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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAVID LINGLE,

Plaintiff and Appellant,

v.

QUAIL RIDGE RESIDENTIAL
ASSOCIATION,

Defendant and Respondent.

A129505

(Contra Costa County
Super. Ct. No. C09-00034)

Pro per appellant David Lingle sued respondent Quail Ridge Residential Association (hereinafter sometimes referred to as “the Association”) in connection with its conduct of an election for its board of directors in January 2008. Following a court trial, the trial court found in favor of respondent on all of appellant’s claims. Because appellant identifies no reversible error, we affirm.

I.

FACTUAL AND PROCEDURAL

BACKGROUND

The Association is a nonprofit homeowners association in Walnut Creek that collects dues from its members, the owners of the 113 homes in the development. The Association announced two openings for its board of directors in its October 2007 and November 2007 newsletters, stated that an election would be held in January 2008, and asked homeowners to consider becoming candidates. The November newsletter included a candidacy form, which was to be returned by November 27. On December 20, 2007, the Association’s management company mailed to homeowners an agenda for its

January 24, 2008 annual meeting, candidacy statements from the members who had nominated themselves, and a secret ballot that could be mailed to the inspector of elections before the annual meeting (members did not need to be present in order for their votes to be counted).

Appellant testified that he decided to run for the board of directors in January 2008 because he was dissatisfied with the performance standards of the Association's management company. It was his understanding that nominations for board positions would "happen from the floor," at the Association's annual meeting. At the time he decided he wanted to run, he had not been given a copy of the governing election rules, so he did not know that he had to forward his name in advance of written ballots being mailed to Association members, in order to be considered. He exchanged e-mails in January with various board members, Association members, and the property manager regarding the election procedures, about whether he could run as a write-in candidate, and whether people who had already voted by mail could revoke their votes. He ultimately was considered a write-in candidate, but was not elected to the board. The two people who were elected each received 35 votes, whereas appellant received nine.

Appellant filed a complaint on January 6, 2009, alleging that from December 2007 through January 30, 2008, respondent's board of directors and its inspector of elections violated respondent's bylaws and election rules, and that the board improperly conducted the January 2008 election. He alleged that the board refused to allow appellant to nominate himself for the board. Appellant sought injunctive relief to compel respondent to comply with its governing documents, and to hold a new election. He also sought declaratory relief, requesting a judicial determination and declaration of his and respondent's rights and duties under respondent's governing documents, the California Corporations Code, and the state constitution. The complaint also alleged a cause of action for breach of fiduciary duty and sought punitive damages. Although the complaint did not specifically refer to the Davis-Stirling Common Interest Development Act (Civ.

Code, § 1350 et seq.)¹ (hereinafter Davis-Stirling Act), it alleged that the board had violated various provisions of the act (e.g., §§ 1363, 1363.03, 1364 et seq.) when it held its election in January 2008.

Before trial, respondent filed a motion in limine to preclude appellant from introducing evidence not provided during discovery, and to preclude appellant from raising new claims at trial that were not specified in appellant's complaint. Respondent argued that appellant's complaint did not seek general damages, and that in a previous small claims court action (which apparently was dismissed for lack of jurisdiction), appellant likewise had not claimed monetary damages. Appellant opposed the motion, claiming that documents recently produced by respondent revealed that respondent had failed to properly adopt election operating rules, as mandated by the Davis-Stirling Act, and that he was entitled to damages. Appellant also argued that the trial court should allow him to amend his complaint to conform to proof at trial, or, in the alternative, to permit him to amend his complaint before trial. Although the written motion is not included in the record on appeal, it is clear that before trial, respondent also filed a motion for judgment on the pleadings, apparently contending (among other things) that appellant lacked standing, because his property was owned by a trust.

At the hearing on respondent's motions, appellant's counsel asked that appellant be allowed to amend his complaint to conform to proof. The trial court allowed an amendment to the pleading, so that appellant could allege that he was a trustee of the Quail Investment Trust (the owner of the property at issue), and that the amendment related back to the date of filing. The trial court also stated that it was permitting appellant to amend the complaint "to allege compensatory damages." The trial court summarized its ruling on respondent's motion for judgment on the pleadings: "The record should reflect that there's been two amendments, one to allege compensatory damages and one to change the terminology that was used in the first Complaint that he was residing in—which may be correct—but also to add that he was an owner, either

¹ All statutory references are to the Civil Code unless otherwise specified.

individually or as a trustee of a trust.” Although the court allowed the changes to appellant’s complaint, it appears that no new written complaint including the changes was prepared for filing.

The parties thereafter discussed respondent’s motion in limine to preclude appellant from making new substantive claims. Appellant argued that he should be permitted to file a first amended complaint, a copy of which was provided to the trial court, and which is included in the record on appeal. The proposed complaint expanded appellant’s claims to include allegations that respondent improperly adopted its election rules. At the hearing, counsel argued that although appellant’s original complaint (which had been prepared by a different law firm) was not well worded, appellant always had claimed that respondent should have properly adopted election rules, and that state law has liberal rules for allowing parties to amend pleadings. The trial court granted respondent’s motion in limine and ruled that “the evidence that I’m going to hear will deal with the Complaint that was filed with the court on January 6th, 2009.”

A court trial was held over four days in January and February 2010. The president of the Association’s board of directors at the time the election was held testified that election operating rules were adopted in February 2006, and he explained the procedures used to nominate candidates for, and to vote in, the January 2008 election. Other board members, as well as the owner of the Association’s management company (who served as the inspector of elections), also explained the applicable election rules, as well as how the January 2008 election was run. During trial, the court barred various questions by appellant’s counsel regarding the Association’s adoption of election rules in 2006, based on the fact that claims related to the adoption of the rules had been barred when the court granted respondent’s motion in limine, discussed above.

Following trial, appellant filed a motion to amend his complaint to conform to proof. According to appellant’s motion, he did not seek to add any new claims, but instead sought “solely to clarify the claim made in the original complaint,” again contending that his original complaint encompassed claims relating to issues broader than the conduct of the January 2008 election. The trial court denied the motion; however, the

court's order does not appear in the record on appeal, so the grounds for denial are unclear.

The trial court issued its statement of decision on April 20, 2010. It found in favor of respondent on all of appellant's causes of action. As for appellant's request for injunctive relief, the court found that appellant had failed to meet his burden of proof to demonstrate irreparable harm, or any harm at all. The court listed the factual allegations underlying appellant's request for an injunction, and explained why there was no support for the allegations, and/or why appellant did not prove that he suffered any legal or practical harm. The court concluded: "Based on all of the above findings of fact and conclusions of law, the Court finds that Plaintiff has failed to meet his burden of proof to demonstrate that the 2008 election was not fair and impartial, and finds specifically that the 2008 election was conducted in a fair and impartial manner with regard to the interests of Plaintiff and all Association members."

Turning to appellant's cause of action for declaratory relief, the trial court found that appellant had failed to meet his burden of proof for each of the allegations underlying the request, had failed to demonstrate that the Association acted improperly, and had failed to show that the 2008 election was not conducted in a fair and impartial manner, and was thus not entitled to the requested declaratory relief. The court likewise rejected appellant's cause of action for breach of fiduciary duty, finding that the Association did meet its fiduciary duty to appellant.

The trial court awarded respondent its reasonable attorney fees and costs as the prevailing party pursuant to section 1354, subdivision (c), and the Association's bylaws, subject to a noticed motion filed by respondent. It also found that appellant's claims were frivolous and unreasonable, pursuant to section 1363.09, subdivision (b). The court thereafter awarded respondent \$130,868.90 in attorney fees and \$9,052.60 in costs.

After trial, appellant filed yet another motion to amend his complaint to conform to proof, along with a proposed second amended complaint. The trial court denied the motion, concluding that it was essentially a motion to reconsider the court's prior denial of appellant's previous posttrial motion to amend. Appellant then filed a motion for

reconsideration of the trial court’s denial of his motion to amend his complaint to conform to proof.² The trial court denied the motion for reconsideration.

Appellant timely appealed from the judgment.³

II. DISCUSSION

A. *Denial of Motion to Amend.*

In somewhat confusing and disjointed appellate briefs, appellant (now proceeding without counsel) argues that the trial court erred in several respects, and asks this court to “examine the questions of law related to the Trial Court’s judgment, along with the related filings on record and information in [his] brief, to determine whether the judgment is proper and what relief should be granted.” To the extent that appellant asks this court to review the record to identify legal error, unassisted by citation to the record or to legal authority, we are of course under no obligation to do so. “ ‘The appellate court is not required to search the record on its own seeking error.’ ” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) “ ‘We are not bound to develop appellant[’s] arguments for [him]. [Citations.] The absence of cogent legal argument or citation to authority allows this court to treat [a] contention as waived.’ [Citations.]” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

We note that the trial court’s statement of decision focused solely on the allegations underlying appellant’s original complaint, namely, that respondent’s conduct of the January 2008 election for its board of directors was improper. On appeal, appellant focuses on broader issues, which were not addressed by the trial court because it granted respondent’s motion in limine to preclude appellant from addressing claims not raised in the original complaint. In particular, he argues that respondent failed to adopt election rules that complied with the Davis-Stirling Act.

² Appellant also filed a motion for a new trial, which the trial court denied.

³ Appellant filed a petition for a writ of supersedeas in this court, seeking a stay of enforcement of the judgment. This court denied the petition by order dated February 16, 2011.

Respondent argues that we may disregard arguments regarding this and other related issues, because appellant did not appeal the trial court's order granting its motion in limine to limit the scope of trial. When the court granted the motion in limine, this amounted to a denial of appellant's request to file a first amended complaint, which included the allegations regarding respondent's adoption of election rules. After trial, appellant filed two additional motions to amend his complaint, which the trial court again denied. Such orders regarding proposed amendments of pleadings are reviewable on appeal from the final judgment. (Code Civ. Proc., § 906; *Freeman v. City of Beverly Hills* (1994) 27 Cal.App.4th 892, 896; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2.247, p. 2-120.)

As for whether the trial court erred in denying appellant's motions to amend his complaint, "[c]ourts must apply a policy of liberality in permitting amendments at any stage of the proceeding, including during trial, when no prejudice to the opposing party is shown. [Citation.] 'However, " 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' " ' [Citations.]" (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.) Cases addressing the amendment of pleadings after trial begins "suggest trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory . . . [,] no prejudice can result." (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.) Leave to amend a complaint is entrusted to the sound discretion of the trial court, and a reviewing court will not disturb the exercise of that discretion absent a clear showing of abuse. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.)

It is somewhat unclear why the trial court here denied appellant's various requests to amend his complaint. Respondent's counsel focused below on the prejudice

respondent would suffer if appellant was permitted to amend his complaint on the eve of trial to include allegations that expanded the scope of the case to focus on events having little to do with the conduct of the 2008 board of directors' election, and occurring years before the election. Appellant first argues, in very general terms, that trial courts shall liberally allow amendments to pleadings. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [where party states only vague, general legal principle without directing court to portion of record supporting contention, court may treat issue as waived].) He later repeats arguments he made in the trial court when requesting that he be allowed to amend his complaint, contending that his original complaint could be construed to include allegations that election rules did not comply with the Civil Code. He does not acknowledge that the trial court impliedly *rejected* those arguments when it denied his motions to amend, he does not specifically connect his argument regarding how to construe his original complaint to a claim that the trial court erred in denying his motion to amend, and he does not focus on principles that courts should consider when deciding whether to permit amendments. (*City of Stanton v. Cox, supra*, 207 Cal.App.3d at p. 1563.) In his reply brief, he belatedly asserts that respondent had "advance knowledge and plenty of time to prepare its defense against claims" other than those related to the January 2008 election, but does not cite any legal authority that would suggest that the trial court erred in denying his requests to amend his complaint. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3 [points raised for first time in reply brief will not be considered, absent good reason shown for failure to present them sooner].) Having failed to provide adequate support for the contention that the trial court erred in denying his requests to amend his complaint, we reject it.

Appellant proceeds to argue why the trial court should have ruled in his favor on whether respondent adopted valid election rules, an issue that the lower court did not address because it had denied appellant's requests to amend his complaint. The only possible way we would reach this issue would be if we concluded that the trial court erred in denying appellant's requests to amend his complaint. Having rejected appellant's

arguments regarding the amendment of his complaint, we do not reach appellant's arguments regarding respondent's adoption of election rules.

B. No Grounds to Reverse Judgment.

We next address appellant's argument that the trial court erred when it denied his claims.⁴

1. Applicable law

As set forth above, appellant sued alleging that respondent violated the Davis-Stirling Act when it held its election for board of directors in January 2008. Section 1363.03, which was added in 2005 and became effective July 1, 2006, governs elections of common interest associations, such as respondent. Section 1363.09, subdivision (a), provides that an association member, such as appellant, may bring a civil action for declaratory or equitable relief for a violation of the election procedures, and that a court may void any results of an election that failed to comply with applicable procedures.

2. No de novo review

Appellant frames his arguments as legal questions, subject to de novo review, claiming that the trial court somehow misinterpreted the applicable statutes. We agree with respondent that appellant raises arguments that amount to a challenge of the evidence supporting the judgment. For example, there is no dispute that respondent had a fiduciary duty to hold a fair election for board of directors, as appellant seems to suggest. Instead, the issue is whether there is sufficient evidentiary support for the trial court's conclusion that respondent met its fiduciary duty. There likewise is no dispute that

⁴ Respondent argues that appellant cannot demonstrate error, because he failed to designate the reporter's transcript. Respondent is correct that, in the absence of a reporter's transcript of the trial testimony, we would presume that the unreported trial testimony would demonstrate the absence of error, if no error was apparent on the face of the existing appellate record. (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) The appellate record in fact *includes* a reporter's transcript of trial, because this court granted, over appellant's objection, *respondent's* request to augment the record with the transcript. However, as we explain below, the fact that appellant did not provide citations to the trial testimony in his opening brief in many cases amounts to a waiver of his arguments.

respondent had an obligation to hold a fair and impartial election; rather, the issue is whether adequate evidence supports the trial court's conclusion that the 2008 election was conducted in a fair and impartial manner.

We review the judgment of the trial court to determine whether it is supported by sufficient evidence, guided by the familiar principle that on appeal, a judgment is presumed to be correct, and we presume that the trial court followed applicable law, and that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Cahill v. San Diego Gas & Electric Co.*, *supra*, 194 Cal.App.4th at p. 956.)

3. Denial of injunction

Appellant sought an injunction ordering respondent to hold elections according to specified procedures, and to void the results of the January 2008 election so that a new election could be held pursuant to the proper procedures. The trial court denied an injunction on the grounds that appellant had failed to meet his burden of proof to demonstrate irreparable harm, or any harm at all, and that he had failed to meet his burden of proof with regard to the allegations underlying his request for an injunction. “ ‘A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action . . . against a defendant and that equitable relief is appropriate.’ [Citation.] The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion. [Citation.] The exercise of discretion must be supported by the evidence and, ‘to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard.’ [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. [Citation.]” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.)

In order to show that insufficient evidence supports a finding of fact, appellant is required to set forth in his brief “ ‘ ‘all material evidence on the point and *not merely*

[his] own evidence. Unless this is done the error is deemed to be waived.” ’ [Citation.]” (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749, original italics, quoting *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; see also *Nwosu v. Uba, supra*, 122 Cal.App.4th at p. 1246 [attack on evidence without fair statement of evidence entitled to no consideration where it is apparent that substantial amount of evidence received on behalf of respondent].)

Appellant argues that evidence presented below supports his claim that the January 2008 election for the Association’s board of directors was improper. Although the appellate record may be adequate to evaluate his arguments (*ante*, fn. 4), appellant apparently did not rely on (or perhaps even have a copy of) the reporter’s transcript of trial when he prepared his opening brief. As a result, the brief contains no citations to any trial testimony, notwithstanding the fact that the trial court relied on such testimony to support each of the findings it made in its statement of decision. Appellant has therefore neglected to support his arguments with a fair summary of all material evidence supporting the judgment. (*Myers v. Trendwest Resorts, Inc., supra*, 178 Cal.App.4th at p. 749; *Nwosu v. Uba, supra*, 122 Cal.App.4th at p. 1246.)

Moreover, although appellant had access to the clerk’s transcript when preparing his brief, he does not address the specific findings made by the trial court as set forth in its statement of decision contained in that transcript, let alone the evidence cited by the court in support of its ruling. For example, he argues that the Association failed to appoint a nominating committee in connection with the January 2008 board of directors’ election. He does not address the trial testimony that the trial court relied on in concluding that this allegation lacked merit, or the trial court’s conclusion that he did not demonstrate that he suffered “any legal or practical harm from the absence of a nominating committee,” in any event. Because appellant fails to set forth all material evidence to support his claim of error, we consider it waived.

As another example where appellant fails to adequately set forth all relevant evidence, he claims that the envelopes delivered to Association members for purposes of voting in the election were proxies, as defined by the Civil Code, and that the Association

violated its bylaws and various code provisions by “denying the existence of proxies,” and thus not allowing members to revoke their proxies and revote after they learned that appellant was a candidate. (§ 1363.03, subd. (d)(1)(A) [proxy is written authorization that gives an association member power to vote on behalf of another member].) He ignores the trial court’s contrary conclusion, that the Association did not, in fact, distribute proxies, as that term is defined in the Civil Code. There was evidence presented that the word “proxy” was printed on the envelopes sent to Association members to be used to mail in ballots. However, the woman who acted as the inspector of elections specifically testified that although mail-in ballots were used for the election, formal proxies were not actually issued, and no proxies were received for the election. Therefore, once she received Association members’ votes, they became irrevocable pursuant to section 1363.03, subdivision (f). Appellant has not identified any legal error in the trial court’s decision.

Appellant likewise argues at length that the Association did not follow proper procedures for its January 2008 election in other ways, when it improperly counted “invalid” votes, and improperly failed to allow members to nominate themselves, again ignoring the trial court’s contrary conclusions, as well as the supporting evidence for those conclusions. He asserts that it “should be undeniable” that the Association violated section 1363.03, subdivision (c)(3)(H), which mandates that the inspector of elections for a common interest development perform “any acts as may be proper to conduct the election with fairness to all members in accordance with” applicable laws and rules. Because appellant relies almost exclusively on his own evidence, and omits a summary of all material evidence on these points, we may deem them to be waived. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *Myers v. Trendwest Resorts, Inc., supra*, 178 Cal.App.4th at p. 749.)

With respect to one of appellant’s claims of error (regarding the use of cumulative voting), appellant arguably provides sufficient legal argument and citations to the record, but nonetheless fails to demonstrate reversible error. Appellant contends that respondent improperly allowed cumulative voting in the January 2008 election, whereby Association

members were informed that they were permitted two votes for the two open seats, and could opt to cast both votes for the same candidate. He acknowledges that the Davis-Stirling Act provides that an association shall allow for cumulative voting using secret ballot procedures authorized by statute, if cumulative voting is provided for in the governing documents. (§ 1363.03, subd. (b).) Respondent's bylaws provide that cumulative voting shall be permitted, but that to cast more than one vote for a particular candidate, an Association member "must give notice at the meeting prior to the vote of such intent to cumulate votes." He apparently contends that the members who chose to vote cumulatively had to be physically present at the meeting where votes were counted in order to provide notice "at the meeting" of the intent to vote cumulatively. The trial court reached a contrary conclusion, ruling that respondent had complied with the Davis-Stirling Act by advising all Association members of their right to vote cumulatively when it mailed the written ballots to be used, and by providing ballots that allowed for cumulative voting.

The provision in respondent's bylaws regarding cumulative voting apparently is based on Corporations Code section 7615, subdivision (b), which provides that no association member shall be entitled to vote cumulatively in an election for directors unless the member has given notice "at the meeting prior to the voting of the member's intention to cumulate votes." Corporations Code section 7513, subdivision (e) also addresses the election of directors, and provides that directors may not be elected by written ballot pursuant to that section where directors are elected by cumulative voting pursuant to section 7615. As one treatise has noted, Corporations Code section 7513, subdivision (e) appears to directly conflict with section 1363.03, subdivision (b), which provides that an association shall allow for cumulative voting using the secret, written ballot procedures set forth in that section. (2 Hanna & Van Atta, Cal. Common Interest Developments: Law and Practice (The Expert Series 2011) ¶ 18.40, pp. 55-56.) According to the authors: "While one might, in order to avoid the appearance of direct conflict between the Corporations Code and the Civil Code, interpret Civil Code § 1363.03(b) to mean that the secret ballot procedures are to be used in a cumulative

voting situation where the election is occurring at a meeting, and a member has given notice at the meeting prior to the voting of the intention to cumulate votes under Corporations Code § 7615(b), *that would be a strained interpretation*. In the opinion of the authors, one of these two code sections must be amended to reconcile the differences.” (Italics added.) The authors further opine that there currently is no good way to amend an association’s bylaws in order to comply with both section 1363.03, subdivision (b) and the Corporations Code provisions regarding cumulative voting. (Hanna, *supra*, § 18:40, pp. 55-56.) For example, where, as here, voting is held by written ballot without the necessity of attending a meeting, “there is obviously no opportunity” to request cumulative voting at a meeting. (*Id.* at p. 56.) According to the treatise authors, “Most knowledgeable community association members seek to amend the bylaws to eliminate cumulative voting,” in order to avoid the conflict between the two code provisions. (*Ibid.*)

By contrast, appellant here apparently does not request that cumulative voting be eliminated from respondent’s bylaws. Instead, he requests an injunction requiring cumulative voting only if notice of intent is given at the meeting prior to the vote. As set forth above, however, any injunction ordering respondent to comply with its bylaws provision to allow cumulative voting only if notice is given at the meeting would directly conflict with the Davis-Stirling Act’s provision allowing cumulative voting even where a member’s presence at a meeting is not required to vote by secret ballot (§ 1363.03, subd. (b)). In the current case, respondent accepted mail-in ballots, and apparently construed any cumulative voting done by ballot received before its annual meeting as sufficient notice that the member intended to vote cumulatively. The trial court found that there was nothing improper about this procedure. Because appellant does not articulate a way in which a court could order cumulative voting under respondent’s

bylaws that would comply with the applicable provisions regarding secret ballots, we cannot say that the trial court abused its discretion in declining to order injunctive relief.⁵

In sum, appellant has failed to meet his burden on appeal to show reversible error regarding the denial of a permanent injunction.⁶

C. Award of Costs.

Appellant also argues that the trial court erred when it awarded respondent its costs pursuant to section 1363.09, subdivision (b). The statute provides that an association member who prevails in an action to enforce rights pertaining to association elections shall be entitled to reasonable attorney fees and court costs, but that a prevailing association shall not recover any costs, unless the trial court finds the action to be “frivolous, unreasonable, or without foundation.” Here, the trial court found that appellant’s claims were “frivolous and unreasonable,” a finding that appellant challenges on appeal.

We are aware of no published case interpreting the phrase “frivolous, unreasonable, or without foundation,” as that phrase is used in section 1363.09. However, this is the standard used by the United States Supreme Court in determining whether a prevailing defendant is entitled to attorney fees in an employment discrimination action brought under title VII of the federal Civil Rights Act (Title VII), and adopted by California courts when determining whether a defendant who prevails in an action brought under the California Fair Employment and Housing Act is entitled to

⁵ That the trial court made its ruling regarding cumulative voting on a somewhat different ground is of no moment. “It is judicial action and not judicial reasoning which is the subject of review. . . .” (*El Centro Grain Co. v. Bank of Italy, etc.* (1932) 123 Cal.App. 564, 567.)

⁶ The trial court also concluded that appellant was not entitled to declaratory relief, and that appellant had failed to prove that respondent breached its fiduciary duty to him, based upon the findings of fact and conclusions of law that were the basis of the denial of injunctive relief. Because we reject appellant’s arguments regarding the denial of injunctive relief, we likewise reject any argument that appellant was entitled to declaratory relief, and that respondent breached its fiduciary duty. Finally, based on the fact that respondent prevailed in both the trial court and on appeal, we reject appellant’s brief argument that respondent was not the “prevailing party” in this action.

attorney fees. (*Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421; *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 865-866.) “The *Christiansburg* court concluded ‘a district court may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was *frivolous, unreasonable, or without foundation*, even though not brought in subjective bad faith.’ ” (*Rosenman* at pp. 865-866, quoting *Christiansburg* at p. 421, fn. omitted, italics added.) “In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.” (*Christiansburg* at pp. 421-422.) *Christiansburg* envisions that attorney fees will be awarded to defendants only in “rare cases.” (*Rosenman* at p. 868.)

Even if this court were to conclude that this is not a “rare case” that justifies an award of costs, appellant would not be entitled to a reversal of the award of costs. The trial court concluded that respondent was entitled to attorney fees and costs as the prevailing party under both section 1354, subdivision (c) [award of fees and costs in actions to enforce governing documents] and respondent’s covenants, conditions, and restrictions. The court *additionally* found that appellant’s claims were frivolous and unreasonable, pursuant to section 1363.09. Because appellant does not challenge the award of fees or costs on the other grounds relied upon by the trial court, we find no reason to reverse the award.

III.
DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

Sepulveda, J.*

We concur:

Ruvolo, P.J.

Reardon, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.