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Supreme Court case no._____

SUPREME COURT of CALIFORNIA

Tract 19051 Homeowners Association et al.,
Plaintiffs and Appellants,
v.
Maurice Kemp et al.,
Defendants and Respondents

Petition after a Decision by the Court of Appeal,
Second Appellate District, Div. 4

PETITION FOR REVIEW

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SUPREME COURT
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I. ISSUES PRESENTED

This Petition for Review presents an important question of law regarding the interpretation of reciprocal statutory attorney's fees provisions.

1. If a plaintiff sues under a statute, which provides for a mandatory award of attorney's fees to the "prevailing party," should the defendant be denied its attorney's fees if the defendant prevails by proving that the statute does not apply to the plaintiff?

2. Should the Court of Appeal have granted petitioner's Petition for Rehearing because the Court of Appeal based its decision on an issue not briefed or argued by either of the parties?

II. REVIEW SHOULD BE GRANTED TO RESOLVE A SPLIT BETWEEN THE COURTS OF APPEAL AND TO SETTLE AN IMPORTANT QUESTION OF LAW

Rule 8.500 of the *California Rules of Court* provides that the Court may order review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." This case meets both criteria.

Here, Plaintiffs sued under the *Davis Stirling Common Interest Development Act* (*Civ. Code* §§1350, *et seq.*) (the "Act"). Section 1354(c) of the Act provides that "[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

The initial issue presented by this Petition is of the first impression before this Court – can the Defendant be denied its fees under that mandatory, reciprocal attorney

fees provision (§1354(c)) because the Defendant proved that the Plaintiff, which had claimed it was a *Common Interest Development* ("CID") as that term is defined by the Act, had sought its attorney's fees under section 1354(c) and would have been entitled to attorney fees if it had prevailed, was in fact not a CID and therefore was not entitled to any relief under Act. Here, Plaintiff was specifically seeking relief under section 1357(b) of the Act, which provided the only way by which the governing documents for Tract 19051 could have been extended by less than 100% approval of the homeowners.

In this case, Division Four of the Second Appellate District, in an unpublished case that relies on a prior published decision issued by that same Division, *Mt. Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885, reversed the Superior Court's award of attorney's fees to petitioner (Respondent/Defendant), holding that because the Act did not apply (because Defendant proved that Plaintiffs/Appellants were not a CID), the reciprocal attorney's fees provision contained in the Act, section 1354(c), also did not apply.

That decision by the Court of Appeal (the "Decision"), and the decision in *Mt. Olympus, supra* (to the extent it is interpreted as it was by the Decision), are in direct conflict with all of the other holdings under analogous cases.

This Court and other Courts of Appeal have many times considered this question in analogous cases relating to the application of a reciprocal attorney's fees provision in actions "on a contract" under *Civil Code* section 1717, and it has been consistently held that when a party litigant prevails in an action on a contact by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that

party's recovery of attorney's fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. Division Three of the Second Appellate District has also applied the reasoning of the section 1717 cases in an analogous case arising under another statute, former *Civil Code section* 3176. That court upheld an award of attorney's fees to a prevailing defendant under a mandatory, reciprocal attorney's fees provision in connection with a plaintiff's action to enforce a "bonded stop notice," even though the defendant in that action proved plaintiff was not entitled to claim the benefits of the bonded stop notice statutes.

Review of the Decision is necessary to secure uniformity of the law with respect to the interpretation of reciprocal attorney's fees statutes. Also, this case presents important public policy considerations and important questions of law and statutory construction.

In California, the general rule regarding the award of attorney's fees is that there is no fee-shifting unless allowed by contract or statute (the "American Rule"). However, in specific cases the Legislature has authorized an award of attorney's fees either to one party only (typically the plaintiff – a unilateral provision) or to the "prevailing party" (a reciprocal provision). In limited cases, the Legislature has enacted "hybrid" attorney's fees statutes that generally are unilateral in favor of the plaintiff, but allow the defendant its attorney's fees if the plaintiff's claim was frivolous or not in good faith. That is, the statute operates against the plaintiff making a "bad" claim.

It is of course the Legislature that must decide, first, if an exception is to be made to the American Rule with respect to any specific cause of action or statutory scheme and, then, if fee-shifting is to be unilateral or reciprocal. When the Legislature elects to

enact a reciprocal attorney's fees provision, the public policy underlying that decision is obviously different than the public policy underlying their enactment of a unilateral or hybrid attorney's fees provision.

The Decision, however, does something the Legislature did not elect to do, and creates something *sui generis* in California -- a fee-shifting hybrid statute that is generally reciprocal, but becomes unilateral in favor of a plaintiff that makes a frivolous, meritless or otherwise untrue claim that it is a CID. In no instance has the Legislature decreed that result, and this Court has made clear that a reciprocal provision should not be transformed into a unilateral provision. *Santisas v. Goodin* (1998), 17 Cal.4th 599, 611.

If the homeowners association for a true CID brings and action to enforce its *Covenants, Conditions and Restrictions* (governing documents) and loses, it is liable for the defendant's attorney's fees under section 1354(c). Under the Decision, however, if a group of homeowners falsely claiming to be a CID bring an action to enforce alleged "governing documents" and they lose, they are not liable for the defendant's attorney's fees under section 1354(c).

No California public policy interest is served by putting homeowners falsely claiming to be a CID in a better position than the true CID Association. As this Court and other courts have recognized time and time again under section 1717, the public policy underlying reciprocal attorney's fees provisions is "mutuality of remedy" – to put plaintiff and defendant on an even playing field. The Decision supports the frivolous or unmeritorious claim.

Also, in addition to being grossly unfair, the Decision can be used as a vehicle of oppression to force settlements of dubious or unmeritorious claims. A group of homeowners advancing a false claim of being a CID against a dissenting homeowner can say "if we win, you must pay both our fees and yours, but if you win, you still have to pay your own fees."

Further, California courts have many times noted that statutes must be construed to achieve a "practical and equitable result" rather than one resulting in "mischief or absurdity," and it cannot seriously be argued that the Legislature intended to have the reciprocal provision that it enacted transformed into a unilateral provision and, among other things, support frivolous or unmeritorious claims and put plaintiff's making a false claim of being a CID in a better position that the true CID.

It is petitioner's hope that this Court will overturn the Decision and take this opportunity to set forth a clear, general rule with respect to the application of reciprocal attorney's fees statutes, whether the statute is *Civil Code section* 1717, 1354(c) 3176 or any of the other numerous reciprocal attorney's fees statutes. That general rule should be, as is already the case under section 1717, that reciprocal means there is to be "mutuality of remedy" and that if the plaintiff would have been entitled to attorney's fees if plaintiff had prevailed, then the defendant is entitled to attorney's fees if the defendant prevails.

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III. STATEMENT OF THE CASE

A. Factual Background And Procedural History

This is a lawsuit to stop a remodeling project of a home at Lot 22 of Tract 19051, which "is a subdivision of 94 single family homes in the Baldwin Vista area of Los Angeles." (Decision, p. 5) "When Tract 19051 was subdivided in 1958, the developer recorded the declaration of restrictions ["DORs"] that is the subject of this litigation. Although the [DORs] allowed any homeowner to sue to enforce its restrictions, the [DORs] expired by its own terms on January 1, 2000, and contained no provision for extending that date." (Id.)

In September 2008, the "voluntary" Association and the owners of 32 lots (Plaintiffs/Appellants) filed this action to stop the remodeling project – they alleged that it was in violation of the height and setback restrictions contained in the DOR's. (Id.) A first amended complaint was filed, which added twenty more property owners as plaintiffs, for a total of 52. (Decision, p. 6)

Because the DORs had expired on January 1, 2000, the gravamen of this action, including Appellants' original and first amended complaints, was whether the Association and Tract were a "common interest development" as that term is defined in the *Davis-Stirling Common Interest Development Act* (*Civ. Code*, §§ 1350 *et seq.*) (the "*Act*"). As this Court stated in its Decision: "During a court trial, the main issue was whether the declaration, which had a January 1, 2000 expiration date, was properly renewed by a majority of homeowners in 1999. The answer turned on whether the subdivision is a 'common interest development' under the ... (Act), such that the

majority's renewal of the declaration was permitted by Civil Code section 1357.1" (Decision, p. 2)

Appellants sought at all times to recover their attorney's fees pursuant to *Civil Code* section 1354(c). (RA 90-¶21 and 92-¶30; RA119-¶23 and 121-¶32). They specifically alleged and claimed they were entitled to attorney's fees pursuant to *Civil Code* section 1354(c) in their first cause of action for breach of the [DORs] and third cause of action for injunctive relief. (Id.)

Attorneys/former Appellants Marcia Brewer and Kenneth Mifflin prepared an Interlocutory Judgment in which they sought and were awarded $112,000 in attorney's fees "pursuant to Civil Code Section 1354." (RA 126, 130).

Respondent Eric Yeldell purchased Lot 22 at a foreclosure sale, and sought to intervene and vacate the Interlocutory Judgment. Intervention was granted and the Interlocutory Judgment was vacated on the grounds that Appellants were not a common interest development. (Decision, p. 8-10)

There is no dispute that if Appellants won this action, they would have sought and been awarded attorney's fees pursuant to *Civil Code* section 1354(c). Accordingly, the Superior Court awarded Yeldell his attorney's fees under that statute. (Decision, p. 10)

Attorney/former Appellant Mifflin filed two notices of appeals on behalf of all of the Plaintiffs as Appellants from the Superior Court's two decisions: [1] finding that Tract 19051 was <u>not</u> a common interest development; and, [2] awarding Respondent his attorney's fees. (Ct.App. Docket, 8/8/11 and 3/8/12.) Since the two appeals were filed, thirty-one (31) of the Plaintiffs/Appellants filed requests for dismissal, including

Appellants/attorneys Brewer and Mifflin. (Decision p. 2, n. 2)

B. The Second District, Division 4's Decision

The Court of Appeal's Decision affirmed the Superior Court's Judgment for Yeldell on the Plaintiff's substantive claim to enforce the DORs, but it reversed as to the remaining Appellants the attorney's fees award in favor of Yeldell. The Decision on the attorney's fees issue was based on the Second District's reported decision in *Mt. Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885. However, neither side had briefed that case in their appellate briefs. For the reasons discussed below, that case does not preclude Yeldell's right to prevailing party attorney's fees.

C. The Petition For Rehearing

Because neither side had briefed *Mt. Olympus Property Owners Assn. v. Shpirt*, 59 Cal.App.4th 885 (1997) on the attorney's fees issue, Yeldell brought a Petition for Rehearing, pursuant to *Government Code* § 68081, which statute provides: "Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." However, the Court of Appeal denied the Petition in an one-sentence order dated June 5, 2013, which was received on June 13.

IV. ARGUMENT FOR REVIEW TO DETERMINE A PREVAILING DEFENDANT'S RIGHT TO STATUTORY ATTORNEY'S FEES

A. Review Should Be Granted to Decide the Important Legal Question of Whether Civil Code Section 1354 is Truly A Reciprocal Attorney's Fees Provision

Supreme Court review is sought because the Court of Appeal held in this case that *Civil Code* section 1354(c) is not truly a reciprocal attorney's fees provision, despite its express language: "In an *action to enforce the governing documents*, the prevailing party *shall* be awarded reasonable attorney's fees and costs." (italics added.) There is no dispute that this was an "*action to enforce*" the Tract's "*governing documents,*" and that Respondent was the "prevailing party." The Court of Appeal's Decision to reverse the attorney's fees award to Respondent was a substantial error of law.

The Court of Appeal concluded that because the Defendant (Respondent) prevailed in this action by proving that the Plaintiffs (Appellants) were not entitled to any relief under the Act, the Defendant was also not entitled to the right to reciprocal attorney's fees provided by section 1354(c). There is no dispute that if the Plaintiffs had won, they would have been entitled to their attorney's fees. Denying the prevailing Defendant the right to statutory attorney's fees is contrary to California law and fundamental logic and fairness.

Supreme Court review is necessary to provide clear guidance on how to interpret and apply such a statutory attorney's fees provision. As discussed in the following sections, the Court of Appeal's Decision is contrary to California law and conflicts with

the decisions issued in other statutory attorney's fees cases.

B. <u>The Court of Appeal Decision Here Held that Civil Code Section 1354 is Not a Reciprocal Attorney's Fees Provision</u>

Although neither party briefed or argued *Mount Olympus, supra*, in their appellate briefs, the Court of Appeal, *sua sponte,* decided the entire §1354(c) attorney's fees claims based on that case. The court stated: "In *Mount Olympus, supra*, 59 Cal.App.4th at pages 895-896, we found that because the Act did not apply, the trial court had erred in awarding attorney fees under section 1354 ... Because the same rationale applies to this case, the attorney fee award under section 1354 must be reversed." (Decision pp.12-13, citation omitted)

For the reasons discussed below, the *Mount Olympus* case was wrongly applied here and its interpretation of statutory attorney's fees provisions is contrary to California law and fundamental fairness.

Mount Olympus was a lawsuit by an individual lot owner (Michael Ross) and the tract's owners association (the Mount Olympus Property Owners Association [MOPOA]) against another lot owner (Boris and Jenny Shpirt). *Id.,* 59 Cal.App.4th at 889. The plaintiffs sought an injunction preventing the defendants from erecting or constructing a house without the association's approval or from erecting or constructing a house which interfered with or reduced the view from the individual plaintiff's property. *Id.* The plaintiffs did not apparently allege that the tract was a common interest development under the *Act* and they apparently did not allege they were entitled to attorney's fees under *Civil Code* section 1354(c), like Appellants here did.

In *Mount Olympus,* the individual plaintiff prevailed at trial and after judgment was entered, he claimed attorney's fees on four separate grounds, one of which was based on *Civil Code* section 1354(c). *Id.*, at 893. The trial court granted the plaintiff's motion for attorney's fees under *Civil Code* section 1354(c). However, the court of appeal in *Mount Olympus* reversed that decision.

The court of appeal in *Mount Olympus* held that in order for a prevailing plaintiff to be entitled to attorney's fees under *Civil Code* section 1354(c), the tract must be a "common interest development for purposes of the" *Act. Id.,* 59 Cal.App.4th at 894. The court of appeal in *Mount Olympus* did not consider whether a prevailing defendant would be entitled to attorney's fees under *Civil Code* section 1354(c) by proving that the tract was not a "common interest development for purposes of the" *Act.* Because there was no discussion in *Mount Olympus* of whether *Civil Code* §1354(c) would apply to a prevailing defendant in an action to "enforce the governing documents" if the association or tract was not a *common interest development* under the *Act*, *Mount Olympus* should be irrelevant to Respondent's right here to prevailing party attorney's fees.[1]

As discussed in the following sections, a prevailing defendant's right to statutory attorney's fees under *Civil Code* §1354(c) should be determined by the principles and

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[1] The *Mount Olympus* case does not apply because a "case is not authority for a proposition not considered." *Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App. 4th 187, 198. The Court in *Mount Olympus* did not consider whether a prevailing defendant, such as Respondent here, is entitled to statutory attorney's fees under §1354(c). Furthermore, "the language of an opinion must be construed with reference to the facts of the case, and the positive authority of a decision goes no farther than those facts. A decision is not authority merely for what it says, but for the points actually involved and actually decided." *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 962 (citing *Trope v. Katz* (1995) 11 Cal.4th 274, 284).

rationales from other California cases construing other statutory attorney's fees provisions. Specifically, a prevailing defendant's right to statutory attorney's fees should not be denied because the defendant prevailed on the substantive merits of the plaintiff's statutory claim by proving that the plaintiff was not entitled to relief under the statute it sued on.

C. The Court of Appeal Decision Here and in *Mount Olympus* Conflicts With Existing Case Law on the Interpretation of Statutory Attorney's Fees Provisions

Supreme Court review is needed to address whether fundamental principles of statutory interpretation apply to statutory attorney's fees provisions. These principles and holdings compel the conclusion that *Civil Code* section 1354(c) should apply to a prevailing defendant in an action brought under the *Act* to enforce the "governing documents" (*e.g.,* Covenants, Conditions and Restriction – "CC&Rs" – or DORs), whether or not the association or tract was entitled to relief under the Act, *i.e.,* whether or not it proved that it was a *common interest development.*

A prevailing defendant's right to attorney's fees under *Civil Code* section 1354(c) should be determined as under other statutory attorney's fees provision. Therefore, Petitioner discusses the following fundamental interpretation rules in order to frame the issue here, which is how *Civil Code* section 1354(c) is to be interpreted and applied for a prevailing defendant.

In all other California decisions regarding "reciprocal" attorney's fees provisions,[2] it has been held that even though the statutory scheme containing the reciprocal attorney's fees provision was not applicable, the prevailing defendant was nevertheless entitled to recover defendant's attorney's fees if the plaintiff would have been entitled to recover plaintiff's attorney's fees if plaintiff had prevailed. *See, e.g., Hsu v. Abarra* (1995) 9 Cal 4th 863, 870-871; *Mechanical Wholesale Corporation v. Fuji Bank Limited* (1996) 42 Cal.App.4th 1647, 1661; *Bovard v. American Horse Enterprises, Inc. (1988)* 201 Cal.App.3d 832, 842; *Jones v. Drain* (1983), 149 Cal.App.3d 484, 489-490; *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 707.

A few examples of other reciprocal statutory attorney's fees provisions that have been interpreted in California cases are discussed below. However, missing from the caselaw are some clearly articulated rules and principles for interpreting reciprocal statutory attorney's fees provisions outside of the context of *Civil Code* section 1717.

For a reciprocal attorney's fees provision or right to function as intended, parties need reasonable prospective assurance of whether they will or will not be able to recover their attorney's fees if they win, and whether they will have to pay their opponent's fees if

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[2] In California, the general rule regarding the award of attorney's fees is that there is no fee-shifting unless allowed by contract or statute (the "American Rule."). *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1139. However, the Legislature has enacted many exceptions to the American Rule. There are numerous "reciprocal" attorney's fees statutes, under which the Legislature has authorized an award of attorney's fees to the "prevailing party" (see *Stirling v. Agricultural Labor Relations Bd.* (1987) 189 Cal.App.3d 1305, 1311, citing over 25 examples of statutory "prevailing party" attorney's fees provisions, such as *Civil Code*, §§ 55, 86 789.3(d) and 815.7). But certain statutes are "unilateral" – they only authorize the award of fees only to one side, which the Legislature defines by using such terms as "plaintiff" .... or "defendant." *Id.* (*see e.g., Civ. Code* §§ 52(a) and 1785.31(d) and *Code Civ. Proc.* §§391(c) 399, and 490.020).

they lose. *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1090-91; *Santisas, supra,* 17 Cal.4th at 610. The "fundamental purpose" of making by statute an attorney's fees provision to be mutual or reciprocal is "to insure mutuality of a prevailing party's access to an award of attorney's fees." *North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865. Because of the "mutuality of remedy" doctrine, a prevailing defendant is entitled to attorney's fees if the defendant is sued on a contract or statute that provides for attorney's fees, even if the defendant prevails by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the contract or statute. *Santisas, supra,* 17 Cal.4th at 611; *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128–129; *North Associates, supra, supra,* at 865. In other words: "Sauce for the goose is sauce for the gander" or, "Same monks, same haircuts." (See *Newman v. Checkrite California, Inc.* (E.D.Cal. 1994) 156 F.R.D. 659, 660, fn. 1.)

This Court in *Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038 recently discussed the broad interpretation to be provided to a reciprocal statutory attorney's fees provision. *Jankey* concerned *Civil Code* section 55, which provides that "the prevailing party" in a statutory disability access discrimination case "shall be entitled to recover reasonable attorney's fees." The Court discussed two main attorney's fees interpretation principles in affirming a holding that the prevailing defendant was entitled to attorney's fees.

First, the Court discussed the broad reach of reciprocal attorney's fees provisions. "The Legislature knows how to write both unilateral fee statutes, which afford fees to either plaintiffs or defendants, and bilateral fee statutes, which may afford fees to both plaintiffs and defendants." *Id.,* 55 Cal.4th at 1045. The Court continued, quoting an

earlier case: "'When the Legislature intends that the successful side shall recover its attorney's fees no matter who brought the legal proceeding, it typically uses the term 'prevailing party.'" *Id.* (quoting *Stirling, supra,* at 1311.)

Second, the Court discussed that the reciprocal attorney's fees provision was mandatory because the Legislature used the word "shall," which meant the Court had to award attorney's fees to the prevailing party. *Civil Code* section 55 was a mandatory fee award: "a 'prevailing party' 'shall be entitled' to 'reasonable attorney's fees.'" *Id.,* at 1045-46.

Here, the Legislature made *Civil Code* section 1354(c), like *Civil Code* section 55, a mandatory reciprocal attorney's fees provision.

Two additional interpretation rules or principles should be expressly considered in formulating a rule for interpreting a reciprocal statutory attorney's fees provision with respect to a prevailing defendant. First, "we are required to ... avoid an absurd result" (*Mechanical Wholesale Corporation, supra,* 42 Cal.App.4th 1647, 1661). Here, that means that a prevailing defendant should not be denied the right to statutory attorney's fees merely because he prevailed by proving that the plaintiff was not entitled to statutory relief. Rather, the logical criteria for determining the prevailing defendant's right to attorney's fees is if the plaintiff would have been entitled to attorney's fees is if the plaintiff had prevailed.

The second principal is that if the attorney's fees statute is ambiguous or susceptible to differing constructions, it should be interpreted to give a "practical and equitable result" rather than one resulting in "mischief or absurdity." *Aleman v. Airtouch*

Cellular (2012) 209 Cal.App.4th 556, 583-584. Similarly stated: "'When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences.'" *Hart v. Autowest Dodge* (2007) 147 Cal.App.4th 1258, 1262 (citation omitted).

Here, the Court of Appeal's Decision is contrary to *all* said decisions (as discussed, *supra*, the *Mount Olympus* court did not deal with this situation – that case dealt only with a prevailing *plaintiff;* it did *not* deal with a prevailing *defendant*). No other reported decision has held that a prevailing defendant was not entitled to attorney's fees under the statute that plaintiffs sued on.

In *Mechanical Wholesale, supra*, for example, the court was faced with an analogous scenario under former *Civil Code* section 3176 (now *Civil Code* section 8558) which provides that the prevailing party shall recover its attorney's fees "In any action against ... [a] construction lender *to enforce ...a bonded stop notice*." (italics added.) (*Civil Code* §1354(c) provides: "In an *action to enforce the governing documents*, the prevailing party *shall* be awarded reasonable attorney's fees and costs.") In that case, a contractor, brought suit against a construction lender to *enforce a bonded stop notice.* The plaintiff alleged that it was entitled to attorney's fees pursuant to *Civil Code* § 3176. However, the plaintiff's claims were defeated by the defendants, on demurrer, by showing that no bonded stop notice existed. As the prevailing defendant, the lender moved for attorney's fees pursuant to *Civil Code* section 3176. *Id.,* 42 Cal.App.4th at

1660.

The plaintiff argued that because the court found that the statutory scheme at issue did not apply to plaintiffs and that *no bonded stop notice existed*, the defendant could not recover attorney's fees under *Civil Code* section 3176. That is the exact type of argument the Appellants are making here: because the Association/Tract was not a common interest development, Respondent as the prevailing party is not entitled to attorney's fees.

The *Mechanical Wholesale* Court held that because the plaintiff would have been entitled to attorney's fees had it prevailed in enforcing the alleged bonded stop notice, the defendant was similarly entitled to statutory attorney's fees as the prevailing party, whether or not the statute sued on applied. *Id.,* 42 Cal.App.4th at 1660-61.

The Court's reasoning was guided by the fundamental principle that in interpreting and applying the statutory attorney's fees provision, "we are required to ... avoid an absurd result." Hence, the Court said that it "can only come to the commonsense conclusion, that the Legislature intended that either party could be a prevailing party. Thus, a construction lender who successfully defends a suit on an invalid stop notice claim, can legitimately claim to have recovered "a greater relief" and is a prevailing party entitled to receive its attorney's fees." *Id.,* at 1661. "We need not be concerned as to why the stop notice claim was invalid; it is only necessary for Fuji Bank to have shown that it defeated the claim. Such invalidity will not bar fees to which a prevailing party is otherwise entitled." *Id.,* 42 Cal.App.4th at 1661.

In rendering its decision, the *Mechanical Wholesale* Court expressly noted that in "a different but analogous context, courts have sustained a right to recover attorney fees

under section 1717, even though the contract which contained the relevant attorney fee clause was found to be invalid or unenforceable." *Id.,* at 1662, n. 14 (citing *Jones v. Drain* (1983) 149 Cal.App.3d 484, 490; *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 707.)

Because of the principles of "mutuality of remedy" and fundamental fairness, the right to attorney's fees is determined by whether the plaintiff would have been entitled to attorney's fees if plaintiff had prevailed; not whether the plaintiff ultimately prevailed in proving that the statutory scheme applied or that the contract was valid and enforceable.

Other court of appeal decisions have recognized that the doctrine against *absurd results* also mandates that a prevailing defendant's right to statutory attorney's fees is determined by whether the plaintiff would have been entitled to attorney's fees if it had won. *See, e.g., Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894. A defendant's right to attorney's fees should not be denied because he prevailed by proving that there was no merit to the plaintiff's claim against the defendant.

For instance in *Mepco Services, Inc. v. Saddleback Valley Unified School Dist.* (2010) 189 Cal.App.4th 1027, the court held a defendant's right to attorney's fees depends on whether the plaintiff would have been entitled to attorney fees if it had prevailed on its claim against the defendant. *Id.,* at 1047. The court stated:

> "Rather than look to the jury's verdict for guidance as to whether [the school district] would have been entitled to its attorney fees, we look to the pleadings to determine whether [the school district's] cross-complaint

sought "enforcement of the bond," such that it would have been able to recover its attorney fees under bond's attorney fee provision." *Id.*

Thus, the pertinent inquiry here is not whether the *Act* actually applied and not whether based on the evidence Appellants would have been the "prevailing party." Rather, the inquiry, focus and criteria on whether Respondent is entitled to attorney's fees under *Civil Code* section 1354(c) is whether the Appellants alleged that the *Act* applied and whether Appellants would have been entitled to attorney's fees if they *had* prevailed on their claim against Respondent.

In this case, Appellants would have been entitled to attorney's fees had they prevailed on their claims. In fact, as the Court of Appeal noted in its Decision, Plaintiffs were awarded $112,000 in attorney's fees in the Superior Court's Interlocutory Judgment, which was later vacated.

Neither *Mount Olympus* nor the Court of Appeal's Decision here considered or discussed whether *Civil Code* section 1354(c) applies to a prevailing defendant in light of the above case law and fundamental principles regarding statutory attorney's fees provisions. Like all statutory attorney's fees provisions, *Civil Code* section 1354(c) was obviously intended to compensate the prevailing party in litigation involving alleged "governing documents." That statute does not state that it only applies if the plaintiff proves it is a common interest development.

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D. The Rule of Law Should Be That a Prevailing Defendant's Right to Attorney's Fees is Determined Based on Whether the Plaintiff Would Have been Entitled to Attorney's Fees if the Plaintiff Had Prevailed

The Legislature obviously chose in *Civil Code* section 1354(c) to enact a mandatory bilateral (reciprocal) fee statute, granting defendants as well as plaintiffs the opportunity for a fee award. *See, Jankey, supra,* 55 Cal.4th 1038. The obvious purpose of a mandatory reciprocal attorney's fees provision is to put *both* the plaintiff and the defendant on an equal footing, so that they are treated evenhandedly, and "[t]he simplest definition of evenhanded has always been 'equitable' . . . and 'dealing equitably with all.'" *Sears*, *supra*, 60 Cal.App4th at 1151. Thus, the purpose of a mandatory reciprocal attorney's fees provision is to ensure "mutuality of remedy."

Now, since Respondent is the "prevailing party," Respondent must pay his own fees. Thus, this Decision has done what the legislature could not have intended; it has transformed a mandatory reciprocal right into a unilateral right because, applying the same reasoning to this case as that set forth by this Court in explaining why an analogous attorney's fees statute, *Civil Code* section 1717, must still be held to apply even when a person sued on a contract containing a provision for attorney's fees to the prevailing party defends the litigation by successfully arguing the inapplicability, invalidity, unenforceability or nonexistence of the same contract: "If section [1354] did not apply in this situation, the right to attorney fees would effectively be unilateral-regardless of the reciprocal wording of the attorney fee [statute] allowing attorney fees to the prevailing attorney-because only the party seeking to affirm and enforce [the governing documents]

could invoke its attorney fee [statute]." *Santisas, supra,* 17 Cal.4th at 611.

The Decision does something the Legislature did not elect to do, and creates something *sui generis* in California -- a fee-shifting hybrid statute that is generally reciprocal, but becomes unilateral *in favor of, rather than against,* a plaintiff that makes a frivolous, meritless or otherwise untrue claim that it is a CID. In no instance has the Legislature decreed that result, and such result serves no California public policy.

Furthermore, if the CC&Rs at issue had an attorney's fees clause and Respondent had prevailed by proving that they were inapplicable, invalid or unenforceable, Respondent would have been entitled to his attorney's fees pursuant to *Civil Code* section 1717, which is considered to be a statutory attorney's fees right, because the Legislature made contractual attorney's fees provisions by law bilateral or reciprocal despite what the parties stated in their contracts. As the court in *Sears, supra,* 60 Cal.App.4th 1136, 1145 discussed, *Civil Code* section 1717 "creat[ed] a bilateral contractual obligation where a unilateral fee provision previously existed" and that "thereafter attorney's fees were to be seen as allowed by statute, rather than by contract."

Here, Respondent prevailing on the grounds that Appellants were not a common interest development is analogous to defeating a contract claim on the grounds that the contract was inapplicable or unenforceable. See *Mechanical Wholesale, supra,* n. 14.

Because Respondent would have been entitled to attorney's fees under *Civil Code* section 1717 by proving that the CC&Rs (Declarations) were unenforceable, he similarly should be entitled to his attorney's fees under *Civil Code* section 1354(c) by proving that the *Act* does not apply.

E. Denying The Prevailing Defendant the Right to Prevailing Party Attorney's Fees Would be an Absurd Result

In addition to being bad public policy, this Decision creates absurd results. As noted above, it transforms a statute the Legislature enacted as mandatory and reciprocal into a unilateral statute. Moreover, the Decision puts plaintiffs, attempting to enforce CC&Rs, who make frivolous, meritless or otherwise false claims that they are a CID *in a better position* than the true CID attempting to enforce CC&Rs.

If the legitimate CID plaintiff is unsuccessful, *it is liable for the defendant's attorney's fees*. On the other hand, under this Decision, if a plaintiff falsely claiming to be a CID is unsuccessful, it is *not* liable for defendant's attorney's fees – *defendant must pay defendant's own fees*. Such "False CID" plaintiffs, unlike what would be the case with real CIDs, are "rewarded" for their meritless claims by being relieved of the obligation to pay the defendant's attorney's fees.

It cannot seriously be argued that the Legislature could have intended to put plaintiffs making false claims that they are a CID in a better position than the true CID.

Also, the Court of Appeal's Decision is rewarding Appellants' counsel for their "faulty reasoning," which the court of appeal held was not a basis to avoid attorney's fees exposure under *Civil Code* §1354(c). *Salehi v. Surfside III Condominium Owners' Assn.* (2011) 200 Cal.App.4th 1146, 1155. Courts should not encourage frivolous or meritless suits.

Another absurd result of the Decision it that it gives plaintiffs with the questionable false claim of being a CID a vehicle for forcing abusive settlements. This is

the exact same "evil" decried by the Court in *Care Constr., Inc., supra,* in connection with "adhesion type contracts":

> "Should the Defendant lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney fees. One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims." *Id.,* 54 Cal.App.3d at 704.

As stated by the California Law Revision Commission, in connection with *Civil Code* § 1717, in its Staff Memo 99-32 titled "*Award of Costs and Contractual Attorney Fees to Prevailing Party* (June 17 1999)", at page 32:

> Any unilateral requirement to reimburse attorney's fees or other litigation expenses distorts access to the courts: It burdens one side with a financial risk that the other side does not have to bear in pursuing justice. Such manipulation of the judicial process should not be permitted.

That statement is as applicable to the reciprocal attorney's fees statute *Civil Code* §1354(c) as it is to the reciprocal attorney's fees statute *Civil Code* § 1717.

The important facts of this case regarding the attorney's fee award are:

(1) Appellants claimed that they were a common interest development subject to the *Davis-Stirling Act* and were suing to enforce "governing documents" (CC&Rs) under the Act.

(2) Appellants alleged in their original and first amended Complaints that they were entitled to attorney's fees under *Civil Code* §1354 for prosecuting the

action to enforce their purported "governing documents."

(3) At one point there were 52 Plaintiffs suing Respondent.

(4) Appellants' claims were defeated by Respondent by showing that Appellants were not a CID and that the *Act* did not apply (the Court did not find any merit to any of the Appellants' claims).

(5) Based on the pleadings, Appellants would have been entitled to attorney's fees had Plaintiffs prevailed on their claims. In fact, Appellants sought and were awarded $112,000 in attorney's fees in the Superior Court's Interlocutory Judgment.

For the above reasons, the Superior Court's attorney's fees award should be affirmed.

V. ARGUMENT FOR REVIEW OF COURT OF APPEAL'S DECISION DENYING RESPONDENT'S REQUEST FOR REHEARING

The Court of Appeal should have also granted Respondent' Petition for Rehearing because the Court of Appeal based its Decision on an issue not briefed or argued by either of the parties. *Government Code* § 68081 provides: "Before ... a court of appeal ... renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

Respondent filed a Petition for Rehearing because the Court of Appeal's May 15,

2013 Decision decided the attorney's fees issue on an issue not briefed by the parties. Specifically, whether Respondent's right to attorney's fees pursuant *Civil Code* §1354(c) was precluded based on *Mount Olympus, supra,* 59 Cal.App.4th 885.

Although the parties discussed in their respective appellate briefs the Mount Olympus case with respect to whether Tract no. 19051 was a "'common interest development'" as defined by the Act, neither Appellants nor Respondent briefed or discussed that case in their briefs with respect to Respondent's right to attorney's fees pursuant *Civil Code* section 1354(c).

Because Appellants did not make any arguments for reversal of the Superior Court's judgment awarding Respondent his attorney's fees Civil Code §1354(c) based on Mount Olympus, supra, Respondent did not discuss or address that case on the attorney's fees section of his Appellate Respondent's Brief. Accordingly, both fundamental fairness and *Government Code* section 68081 required the Court of Appeal to grant Respondent's Petition for Rehearing so that Respondent can present his argument.

For the reasons discussed above, the *Mount Olympus* case does not preclude a prevailing defendant his or her right to attorney's fees because the plaintiff failed to prove it was a common interest development. Rather, the criteria for a defendant's right to statutory attorney's fees should be whether the plaintiff would have been entitled to attorney's fees if it had prevailed. It is illogical and fundamentally unfair to deny Respondent his right to attorney's fees as the prevailing party, particularly because there was no merit to Appellants' lawsuit.

VI. CONCLUSION

For the reasons stated above, the Court should grant this Petition for Review because this Court has not addressed the criteria for determining a prevailing defendant's right to statutory attorney's fees, outside of the context of *Civil Code* section 1717, and the Court of Appeal's Decision here is contrary to every other California decision to have addressed the issue. Specifically, a prevailing defendant's right to statutory attorney's fees in a clearly reciprocal and broadly stated statute should be determined based on if the plaintiff would have been entitled to attorney's fees if it had won.

DATED: June 24, 2013

Respectfully Submitted,

By: /s/ Keith J. Turner
Keith J. Turner
Attorney for Respondent Eric Yeldell

4831-5548-2900, v. 1

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the *California Rules of Court*, I hereby certify that this Petition for Review is produced using 13-point Roman type, its lines are at least one-and-a-half-spaced, and it contains approximately 7,150 words (as counted by the Microsoft Office Word 2010 used to generate this brief), which is less than the maximum amount of words permitted by the rules of court.

Dated: June 24, 2013

/s/ Keith J. Turner
Keith J. Turner

4823-3628-1353, v. 1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TRACT 19051 HOMEOWNERS ASSOCIATION et al., Plaintiffs and Appellants, v. MAURICE KEMP et al., Defendants and Respondents.	B235015 (Los Angeles County Super. Ct. No. BC398978)

COURT OF APPEAL - SECOND DIS
FILED
MAY 15 2013
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Affirmed in part; reversed in part.

Law Office of Mifflin & Associates and Ken Mifflin for Plaintiffs and Appellants.

Robert L. Jones, in pro. per., for Plaintiff and Appellant.

No response for Defendant and Respondent Maurice Kemp.

Turner Law Firm and Keith J. Turner for Defendant and Respondent Eric Yeldell.

A homeowners association and numerous homeowners (plaintiffs) sued to halt defendant homeowners' remodeling construction for alleged violations of the subdivision's declaration of restrictions (declaration or DOR's). During a court trial, the main issue was whether the declaration, which had a January 1, 2000 expiration date, was properly renewed by a majority of homeowners in 1999. The answer turned on whether the subdivision is a "common interest development" under the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.) (Act), such that the majority's renewal of the declaration was permitted by Civil Code section 1357.[1] The trial court found that because the subdivision is not a common interest development, section 1357 did not apply and the majority's renewal of the declaration was ineffectual. Because the declaration had expired, the court entered judgment for defendant homeowners, who recovered costs and attorney fees under section 1354.

In this appeal by plaintiffs,[2] we affirm the judgment for defendants, but reverse the award of attorney fees under section 1354. (*Mount Olympus Property Owners Assn. v.*

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1 All further undesignated statutory references are to the Civil Code.

2 Although the notice of appeal was filed on behalf of all plaintiffs—the homeowners association and owners of 52 lots listed in the judgment—the number of appellants has since declined. Appellants presently consist of the homeowners association and owners of 21 lots.

The appellants are: (1) Tract 19051 Homeowners Association, also known as Cloverdale, Terraza, Stillwater, Weatherford Homeowners Association; (2) Robert L. Jones and Kaidi Jones; (3) David Winston and Brenda L. Winston; (4) Steven Burr and LaDonna Burr; (5) Sergio Bent; (6) Judy Pace; (7) Quinton James and Marcia James; (8) Carl Potts and Elaine Potts; (9) Ruth Turner; (10) Charles Dotts and Victoria Franklin Dotts; (11) Charles Stewart; (12) John W. Harris; (13) David Chaney; (14) Rodney W. Collins; (15) Earnestine Jeffries; (16) Gloria Potts; (17) Ron Smothers and Barbara Bass; (18) Greg McNair and Margaret McNair; (19) Ryan Jones and Lynn Jones; (20) Alfred Brazil; (21) Valerie J. Tutson; and (22) Frank Williams, Jr.

Dismissals of the appeal were filed by the owners of 31 lots: (1) Pat Lang; (2) Kenneth Mifflin and Doris Evans Mifflin; (3) Dexter Nitta and Lynn Nitta; (4) Edward Butts and Diana J. Butts; (5) Cori Grayson and Gene Grayson; (6) Marjorie Garrison; (7) J.S. Lehman; (8) Fred Calloway and Eugenia Calloway; (9) G.B. Kynard; (10) Diane Island; (11) Marcia Brewer; (12) Eugene Collier and Dorothy Collier;

(Fn. continued.)

Shpirt (1997) 59 Cal.App.4th 885, 895-896 (*Mount Olympus*) [because the Act did not apply, the trial court erred in awarding attorney fees under § 1354].)

PREFACE

In order to place the facts in their proper context, we begin by noting that a declaration of restrictions may be extended (1) by the unanimous vote of 100 percent of the property owners; (2) by the vote of a lesser number of owners as provided in the declaration; or (3) in common interest developments only, by compliance with specified statutory procedures. (See 8 Miller & Starr, Cal. Real Estate (3d ed. 2009) § 24:41, p. 24-136.) It is undisputed that the first two methods of extending a declaration are inapplicable to this case. As to the third method, the parties agree that the sole statutory procedure that applies, if at all, is found in section 1357.

Plaintiffs' case hinges on section 1357, which applies only to common interest developments. Section 1357 states that if a declaration for a common interest development does "not provide a means for the property owners to extend the term of the declaration," the term can be extended "if owners having more than 50 percent of the votes in the association choose to do so." (§ 1357, subd. (a).)

In order for section 1357's voting procedure to apply, plaintiffs must prove that their subdivision, Tract 19051, is a common interest development. According to section 1352, "a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided, all of the following are recorded: [¶] (a) A declaration. [¶] (b) A

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(13) Jessie Ford; (14) Iona V. Goodall; (15) Frank E. Phillips; (16) Cora King; (17) Wallace R. Vernoff; (18) Tracy Lewis; (19) Jorge deNeve; (20) Delphine Mablish; (21) Bridgett Benmosche; (22) Michael Thomas; (23) Floy Sims; (24) Reginald Dunn; (25) Kevin Jackson; (26) Jackie Kimbrough; (27) Albert Mayfield and Gailya Mayfield; (28) Herbert Patterson; (29) Dawn Sutherland; (30) Carl Christopher and Bobby Christopher; and (31) Jamie Simpson. We deem all of them dismissed from this appeal.

condominium plan, if any exists. [¶] (c) A final map or parcel map, if Division 2 (commencing with Section 66410) of Title 7 of the Government Code requires the recording of either a final map or parcel map for the common interest development."

The parties agree that of the several types of common interest developments that exist, the planned development is the only type that arguably applies to Tract 19051. (§ 1351, subd. (c).) A planned development is "a development (other than a community apartment project, a condominium project, or a stock cooperative) having either or both of the following features: [¶] (1) The common area is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area. [¶] (2) A power exists in the association to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment which may become a lien upon the separate interests in accordance with Section 1367 or 1367.1." (§ 1351, subd. (k).) A separate interest in a planned development "means a separately owned lot, parcel, area, or space." (§ 1351, subd. (*l*)(3).)

In order for plaintiffs to demonstrate that Tract 19051 is a planned development, they must establish the existence of a common area. If there is no common area, Tract 19051 is not a common interest development and none of the Act's provisions, including section 1357's statutory voting procedure, applies. Section 1374 provides: "Nothing in this title may be construed to apply to a development wherein there does not exist a common area as defined in subdivision (b) of Section 1351."

As will be discussed, the primary difficulty faced by plaintiffs at trial was that Tract 19051 has no obvious common areas. There are no commonly owned or maintained roads, trails, bike lanes, landscaping, fencing, lighting, pools, tennis courts, clubhouses, or other amenities. In light of this difficulty, plaintiffs sought to establish the existence of a common area based on the statutory definition that "the common area for a planned development specified in paragraph (2) of subdivision (k) may consist of mutual or reciprocal easement rights appurtenant to the separate interests." (§ 1351, subd. (b).)

FACTS AND PROCEDURAL BACKGROUND

Tract 19051 is a subdivision of 94 single family homes in the Baldwin Vista area of Los Angeles. It has a voluntary homeowners association—"Tract 19051 Homeowners Association a.k.a. Cloverdale, Terraza, Stillwater, Weatherford Homeowners Association" (Association)—that is open to homeowners in and around Tract 19051 (according to the respondent's brief, "Stillwater and Weatherford Streets are not in Tract 19051").

When Tract 19051 was subdivided in 1958, the developer recorded the declaration of restrictions that is the subject of this litigation. Although the declaration allowed any homeowner to sue to enforce its restrictions, the declaration expired by its own terms on January 1, 2000, and contained no provision for extending that date.[3]

In 2006, defendant Maurice Kemp acquired lot 22 of Tract 19051, which has a street address of 4085 Cloverdale. Lot 22 contained a single story residence that Kemp essentially demolished in order to build a much larger 7,000 square foot two-story home. After construction began, the attorney for a fellow homeowner informed Kemp that the remodeling project was in violation of the height and setback restrictions contained in the DOR's.

In September 2008, Kemp was sued by the Association and the owners of 32 lots (plaintiffs) for breach of the DOR's, nuisance, injunctive relief, and declaratory relief. Plaintiffs sought a temporary restraining order (TRO) to halt the remodeling project. In opposition, defense attorney Keith Turner argued the DOR's had expired by its own terms on January 1, 2000. Plaintiffs countered that a majority of homeowners had voted

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[3] The DOR's stated in relevant part: "Each and all of the conditions herein contained shall in all respects terminate and end and be of no further effect, either legal or equitable, either on said property or any part thereof, or on the parties thereto, their heirs, successors, devisees, executors, administrators or assigns, on or after January 1, of the year 2000."

in December 1999 to extend the DOR's to December 31, 2010.[4] The trial court (Judge David P. Yaffe) denied the TRO after noting that only 32 of the 94 homeowners were seeking relief as plaintiffs.

After 48 of the 94 homeowners filed an amended complaint, which was later increased to 52 of 94 homeowners, plaintiffs requested a preliminary injunction to halt the remodeling project.[5] The trial court (Judge Yaffe) denied the preliminary injunction on January 6, 2009. The court stated in relevant part: "An amendment to the declaration of restrictions was made on December 29, 1999, that purports to extend the force and effect of the declaration of restrictions to December 31, 2010. The amendment recites that it is agreed to by, 'at least 50 percent, plus one, of the total voting power of the members. . . .' [¶] Plaintiffs contend that the amendment is sufficient to extend the term of the declaration of restrictions under section 1355 of the Civil Code, a portion of the Davis-Stirling Common Interest Development Act. The contention is without merit because Tract 19051 is not a common interest development, and therefore the Davis-Stirling Act has nothing to do with it. Tract 19051 is a tract of individually owned single family residences that border upon streets that are dedicated to the public and are not owned in common by the homeowners or by the homeowners' association." As to the statutory requirements of a common interest development, the trial court found no evidence that the tract had any common areas, that membership in the Association had

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4 According to the amended judgment, "[p]laintiff MARCIA BREWER recorded a document entitled CERTIFICATION OF AMENDMENT TO DECLARATION OF RESTRICTIONS AND AMENDMENT TO DECLARATION OF RESTRICTIONS, which purported to extend the DORs to December 31, 2010."

5 On December 11, 2008, the court added four plaintiffs to the amended complaint, bringing the total number of homeowner plaintiffs to 52.

The amended complaint added Douglas Higgins, who was Kemp's contractor, as a defendant. According to plaintiffs' opening brief, Higgins died before trial. Although plaintiffs continue to refer to Higgins as a defendant, there is no indication that either the executor of his estate or his personal representative has appeared in this litigation.

been conveyed to the homeowners, or that the Association was authorized to collect assessments and impose liens.

Before the case was tried, Kemp defaulted on his construction loan and the lender recorded a notice of default on February 3, 2009. In light of the impending foreclosure sale, Kemp ceased defending this action and his attorney was allowed to withdraw from the case on August 12, 2009.

The court (Judge Richard L. Fruin) conducted a bench trial on January 25 and 28, 2010. Kemp, who was on the verge of losing his property, did not appear at trial. Plaintiffs, who appeared through their attorneys Marcia J. Brewer and Ken Mifflin (who are plaintiffs but not appellants in this action), provided documentary evidence and testimony in support of their claim that Kemp's home was being enlarged in violation of the height and setback restrictions in the declaration, which a majority of homeowners had extended to December 31, 2010.

At the conclusion of trial, the court entered an interlocutory judgment for plaintiffs, who were granted $112,000 in attorney fees and costs under section 1354.[6] Because the DOR's were scheduled to expire on December 31, 2010, the trial court

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[6] Subdivision (a) of section 1354 provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both."

Subdivision (c) of section 1354 provides: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

The term "declaration" as used in section 1354 is defined as "the document, however denominated, which contains the information required by Section 1353." (§ 1351, subd. (h).) Section 1353, subdivision (a)(1) provides: "A declaration, recorded on or after January 1, 1986, shall contain a legal description of the common interest development, and a statement that the common interest development is a community apartment project, condominium project, planned development, stock cooperative, or combination thereof. The declaration shall additionally set forth the name of the association and the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes. . . ."

continued the matter in order for plaintiffs to show that the DOR's would be extended beyond that date.

In March 2010, defendant Eric Yeldell purchased Kemp's home at a trustee's foreclosure sale. In August 2010, a majority of homeowners voted to extend the DOR's to December 31, 2030.

In October 2010, Yeldell moved to intervene as a defendant and vacate the interlocutory judgment on the ground that the DOR's had expired in January 2000 and were therefore unenforceable. The trial court granted Yeldell's motion to intervene on December 3, 2010. It issued an order to show cause and requested further briefing on whether "to: (1) vacate the Interlocutory Judgment; (2) whether to enter judgment against plaintiffs on the evidence already presented; and (3) whether to hold a further evidentiary hearing to receive new evidence that may be offered in support of Plaintiffs' claims."

At a February 10, 2011 evidentiary hearing, Yeldell was represented by Kemp's former attorney Turner. Yeldell argued that because the development did not qualify as a common interest development under the Act, section 1357 did not apply and the vote by a majority of homeowners to extend the DOR's to December 31, 2010, was ineffectual. The parties litigated the following issues:

The 1946 Grant Deed. Plaintiffs argued that a newly discovered 1946 grant deed had created a common area by providing an "express permanent easement over Parcel No. 1 of the development that is appurtenant to the separate interests of the owners therein for use as a means of ingress and egress to and from the neighboring park."[7]

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[7] In his declaration, plaintiffs' attorney Ken Mifflin explained that "[s]everal weeks before the evidentiary hearing, I sent the subdivision map to Fidelity Title Company to see if they could assist in locating any easements in favor of Tract 19051 . . . . They were unable to find anything. [¶] . . . On or about January 5, 2011, I went to Norwalk to search the grantor/grantee index files for conveyances from the Baldwin Hills Company to the City of Los Angeles that reserved any easement rights to the grantor. I was unable to find anything. [¶] . . . On or about January 20, 2011[,] I went back to Norwalk to the County Records office to see if I could find the deed that referenced the subdivision map

(Fn. continued.)

However, Yeldell's evidence showed that Parcel No. 1 is not in Tract 19051, but in the state park that abuts Tract 19051. Plaintiffs did not refute Yeldell's evidence. Accordingly, plaintiffs conceded that they were attempting to show the existence of a common area based on an easement that runs from the edge of Tract 19051 through the Kenneth Hahn State Park and does not burden any property within the tract.

The Subdivision Map. Plaintiffs argued that the subdivision map for Tract 19051 had created a common area by depicting public streets and utility easements, which they claimed were mutual or reciprocal easements that are appurtenant to the separate interests and necessary to the use and enjoyment of each lot. Yeldell disagreed. Yeldell argued that public streets and utility easements do not create mutual or reciprocal easements that are appurtenant to the separate interests of the property owners.

The Association's Powers to Assess and Levy. Under section 1351, subdivision (k)(2), one indication of a planned development is the Association's power "to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment which may become a lien upon the separate interests in accordance with Section 1367 or 1367.1." In support of their contention that Tract 19051 is a planned development, plaintiffs pointed out that the Association was authorized by its bylaws to assess and collect dues and levy special assessments to meet any unanticipated needs. Yeldell argued that this was insufficient to show that Tract 19051 is a planned development. Yeldell asserted that in a planned development, any conveyance of the owner's entire estate also includes the owner's membership interest in the association. (§§ 1352, 1358, subd. (c).) In this case, however, there was no evidence that membership in the Association, which was purely voluntary, was transferred with the sale of any of the lots in the tract.

At the conclusion of trial, the court found that plaintiffs had failed to show that Tract 19051 is a planned development. Accordingly, the court held that the majority

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that I observed by use of a magnifying instrument. With the assistance of an employee, I located that attached deed (Exhibit C)."

homeowners' attempts to extend the DOR's under section 1357 were ineffectual. Because the DOR's had expired and were unenforceable, the trial court vacated the interlocutory judgment for plaintiffs and entered judgment for defendants. The trial court awarded defendants costs under Code of Civil Procedure sections 1032 and 1033.5, plus attorney fees under section 1354. We consolidated plaintiffs' separate appeals from the judgment (B235015) and attorney fee award (B239588).

DISCUSSION

Plaintiffs contend: (1) "Tract 19051 is a common interest development under the Davis-Sterling Act because the owners in the development possess appurtenant easement rights to a portion of the development and an association with authority to enforce the DORS"; and (2) "Even if the court affirms the judgment that the Davis-Sterling Act does not apply, the award of attorneys' fees should be reversed because there is no basis for recovery of attorney's fees."

I. Tract 19051 Is Not a Common Interest Development

Plaintiffs contend the undisputed evidence shows that, as a matter of law, Tract 19051 is a planned development. We conclude the contention lacks merit.

In *Mount Olympus*, *supra*, 59 Cal.App.4th 885, we stated that in order for "a development to fall within the governance of the Act, the statutory requirements are clear: (1) there must exist a common area owned either by the association or 'by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area' (Civ. Code, §§ 1351, subd. (k)(1), 1374); (2) there must have been recorded '[a] declaration,' '[a] condominium plan, if any exists,' and '[a] final map or parcel map' (*id.*, § 1352); and (3) there must have been conveyed 'a separate interest coupled with an interest in the common area or membership in the association' (*ibid.*)." (*Id.* at pp. 895-896.)

As previously mentioned, plaintiffs sought to establish the existence of a common area based on the statutory definition that "the common area for a planned development specified in paragraph (2) of subdivision (k) may consist of mutual or reciprocal easement rights appurtenant to the separate interests." (§ 1351, subd. (b).) In order to show the existence of "mutual or reciprocal easement rights appurtenant to the separate interests" (*ibid.*), plaintiffs relied on (1) a roadway easement outside Tract 19051, and (2) public roads and utility easements within Tract 19051.

We conclude that the roadway easement outside Tract 19051 fails to establish the existence of a common area. As stated in *Comm. to Save the Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, "there must be, at a minimum, appurtenant easement rights to a portion of the development." (*Id.* at p. 1271.) Because the roadway easement lies outside the development, it does not create any "appurtenant easement rights to a portion of the development." (*Ibid.*)

Plaintiffs have cited no authority for the proposition that public streets create "mutual or reciprocal easement rights appurtenant to the separate interests." (§ 1351, subd. (b).) The fact that property owners have a right of ingress and egress over the city streets abutting their lots does not transform the municipality's roads into a common area for purposes of the Act. There was no evidence that any of the plaintiffs treated the public streets as a common area that was to be maintained by the Association. Although there are no cases that have decided this question, we agree with the view expressed by one commentator: "The often subtle but important distinction between a common interest development and a standard subdivision involves the manner in which common roads, recreational lots and other facilities are held by the owners of interests in a subdivision. If a subdivision includes only public streets and no common areas, it is a standard subdivision." (9 Miller & Starr, Cal. Real Estate (3d ed. 2007) § 25C:8, p. 25C-30.)

We similarly conclude that the homeowners in Tract 19051 have no appurtenant easement rights to the utility easements, which are for the benefit of the utility. (See, e.g., *Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 544 [easement granted the

utility the exclusive right to occupy the property].) Even though the utilities provide water, gas, and electrical services that are necessary for the use and enjoyment of the homes in the subdivision, the homeowners do not have appurtenant easement rights to the utility easements.

Given the lack of any evidence of a common area, the Association's authority to assess and collect dues and levy special assessments to meet any unanticipated needs is insufficient to show that Tract 19051 is a planned development. A similar situation existed in *Mount Olympus, supra,* 59 Cal.App.4th at page 895, where, as here, there was no evidence that membership in the homeowners association was transferred with the sale of any of the lots in the tract. (§§ 1352, 1358, subd. (c).) In that case, the homeowners association (MOPOA) owned and maintained two small plots of land on which a sign was displayed. In rejecting MOPOA's argument that the two small plots constituted a common area within the meaning of the Act, we stated that the association "did not establish that a 'separate interest coupled with an interest in the common area or membership in the association' had been conveyed. Indeed, it is clear from testimony at trial that there was no mandatory membership in MOPOA, and that it was a purely voluntary association of homeowners with no power to charge or collect assessments." (*Ibid.*) The same reasoning is equally applicable to this case.[8]

II. Defendants Are Not Entitled to Attorney Fees Under Section 1354

Plaintiffs contend that if we determine that Tract 19051 is not a common interest development, the award of attorney fees under section 1354 must be reversed because the Act does not apply. The contention is well taken. In *Mount Olympus, supra,* 59 Cal.App.4th at pages 895-896, we found that because the Act did not apply, the trial court had erred in awarding attorney fees under section 1354. (See 12 Miller & Starr, Cal. Real Estate (3d ed. 2008) § 34:66, p. 34-229 ["If the property described in the restrictions is

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[8] Yeldell filed a motion seeking leave to produce additional evidence. The request is denied.

not a 'common interest development,' this provision for the award of fees does not apply."].) Because the same rationale applies to this case, the attorney fee award under section 1354 must be reversed.

DISPOSITION

The order awarding plaintiffs' attorney fees under section 1354 is reversed. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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ORIGINAL

B235015; B239588

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

Tract 19051 Homeowners Association et al.,
Plaintiffs and Appellants,
v.
Maurice Kemp et al.,
Defendants and Respondents

On Appeal from a Judgment of the Superior Court of California
Los Angeles County Superior Court No. BC398978
The Honorable Richard L. Fruin

RESPONDENT ERIC YELDELL'S PETITION FOR REHEARING; DECLARATIONS OF ERIC YELDELL, MICHAEL THOMAS, JORGE DENEVE, HERB ANDREWS, AND DIANNE ISLAND

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 4 June 5, 2013

Keith J. Turner
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Santa Monica, CA 90401

TRACT 19051 HOMEOWNERS ASSOCIATION et al.,
Plaintiffs and Appellants,
v.
MAURICE KEMP et al.,
Defendants and Respondents.

B235015
Los Angeles County No. BC398978

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Tract 19051, et al., v Maurice Kemp, et al.

Court of Appeal Case Nos. B235015; B239588

I am over the age of 18 and not a party to the within action; I am employed in the County of Los Angeles at 429 Santa Monica Blvd., Suite 500, Santa Monica, CA 90401. On the date below I served the following document:

PETITION FOR REVIEW

The document was served by the following means on all parties listed in the attached service list:

[√] **(BY U.S. MAIL)** I am "readily familiar" with my office's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 24, 2013 at Santa Monica, California.

/s/Max Master
Max Master

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