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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| LYNN THOMPSON,<br>Plaintiff and Appellant,<br>v.<br>LAKEWOOD HILLS HOMEOWNERS' ASSOCIATION,<br>Defendant and Respondent. | A144674<br>A146081<br><br>(Sonoma County<br>Super. Ct. No. SCV-255527) |

Plaintiff Lynn Thompson appeals from a judgment entered in favor of defendant Lakewood Hills Homeowners' Association (the Association) and a postjudgment order awarding the Association attorney fees and costs. We affirm the judgment but reverse the fee award.

## FACTUAL BACKGROUND[1]

*2013 Election*

In June 2013, Plaintiff, a member of the Association, was one of six candidates running for four open seats on the Association's board of directors. Three inspectors of elections counted the ballots and, according to their reported results, Plaintiff did not win a seat on the board. Shortly after the election, several members of the Association

[1] "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).)

informed the board president that mistakes had been made in counting the ballots and that ballot tampering may have taken place. In April 2014, the board president received an anonymous note implying that the 2013 election results were fraudulently reported. The board president and two other board members recounted the ballots; according to their recount, Plaintiff had in fact been elected. The entire board was informed of this recount. The board member who should not have been seated, according to the recount, resigned. In May 2014, the board decided to keep the recount a secret and to fill the vacancy after the June 2014 election. One director suggested Plaintiff be appointed to the vacant seat, but three other directors objected. Plaintiff became aware that she may have been elected in 2013. She inspected the ballots and, according to her recount, she had won.

*Work Truck Dispute and 2014 Election*

In March 2013, in response to a neighbor's complaint, the Association notified Plaintiff and her husband that they were violating the Association's conditions, covenants and restrictions (CC&Rs) by parking a work truck in their driveway. Although they disagreed the truck constituted a violation, they made multiple attempts to seek a variance from the board, but the board failed to act. Plaintiff then requested the dispute be resolved through the Association's informal dispute resolution procedure. At a September 2013 hearing, a panel of three directors entered into an agreement with Plaintiff and her husband permitting them to construct a parking area next to their home for the work truck. However, in February 2014 the Association informed Plaintiff and her husband they had to make other arrangements to park the work truck. The board subsequently informed Plaintiff she would be fined if the truck was still parked at their residence on March 16, 2014. Plaintiff and her husband requested the dispute be mediated, and the Association agreed.

On April 30, 2014, Plaintiff informed the Association's management company that she intended to nominate herself as a candidate for the 2014 board election. She asked if there were any pending fines against her or her husband and was told there were none. Plaintiff was later informed by the Association's manager that that she would not be

placed on the 2014 ballot because she had pending fines related to the work truck. Plaintiff was informed that the fines had posted on April 1 and April 17, 2014.

PROCEDURAL HISTORY

In May 2014, Plaintiff filed the instant lawsuit alleging a violation of Civil Code section 5100 et seq.[2] in connection with the 2013 election; seeking declaratory and injunctive relief under Corporations Code section 7616 in connection with both the 2013 and 2014 elections; and asserting negligent misrepresentation and fraud claims in connection with the 2013 election. Plaintiff also sought a hearing pursuant to Corporations Code section 7616 to determine the validity of the results of the 2013 election. The Association filed a demurrer on the ground that Plaintiff failed to demonstrate compliance with statutory prelitigation alternative dispute resolution (ADR) procedures (§ 5925 et seq.).

In August 2014, the trial court sustained the demurrer with leave to amend for failure to comply with prelitigation ADR provisions. Plaintiff subsequently filed the operative first amended complaint. The Association demurred again, arguing the ADR requirement was still unmet and, in addition, Plaintiff's tort causes of action failed to state a claim.

In September 2014, while the demurrer to the first amended complaint was pending, the trial court heard Plaintiff's Corporations Code section 7616 application. The trial court denied Plaintiff's request for relief and found that the 2013 election results will stand.

In December 2014, the trial court sustained the Association's demurrer without leave to amend on the grounds that Plaintiff had not engaged in the requisite ADR and, as to her tort claims, she had not alleged a misrepresentation made to her upon which she had reasonably relied. The trial court entered judgment for the Association. The

[2] All undesignated section references are to the Civil Code. Section 5100 is part of the Davis-Stirling Common Interest Development Act (§ 4000 et seq.; hereafter the Davis-Stirling Act), which governs common interest development homeowners' associations.

Association subsequently filed a motion for attorney fees and costs. The trial court granted the motion.

DISCUSSION

Plaintiff argues the trial court erred in (1) denying her request for relief pursuant to Corporations Code section 7616, (2) sustaining the Association's demurrer, and (3) awarding the Association attorney fees and costs.

I. *Corporations Code Section 7616*

Plaintiff argues the trial court erred in denying her request pursuant to Corporations Code section 7616 for an order that she be seated on the board as a winner of the 2013 election. The Association argues this order was not included in Plaintiff's notice of appeal and any appeal would be untimely.[3] We agree with the Association.

Plaintiff's notice of appeal following judgment provides she is appealing from a "[j]udgment of dismissal after an order sustaining a demurrer," and "[a]ny judgment entered in the action against plaintiff."

"A *prior nonappealable* order or ruling need *not* be specified in the notice of appeal from a subsequent appealable judgment or order." (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2007) ¶ 3:119.) However, where orders are separately appealable, " ' "each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal." ' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173.)

Corporations Code section 7616, subdivision (a), provides: "Upon the filing of an action therefor by any director or member or by any person who had the right to vote in the election at issue, the superior court of the proper county shall determine the validity of any election or appointment of any director of any corporation." Among other relief, the court "may determine the person entitled to the office of director or may order a new election to be held or appointment to be made . . . ." (Corp. Code, § 7616, subd. (d).)

[3] Plaintiff's reply brief did not address or respond to this contention.

Plaintiff's complaint sought "injunctive relief requiring the [Association] to seat [Plaintiff] on the board of directors.

An order granting or denying an injunction pursuant to Corporations Code section 7616 is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6) ["an order granting . . . an injunction, or refusing to grant . . . an injunction" is appealable]; *PV Little Italy, LLC v. MetroWork Condominium Assn.* (2012) 210 Cal.App.4th 132, 142–143 [holding order requiring new election pursuant to Corp. Code § 7616 was appealable under Code Civ. Proc. § 904.1, subd. (a)(6)].) Because the Corporations Code section 7616 order was separately appealable, but Plaintiff did not expressly specify it in her notice of appeal, she has not appealed the order. Even if she had so identified the order in her notice of appeal, the appeal would be untimely.

II. *Demurrer*

Plaintiff argues the trial court erred in sustaining the Association's demurrer on the ground that Plaintiff failed to comply with prelitigation ADR. We disagree.

Section 5930, part of the Davis-Stirling Act, provides: "(a) An association or a member may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article. [¶] (b) This section applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the jurisdictional limits [for small claims court] . . . ." Section 5950 provides: "(a) At the time of commencement of an enforcement action, the party commencing the action shall file with the initial pleading a certificate stating that one or more of the following conditions are satisfied: [¶] (1) Alternative dispute resolution has been completed in compliance with this article. [¶] (2) One of the other parties to the dispute did not accept the terms offered for alternative dispute resolution. [¶] (3) Preliminary or temporary injunctive relief is necessary. [¶] (b) Failure to file a certificate pursuant to subdivision (a) is grounds for a demurrer or a motion to strike unless the court finds that dismissal of the action for failure to comply with this article

would result in substantial prejudice to one of the parties."[4] Plaintiff did not file a certificate with her complaint.

Plaintiff first argues her action was not subject to this ADR requirement because her enforcement action included claims for money damages in excess of the small claims limit. (See § 5930, subd. (b).) In her original complaint, Plaintiff's tort claims—alleging misrepresentations in the announcement of the 2013 election results—alleged she "was damaged in that she was denied her seat on the board of directors of the HOA to which she was duly elected." According to the Association's bylaws, directors receive no compensation for their services as directors. After the trial court sustained the Association's demurrer on the ground that Plaintiff did not comply with the statutory ADR requirements, Plaintiff filed a first amended complaint adding the following allegations to her tort claims: "Plaintiff is informed and believes that had she been properly seated on the board of directors instead of Mr. Antonio [who was seated], the work vehicle issue would have been timely resolved and Plaintiff would not have incurred costs and other damages, including legal expenses, associated with the work truck issue and bogus IDR [internal dispute resolution]. Plaintiff is informed and believes that such damages exceed the small claims jurisdictional limits." On appeal, Plaintiff points to these allegations to support her argument that the statutory ADR requirements do not apply to her action. However, the complaint's allegations do not support an inference that Plaintiff's expenses in resolving the work truck dispute would have been avoided but for the alleged misrepresentations about the 2013 election. We decline to simply accept the damages allegations—which were apparently added to the first amended complaint in an attempt to avoid the statutory ADR requirements—on their face. (Cf. *Sellery v. Ward* (1942) 21 Cal.2d 300, 305 ["To ascertain the nature of and amount in controversy for determining the jurisdiction of the subject matter the complaint as a whole may be examined."]; *Ytuarte v. Superior Court* (2005) 129 Cal.App.4th 266,

[4] The Association's CC&Rs also include a prelitigation ADR requirement, but the remedy for failure to comply is that the other party "shall be entitled to stay the action and request [ADR]."

276 ["a matter may be reclassified as a limited civil action 'when . . . the absence of jurisdiction is apparent before trial from the complaint, petition, or related documents' "].)

Plaintiff next argues her failure to comply with the statutory ADR requirements should have been excused because ADR would have been futile. Plaintiff failed to raise this argument below and has therefore forfeited it. (*Kelly v. CB & I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451–452.) Moreover, Plaintiff cites no authority establishing a futility exception to the Davis-Stirling Act's ADR requirements. Even assuming there is such an exception (and Plaintiff had not forfeited the argument), Plaintiff failed to allege sufficient facts demonstrating futility. She points to allegations that (1) the board took no action after being informed of the recount finding Plaintiff won the 2013 election, and (2) following the resignation of the board member who according to the recount was not in fact elected, three board members (out of six remaining members) objected to another member's suggestion that Plaintiff be appointed to the vacant seat. These facts are insufficient to demonstrate ADR "would have served no purpose" or that its outcome "was a fait accompli." (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 419 [discussing futility exception to requirement that administrative remedies be exhausted]; see also *id.* at p. 418 [" 'Futility is a narrow exception to the general rule.' "]; *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1459 [" 'The futility exception [to the exhaustion of administrative remedies] requires that the party invoking the exception "can positively state that the [agency] has declared what its ruling will be on a particular case." ' "].)[5]

Finally, Plaintiff argues that her complaint should not have been dismissed for failure to comply with the ADR requirements because she will suffer substantial

[5] Although Plaintiff also argues she should be granted leave to amend to allege additional facts demonstrating futility, she was granted leave to amend after the first demurrer and she does not assert any additional facts that could demonstrate futility. (*Schifando, supra,* 31 Cal.4th at p. 1081 ["The plaintiff has the burden of proving that an amendment would cure the defect."].)

prejudice as a result. (§ 5950, subd. (b) ["Failure to file a certificate pursuant to subdivision (a) is grounds for a demurrer or a motion to strike *unless the court finds that dismissal of the action for failure to comply with this article would result in substantial prejudice to one of the parties*," italics added].) Plaintiff argues the dismissal precludes her from litigating her challenges to the 2013 and 2014 elections. At the time of the demurrer order in December 2014, the statute of limitations for Plaintiff's challenge to the 2014 election had not yet run and a request for ADR would have tolled the limitations period; therefore, the demurrer order did not preclude her from litigating the 2014 election challenge. (§ 5145, subd. (a) [one year limitations period for violation of elections provisions]; § 5945 [applicable statute of limitations tolled following a party's request for ADR pursuant to § 5130].) As for Plaintiff's challenges to the 2013 election, the trial court's demurrer order dismissed her tort claims on an alternate ground which Plaintiff does not contest on appeal, and the trial court had already rejected Plaintiff's remaining challenge to the 2013 election following the Corporations Code section 7616 hearing. Plaintiff failed to show the dismissal caused her substantial prejudice.

III. *Attorney Fees and Costs*

Plaintiff challenges the trial court's award of attorney fees and costs, arguing the applicable statute precludes such an award unless her action was frivolous. The Association argues a different statute, which authorizes fees and costs to the prevailing party, governs the matter. We reverse the fee award.

Plaintiff relies on section 5145, which provides "[a] member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof . . . ." (§ 5145, subd. (a).) This section is part of Article 4 of Chapter 6 of the Davis-Stirling Act, which sets forth various requirements for homeowners' association elections. (§§ 5100–5145.) Section 5145, subdivision (b) provides: "A member who prevails in a civil action to enforce the member's rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs . . . . A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or

without foundation."[6] The Association contends section 5975 governs. This section provides: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (§ 5975, subd. (c).)[7] "We review a determination of the legal basis for an award of attorney fees de novo as a question of law." (*Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 828.)

To determine whether Plaintiff's action is to enforce the Davis-Stirling Act's election provisions or the Association's governing documents, we look to the gravamen or "gist" of the claims. (*Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 259-260 [looking to the "gravamen" of the complaint, "the substance of the claims asserted and relief sought, in determining whether an action is one 'to enforce the governing documents' in the meaning of section 5975"]; *Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 Cal.App.4th 715, 720 (*Kaplan*) [looking to "[t]he gist of the action" to determine whether action was one to enforce the governing documents]; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 671 (*Salawy*) [action is one to enforce the governing documents if "the essence of the claim falls within the enforcement of the governing documents"].)

Plaintiff's first two causes of action involve the 2013 election. Her first cause of action alleges the Association violated the Davis-Stirling Act by "by either failing to accurately count the ballots of the election or fraudulently tabulating the results of the election," and further alleges "the Inspectors of Election failed to conduct the election with fairness to all members in accordance with the Davis Stirling [A]ct and Corporations Code nor did they perform their duties impartially and in good faith, as required by the Davis Stirling Act." The second cause of action seeks declaratory and injunctive relief

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[6] The trial court found Plaintiff's action was not frivolous.

[7] The Davis-Stirling Act defines "governing documents" as "the declaration and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association." (§ 4150.)

on the ground that Plaintiff "received more votes" than another candidate who was seated on the board, and "the Inspectors of Election did not conduct the election or vote with fairness to all members nor did they perform their duties impartially and in good faith . . . ." Plaintiff's third cause of action involves the 2014 election and alleges "some members of the board of directors conspired to make [Plaintiff] ineligible for candidacy by allowing substantial delays in resolving the work vehicle issue, timing the fines related to the work vehicle issue to coincide with the election, and delaying the posting of fines in [the management company's] computer system until after [Plaintiff] was ineligible for candidacy."

The Davis-Stirling Act's election provisions govern, inter alia, the "election and removal of directors." (§ 5100, subd. (a).) They require homeowners' associations to select one or three "independent third party or parties as an inspector of elections." (§ 5110, subd. (a).) The inspectors of elections shall, among other duties, "[c]ount and tabulate all votes," "[d]etermine the tabulated results of the election," "[p]erform any acts as may be proper to conduct the election with fairness to all members," and "perform all duties impartially, in good faith, to the best of the inspector of election's ability." (§ 5110, subds. (c)(5), (c)(7), (c)(8), (d).) The statutes set forth specific procedures for ensuring the secrecy of ballots, provide that ballot counting be conducted in public, and specify who shall retain custody of the ballots. (§§ 5115, 5120, 5125.) The provisions also state associations "shall adopt rules" ensuring all candidates are afforded "equal access" to association media or communications for election purposes; providing all candidates have access to any common area meeting space; and specifying the candidate qualifications and nomination procedures. (§ 5105, subd. (a)(1)–(3).) Associations shall also adopt rules about the qualifications for voting, various voting procedures, and the method of selecting the inspectors of election. (§ 5105, subd. (a)(4)–(5).)

The Association's bylaws set forth detailed procedures for elections, including voting procedures, selection procedures and candidate qualifications, quorum requirements, and proxies. The bylaws also provide for inspectors of election and state

they shall "[c]ount and tabulate all votes" and "may also take other actions to assure fairness in the election process . . . ."

The Davis-Stirling Act's election provisions specifically obligate inspectors of elections to act impartially and with fairness to all members, and set forth certain ways in which candidates shall be treated equally. While the Association's bylaws set forth the procedures by which Association elections shall be conducted, they do not include the specific requirements of the Davis-Stirling Act that members be treated fairly and equally in the context of elections. The gravamen of Plaintiff's complaint is that she was singled out for unfair treatment in the tabulation of the 2013 election results and in the candidate qualification process for the 2014 election. We therefore conclude that the gravamen of Plaintiff's complaint is not that the procedures set forth in the Association's bylaws were violated, but rather that the elections process was performed unfairly in violation of Article 4, Chapter 6 of the Davis-Stirling Act. Section 5145 is the applicable fee statute.[8]

The Association argues various provisions of the bylaws and CC&Rs must be interpreted to determine Plaintiff's claims. With respect to the 2013 election, the Association argues the analysis of Plaintiff's claim requires examination of whether Plaintiff was "duly nominated as a candidate," whether the appointment of the inspectors of election was "in accordance with [the bylaws]," whether the inspectors "discharge[d] their duties under [the bylaws] properly," and whether the election was "otherwise in conformity with" the procedures set forth in the bylaws. That these inquiries may have formed part of the Association's defense or had some other relevance in the analysis of Plaintiff's claims does not render Plaintiff's action one to enforce the governing documents. (*Salawy, supra,* 121 Cal.App.4th at pp. 667, 670 ["a defendant's successful invocation of the governing documents as a defense does not entitle it to attorney fees if the claim was not brought to enforce those documents" because "[d]emurrers or other defenses asserting the governing documents do not constitute 'action[s] . . . to enforce the

[8] To the extent Plaintiff contends that *every* elections challenge is controlled by section 5145, we disagree. (See *Kaplan, supra,* 98 Cal.App.4th at p. 720 ["[t]he gist of the action . . . was to enforce the members' proxy and cumulative voting rights under the bylaws"].)

governing documents' "].) To determine the gravamen of Plaintiff's action, we do not look to whether a provision of the bylaws might have some relevance, but rather to whether it forms the basis of Plaintiff's claim. (See *id.* at p. 670 ["Appellants actions were not to 'enforce' respondents 'governing documents' because the complaints and the amended complaints contained no claim based on a right or remedy under the governing documents."].) Although her claim does rest on violations by the Inspectors of Election, as discussed above, the duties set forth in the Davis-Stirling Act's election provisions are the ones allegedly violated, not those listed in the bylaws. Similarly, with respect to the 2014 election, the Association argues Plaintiff's claim requires an analysis of whether the work truck constituted a violation of the CC&Rs and whether the alternative dispute resolution procedure was properly followed. However, Plaintiff's cause of action is not that the work truck did not constitute a violation of the CC&Rs or that any procedures of the alternative dispute resolution provisions were violated; it is that she was singled out for unfair treatment designed to prevent her from being a candidate in the 2014 election.[9]

The Association argues that even if section 5145 applies to this case, it only prohibits a prevailing homeowners' association from recovering court costs, leaving open the possibility of an association recovering attorney fees authorized by another statute or contractual provision. We need not decide this question because the only other bases for awarding attorney fees relied on by the Association are section 5975, which authorizes attorney fees "[i]n an action to enforce the governing documents" (§ 5975, subd. (c)), and the Association's CC&Rs, which authorize attorney fees in "any action brought because of any alleged breach or default of any Owner or other party hereto under this Declaration . . . ." Because, as explained above, the gravamen of Plaintiff's action involves alleged violations of the Davis-Stirling Act, rather than violations of the

[9] Plaintiff's complaint does not specifically allege that this conduct constituted a violation of the Davis-Stirling Act's election provisions, and we do not so hold. However, because we must determine the gravamen of the claim for attorney fees purposes, we conclude it appears to be based in the fairness provisions of the Davis-Stirling Act, rather than any procedural provision of the bylaws or CC&Rs.

Association's governing documents, neither section 5975 nor the CC&Rs authorize awarding the Association attorney fees.[10]

Finally, the Association argues that only the first cause of action specifically alleged a violation of the Davis-Stirling Act's election provisions and therefore the action is too broad to fall within the scope of section 5145. The second and third causes of action seek relief pursuant to Corporations Code section 7616. "While [Corporations Code] section 7616 provides a procedural vehicle for challenging an election, it does not create any substantive rights." (*Kaplan, supra*, 98 Cal.App.4th at p. 719.) The gravamen of these causes of action is the Association's violation of the Davis-Stirling Act's election provisions. The fourth and fifth causes of action are misrepresentation tort claims. These are brought neither under the Davis-Stirling Act nor under the governing documents, and the Association cites no other basis for prevailing party attorney fees on these claims. That Plaintiff's complaint includes such claims does not bring the entire action outside of the scope of section 5145. (See *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686–687 [" 'When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees.' "].)

DISPOSITION

In No. A144674, the judgment is affirmed. In No. A146081, the postjudgment order awarding respondent attorney fees and costs is reversed. The parties shall bear their own costs on appeal.

[10] Because we conclude section 5975 and the CC&Rs' fees provision do not apply to Plaintiff's action, we also deny the Association's request for appellate fees.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.