

S 275843

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

JJD-ELK GROVE, LLC

Plaintiff and Appellant,

v.

JO-ANN STORES, LLC

Defendant and Respondent.

On Review From The Court Of Appeal For the Third Appellate
District,
Division One, 3rd Civil No. C094190

After An Appeal From the Superior Court For The State of
California,
County of Sacramento, Case Number 34-201900248163, Hon.
Shama H. Mesiwala

REPLY IN SUPPORT OF PETITION FOR REVIEW

Whitney, Thompson & Jeffcoach LLP
Marshall C. Whitney, #82952
mwhitney@wtjlaw.com
Jacob S. Sarabian, #322108
jsarabian@wtjlaw.com
970 W. Alluvial Ave.
Fresno, California 93711
Telephone: (559) 753-2550
Facsimile: (559) 753-2560

Attorneys for JJD- ELK GROVE, LLC

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	4
II. ARGUMENT	6
A. As Objective Observers Including Miller & Starr Agree, There Is A Split Of Authority In The Courts Of Appeal On The Enforceability Of Co-Tenancy Provisions.	6
B. Jo-Ann’s Discussion Of A Supposed “Waiver” Of Section 3275 Is A Red Herring.....	10
III. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

CASES

<i>Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.</i> (2015) 232 Cal.App.4th 1332	5, 9, 10, 11
<i>New York Times v. Sullivan</i> (1964) 376 U.S. 254	5

STATUTES

Cal. Civ. Code 1671	10
Civil Code § 3275	5, 10, 11

OTHER AUTHORITIES

<i>California Practice Guide: Civil Appeals and Writs</i> , Cal. Prac. Guide Civ. App. & Writs 13:1	9
<i>Commercial Leasing: California Case Upholds Co-Tenancy Provision</i> , 52-SEP Real Est. L. Rep. NL 4 (Sept. 2022)	7
<i>Co-tenancy provisions and conditional payment terms — enforceable only where reasonable?</i> , West Practitioner Insights Commentaries, 2022 PRINDBRF 0307 (July 13, 2022)	7
<i>Co-tenancy Provisions in Retail Leases: Liquidated Damages of Alternative Performance?</i> , 33 No. 1 Miller & Starr, Real Estate Newsalert NL 1 (Sept. 2022)	4, 6
<i>Lowering-of-Rent Provision Wasn't Unenforceable Penalty: Third District Declines to Follow Contrary Fifth District Decision</i> (June 29, 2022)	7

I.

INTRODUCTION

Jo-Ann Stores LLC’s Answer makes just two arguments, made and remade with varying amounts of hyperbole: (1) There is no split of authority on the rule governing the enforceability of co-tenancy provisions in commercial leases; and (2) JJD-HOV waived the ability to refer to a Civil Code provision extensively discussed, and the basis for the holding, in the key case JJD cited and relied upon in the lower courts.

On Jo-Ann’s first point, objective observers agree that there is a split. In an alert about the opinion below, Miller & Starr wrote: “Two cases from different appellate districts in California have come to different conclusions about the enforceability of co-tenancy provisions.” (Jenny Dao & Star Lightner, *Co-tenancy Provisions in Retail Leases: Liquidated Damages of Alternative Performance?*, 33 No. 1 Miller & Starr, Real Estate Newsalert NL 1 (Sept. 2022)). Even Westlaw agrees:

Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.

Court of Appeal, Fifth District, California. · January 12, 2015 · 232 Cal.App.4th 1332 · 182 Cal.Rptr.3d 235 · 15 Cal. Daily Op. Serv. 325 · 2015 Daily Journal D.A.R. 409 (Approx. 40 pages)

Document Filings (5) Negative Treatment (3) History (1) Citing References (355) Table of Authorities Powered by KeyCite

Declined to Follow by JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC, Cal.App. 3 Dist., June 28, 2022

232 Cal.App.4th 1332
Court of Appeal, Fifth District, California.

GRAND PROSPECT PARTNERS, L.P., Plaintiff, Cross-Defendant and Respondent,
v.
ROSS DRESS FOR LESS, INC. et al., Defendants, Cross-Complainants and Appellants.

F067327
Filed January 12, 2015
As Modified on Denial of Rehearing February 9, 2015
Review Denied May 20, 2015
Certified for Partial Publication.

Jo-Ann's assertion that there is no conflict in the Courts of Appeal requiring this Court's intervention is wrong.

Jo-Ann's second argument fares no better. JJD did not waive the ability to cite Civil Code 3275. But even if somehow it did, Civil Code § 3275 is not the basis for the split of authority—no code provision ever is. JJD relied on *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, to argue that the parties' co-tenancy agreement is unenforceable. *Grand Prospect* relied in part on Section 3275's codification of California's rule against contractual penalties. The opinion of the Court of Appeal below declined to do so. Whether and how Section 3275 applies is a subsidiary question to whether this Court should endorse the approach of the Fifth District in *Grand Prospect* or the Third District in the opinion below. Asserting waiver in this context is like claiming a newspaper waived the First Amendment by relying on the actual malice standard of *New York Times v. Sullivan* (1964) 376 U.S. 254.

Jo-Ann's Answer does a dutiful job trying to defeat review in a case so obviously well suited to it. But that job is a lost cause, as no amount of italics and bold can obscure the fundamental point here: There is conflict in the Courts of Appeal on an issue of major

economic importance to commercial landlords in California. This Court's intervention to settle the law is not only appropriate but, JJD respectfully suggests, necessary.

II.

ARGUMENT

A. As Objective Observers Including Miller & Starr Agree, There Is A Split Of Authority In The Courts Of Appeal On The Enforceability Of Co-Tenancy Provisions.

The leading California treatise on real estate law could not have put it more succinctly than when, only days ago, it wrote:

Despite the fact that co-tenancy clauses are usually heavily negotiated by the parties, there is still a risk that a harsh co-tenancy clause could be deemed unenforceable. This uncertainty stems from **a recent split in the court opinions in *Grand Prospect* and *JJD*** regarding the nature of a co-tenancy clause. . . . Such a split in the court opinions has created uncertainty regarding how co-tenancy clauses should be interpreted, and **may now need to be resolved by the California Supreme Court.**

(Jenny Dao & Star Lightner, *Co-tenancy Provisions in Retail Leases: Liquidated Damages of Alternative Performance?*, 33 No. 1 Miller & Starr, Real Estate Newsalert NL 1 (Sept. 2022) [emphases added].)

Or, to use the description from another service:

In 2015, the California Court of Appeals held that co-tenancy provision in a shopping center lease was

unenforceable as an attempt to impose a penalty for breach of contract. A new decision has rejected that analysis, finding the co-tenancy provision is not an attempt to liquidate damages but a valid contract term for alternative performance based on the possible occurrence of a particular contingency. *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC*, 80 Cal. App. 5th 409, 295 Cal. Rptr. 3d 725 (3d Dist. 2022), *review filed*, (Aug. 4, 2022).

(Real Estate Law Report, *Commercial Leasing: California Case Upholds Co-Tenancy Provision*, 52-SEP Real Est. L. Rep. NL 4 (Sept. 2022).)

Practitioners and news sources agree. (See, e.g., Patrick R. Tira, *Co-tenancy provisions and conditional payment terms — enforceable only where reasonable?*, West Practitioner Insights Commentaries, 2022 PRINDBRF 0307 (July 13, 2022). [“[A]nalyz[ing] a recent split among California appeals courts over the enforceability of co-tenancy provisions that reduce rent if shopping center occupancy does not meet specified conditions]; MetNews Staff Writer, *Lowering-of-Rent Provision Wasn’t Unenforceable Penalty: Third District Declines to Follow Contrary Fifth District Decision* (June 29, 2022), available at <http://www.metnews.com/articles/2022/LeaseProvision06292022.htm> [“The Third District Court of Appeal yesterday declared valid a clause in a lease under which a tenant would pay

reduced rent if 60 percent of the space in a shopping center was unoccupied, repudiating a 2015 decision by the Fifth District declaring such a provision to be an unenforceable penalty.”].)

Jo-Ann’s position that there is no disagreement in the Courts of Appeal is simply not tenable when this many scholars and practitioners say otherwise. Its Answer makes the fundamental mistake of confusing a *standard*, which is a rule where the result depends on facts as evaluated in light of a principle, with a *bright-line rule*, which is a rule where the result follows without further analysis. “No co-tenancy provision is ever enforceable” would be a bright-line rule. No court has taken that position, and JJD does not either.

All standards, by contrast, necessarily depend on the specific facts of a case. “Co-tenancy provisions are enforceable only so long as they represent a reasonable effort to approximate the harm flowing from the landlord’s failure to satisfy the provision” is a standard. That is the standard in the Fifth District, and it is JJD’s position.

“Co-tenancy provisions are enforceable so long as they are negotiated and intended to present an alternative means of performance rather than to approximate any harm” is also a

standard, and the one adopted by the Third District and Jo-Ann. That standard is irreconcilable with one focused on the economic reasonableness of the co-tenancy provision.

This Court's intervention is therefore necessary to instruct the lower courts on the appropriate standard: reasonableness of approximation of harm (*Grand Prospect*) versus existence of negotiation¹ and intent to constitute alternative performance (the opinion below). That *Grand Prospect* involved a Ross Dress for Less and an anchor tenant that never opened, while this case involves a Jo-Ann Stores and an anchor tenant that closed is, like the other factual distinctions present, irrelevant to the basic question: What's the standard, or put another way, how should courts think about co-tenancy provisions? Currently the lower courts do not know, and the issue is of considerable economic importance. That is the *classic* case for this Court's intervention. (Jon B. Eisenberg et al., *California Practice Guide: Civil Appeals and Writs*, Cal. Prac. Guide Civ. App. & Writs 13:1 ["In practical effect, the supreme court functions as an 'institutional overseer'

¹ The Third District's opinion also invites trial courts throughout the state to sanction all sorts of otherwise illegal contractual provisions so long as they are negotiated, as detailed further in JJD's Petition for Review.

of the state courts. It decides cases involving important public policy questions and other matters significantly affecting the administration of justice, and resolves conflicts among the courts of appeal.”].)

B. Jo-Ann’s Discussion Of A Supposed “Waiver” Of Section 3275 Is A Red Herring

Despite many commentators saying *Grand Prospect* treated co-tenancy provisions as liquidated damages clauses, the enforceability of which are governed by Cal. Civ. Code 1671, review of the decision itself reveals it was founded on analysis of Cal. Civ. Code 3275’s prohibition against contractual penalties or forfeitures. (*Grand Prospect, supra*, 232 Cal.App.4th at 1365 [“In reaching its conclusion that the rent abatement provision was an unenforceable penalty, the trial court referred to Civil Code section 3275 . . .”].) In fact, the opinion contains no cite to Section 1671 at all. *Grand Prospect* is a penalty and forfeiture case, one that quotes the full text of Section 3275 and cites the provision no fewer than 10 times outside of the headnotes. To pretend as though Section 3275 has played no role in the case until now, or that JJD has somehow waived any opportunity to cite it as part of its argument, defies reason and belief.

It also ignores the facts. Since the September 2018 letter that commenced this litigation, JJD has consistently maintained that the cotenancy provision is an unenforceable *penalty* under the holding of *Grand Prospect* stating:

I have reviewed the original Lease and First Amendment and have concluded that the cotenancy provision which would purport to allow Jo-Ann to pay Substitute Rent appears to be an unenforceable penalty. A recent California Court of Appeal decision, *Grand Prospect*, held a similar cotenancy provision unenforceable because the amount of rent abatement from the expected loss of the anchor tenant had no connection to the tenant's estimated loss it would suffer from the loss of the anchor tenant at that site.

(AA 81.)

This was repeated yet again in the complaint: “On or about September 18, 2018 JJD’s attorney advised Mr. Sinko in a letter that the cotenancy provision in the Lease which would purport to allow Jo-Ann to pay Substitute Rent was an unenforceable penalty, citing *Grand Prospect*.” (AA 392 ¶ 26.)

JJD invoked the most relevant—indeed, until the opinion below, the *only* on-point—precedent construing how Section 3275’s prohibition against contractual penalties and forfeitures applies to co-tenancy provisions. There is no evidentiary support for Jo-Ann’s assertion that JJD somehow waived this argument.

III.

CONCLUSION

The enforceability of two materially identical lease provisions was treated differently in two published opinions. Legal commentators across the State have acknowledged the explicit divide, and this Court's intervention is necessary to secure both uniformity and justice. No party, no matter how commercially sophisticated, should suffer a penalty in excess of \$30,000 per month simply because their predecessor entered into unreasonable agreement twenty years ago. That is the functional result of the Third District's opinion, and the Court should make clear that is wrong; California law protects against inequitable penalties and forfeitures, regardless whether they are negotiated. This has been the case and codal law of this State since the 19th century. For the reasons set forth, JJD respectfully requests that the Court grant its petition for review and set this case for full briefing and argument.

DATED: August 31, 2022

WHITNEY, THOMPSON &
JEFFCOACH LLP

By: /s/ Jacob S. Sarabian
Marshall C. Whitney
Jacob S. Sarabian
Attorneys for JJD- ELK
GROVE, LLC

**CERTIFICATE OF COMPLIANCE PURSUANT TO
CALIFORNIA RULES OF COURT RULE 8.504(d)(1)**

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 2,552 words.

DATED: August 31, 2022

WHITNEY, THOMPSON &
JEFFCOACH LLP

By: /s/ Jacob S. Sarabian
Marshall C. Whitney
Jacob S. Sarabian
Attorneys for JJD- ELK
GROVE, LLC

PROOF OF SERVICE

JJD-HOV ELK GROVE v. JO-ANN STORES, LLC
Case No. 34-2019-00248163

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Fresno, State of California. My business address is 970 W. Alluvial Ave., Fresno, CA 93711.

On August 31, 2022, I served true copies of the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

Mark McKeen	Clerk of the Court
Evi Schueller	Third District Court of
DLA Piper LLP (US)	Appeal
555 Mission Street	914 Capitol Mall,
Suite 2400	Sacramento, CA 95814
San Francisco, CA 94105-2933	
mark.mckeen@dlapiper.com	<i>Served via TrueFiling</i>
evi.schueller@dlapiper.com	

Served via E-Mail and U.S. Mail

Clerk of the Court
Sacramento County Superior
Court
720 Ninth Street
Sacramento, CA 95814

Served via U.S. Mail

BY TRUEFILING ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Whitney, Thompson & Jeffcoach LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Fresno, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address rleal@wtjlaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on August 31, 2022, at Fresno, California.

/s/ Rebecca Leal

Rebecca Leal

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JJD-HOV ELK GROVE v. JO-ANN STORES**

Case Number: **S275843**

Lower Court Case Number: **C094190**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **jsarabian@wtjlaw.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REPLY TO ANSWER TO PETITION FOR REVIEW	2022.08.31 JJD-Elk Reply Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jacob Sarabian Whitney Thompson & Jeffcoach, LLP 322108	jsarabian@wtjlaw.com	e-Serve	8/31/2022 2:17:32 PM
Mark Mckeen DLA Piper LLP 130950	mark.mckeen@us.dlapiper.com	e-Serve	8/31/2022 2:17:32 PM
Evi Schueller DLA Piper LLP (US) 237886	evi.schueller@us.dlapiper.com	e-Serve	8/31/2022 2:17:32 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/31/2022

Date

/s/Jacob Sarabian

Signature

Sarabian, Jacob (322108)

Last Name, First Name (PNum)

Whitney Thompson & Jeffcoach LLP

Law Firm