

GEORGE A. MURRELL et al., Plaintiffs and Appellants,

v.

DONALD CROCKER, Defendant and Respondent.

B190152

California Court of Appeal, Second District, First Division

June 28, 2007

NOT TO BE PUBLISHED

APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BC325047. Andria K. Richey, Judge. Affirmed.

Law Offices of Harold J. Light, Harold J. Light and Bruce A. Gilbert for Plaintiffs and Appellants.

Sidney A. Croft for Defendant and Respondent.

OPINION

MALLANO, Acting P. J.

Defendant Donald Crocker was a volunteer director serving on the Board of Directors of the Rolling Hills Community Association (RHCA) when neighbors of plaintiffs George and Anne-Merelie Murrell filed complaints with the RHCA that the Murrells' trees blocked the neighbors' view. As a result of the complaints, some trees on the Murrell property were trimmed or removed. The Murrells sued the RHCA and Crocker for breach of fiduciary duty and declaratory relief based on their conduct in handling the complaints. The trial court granted Crocker's motion for summary judgment, and the Murrells appealed. We affirm the judgment because Crocker's declaration is sufficient to support summary judgment in his favor and the evidence presented in opposition does not create a triable issue of material fact.

BACKGROUND

A. Allegations of Second Amended Complaint (Complaint)

The causes of action asserted against Crocker were based on the following allegations:

The Murrells and Leonard and Linda Fuller are neighbors on adjacent residential properties in the City of Rolling Hills. They are members of the RHCA, a nonprofit cooperative corporation governed by a five-member board of directors (Board). The Agreement and Declaration No. 150-AR, containing conditions,

covenants and restrictions (CC&R's), is the governing document setting out the rights and obligations among the RHCA, the Murrells and the Fullers. According to the CC&R's, in order to improve the view from, and to protect, adjoining property, the RHCA has the authority to *cut back* or trim trees and shrubs on a member's property; but in the RHCA's easement over the member's lot (a 10-foot wide strip along the boundary of each lot), the RHCA had the right to *remove* trees or shrubs.[1]

In 1997, the RHCA passed Resolution No. 166, establishing procedures for implementing its authority to maintain and improve views. At that time, the Fullers demanded that the Murrells remove foliage on their property to create a view for the Fullers. To be good neighbors and to avoid a dispute, the Murrells removed and trimmed some trees and shrubs on their property. In 2000, the Fullers brought a view complaint before the RHCA, which submitted the matter to its View Preservation Committee (Committee). The Committee recommended the removal of 12 trees from the Murrell property. During 2001, the RHCA "caused the removal" of five trees and the trimming or topping of an additional 12 trees on the Murrell property.

In November 2002, the Board adopted Resolution No. 181, which contained more detailed guidelines and procedures to implement the RHCA's authority to maintain and improve views. In June 2003, the Fullers submitted a second view complaint to the RHCA. The Committee recommended that two of the Murrells' trees be trimmed, and in late August or early September 2003, the Murrells trimmed the trees. The Fullers complained that the trees were not trimmed enough, and in July 2004 the Board ordered that a pine in the RHCA easement be removed and that other trees not on the easement be severely trimmed.

Crocker took actions in connection with the Fullers' view complaints, and encouraged other Board members to take actions, inconsistent with their fiduciary duties and the CC&R's, to wit: (1) failing or refusing to inform other Board members that the CC&R's did not permit the removal of trees or other plantings from the portion of the Murrells' property not encumbered with the easement; (2) causing the adoption of Resolutions Nos. 166 and 181, which are inconsistent with the powers granted to the RHCA under the CC&R's; (3) enthusiastically supporting the removal of trees and the remedies proposed in the Fullers' view complaints, which violated Resolution No. 181 as well as the CC&R's; (4) ignoring the Murrells' concerns about the impacts of the removal and severe trimming of their trees; (5) attempting to force the Murrells to agree to the radical trimming of trees in July 2004, even though the trees were not blocking the Fullers' view; (6) calling for the removal of the pine when the Murrells did not agree to the radical trimming of their trees; and (7) calling for the trimming of trees so that the

trees will not grow back for three or four years.

Crocker and other Board members (1) worked with the Fullers and allowed the Fullers to control the actions of the Board so that all matters involving the Murrells went in favor of the Fullers' interests and against the interests of the Murrells; (2) took actions purposely designed to interfere with the Murrells' privacy rights; (3) passed and applied resolutions to allow the illegal removal of trees to create a view for the Fullers; (4) ignored important issues relating to the Murrells' privacy and the stability of the hillside on which the pine tree was growing; and (5) ordered the removal and trimming of trees for arbitrary and capricious reasons.

B. Summary Judgment Motion

After answering the Complaint, Crocker moved for summary judgment on the ground that, as established by his declaration, there was no factual basis for the claims against him. In his 37-paragraph declaration, Crocker denied all of the foregoing assertions by the Murrells. Crocker also declared that he had no personal relationship with either the Murrells or the Fullers, that he had no financial or personal interest in the outcome of their dispute, that the Board's votes on the Fullers' view complaints were unanimous, that he had no influence over any Board member and had only one of five votes, and that he never intentionally sought to cause injury to the Murrells.

With respect to the first view complaint, Crocker declared that it was resolved by an agreement between the Murrells and the Fullers after several meetings with the Committee and an arborist (Rick Dykzel) hired by the RHCA and after several Board meetings attended by the parties. Crocker's actions were limited to participation in the Board meetings and being one of five votes — the same as all other Board members.

In opposition to the summary judgment motion, the Murrells submitted their declarations as well as the declarations of their attorney and one of their neighbors. The Murrells also offered portions of deposition testimony of the Fullers and of Croft, the attorney for the RHCA.

Linda Fuller testified that she and the Murrells reached an oral agreement in 2001 that "some trees would stay but they would be trimmed" and some of the trees would go.

In George Murrell's declaration, he stated that sometime after 2001, the Committee and the Board stated that an agreement had been reached to keep two trees trimmed to the level they were in the spring of 2001. Although George Murrell denied any such agreement, he felt that because the Committee and the Board had a negative attitude toward him and his wife, he "had no choice but to play along with the concept that some agreement had been reached as the Association Board

and View Committee were claiming."

Anne-Merelie Murrell declared that no one informed her that the RHCA could not remove trees on the Murrells' property without their consent. Because she believed that they had no right to stop the removal of their trees by RHCA, her "efforts were focused on trying to persuade the . . . Board to limit its destruction of our trees and foliage so as not to destroy the privacy shield which had existed on our property for decades." Although she denied any agreement to remove trees not located in the easement, she admitted that because the Committee and the Board "made clear to me that [some trees not in the easement] were being removed, I did not vigorously fight their removal. I was attempting to avoid a confrontation in the hope that the . . . Board would, in the end, make some effort to protect some aspect of our privacy." According to Anne-Merelie Murrell, it was not until this litigation that she saw the cover letter for Dykzel's report in which he recommended the trimming of some trees and the removal of a pine and a cedar tree. In his cover letter Dykzel wrote that she seemed "o.k. with these suggestions," but in her declaration she asserted that she "was not okay with the Association removing our trees."

In reply to the opposition, Crocker submitted numerous evidentiary objections to portions of the four declarations offered by the Murrells. After a hearing on the motion, the court sustained most of Crocker's evidentiary objections and granted the motion.

The Murrells appeal from the judgment, raising two main issues: (1) whether the trial court erred in sustaining Crocker's evidentiary objections and (2) whether triable issues of fact on the claim for breach of fiduciary duty precluded summary judgment in favor of Crocker. Because the Murrells' briefs do not specifically discuss the cause of action for declaratory relief, we deem them to have abandoned the appeal as to that cause of action. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

DISCUSSION

A. Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A defendant can meet his burden on summary judgment by presenting evidence that negates an essential element of the plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We review a summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) In doing so, we consider all of the evidence

offered by the parties, except that which the court properly excluded, and the uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Although our review of a summary judgment motion is de novo, we review the trial court's final rulings on evidentiary objections by applying an abuse of discretion standard. (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467.)

B. Evidentiary Rulings

The Murrells challenge the trial court's evidentiary rulings. But instead of discussing separately each evidentiary objection and providing an argument as to the propriety of the objection, the Murrells lump together all of the objections and argue in general terms that the evidentiary objections should have been overruled. This is insufficient to meet their burden of establishing error or abuse of discretion. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 [challenge to exclusion of evidence is waived on appeal because brief failed to discuss issue with specificity].) Because the Murrells fail to establish that the trial court's evidentiary rulings were erroneous or an abuse of discretion, the rulings stand. Accordingly, we do not consider the evidence excluded by the trial court.

C. Breach of Fiduciary Duty

"Directors of nonprofit corporations such as [a homeowners association] are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code." (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513.) A director fulfills his duty to a member of the association by strictly enforcing the provisions of the CC&R's but has no fiduciary duty to exercise his discretion one way or the other with regard to a member so long as the director's conduct conforms to the standard set out in Corporations Code section 7231 (section 7231). (*Frances T.*, at p. 514.) Thus, section 7231 sets out the standard of care for directors of nonprofit corporations. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 258.) Section 7231 is "California's statutory business judgment rule." (*Lamden*, at p. 259.)

Section 7231 provides in relevant part: "(a) A director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use in similar circumstances." In performing such duties, a director "shall be entitled to rely on information, opinions, reports or statements . . . prepared or presented by: [¶] (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented; [¶] (2) Counsel . . . ; or [¶] (3) A committee of the board upon which the director does not serve . . . so long as, in any such case, the director acts in good faith, after

reasonable inquiry when the need therefore is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted." (§ 7231, subd. (b).)

"A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director" (§ 7231, subd. (c).)

Crocker's declaration establishes that he performed his duties in connection with both view complaints in good faith and with due care within the meaning of section 7231: His only involvement with the Murrells or the Fullers has been in public meetings of the RHCA or in officially sanctioned trips to their property attended by the Board members, the Murrells and the Fullers; he has no personal relationship with either the Murrells or the Fullers and has no personal interest in the outcome of their dispute; he was not the "primary driving force" behind the alleged improper treatment of the Murrells — he was only one of five Board members, with one vote; he participated in the meetings and voted in the same manner as the other Board members; the votes were unanimous in all Board actions regarding the Murrells and the Fullers; he did not knowingly or with reckless disregard for the truth take any action, or encourage any other Board member, to take any action inconsistent with a Board member's fiduciary duties or the CC&R's; he considered all of the facts presented by all of the parties; he never purposely took actions designed to interfere with the Murrells' privacy rights; at the July 2004 Board meeting, he did not arbitrarily or capriciously demand that the Murrells agree to allow the RHCA to trim a number of their trees; and he never intentionally sought to cause injury to the Murrells.

Liberal construed, the evidence submitted by the Murrells is insufficient to create a dispute of fact with respect to the foregoing evidence.

The Murrells argue that Crocker did not correct their mistaken belief that the RHCA had authority to remove trees not located in the easement and that he withheld this legal information from them. They thus intimate that Crocker's failure to inform them about the scope of the legal authority of the RHCA deceived them into consenting to the removal of such trees in connection with the first view complaint.

But the evidence establishes that the Murrells engaged in conduct leading the Fullers, Dykzel, and Crocker to conclude that the Murrells had consented to removal of some trees not located in the easement as part of an agreement to resolve the first view complaint. Linda Fuller testified that the Murrells and the Fullers reached an agreement with respect to the first view complaint. Dykzel wrote that Mrs. Murrell seemed "o.k." with the removal of the trees. Mrs. Murrell admitted in her

declaration that she "did not vigorously fight their removal," that she was attempting to avoid a confrontation in the hope that the Board would make an effort to protect their privacy, and that her efforts were focused on trying to persuade the Board to limit its destruction of their trees so as not to destroy their privacy shield.

With respect to the second view complaint, Mr. Murrell admitted that he "play[ed] along with the concept that some agreement had been reached" to keep the trees trimmed to the 2001 levels. And the Murrells were represented by an attorney when the Board considered the second view complaint and made its order thereon at a meeting in July 2004.

The Murrells therefore admitted that they engaged in conduct leading Crocker and the RHCA to believe that the Fullers and the Murrells had come to agreements involving the removal and trimming of the trees. Because there was no reason for Crocker to suspect that the Murrells were laboring under any mistake as to their legal rights, there was no duty for him to make any disclosures on the point. Any unexpressed position on the part of the Murrells concerning the view complaints does not create a triable issue of fact pertaining to Crocker's good faith compliance with his duties.

We thus conclude that Crocker is entitled to summary judgment in his favor. As Crocker established that the claim for breach of fiduciary duty is without merit, we need not address the issue of whether he is immune from liability under Civil Code section 1365.7, a defense not raised in his answer but in his reply to the opposition to the summary judgment motion.[2]

DISPOSITION

The judgment is affirmed.

We concur: VOGEL, J., ROTHSCHILD, J.

Notes:

[1] Portions of the deposition testimony of Sidney Croft, the attorney for the RHCA, were submitted in opposition to the summary judgment motion. Croft testified that, unless a member consented, the RHCA did not have the right to *remove* trees from the portion of a member's property not encumbered by the RHCA easement.

[2] Civil Code section 1365.7 provides in pertinent part: "(a) A . . . volunteer director of an association . . . which manages a common interest development that is exclusively residential, shall not be personally liable in excess of the coverage of insurance specified in paragraph (4) to any person who suffers injury, including, but not limited to, bodily injury, emotional distress, wrongful death, or property damage or loss as a result of

the tortious act or omission of the . . . volunteer director if all of the following criteria are met: [¶] (1) The act or omission was performed within the scope of the . . . director's association duties. [¶] (2) The act or omission was performed in good faith. [¶] (3) The act or omission was not willful, wanton, or grossly negligent. [¶] (4) The association maintained and had in effect . . . one or more policies of insurance . . ."
