

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST APPELLATE DISTRICT

DIVISION THREE

PORTSIDE MASTER OWNERS'
ASSOCIATION,

Plaintiff and Appellant,

v.

PORTSIDE INVESTMENTS LLC et al.,

Defendants and Respondents.

A128965, A129629

(San Francisco County
Super. Ct. No. CGC-09-494833)

This case involves a dispute over title to the common areas designated as Parcel 1 in the Portside common interest development established in 1994. In these consolidated appeals, plaintiff Portside Master Owners' Association¹ (the Association) appeals the judgment of dismissal entered in favor of defendant Portside Investments LLC (Portside) after the trial court sustained a demurrer to the complaint without leave to amend on statute of limitation grounds. The Association also appeals the trial court's attorney fee award in favor of Portside. For reasons explained below, we conclude the Association's complaint can be amended to assert a claim for legal title to Parcel 1 that is not necessarily barred by the statute of limitations. Accordingly, we reverse the judgment of dismissal and attorney fee order entered in favor of Portside, and remand for further proceedings.

¹ Appellant is listed in the records of this court as "Portside Master Homeowners' Association." In fact its proper name is Portside Master Owners' Association.

FACTUAL AND PROCEDURAL BACKGROUND

The operative pleading is the First Amended Complaint (FAC) filed in February 2010. The facts alleged in the FAC and the documents attached thereto are as follows: In February 1994, owner and developer Hum Baby Associates (Hum Baby), a California limited partnership, recorded the “Master Declaration of Conditions, Covenants and Restrictions Establishing Reciprocal Easements and a Plan of Ownership for Portside, San Francisco, California” (CC&Rs), which sets out Hum Baby’s plans for the development of the real property described therein. The CC&Rs provide that the Portside Subdivision shall be improved “with a mixed-use retail/commercial/residential project” consisting of four (4) separate airspace parcels:² Parcel 1 (air, earth and certain other areas to be used in common by Parcels 2, 3 and 4); Parcel 2 (commercial parking uses); Parcel 3 (retail/commercial uses); and Parcel 4 (a condominium project).

The CC&Rs establish the Portside Master Owners’ Association (referred throughout the CC&Rs as “Association” or “Master Association”), “a California nonprofit mutual benefit corporation, the Members of which shall be Owners of Parcels, or portions thereof, in the Property.”³ Article III of the CC&Rs declares the Association shall manage the “Property and the improvements thereon,” including the building roofs, fascia, supports, sidewalks and building utility systems. Article III further provides the Association shall be comprised of three Memberships, namely the Parking Membership (Owners of Parcel 2), the Commercial/Retail Membership (Owners of Parcel 3) and the Residential Membership (Owners of Parcel 4), and shall be governed by five directors, three representing Parcel 4, one representing Parcel 3, and one representing parcel 2. The CC&Rs empower the Association to levy assessments on the “Owner of any Parcel or portion thereof” for purposes of “repair, operation and maintenance of the Property.”

² The four parcels are delineated on a parcel map recorded in January 1994. The parcel map was not filed in trial court and is not part of the record on appeal.

³ “ ‘Property’ Shall mean and refer to the entire real property described herein, including all structures and improvements erected thereon.” (CC&Rs, § 1.25.)

Article II of the CC&Rs describes the “Division of Property and Creation of Property Rights,” the language of which provides the basis of the dispute between the parties. Article II, section 2.2 declares, “The Property is hereby divided into the following separate freehold estates: [¶] (a) Parcel 1. Parcel 1 shall consist of the air and earth parcels delineating the upper and lower elevations of the Property and certain other areas to be used in common by Parcels 2, 3 and 4. *Prior to conveyance of a Parcel or any Unit in a Parcel to an Owner, Parcel 1 shall be conveyed by the Declarant [Hum Baby] to the Association.* Parcel 1 shall have appurtenant easements for ingress and egress and support over the other Parcels.”

In November 1999, Hum Baby sold part of the Portside Subdivision to Main and Harrison LLC by grant deed (1999 grant deed). Attached to and referenced in the 1999 grant deed is a legal description of the property to be conveyed. The attachment describes two parcels, one of which includes Parcel 1 (common areas) and Parcel 2 (commercial garage park) of the Portside Subdivision. In December 2002, Main and Harrison LLC sold the real property purchased from Hum Baby to defendant Portside by way of a grant deed (2002 grant deed). Attached to and referenced in the 2002 grant deed is a legal description of the property to be conveyed. The attachment describes the same two parcels referenced in the 1999 deed.

In the FAC, the Association claims fee simple title to Parcel 1. The Association alleges it “has occupied, supervised, managed, maintained, repaired and controlled” Parcel 1 since 1994. Further, the Association alleges Hum Baby was obligated under the terms of the CC&Rs to transfer Parcel 1 to the Association, that Hum Baby breached the CC&Rs by transferring title to Parcel 1 to Main and Harrison LLC, and that the Association did not learn of the breach until less than two years ago. In the FAC, the Association also alleges it requested defendant Portside to convey Parcel 1 to the

Association in compliance with the CC&Rs and Portside refused to do so, in violation of sections 2.2 and 8.12 of the CC&Rs.⁴

The FAC asserts three causes of action, namely, breach of the CC&Rs, specific performance and declaratory relief.⁵ The Association sought general, special and consequential damages for breach of the CC&Rs, declaratory relief on the parties respective rights to Parcel 1 and specific performance under the terms of the CC&Rs requiring defendant to convey Parcel 1 to plaintiff.

Portside demurred to the complaint, contending the action was barred (1) by the four-year statute of limitation for breach of written instruments, (2) by laches, and (3) by the five-year statute of limitations for breach of a restrictive covenant. In connection with its demurrer, Portside also requested judicial notice of portions of the FAC and two recorded documents, a memorandum of right of first offer, dated February 19, 1997 (1997 memorandum) and a quitclaim deed, executed on October 7, 1999 (1999 quitclaim deed).⁶ In the 1997 memorandum, Hum Baby grants the Association a right of first offer to purchase the property “described in attached Exhibit A” in connection with the sale of

⁴ Section 8.12 provides that if the Declarant (Hum Baby) “shall convey all of its rights, title and interest in and to the Property to any . . . corporation . . . then in such event, Declarant shall be relieved of the performance of any further duty or obligation hereunder and such. . . [the successor] corporation . . . shall be obligated to perform all such duties and obligations of the Declarant.”

⁵ In the original complaint filed on November 30, 2009, the Association stated two causes of action, namely, breach of the CC&Rs and quiet title. When Portside Investments demurred to the original complaint, the Association did not file an opposition to the demurrer and instead filed the FAC, dropping the quiet title action and adding causes of action for declaratory relief and specific performance.

⁶ On February 22, 2011, Portside filed a motion requesting that we take judicial notice of these documents. Consideration of the motion was deferred to the decision of this appeal on its merits. We now grant the motion. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549 [“The court may take judicial notice of recorded deeds”].)

the parking garage on Parcel 2.⁷ In the 1999 quitclaim deed, the Association quitclaims to Hum Baby all rights in the 1997 memorandum.⁸

Following a hearing on the demurrer, the court issued an order adopting its tentative ruling sustaining the demurrer “without leave to amend because the claims are barred by the 4-year statute of limitation given that the clause allegedly breached required performance at a specific time more than 4 years before filing.” Judgment of dismissal as to Portside was entered on June 2, 2010. The Association filed a notice of appeal from the judgment on June 29, 2010. On August 31, 2010, the trial court entered an order granting Portside’s motion for attorney fees, awarding fees in the amount of \$31,951. On September 2, 2010, the Association filed a notice of appeal from the court’s order on attorney fees.

DISCUSSION

A. *Standard of Review*

This court applies two separate standards of review on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend. (See *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) First, we first review the complaint de novo to determine whether the complaint alleges facts sufficient to state a cause of action under

⁷ Specifically, Hum Baby granted the Association a right first offer “to purchase certain real property described in attached Exhibit A, incorporated in this Memorandum (‘Real Property’) and the improvements constructed on the Real Property, together with all rights of Grantor to adjoining streets, rights of way and easements, all other appurtenant rights, and all personal property belonging to Grantor that is located on the Real Property (collectively ‘Property’) pursuant to the terms and conditions in an Agreement Regarding Portside Parking Garage (‘Agreement’) dated as of February 19, 1997, and executed between Grantor and Grantee.” Exhibit A is not attached to the copy of the 1997 memorandum submitted for our judicial notice.

⁸ Specifically, the Association quitclaimed to Hum Baby all rights in the 1997 memorandum “concerning that certain real property . . . described in attached Exhibit A and incorporated by reference.” Exhibit A is attached to the copy of the 1999 quitclaim deed submitted for our judicial notice. Exhibit A describes two parcels: Parcel I is “Lot 22, Parcel 2” as shown on the subdivision map, and Parcel II is “Non-exclusive easements . . . as described in the [CC&Rs].”

any legal theory or to determine whether the trial court erroneously sustained the demurrer as a matter of law. (*Ibid.*) Under our de novo review, we treat the demurrer as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law, and we also consider matters subject to judicial notice. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Moreover, because a demurrer raises only questions of law, “ ‘ ‘an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds. [Citations.]’ ’ (Citation.)” (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1022.)

Second, we review under an abuse of discretion standard whether the trial court erred by sustaining the demurrer without leave to amend. (See *Aguilera v. Heiman, supra*, 174 Cal.App.4th at p. 595.) “Under both standards, appellant has the burden of demonstrating that the trial court erred. (Citation.) An abuse of discretion is established when ‘there is a reasonable possibility the plaintiff could cure the defect with an amendment.’ (Citation.)” (*Ibid.*)

B. Analysis

The trial court sustained Portside’s demurrer to the FAC without leave to amend on the basis that the Association’s claims are barred by the 4-year statute of limitation (SOL) because the covenant at issue “required performance at a specific time more than 4 years before filing.” However, the Association contends the trial court should have granted it leave to amend the FAC to state a quiet title action because the applicable SOL underlying any quiet title action is tolled, under *Muktarian v. Barmby*, for a plaintiff in possession of the property. (*Muktarian v. Barmby* (1965) 63 Cal.2d 558, 560 (*Muktarian*)). We agree.

In *Muktarian*, father (plaintiff) married for a second time at an advanced age. His son (defendant), seeking to prevent the second wife from obtaining father’s real property through the marriage, urged his father to deed the real property to him. In December 1947, father executed a grant deed transferring the property to son subject to a life estate in father. The day after executing the deed, however, father discovered the deed did not

reflect “his intentions as grantor in the granting clause . . . of said deed.” (*Muktarian, supra*, 63 Cal.2d at p. 559.) At all times after executing the deed, father remained in possession of the property and paid the taxes on it. (*Id.* at p. 560.) In 1960, father sold three acres of the property and son signed the deed. Later that year, father proposed selling 52 acres of the property and son refused to discuss the proposal. (*Ibid.*) Father then brought an action against his son to quiet title to the property. The trial court concluded the action was barred under the three-year statute of limitation applicable to actions for relief on the ground of fraud or mistake (Code of Civ. Proc., § 388, [currently subd. (d)]), and entered judgment for the son. Father appealed to the California Supreme Court, contending the trial court erred in holding his action was barred by the three-year statute of limitations in section 388. (*Id.* at p. 559.)

The court noted that because “there is no statute of limitations governing quiet title actions as such, it is ordinarily necessary to refer to the underlying theory of relief to determine which statute applies.” (*Muktarian, supra*, 63 Cal.2d at p. 560.) However, the court concluded it did not have to determine “which statute would otherwise apply, *for no statute of limitations runs against a plaintiff seeking to quiet title while he is in possession of the property.*” (*Id.*, citing cases, italics added.)

The rule announced in *Muktarian* was applied in favor of an owners’ association in a context similar to the one at bar in *Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223 (*Crestmar*). In *Crestmar*, as in this case, a developer failed to deed real property to an owners’ association as required under the governing CC&Rs. The developer, Hartford Equity and Management Corporation (Hartford), converted a building into condominiums in 1977. After the conversion, Crestmar Owners Association (Crestmar) assumed management of the property’s common areas. Under the CC&Rs, Hartford was obligated to transfer a parking space in the building’s garage to anyone who bought a condominium. The CC&Rs further provided that if any condominiums remained unsold three years after the first unit was purchased, Hartford had to convey all remaining unassigned parking spaces to Crestmar. (*Crestmar, supra*, 157 Cal.App.4th at p. 1225.)

The first condominium unit was purchased in the late 1970s, meaning Hartford should have transferred any remaining parking spaces to Crestmar sometime in the early 1980s. In 2004, Hartford conveyed to its president, William Stapakis, two parking spaces it had not transferred to Crestmar, and Stapakis demanded from Crestmar back rent for its use of the parking spaces since the early 1980s. In response, Crestmar filed a complaint in January 2005, seeking (1) cancellation of Hartford's deeds to Stapakis, (2) enforcement of the equitable servitudes in the CC&Rs obligating Hartford to convey the parking spaces to Crestmar, and (3) quiet title to the two parking spaces in Crestmar. (*Crestmar, supra*, 157 Cal.App.4th at pp. 1225-1226.)

Stapakis moved for summary judgment, contending Crestmar's cause of action to enforce the CC&Rs accrued in the early 1980s, when Hartford failed to convey the two parking spaces to Crestmar as required under the CC&Rs. The trial court denied summary judgment, reasoning that Crestmar's cause of action to enforce a covenant running with the land accrued when Crestmar demanded Hartford's performance with the filing of its complaint, therefore the complaint was timely. (*Crestmar, supra*, 157 Cal.App.4th at p. 1226.) Subsequently, the trial court conducted a bench trial and entered judgment quieting title to the two parking spaces in Crestmar. Stapakis and Hartford appealed, contending the complaint was untimely. (*Id.* at 1227.) The appellate court rejected the trial court's finding that Crestmar's cause of action on the CC&Rs accrued when Crestmar demanded performance. (*Crestmar, supra*, 157 Cal.App.4th at pp. 1227-1228.) The appellate court nevertheless concluded the complaint was timely "because the statute of limitations for an action to quiet title does not begin to run until someone presses an adverse claim against the person holding the property." (*Id.* at p. 1228, citing *Muktarian, supra*, 63 Cal.2d 558.)

Just as in *Crestmar*, the *Muktarian* rule applies here. The FAC alleges that the Association has "occupied, supervised, managed, maintained, repaired and controlled [Parcel 1] since 1994." These facts, if proven, may establish that the Association has been the holder of the property, within the meaning of *Muktarian, supra*, since 1994. Thus, under *Muktarian* and *Crestmar, supra*, a quiet title action alleged by the

Association would necessarily be tolled until the Association learned that Portside asserted title to Parcel 1. Because there is a “reasonable possibility” the Association could cure any limitations defect by amending the complaint to state a cause of action for quiet title, leave to amend should have been granted. (See *Aguilera v. Heiman, supra*, 174 Cal.App.4th at p. 595.)

Portside, however, unsuccessfully attempts to distinguish the *Crestmar* court’s application of the *Muktarian* rule on several grounds. For example, Portside asserts *Crestmar* is factually distinguishable because in *Crestmar* defendant may not have been a bona fide purchaser for value and may have acquired the subject property by fraudulent conveyance. However, the nature of the conveyance in *Crestmar* was not central to the appellate court’s determination that the statute of limitations on the Association’s quiet title action was tolled while the Association was in possession of the subject property. (See *Crestmar, supra*, 157 Cal.App.4th at p. 1228.)⁹

Portside also attacks *Crestmar*’s applicability on the grounds that “exclusive and undisputed possession only tolls actions in voidable instrument cases” where there was some “mistake” in the transfer of a subject property, for example, as in *Smith v. Matthews* (1889) 81 Cal. 120.¹⁰ The *Crestmar* court, according to Portside, failed to identify any instrument under which the homeowner’s association mistakenly conveyed property, and

⁹ Also, contrary to Portside’s assertion, the *Crestmar* court did not link its determination on the running of the statute of limitations to an earlier default taken by the Association against defendant Hartford because its corporate charter had been suspended for failure to pay state taxes. (See *Crestmar, supra*, 157 Cal.App.4th at p. 1226.)

¹⁰ There, “plaintiffs’ grantor attempted to convey certain lands to the defendant’s grantor; [] by a mistake in locating one of the monuments, too much land was included in the deed; [] the land thus improperly included in the deed was never taken possession of by the defendant, or any of his grantors, but has for many years, and ever since the conveyance, remained in the actual possession of the plaintiffs and their grantors.” (*Smith v. Matthews, supra*, 81 Cal. at p. 121.) On those facts, California Supreme Court held that “[t]he right of the plaintiffs to have their title to the land quieted, as against a claim asserted by the defendant under this deed, was not barred, and could not be, while the plaintiffs and their grantors remained in the actual possession of the land, claiming to be the owners thereof, and the actual owners, as against the defendant, of all interest therein except the mere naked title.” (*Ibid.*)

conflated “a mistaken failure to discover a breach of contract (for which there is generally no remedy) with a mistaken conveyance (which may be rescinded, reformed, or cancelled).”

We reject Portside’s spin on the *Crestmar* case because *Crestmar*, in arriving at its determination that the SOL on the owners’ association’s quiet title action was tolled (see *Crestmar, supra*, 157 Cal.App.4th at p. 1228), relied on *Muktarian*’s holding that the statute of limitations on father’s quiet title action did not begin to run while father was in possession of property which he had deeded to his son. (*Muktarian, supra*, 63 Cal.2d at p. 560.) Here, just as in *Muktarian*, the Association could amend its pleading and seek to quiet title to property it has “occupied, supervised, managed, maintained, repaired and controlled since 1994” on the basis of the covenant in the CC&Rs requiring Hum Baby and its successors to transfer title to Parcel 1 to the Association. Under *Muktarian* and *Crestmar, supra*, the Associations’ quiet title action would not necessarily be time-barred.¹¹

Additionally, Portside proffers several other bases in support of its argument that the Association should not be permitted to amend the FAC to allege a quiet title action. First, Portside argues that the Association “previously abandoned [the quiet title action] in the face of a prior demurrer,” citing *Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721 (*Dey*). In *Dey*, the appellate court affirmed the trial court’s denial of leave to amend to add a claim alleging a violation of a liquidated damages provision, where such amendment was “not apparent or consistent” with plaintiff’s theory of the

¹¹ However, as noted in *Muktarian, supra*, “the party in possession runs the risk that the doctrine of laches will bar his action to quiet title if his delay in bringing the action has prejudiced the claimant.” (*Muktarian, supra*, 63 Cal.2d at p. 561.) “ ‘The defense of laches requires unreasonable delay plus . . . prejudice to the defendant resulting from the delay.’ (Citation.)” (*California School Employees Assn. Tustin Chapter No. 450 v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510, 521.) Below, Portside raised laches in its demurrer to the FAC based on *Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 295, which we have deemed inapposite to the case at bar. For a demurrer to be sustained on grounds of laches, both unreasonable delay and injury must be disclosed in the complaint, otherwise “any prejudice should be raised in the answer and the issue determined at trial.” (*Sangiolo v. Sangiolo* (1978) 87 Cal.App.3d 511, 514.)

case, the trial court had sustained a demurrer to the original complaint on the ground it did not allege a specific contract term regarding liquidated damages, and the plaintiff's request to amend was not made "in good faith" because the amendment requested "directly contradicts his theory at the trial court." (*Dey, supra*, 170 Cal.App.4th at p. 731, 732.) Here by contrast, a quiet title action is consistent with the Association's action to enforce the covenant at issue, there is no indication the Association has acted in bad faith, and the trial court has not previously sustained a demurrer against the Association. Because none of these concerns in *Dey* are apparent here, *Dey* does not support denial of leave to amend in this case.

Second, Portside contends the Association cannot state a quiet title action because any such action is necessarily based the Association's claim that Portside is in breach of the CC&Rs, and the trial court sustained a demurrer to that claim on statute of limitation grounds. On this point, Portside confuses the issue of the applicable SOL with the issue of accrual of the SOL. Even if the trial court correctly determined the SOL is 4-years, the SOL does not accrue against a plaintiff-in-possession on a quiet title action until there is an adverse claim on the property. (See *Crestmar, supra*, 157 Cal.App.4th at p. 1228.)

Third, Portside argues the Association cannot, as a matter of law, state a quiet title action under the rule that "the owner of an equitable interest cannot maintain an action to quiet title against the owner of the legal title." (*Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 294-295 (*Stafford*) [noting plaintiff "may at one time have acquired some equitable rights" in subject property "by virtue of his deal" with prior owner under which plaintiff made a down payment on a lot, prior owner promised to deliver a deed conveying lot to plaintiff when balance was paid, and prior owner reneged on deal and did not return down payment].) The plaintiff in *Stafford*, however, did not press a quiet title action while in possession of the property: Indeed, he never had possession of the property at any time. By contrast, the Association claims it is entitled to fee simple title to Parcel 1 (the common areas) by virtue of the covenant at issue in the CC&Rs and asserts that it has occupied, supervised, managed, maintained, repaired and controlled

Parcel 1 since 1994. Thus, the Association has alleged a sufficient ownership interest under *Stafford* to maintain a quiet title action.¹²

In sum, having reviewed de novo the facts alleged in the complaint, and having fully considered the contentions of the parties thereon, we conclude “there is a reasonable probability” any statute of limitations defect in the FAC could be cured by amendment to add a quiet title action, as discussed above.¹³ (See *Aguilera v. Heiman, supra*, 174 Cal.App.4th at p. 595.)

Furthermore, because the trial court awarded attorney fees to Portside as the prevailing party based on an attorney fee provision in the CC&Rs, our reversal of the judgment of dismissal requires the reversal of the attorney fee award as well.

(*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 673.)

¹² Relying also on the *Stafford* court’s statement that “if the specifically pleaded facts affirmatively reveal the absence of an essential element in a plaintiff’s claim of title, no cause of action is stated” (199 Cal.App.2d at p. 292), Portside asserts the Association’s quiet title claim lacks an essential element because the underlying claim for breach of the CC&Rs was deemed untimely. However, as we have already determined, the SOL governing the underlying claim to title upon which the Association’s quiet title action is based was tolled while the Association was in possession of the property under the rule announced in *Muktarian, supra*, 63 Cal.2d 558.

¹³ In light of our remand, we see no need to opine on the Association’s claim it could also amend the FAC to allege a prescriptive easement. Such a claim can be more adequately addressed by the trial court in the first instance if pleaded on remand.

DISPOSITION

The judgment of dismissal is reversed. The trial court's order awarding attorney fees in favor of Portside is also reversed. The matter is remanded for further proceedings. The Association shall recover its costs on appeal.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.