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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RODNEY A. MARIANI,

Plaintiff and Appellant,

v.

HARBOR POINTE OWNERS'
ASSOCIATION,

Defendant and Respondent.

A130360

(Alameda County
Super. Ct. No. RG 09463454)

A homeowner in a common interest development sued the homeowners association for declaratory relief, seeking a determination that any amendments to the development's covenants, conditions, and restrictions (CC&Rs) that "deprive owners of significant property rights, especially when such amendment operates retroactively to terminate a vested right" requires prior consent of the owner. The trial court granted summary judgment to the defendant homeowners association upon concluding that the challenged amendment was passed by a supermajority of the homeowners, thus obviating the need for individual owner consent. The trial court thereafter awarded attorney fees and costs to the homeowners association. We affirm.

I. BACKGROUND

Plaintiff Rodney A. Mariani is an attorney and represents himself in these proceedings. In 1982, plaintiff purchased a unit in Harbor Pointe Vista (Harbor Pointe). Harbor Pointe is a 47-unit planned development located in Alameda. The Harbor Pointe Owners' Association (Association) is a nonprofit mutual benefit corporation, which was

formed to manage the community of homeowners at Harbor Pointe. The Association's CC&Rs were recorded in 1980 and were amended in 1981 and then again in 1998. The 1998 amendment transferred responsibility for exterior maintenance of the residences from the individual owners to the Association.

In 2008, the homeowners voted on and passed an amendment to the CC&Rs, which transferred responsibility for exterior maintenance of the residences back to the individual owners. The 2008 amendment was approved by 34 of the 42 homeowners who voted; plaintiff did not participate in the vote.

Plaintiff sued the Association in July 2009. Plaintiff seeks "a judicial determination that consent is required of an owner for amendments that deprive owners of significant property rights, especially when such amendment operates retroactively to terminate a vested right." Plaintiff alleged that a judicial declaration of his rights and duties is "necessary and appropriate . . . because [he] is confronted with significant maintenance that was, prior to [the 2008 amendment], the responsibility of defendant."

Defendant Association moved for summary judgment in June 2010. Defendant presented several grounds for the motion, including that the 2008 amendment was passed by a supermajority of the owners, and that it was binding on each owner, including plaintiff, irrespective of whether plaintiff consented or voted in favor of the amendment. Plaintiff opposed the motion, arguing his consent was required and claiming that defendant was obligated to perform certain unstated maintenance on his unit pursuant to the 1998 amended CC&Rs. Along with his opposition, plaintiff filed a motion to exclude the declaration of the secretary of the defendant's board of directors.

At the September 2010 summary judgment hearing, plaintiff requested a continuance and leave to amend the complaint if the court believed the complaint was unclear regarding the alleged outstanding maintenance on his unit. The trial court denied the request for continuance. In granting summary judgment, the trial court found that "the undisputed material facts establish that pursuant to the 2008 amendment of the CC&Rs, which was regularly and legally passed by 34 of 47 homeowners, . . . Plaintiff is responsible for the exterior maintenance of his residence." The trial court further found

that plaintiff failed to submit any admissible evidence to support his claims regarding the alleged outstanding maintenance. Finally, the trial court determined that plaintiff's evidentiary objection failed to comply with California Rules of Court, rule 3.1354, by failing to set forth or quote the objectionable statement and by failing to submit a proposed order. Moreover, to the extent plaintiff did comply with the rules of court, the trial court overruled the objection.

Thereafter, defendant filed a motion for attorney fees as the prevailing party in an action to enforce the governing documents of a common interest development. (Civ. Code, § 1354, subd. (c).) Plaintiff opposed the motion, claiming that his complaint was not an action to enforce the governing documents. The trial court granted the motion, awarding defendant \$36,151 in attorney fees and costs.

Plaintiff appeals from the judgment and the order awarding attorney fees.

II. DISCUSSION

On appeal, plaintiff argues that the trial court erred in granting summary judgment because there was a triable issue of fact regarding whether, at the time of the 2008 amendment, there was accrued or in-progress maintenance. Plaintiff also claims the trial court erred in denying his request for a continuance to amend the complaint denying his evidentiary objection and awarding attorney fees to defendant.

A. *Standards of Review*

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).)¹ We review the record de novo to determine whether triable issues of material fact exist and whether defendant was entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

With respect to the trial court's rulings on evidentiary objections, the standard of review is abuse of discretion. (*Miranda v. Bomel Construction Co., Inc.* (2010)

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

187 Cal.App.4th 1326, 1335; accord *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.) The trial court’s ruling on plaintiff’s request for a continuance is also reviewed for abuse of discretion. (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1023, 1025.)

Orders denying or granting an award of attorney fees are also generally reviewed using an abuse of discretion standard of review. (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615.) But a “determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.” (*Id.* at p. 621.)

B. Plaintiff Failed to Raise a Triable Issue of Material Fact

“Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit.” (§ 437c, subd. (a).) A defendant is entitled to summary judgment if he meets his burden to present evidence negating an essential element of the plaintiff’s cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; see also *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Applying the aforementioned standard of review, we independently determine whether no material factual issue exists, and the moving party is entitled to judgment as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

Preliminarily, as he admitted in the trial court, plaintiff concedes on appeal that he is bound by the 2008 amendment.² The gravamen of plaintiff’s complaint is that the 2008 amendment did not terminate defendant’s “duty to perform maintenance that was in progress before the enactment of the amendment.” Plaintiff argues that the trial court erroneously granted summary judgment because there was a triable issue of fact arising out of defendant’s obligation to perform such accrued or in-progress maintenance. Plaintiff, however, failed to offer any admissible evidence that defendant failed to perform any such required maintenance. Indeed, in his opposing declaration, plaintiff

² To the extent that plaintiff purports to challenge the validity of the 2008 amendment for the first time on appeal, he has forfeited any such claims by failing to raise these issues below. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.)

averred that “[f]rom 1982 to 2008 the Association, with the exception of roof, decks, and window glass [which were the responsibility of the homeowners under the 1998 CC&Rs], maintained the exterior of the dwellings.”

Moreover, plaintiff failed to identify the specific maintenance work that defendant was allegedly obligated to perform, but did not. Nevertheless, plaintiff appears to suggest, for the first time on appeal, that defendant failed to complete a so-called “ ‘shingle project’ ” that was in progress at the time of the 2008 amendment. To the extent plaintiff mentioned the “ ‘shingle project’ ” below, it was in the context of challenging the soundness of the board’s decision to replace all of the siding on the units irrespective of need. As our Supreme Court explains, however, in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, a homeowners association decision made in good faith regarding ordinary maintenance is entitled to judicial deference. (*Id.* at p. 253.) The rule of judicial deference applies in the instant case, as there is nothing in the record even remotely suggesting that defendant acted without good faith in its decisions regarding the “ ‘shingle project.’ ”

In sum, the trial court properly granted summary judgment, as there are no triable issues of material fact that could support plaintiff’s so-called “retroactivity” claim that defendant failed to perform its maintenance obligations that had accrued or were otherwise in progress at the time of the 2008 amendment.

C. The Trial Court Properly Denied the Request for a Continuance

“Section 437c subdivision (h) provides: ‘If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.’ Subdivision (h) was added to section 437c ‘ “[t]o mitigate summary judgment’s harshness,” . . . [citations]’ [citation] ‘for an opposing party who has not had an opportunity to marshal the evidence[.]’ [Citation.] The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional

time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion. [Citation.] [¶] . . . [¶] A declaration in support of a request for continuance under section 437c, subdivision (h) must show: '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' [Citation.] ' "The purpose of the affidavit required by . . . section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]' ' [Citation.] 'It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." ' [Citation.]' (Cooksey v. Alexakis (2004) 123 Cal.App.4th 246, 253-254.)

Here, plaintiff did not make a written motion or proffer any declaration, written or otherwise, demonstrating that he needed additional time to oppose the motion for summary judgment. Rather, at the summary judgment hearing, plaintiff submitted on his papers, stating "everything I've said in my complaint and [in] the opposition is consistent, and that the main issue and thrust of the complaint is that the Court needs to make a determination of the rights and duties with respect to the maintenance that remains unperformed" "If the court feels that the facts that I've alleged in the complaint maybe are not as clear as they should be, then . . . I would simply ask that the Court continue this matter, [and] allow me to amend the complaint" (Italics added.)

Plaintiff's conditional request to amend his complaint clearly does not comport with the statutory prerequisites for continuing a summary judgment hearing. Accordingly, the trial court did not abuse its discretion in denying plaintiff's request.

D. *The Trial Court Did Not Err in its Evidentiary Ruling*

A party challenging evidentiary rulings made in the course of a summary judgment motion has two burdens on appeal: the party must affirmatively show error in the rulings and the party must establish prejudice. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.) “A ruling that resulted in no discernible prejudice cannot, of course, be characterized as a miscarriage of justice.” (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 81.)

In the instant case, plaintiff sought to exclude the secretary’s declaration on hearsay grounds. The trial court ruled that plaintiff’s evidentiary objection to the challenged evidence failed to comply with the applicable rules of court (see Cal. Rules of Court, rule 3.1354) by failing to delineate the substance of the objectionable statement. Plaintiff concedes that he did not comply with the rules of court, but maintains that the challenged evidence “was set forth in the body of the motion.” Plaintiff argues that the trial court put form over substance by overruling his hearsay objection on purely procedural grounds.

Even assuming arguendo that the trial court erred in overruling plaintiff’s objection, to establish reversible error, he must also establish prejudice. This he did not do. A miscarriage of justice will be found only when a reviewing court, after examining the entire case, including the evidence, is of the opinion that “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) To establish prejudicial error, a party must do more than just point to the alleged error. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) Rather, a party must support his or her claims of error by cogent legal analysis. (*Ibid.*) It is not up to this court to “act as counsel for appellant by furnishing legal argument as to how the trial court’s ruling was prejudicial.” (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) Accordingly, when an appellant asserts a point but fails to support it with reasoned argument and legal authority, the court may treat it as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *EnPalm, LLC v.*

Teitler (2008) 162 Cal.App.4th 770, 775 [issue deemed waived where appellant failed to support claim with argument, discussion, analysis, or citation to the record]; *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 [error not discussed in body of opening brief waived as there is no serious effort to raise issue on appeal].)

In the instant case, plaintiff does not even attempt to demonstrate prejudicial error. Accordingly, he has forfeited any claim on this issue.

E. The Trial Court Properly Awarded Attorney Fees to Defendant

Civil Code section 1354, subdivision (c) provides that “[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney’s fees and costs.” Under this section, the award to defendants as the prevailing party in an action seeking a determination of the parties’ rights and obligations under the CC&Rs was proper. (*Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 Cal.App.4th 715, 720–721.)

Plaintiff contends the trial court abused its discretion in awarding attorney fees and costs to defendant because the complaint was not an action to enforce the governing documents. Rather, he says, the complaint sought to enforce the 1998 CC&Rs, which were “ ‘promises unrelated to the governing documents’ ” We do not accept this argument. The declaratory relief plaintiff sought was with respect to the rights and duties relative to the 2008 amendment vis-à-vis the 1998 CC&Rs. The requested relief unquestionably sought a determination of the parties’ rights and obligations *under the CC&Rs*.

Salawy v. Ocean Towers Housing Corp. (2004) 121 Cal.App.4th 664, relied upon by plaintiff, does not compel a contrary conclusion. “There, unit owners in a cooperative apartment building sued the cooperative corporation for breach of a promise to reimburse them for costs incurred in temporarily relocating, while repairs were made following an earthquake. The cooperative corporation successfully demurred based on provisions in its bylaws. It then requested attorney fees under a statute that awards fees to the prevailing party in ‘an action to enforce the governing documents’ (Civ. Code, § 354, subd. (c)), which are those documents that govern the operation of a condominium,

among others. (Civ. Code, § 1351, subds. (c), (j).) The court held fees were not recoverable because the action was based on a breach of promise, *not the governing documents*. (*Salawy, supra*, at p. 671.)” (*Farber v. Bay Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1012.) Here, the essence of plaintiff’s claim is that the 2008 amendment could not retroactively terminate defendant’s obligation to perform maintenance existing at the time of the amendment. There is no independent promise here, only an obligation he finds in the CC&Rs. That *is* an action to enforce the CC&Rs, whether framed in terms of plaintiff’s rights under the 1998 CC&Rs or the 2008 amendment.

Accordingly, plaintiff has failed to show that the trial court improperly awarded fees and costs to defendant.

III. DISPOSITION

The judgment and order granting attorney fees to defendant are both affirmed. Defendant is entitled to its costs on appeal.

RIVERA, J.

We concur:

RUVOLO, P.J.

REARDON, J.