instead, the Commission merely stated that, as a result of uncertainty regarding the extent of the state's interest in the land, it would no longer require leases from the adjacent land owners. In fact, on May 7, 2003, the Commission issued another letter, in which it reiterated that it was in no way disclaiming ownership of Taylor Slough.

[17] As with our findings regarding the motion to amend, this ground alone is sufficient to support the trial court's denial of defendants' motion to amend. Therefore, we need not address the trial court's many other grounds for denying the motion.

III. *Trial Court's Grant of Plaintiffs' Motions for Summary Adjudication and Summary Judgment*

Defendants contend the trial court improperly granted plaintiffs' summary adjudication and summary judgment motions because there were several triable issues of material fact that precluded the granting of these motions.

A motion for summary adjudication or summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) "In moving for summary judgment, a 'plaintiff . . . has met' his 'burden of showing that there is no defense to a cause of action if he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (. . . § 437c, subd. (*o*)(1).)" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

We review rulings on motions for summary adjudication and summary judgment de novo. (*Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 949.)

A. *Grant of Summary Adjudication of Issues*

On February 3, 2003, the trial court filed an order granting plaintiffs' summary adjudication motion, on all except the third cause of action (for declaratory relief regarding defendants' violation of the CC&Rs).

The trial court (Hon. Richard S. Flier) granted summary adjudication of the first cause of action in plaintiffs' first amended complaint, "Declaratory Relief Re: Location of Littoral Rights," declaring "that the location of the boundary separating the Luckenbach littoral rights from the Walker littoral rights is 'LINE "B" ' as depicted upon

the survey map [attached to the order as exhibit A]." The court found "[t]here is no disputed issue of fact with respect to the boundary, but only questions of law, which are resolved in plaintiffs' favor in accordance with applicable authority. ([See *Marks v. Whitney*, *supra*, 6 Cal.3d 251, 256, 262-263; and *Fraser's etc. P. Co. v. Ocean Park P. Co.* (1921) 185 Cal. 464, 472-473 (*Fraser's*)].) The boundary line is not determined by any projection or extension of the upland property lines into the water. Rather, it is determined by a line drawn into the water which is perpendicular to the shore line, that is, to the general course of the shore at that point. The location of the boundary line is also consistent with the State Lands Commission's 'Colonial Method' of determining boundaries for leasable water areas. (See State Lands Commission's letter brief filed on May 18, 2001.)"

The trial court granted summary adjudication of plaintiffs' second cause of action, "Declaratory Relief Re: Paramount Rights Conferred by Army Authorization," declaring "that: (a) plaintiffs are authorized to construct a dock upon a portion of the area occupied by the WALKER houseboat, by virtue of a written authorization letter from the United States Department of the Army, Corps of Engineers, and that defendants WALKER have no rights in that area which are paramount to such authorization; and (b) the aforesaid authorization from the United States Department of the Army, Corps of Engineers, confers upon the plaintiffs the right to construct a dock, which right is paramount to any alleged rights of anyone else to moor a boat in the same location. [¶] Plaintiffs have federal authority to relocate their dock in an area which is encroached upon by defendants' houseboat."

The trial court also granted summary adjudication of plaintiffs' fourth cause of action, "Relief from Nuisance due to Encroachment on Littoral Rights." The court ordered that "a permanent injunction shall be issued enjoining defendants WALKER from in any way encroaching upon the littoral rights belonging to the plaintiffs, including

an encroachment by mooring a boat (such as a houseboat) within any part of plaintiffs' littoral rights."[18]

The trial court granted summary adjudication of the plaintiffs' fifth cause of action, "Relief from Nuisance due to Violation of CC&Rs," ordering that "a permanent injunction shall be issued enjoining defendants WALKER from in any way mooring a houseboat, or other type of floating residence, at the structure referred to in U.S. Army Corps of Engineers permit No. 5118. . . . [¶] The houseboat is a floating residence, and thus violates the CC&Rs. Defendants have failed to show that plaintiffs do not have standing or the right to enforce the CC&Rs. [Citation.]"

Finally, the trial court granted summary adjudication of the plaintiffs' sixth cause of action, "Relief for Trespass to Littoral Rights," and ordered that "a permanent injunction shall be issued enjoining defendants WALKER from in any way encroaching upon the littoral rights belonging to the plaintiffs, including an encroachment by mooring a boat (such as a houseboat) within any part of plaintiffs' littoral rights."[19]

1. *Waiver of Second and Fifth Causes of Action*

Plaintiffs contend defendants have waived any challenge to (1) the second cause of action, regarding plaintiffs' paramount rights to build a dock partially in the location occupied by defendants' houseboat, based on authorization by the United States Department of the Army, Corps of Engineers, and (2) the fifth cause of action, regarding defendants' violation of the CC&Rs, because they failed to address these two causes of action in their opening brief. We agree.

Defendants made only passing reference to both causes of action in their opening brief. With respect to the second cause of action, in the "Introduction" portion of their opening brief, defendants stated: "In addition, the Trial Court allowed the absurd result of allowing [plaintiffs] to misapply the terms of a permit administered by the U.S. Army

[18] Plaintiffs agreed to the dismissal of their damage claims related to the fourth cause of action, in order to allow summary adjudication of that cause of action.

[19] Plaintiffs agreed to the dismissal of their damage claims related to the sixth cause of action, in order to allow summary adjudication of that cause of action.

Corps of Engineers under the Federal Rivers and Harbors Act, even though clear federal authority holds that private parties have no standing to do so." This cause of action does not appear to have been mentioned anywhere else in the opening brief.

With respect to the fifth cause of action, defendants mentioned the CC&Rs issue only three times, in the "Summary of the Case" portion of their opening brief. In recounting what they had argued in their (later withdrawn) motion for summary judgment, defendants stated: "2. That [plaintiffs] were without standing to enforce an agreement between [defendants] and the State, recorded as CC&Rs encumbering only [defendants'] property. [Citation to record.]" Then, while discussing their motion to amend, defendants stated: "Likewise, the U.S. Army Corps of Engineers confirmed that [defendants'] vessel was in full compliance with their permits and CC&Rs issued by the U.S. Army Corps of Engineers. [Citation to record.]" Finally, while discussing plaintiffs' motion for a preliminary injunction, defendants stated: "By the same means, [defendants] brought to the court's attention correspondence from the United States Army Corps of Engineers, including citation to the U.S. Supreme Court authority establishing that third parties such as [plaintiffs] have no private right of enforcement under [defendants'] permit or the related CC&Rs. (Second Request for Judicial Notice, dated June 17, 2002.) By reference to the October 2001 declaration of the U.S. Army Corps of Engineers Project Manager, [defendants] again showed that the Corps did not view [defendants'] boat as a violation. [Citation to record.]"

Defendants' failure to properly raise these two issues and support them with adequate argument and citation to authority waived the issues on appeal. (See, e.g., *California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1619; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624, fn. 2.)[20]

[20] Defendants also have waived any challenge to the trial court's denial of their request for a continuance, under section 437c, subdivision (h), due to their failure to raise it in their opening brief. (See, e.g., *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

2. *Applicable Law Regarding Littoral Rights*

The California Supreme Court has explained the rights of an upland property owner with respect to littoral rights: "A littoral owner has a right in the foreshore adjacent to his property separate and distinct from that of the general public [citation]. This is a property right and is valuable, and although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed. [Citation.] A littoral owner can enjoin as a nuisance interference by a private person with this right. [Citation.] A littoral owner has been held to have the right to build a pier out to the line of navigability; a right to accretion; a right to navigation (the latter right being held in common with the general public) [citations]; and a right of access from every part of his frontage across the foreshore [citation]. This right of access extends to ordinary low tide both when the tide is in and when the tide is out. [Citation.]" (*Marks v. Whitney*, *supra*, 6 Cal.3d at pp. 262-263, fn. omitted.)

Moreover, it is owners of land abutting on "the waterfront line who, under legal sanction, may . . . build into the deeper public waters beyond." (*Shirley v. City of Benicia* (1897) 118 Cal. 344, 346.) Erection of a private wharf that would preclude upland owners from building a wharf on part of their waterfront constitutes a nuisance in the navigable waters of the state, which the upland owner may have abated. (*Shirley v. Bishop* (1885) 67 Cal. 543, 546; 63 Cal.Jur.3d Water (2005) § 774, p. 128.)

In *Fraser's, supra,* 185 Cal. 464, our Supreme Court discussed the proper line of division between adjoining littoral landowners. *Fraser's* was concerned with the boundaries of a city over the waters of the ocean and whether a pier built out into the ocean by a private owner was fully within the jurisdictional limits of the city of Santa Monica or partly with the limits of the city of Venice, for purposes of determining the proper tax assessments against the cities. (*Id.* at p. 471.)

The Supreme Court in *Fraser's* corrected the parties' misunderstanding of the method of determining the littoral boundary: "All the parties appear to have assumed that the division line which marked the jurisdiction of the respective cities over the water beyond high-tide line would be the line of the boundary extended into the water. It

appears that this line is not perpendicular to the shore line at that point, but strikes it at an angle, less than ninety degrees on the Venice side and more than ninety degrees on the Santa Monica side. Under the law applicable to such matters it is not true that the rights of adjoining owners of land bordering upon tide water, or upon a navigable lake or stream, in the land under the water upon which both tracts abut are to be ascertained by extending the line of the boundary between them in its original direction into the water, to the center thereof in the case of a stream, or indefinitely in the case of the ocean. On the contrary, the rule is that the area over which such rights as each proprietor may have in the land under the water upon which his tract abuts, and to the use of the water covering the same, is not fixed by extending his boundary line into the water in the direction of the last course ending at the shore line, but is fixed by a line drawn into the water perpendicular to the shore line; that is, to the general course of the shore line at that point. Unless extraordinary conditions occur, this is the rule to be applied in defining the respective rights of such owners to the space in front, under, upon, and in the water. If accretions occur in front of the land the boundary line between them as to such accretions is a line extending into the water perpendicular to the original shore line in its general course and not by the line of the boundary extended in its original direction. If this were not the case it will be seen that where the boundary strikes the shore line at an acute angle the rights of one proprietor would extend in front of the land of the other so as to practically cut him off from the use of the water. The authorities are all to the effect that this is not the case. [Citations.]" (*Fraser's*, *supra*, 185 Cal. at pp. 472-473.)

The court then noted that the same general rule applied to the boundaries of municipal jurisdictions over the waters of the ocean, and that the line dividing the jurisdictions of Santa Monica and Venice over the ocean "is a line drawn from the intersection of that boundary with the shore line into the ocean in a direction perpendicular to the general course of the shore line at that place. If the shore line is

circular it will be perpendicular to a tangent drawn on the circle at that point of such intersection." (*Fraser's*, *supra*, 185 Cal. at p. 473.)[21]

Later, in *Swarzwald v. Cooley* (1934) 220 Cal. 438, 443 (*Swarzwald*), our Supreme Court stated that it interpreted *Fraser's* "as setting forth the general rule of the common law by which accretions are to be subdivided." The *Swarzwald* court noted there are exceptions to the rule under certain circumstances. " 'For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such case, it should be reduced by an equitable and judicious estimate, to the general available line of the land upon the river.' " (*Id*. at p. 444.)

The court further stated: "There is nothing in the case of *Fraser's* . . . at variance with these principles or with the exceptions noted to the general rule. By use of the phrases 'at that point' and 'at that place' the court did not mean to limit its other pronouncement defining the original line as the 'general course' of the 'original shore line.' One point will not determine a line nor two points an arc. At least three points are

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[21] In a brief subsequent opinion, the court stated that its discussion in its opinion regarding the direction of the extension of boundary lines into water was wholly based on the facts in the record, and that, because the charter in connection with sections of the Political Code defining county boundaries left it difficult to determine whether the boundaries in fact extend into the ocean, the court withheld any expression of opinion on that subject. (*Fraser's Million Dollar Pier Co. v. Ocean Park Pier Co.* (1921) 198 P. 212.)

Also, in the very early case of *Emerson v. Taylor* (1832) 9 Maine 42, 44-45, the Supreme Court of Maine discussed the so-called Colonial Method for determining the littoral boundary on a shoreline that is not flat. The court explained: "The mode of applying the principle is this. Draw a base line from the two corners of each lot where they strike the shore; and from these two corners, extend parallel lines to low water mark, at right angles with the base line. If the line of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a cove, of a regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne or gain enjoyed equally by the contiguous owners . . . ."

necessary to describe an arc. What is meant by the original general shore line is the general course of the line marking the margin of the properties as a whole and it is altogether possible that to determine it in some cases it would be necessary to consider points in the shore line nearby the particular margin in question." (*Swarzwald, supra*, 220 Cal. at p. 445.)

3. *Analysis*

The shoreline in this case, as shown on the 1944 subdivision map utilized by the court and the parties, comes to a point where the dividing line between the properties meets the shore, and then angles slightly up from that point on both sides, which plaintiffs describe as looking something like the bottom of a stop sign. Plaintiffs' surveyor, Ronald C. Greenwell, made three boundary measurements on the map. Line A is a line perpendicular to defendants' shoreline boundary; Line C is a line perpendicular to plaintiffs' shoreline boundary. These lines make a "V" out from the dividing line at the shore. Line B, which the trial court found to be the proper line dividing the parties' areas of littoral rights, comes out from the base of the "V" and is "the mathematical equal split" of Lines A and C.

Defendants argue that summary adjudication on the first cause of action, regarding the boundary dividing the parties' areas of littoral rights, was improper because there was a factual dispute as to the location of the original shoreline. According to defendants, the *Fraser's* rule requires a determination of the shoreline at the time California became a state in 1850. However, because the shoreline map used to determine the boundary line was a 1944 subdivision map and because both the Commission and defendants' expert, Roy Minnick, questioned whether dredging and other activities over the years had changed the location of Taylor Slough, defendants claim there has been no determination of the original shoreline in this case, as required by *Fraser's*. Defendants also claim that, under *Swarzwald*, it was necessary to make an equitable determination of the boundary, and that such a determination is not compatible with summary adjudication. They further claim that the mathematical formula utilized to arrive at "Line B" as the dividing line was flawed.

Defendants failed to raise these issues either in their opposition to plaintiffs' summary adjudication motion or in their response to plaintiffs' separate statement of undisputed facts. In their response to plaintiffs' separate statement, defendants' sole challenge to the survey method or map used by plaintiffs' land surveyor, was an objection that the term "shoreline" was "ambiguous in that it could mean the ordinary high water line, the ordinary low water line, or other points. The Exhibit prepared by Greenwell [plaintiffs' surveyor] does not identify the high water mark, low water mark, tidal zone or submerged lands."

Defendants did not challenge the results of plaintiffs' survey until they raised the issue in their opposition to plaintiffs' subsequent summary judgment motion, by which time the littoral rights issues to which the map of the shoreline and mathematical formula pertained had already been adjudicated. Accordingly, defendants have waived these issues on appeal. (See *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 640 [appellate court "will consider only those facts that were before the trial court [i.e., contained in parties' separate statements] when it ruled on the motion[]"].)

In any event, even were we to address defendants' claims regarding determination of the original shoreline and the proper dividing line of the parties' areas of littoral rights, we would find them to be without merit.

First, with respect to the alleged failure to determine the course of the original shoreline, *Swarzwald* explained the term "ancient shore line" discussed in *Fraser's*: "What is meant by the original general shore line is the general course of the line marking the margin of the properties as a whole." (*Swarzwald*, *supra*, 220 Cal. at p. 445.) Thus, the question is not what the shoreline looked like at the earliest possible date. Rather, it is what the general course of the shoreline is "if [the actual shoreline] happens to be elongated by deep indentations or sharp projections." (*Id.* at p. 444.)

In the present case, defendants presented no evidence that the general course of the shoreline was not that depicted in the 1944 subdivision map used to determine the littoral boundary between the properties. Thus, there was no material factual dispute on this point.

Second, regarding defendants' claim that *Swarzwald* sets forth the rule that any determination of littoral boundaries requires an equitable determination, on the contrary, *Swarzwald* states an *exception* to the general rule set forth in *Fraser's*, and holds that an equitable determination is required only when "deep indentations or sharp projections" distort the shoreline such that the general rule of *Fraser's* cannot equitably be utilized in determining the boundaries. (*Swarzwald, supra,* 220 Cal. at pp. 443-444.)

In this case, while there is a slight angle in the shoreline where the parties' property line meets the shore, that angle is not equivalent to the dramatic indentations or projections described in *Swarzwald* that required equitable consideration to avoid an unjust result. Hence, *Fraser's* general rule applies, just as it does when the shoreline is circular, and the trial court properly determined the littoral boundaries in this case using that method. (See also *Emerson v. Taylor, supra,* 9 Maine 42, 44-45 [discussing Colonial Method, which was used in this case by Commission to arrive at same result reached by trial court].)[22]

Finally, defendants contend their adverse possession and prescriptive rights claims raised a triable issue of material fact—whether the state did or did not own the land—

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[22] In their opening brief, defendants state that the parties' docks have been built across the foreshore to the line of navigability. In their reply brief, they assert, without citation to the record, that "[i]t is common knowledge throughout the proceedings" that the docks are dozens of feet beyond the line of navigability, and that littoral rights do not apply past the line of navigability. Defendants have waived this issue both by failing to articulate it in their opening brief and failing to cite to the record to support the assertion in their reply brief. Moreover, as previously noted, upland owners of waterfront land, "under legal sanction, may . . . build into the deeper public waters beyond." (*Shirley v. City of Benicia, supra,* 118 Cal. at p. 346.)

Defendants also cite *Woods v. Johnson* (1966) 241 Cal.App.2d 278, for the proposition that plaintiffs are not entitled to an injunction against the mooring of defendants' houseboat, absent a factual showing and weighing of evidence to determine "whether the few feet on [plaintiffs'] side of the 'boundary' occupied by [defendants'] boat were *necessary* to [plaintiffs'] 'reasonable access' to navigable water." *Woods v. Johnson,* however, is plainly distinguishable from the present case in that, there, "[a]dmittedly, respondents' fill does not encroach on lands of appellants, nor does it lie on land directly lakeward to appellants' property." (*Id.* at p. 280.)

requiring denial of plaintiffs' summary adjudication motion, despite the fact that the trial court did not permit them to file amended or supplemental pleadings. We disagree.

"[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citation.]" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663, italics omitted.) In particular, as relevant here, "[a] party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer. [Citation.]" (*Lux v. Haggin* (1886) 69 Cal. 255, 267; accord, *Warden v. Bailey* (1933) 133 Cal.App. 383, 388-389.) Thus, defendants were precluded from raising claims of adverse possession and prescriptive rights when they did not raise these issues in their answer or cross-complaint.[23]

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23 We further observe that defendants' allegations regarding state non-ownership of the submerged land were based on speculation. For example, in their response to plaintiffs' separate statement of material facts, they disputed that plaintiffs' and defendants' parcels have frontage on Taylor Slough, stating, "It appears that the area owned by the State is partially or completely outside of the area of [defendants'] dock and houseboat," and cited as a material fact that "[t]he State of California may not own the area of [defendants'] dock and houseboat and it may be private land adversely possessed by [defendants]." In support of these propositions, defendants cited the declarations of their expert, Roy Minnick ["Based on my work to date, it is my preliminary opinion that the original location of Taylor Slough as of 1850 is closer to the opposite shore from the Walker property. If this preliminary analysis is confirmed by further work, it will mean that the State of California does not own fee title to the area currently under water adjacent to the Walker property . . ."], their counsel ["It is my expectation that admissible evidence may exist and be forthcoming that will establish that some or all of the area in dispute is private land, as to which [defendants] will have title by adverse possession, or at least an easement by prescription for the statutory period"], and exhibit C to the declaration of Margery F. Walker [August 9, 2001 letter from Commission stating that "not all property owners need obtain a lease from the State Lands Commission to place a dock on a waterway. This is due to the fact that the State does not own the beds of all of the rivers and sloughs and it may issue leases only on those lands it does own"]. These unsupported allegations do not rise to the level of "substantial responsive evidence sufficient to establish a triable issue of material fact," as is necessary to defeat a motion for summary judgment or summary adjudication of issues. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.)

In conclusion, the trial court properly granted summary adjudication of issues on the first, fourth and sixth causes of actions in plaintiffs' first amended complaint related to plaintiffs' littoral rights.

B. *Grant of Summary Judgment*

On September 19, 2003, the trial court (Hon. Barbara Zuniga) granted plaintiffs' motion for summary judgment. First, the court granted summary adjudication of defendants cross-complaint, finding that no issues raised in the cross-complaint remained unresolved. The court then granted summary judgment in favor of plaintiffs after plaintiffs agreed to dismissal of the third cause of action in their first amended complaint, in order to completely resolve the case. The trial court rejected defendants' attempts to raise the same unpleaded defenses they had raised in opposition to plaintiffs' summary adjudication motion. The trial court also rejected defendants' attempts to raise issues regarding the equitable determination of littoral rights, where the littoral rights determination had been previously resolved in the order granting plaintiffs' summary adjudication motion.

In light of our previous findings that defendants' motions to amend and supplement the pleadings were properly denied, that defendants were barred from raising unpleaded defenses or causes of action in opposition to plaintiffs' motions for summary adjudication/summary judgment, and that the trial court properly determined the littoral rights of the parties in its order granting plaintiffs' summary adjudication motion, we find no error in the trial court's order granting plaintiffs' motion for summary judgment.

DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to their costs on appeal.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.

Filed 1/27/2010 Order modifying unpublished opinion filed 12/30/09, and certifying for partial publication

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN T. KENDALL, as Trustee in Bankruptcy, etc., et al., Plaintiffs and Respondents, v. PAULL C. WALKER et al., Defendants and Appellants.	A105981 (Contra Costa County Super. Ct. No. C9804322) **ORDER MODIFYING OPINION, CERTIFYING OPINION FOR PARTIAL PUBLICATION, AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the unpublished opinion filed herein on December 30, 2009, be modified as follows:

1. On page 1, in the first paragraph of the opinion, there is no space between "(2)" and "grant"; a space should be added.
2. On page 2, in footnote 2, the words "in the foreshore" should be deleted.
3. On page 4, in the last paragraph at the bottom of the page, there is no space between "May" and "5, 2003"; a space should be added.
4. On page 5, in the second full paragraph, the comma between "On" and "February 17, 2004" should be deleted.
5. On page 5, in the first sentence of the fourth full paragraph, the word "plaintiffs" should be replaced with the name "Alvin H. Luckenbach" and the corrected sentence should read: "On November 8, 2005, this court ordered that

all proceedings in this appeal be stayed, in light of bankruptcy proceedings initiated by Alvin H. Luckenbach on October 12, 2005."

6. On page 17, at the end of the sentence at the top of the page, which concludes with " . . . the survey map [attached to the order as exhibit A]," the following sentence should be added in parenthesis: "(A copy of the survey map is attached as Appendix A at the end of this opinion.)" The map to be added as Appendix A is submitted at the end of this Order.
7. On page 22, in footnote 21, the last word of the first sentence in the second paragraph of the footnote should be changed from "flat" to "straight."
8. On page 23, at the end of the first paragraph of subpart "3. Analysis" the following reference in parenthesis should be added: "(See Appendix A.)"
9. On page 25, in the last sentence of the second full paragraph, the word "the" should be added between "by" and "Commission".

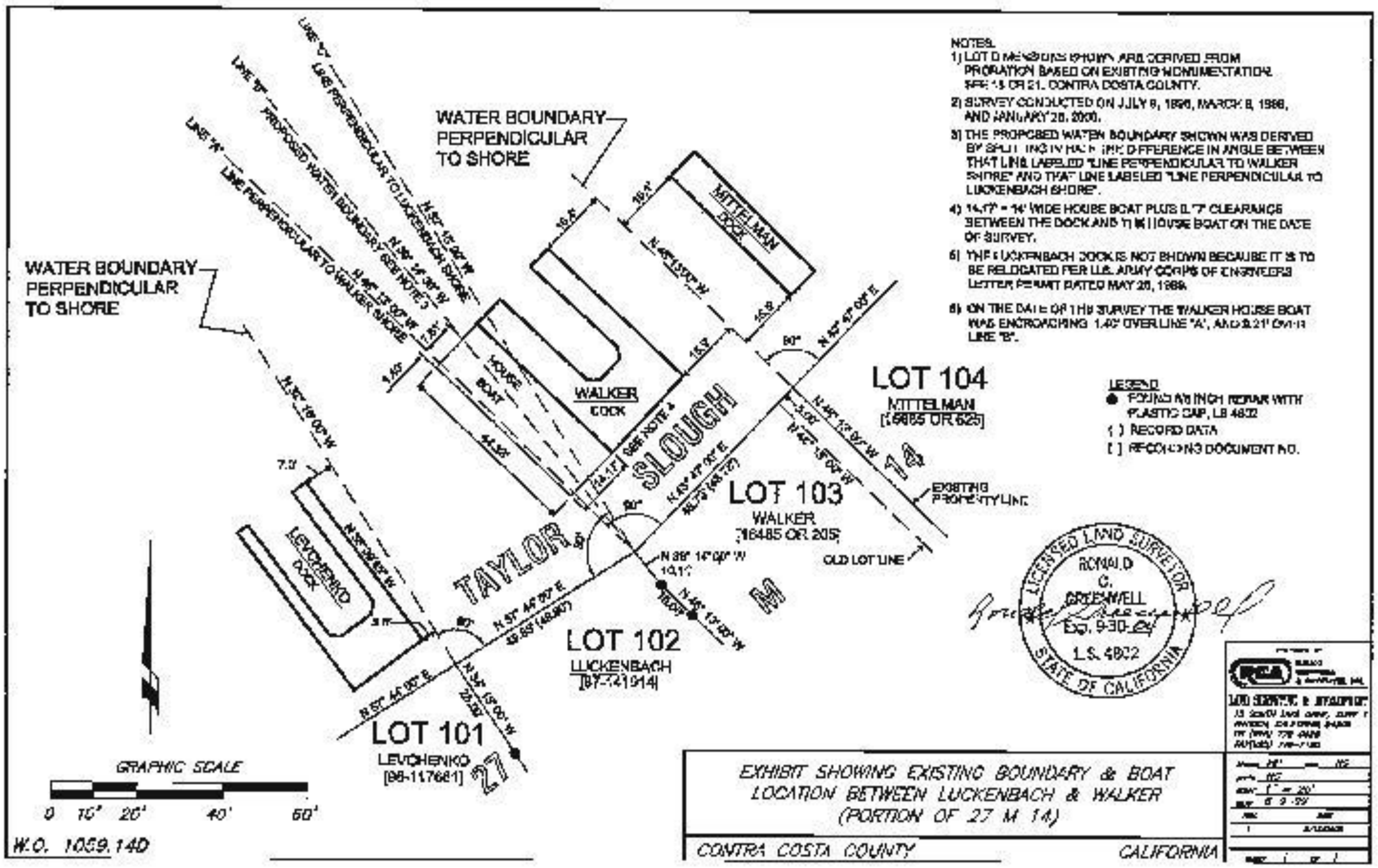
There is no change in the judgment.

Respondents' petition for rehearing is denied.

The opinion in the above-entitled matter filed on December 30, 2009 was not certified for publication in the Official Reports. For good cause and pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion, as modified herein, is certified for publication with the exception of parts I, II, III.A.1 and III.B., and it is so ordered.

Dated: _____

_____
Kline, P.J.


NOTES
1) LOT DIMENSIONS SHOWN ARE DERIVED FROM PRORATION BASED ON EXISTING MONUMENTATION. CONTRA COSTA COUNTY.
2) SURVEY CONDUCTED ON JULY 8, MARCH 8, AND JANUARY 28, 2000.
3) THE PROPOSED WATER BOUNDARY SHOWN WAS DERIVED BY SPLITTING IN HALF THE DIFFERENCE IN ANGLE BETWEEN THAT LINE LABELED "LINE PERPENDICULAR TO WALKER SHORE" AND THAT LINE LABELED "LINE PERPENDICULAR TO LUCKENBACH SHORE".
4) 14' WIDE HOUSE BOAT PLUS CLEARANCE BETWEEN THE DOCK AND THE HOUSE BOAT ON THE DATE OF SURVEY.
5) THE LUCKENBACH DOCK IS NOT SHOWN BECAUSE IT IS TO BE RELOCATED PER U.S. ARMY CORPS OF ENGINEERS LETTER PERMIT DATED MAY
6) ON THE DATE OF THE SURVEY THE WALKER HOUSE BOAT WAS ENCROACHING OVER LINE "A", AND OVER LINE "B".
LEGEND
FOUND INCH REBAR WITH PLASTIC CAP, LS 4802
( ) RECORD DATA
[ ] RECORDING DOCUMENT NO.
WATER BOUNDARY PERPENDICULAR TO SHORE
WATER BOUNDARY PERPENDICULAR TO SHORE
LINE "A" LINE PERPENDICULAR TO WALKER SHORE
LINE "B" PROPOSED WATER BOUNDARY (SEE NOTE 3)
LINE "C" LINE PERPENDICULAR TO LUCKENBACH SHORE
MITTELMAN DOCK
WALKER DOCK
HOUSE BOAT
LEVCHENKO DOCK
TAYLOR SLOUGH
SEE NOTE 4
LOT 104
MITTELMAN
LOT 103
WALKER
LOT 102
LUCKENBACH
LOT 101
LEVCHENKO
27 M 14
OLD LOT LINE
EXISTING PROPERTY LINE
GRAPHIC SCALE
0 10' 20' 40' 60'
W.O. 1059.140
LICENSED LAND SURVEYOR
RONALD C. GREENWELL
L.S. 4802
STATE OF CALIFORNIA
EXHIBIT SHOWING EXISTING BOUNDARY & BOAT LOCATION BETWEEN LUCKENBACH & WALKER
(PORTION OF 27 M 14)
CONTRA COSTA COUNTY
CALIFORNIA

APPENDIX "A"

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Hon. John F. Van de Poel Hon. Richard S. Flier Hon. Barbara Zuniga
Attorneys for Appellants Paull C. and Margery F. Walker:	Miller, Starr & Regalia Scott A. Sommer Lewis J. Soffer
Attorney for Respondents John T. Kendall, as Trustee in Bankruptcy, etc.; Maria E. Luckenbach:	Law Office of David R. Fischer David Randall Fischer