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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

WAYNE FERREE,

Plaintiff and Appellant,

v.

ANDREW MORSE et al.,

Defendants and Respondents.

C066311

(Super. Ct. No.
T093725C)

Must a condominium owner plead exclusive ownership of trees rooted in a common area or, as in this case, a 150-year-old pine tree, to state a cause of action against a homeowners association and/or a board member? In a series of demurrers, the trial court repeatedly ruled that plaintiff Wayne Ferree had not pleaded a viable cause of action because he did not plead that he alone owned the pine tree defendants Donner Pines Homeowners Association (Association) and its director, Andrew Morse, chopped down. Defendants avoid the threshold and dispositive issue and attempt to divert our attention to so-

called issues of standing and pleading. We conclude the trial court's legal premise was in error because a homeowners association and director's duties to an owner are not contingent upon exclusive ownership of a common area; indeed, by definition, an owner cannot exclusively own a common area. We reverse.

PLEADINGS

We must conduct a de novo review of the sufficiency of the complaint to state a cause of action under any legal theory. (*Sui v. Price* (2011) 196 Cal.App.4th 933, 938.) We must assume the truth of the factual or implied factual allegations. (*Ibid.*) "If the complaint does not allege facts sufficient to state a cause of action, a trial court nevertheless abuses its discretion by sustaining a demurrer *without leave to amend* if the plaintiff shows there is a reasonable possibility any defect can be cured by amendment of the complaint." (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1168 (*Windham*).)

Plaintiff made three unsuccessful attempts to state a viable cause of action, first against Morse in his capacity as a board member and then against both Morse and the Association. In the initial complaint, plaintiff alleged causes of action for negligence, negligence per se, trespass, wrongful injury to timber, and breach of fiduciary duty against Morse. Factually, plaintiff alleged that at Association meetings in January 2007 and January 2009 the participants agreed that trees would not be removed or destroyed. Without notice to owners, the complaint

states, Morse convinced a majority of the board in May 2009 to ignore the owners who wanted to preserve trees in the common area and to pay to have various trees cut down.

The trial court sustained Morse's demurrer to the original complaint with leave to amend. As to the dispositive issue, the court ruled: "[I]t cannot be ascertained whether the tree removed is located on property owned by Plaintiff by virtue of him being a homeowner (in other words, it is part of the common area), or whether Plaintiff has a separate interest in real property located outside the walls of his condominium unit."

Plaintiff then filed a first amended complaint, adding the Association as a defendant. As to Morse, the complaint's allegations were more specific. For example, Morse removed large cottonwood trees "to improve the view of Lake Donner which Morse enjoys from his condominium unit" and to "enhance the fair market value of his condominium unit." Plaintiff further alleged: "Defendant Morse arranged for the pine tree located on Plaintiff's property to be cut down so as to further a personal grudge that he holds for Plaintiff. Defendant Morse has, on numerous prior occasions, through actions and words, expressed dislike for Plaintiff and Plaintiff's wife and engaged in purposeful conduct designed to injure and damage the fair market value of plaintiff's unit, and to injure and damage Plaintiff's use and enjoyment of his unit. Morse further acted so as to humiliate and vex Plaintiff."

Plaintiff also explained that the 150-year-old pine tree defendants removed was integrated into his deck. "When

Plaintiff's unit was constructed, the outdoor deck affixed to Plaintiff's unit was specifically designed and built to integrate and accommodate said pine tree which is located on property and/or airspace owned solely by Plaintiff."

In ruling on the demurrer to the first amended complaint, the court ruled again: "As a matter of law, one cannot maintain an action for property which they do not own. The First Amended Complaint does not state that the tree which was removed belonged to Plaintiff and Plaintiff alone, and was on property owned only by Plaintiff. Thus the entire First Amended Complaint is uncertain at best."

The second amended complaint alleges causes of action for negligence and breach of fiduciary duty against the Association and a cause of action against Morse for trespass.¹ Paragraph 3 captured the trial court's attention. It reads: "On or about June 12, 2009, Defendants, Andrew Morse and/or the [Association] caused a large pine tree to be cut down and destroyed. The subject pine tree was located on real property which is owned solely by Plaintiff. When Plaintiff's unit was constructed, the outdoor deck affixed to Plaintiff's unit was specifically designed and built to integrate and accomodate [sic] said pine tree which is located on property and/or airspace owned solely by Plaintiff. At no time did Plaintiff consent to Defendants'

¹ All three causes of action involve the removal of the pine tree. The lawsuit no longer contains any allegations relating to the removal of the cottonwood trees.

destruction of said tree which was done unlawfully and without notice to Plaintiff. All tortious conduct by Defendants occurred in the County of Nevada, California."

The trial court then terminated the lawsuit. The judgment (order sustaining demurrers) states: "The Demurrer brought by Defendant Morse and the Demurrer brought by Defendant [Association] are all sustained without leave to amend. This is Plaintiff's third attempt to state unequivocally that the tree which is the subject of the dispute was located on property owned only by Plaintiff. The allegations of the [second amended complaint], at Paragraph 3, contain two sentences, one right after the other, which conflict with one another, making the [second amended complaint] uncertain. Although Plaintiff requests leave to amend to delete the "/or" from the phrase "and/or", claiming that it was an oversight to have left this in the [second amended complaint], the Court finds this difficult to believe, given that this has been the very crux of the arguments of the two previous demurrers. [¶] . . . [¶] . . . As previously stated, as a matter of law, one cannot maintain an action for property which one does not own. The Court does not believe that Plaintiff can amend its complaint to truthfully state exclusive ownership of the tree in question." Plaintiff appeals.

DISCUSSION

This appeal presents a straightforward legal question. Is exclusive ownership of the tree a prerequisite to any cause of action against the Association or its director? In sustaining

three consecutive demurrers, culminating in its decision to preclude further amendment, the trial court ruled that plaintiff had not, and could not, honestly state he exclusively owned the tree, and consequently, he could not state a cause of action. But if exclusive ownership is not a prerequisite, that is, if the court's legal premise is in error, then the demurrers were improvidently sustained and we must address the secondary issue, whether the court abused its discretion by refusing to allow plaintiff the opportunity to amend. Indeed, we conclude the trial court misunderstood the essence of plaintiff's claim and erroneously required him to plead exclusive ownership.

In the last half of the 20th century, many Americans, including formidable numbers of Californians, bought property expressly entangling their individual and communal rights. By voluntarily joining homeowners associations, they have been willing to sacrifice individual freedom for mutually enforceable rules and regulations. The associations operate as "mini-governments" with extensive powers and, concomitantly, the potential for abuse of those powers. (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 651 (*Cohen*).) In recognition of the increasingly important role played by private homeowners associations and the power wielded by their boards of directors, courts hold associations to a high standard of responsibility, including fiduciary responsibilities to their members, both individually and collectively. (*Ibid.*)

Plaintiff, a condominium owner, belonged to such an association. His real property rights, however, are prescribed

by statute. Civil Code section 1351, subdivision (f) defines a condominium to consist of "an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit" Thus, the condominium owners own the common area as tenants in common. (*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103, 118 (*Ritter & Ritter*).) "Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration. . . . [¶] 'Any owner who believes that the association is not discharging its duty to enforce the restrictions has an individual cause of action against the association and the person who has violated the restrictions. . . .' [Citations.]" (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246–1247 (*Posey*).)

Posey is instructive, if not dispositive. Mr. Posey, like plaintiff, owned a condominium. (*Posey, supra*, 229 Cal.App.3d at p. 1240.) Like Morse, Mr. Posey's neighbors claimed a right to take action on common space. In *Posey*, the neighbors built a deck that encroached into the common area. Mr. Posey sued the association and the neighbors for trespass and nuisance, praying for both injunctive relief and damages. The neighbors insisted the association owned the common area and had given its consent to the encroachment. A jury found for the neighbors, but awarded Mr. Posey \$30,000 against the association. (*Id.* at pp. 1240–1242.)

There are obvious differences between *Posey* and the case before us, including the procedural posture of the case and the type of relief the plaintiff sought. But on the threshold issue before us, *Posey* is clear. The Court of Appeal held, “[I]t is not necessary that the plaintiff own the property. All plaintiff needed to do was to show a possessory right superior to the right of the trespassers.” (*Posey, supra*, 229 Cal.App.3d at p. 1246.)

Defendants fail to cite any authority to the contrary. Rather, they devote many pages of their briefing to the proposition that plaintiff lacks “standing” because he has not pled exclusive ownership and he cannot be allowed to belatedly claim he did own the tree he previously denied he owned. But these side issues miss the fundamental question posed by each of the demurrers and now before us on appeal. What authority supports the counterintuitive notion that plaintiff, a tenant in common with the other owners of the common area, cannot state a cause of action against the association or one of its directors on any theory if he cannot plead exclusive ownership of the 150-year-old pine tree? We cannot find any authority to support the proposition and defendants have not provided the only relevant authority necessary to their appeal.

That is not to say that plaintiff’s complaints have been a model of pleading. They have not. But plaintiff found himself with the unpleasant dilemma of attempting to amend a complaint to survive demurrers predicated on an erroneous legal premise. Trying to both survive a demurrer and honestly plead his

ownership interest resulted in ambiguity and uncertainty. Yet the trial court sustained defendants' demurrers without leave to amend. Not only did the court sustain the demurrers on a flawed legal premise, but it also abused its discretion by refusing to allow plaintiff the opportunity to amend.

The crucial issue is not exclusive ownership, but duty. As a condominium owner, plaintiff's ability to state a cause of action is exemplified in a handsome body of cases. An association must act in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375; *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) A homeowners association, therefore, has fiduciary duties to its members. (*Cohen, supra*, 142 Cal.App.3d at pp. 650-651.)

In other cases, plaintiff condominium owners have stated causes of action against a homeowners association and its individual directors for negligence. (See, e.g., *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 498 (*Frances T.*)). "[T]he Association is, for all practical purposes, the Project's 'landlord.' And traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control." (*Id.* at p. 499, fn. omitted.)

To state a cause of action against an individual director, an owner must allege the director personally participated in or authorized the tortious act. (*Frances T.*, *supra*, 42 Cal.3d at pp. 503-504.) "A corporate officer or director, like any other person, owes a duty to refrain from injuring others.

[Citations.] Consequently, directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct." (*Ritter & Ritter*, *supra*, 166 Cal.App.4th at p. 120.)

As discussed above, a condominium owner stated a cause of action for trespass in *Posey*. Thus, there is abundant precedent for each of the causes of action plaintiff attempted to plead. We recognize that the facts of this case do not parallel the facts alleged in very different contexts in these other cases. Here plaintiff's ability to plead his causes of action was thwarted by the trial court's erroneous ruling that, as a threshold matter, he needed to plead exclusive ownership of the tree. We need not speculate on the viability of the causes of action he could have pleaded free of the restrictions imposed by the trial court concerning ownership of the tree.

Defendants urge us to apply the rule of judicial deference to the Association's decision to remove the tree. In *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, the California Supreme Court announced a new rule of judicial deference in very circumscribed situations involving homeowners associations: "Where a duly constituted community association board, upon reasonable investigation, in good faith

and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Id.* at p. 253.) Judicial deference has no application on appeal where, as here, there are factual issues underlying application of the rule. Moreover, "the judicial deference rule is an affirmative defense" and "the defendant has the burden of establishing the requisite elements for applying the rule." (*Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 940-941.)

The Association also asserts that plaintiff lacks standing because only the Association can prosecute an action for damages to property in the common area. The Association concedes that plaintiff indeed has a shared or common ownership interest in the common area on which the old tree had been located. Nevertheless, defendants insist that plaintiff's undivided 1/17th interest does not give him standing to assert any claim arising from removal of the tree.

In support of this position, the Association relies on Civil Code section 1368.3 and *Windham, supra*, 109 Cal.App.4th 1162. The reliance is misplaced. It is true that pursuant to section 1368.3, the Association has standing to institute litigation as the real party in interest without joining the individual owners in matters pertaining to "[d]amage to the

common area." (§ 1368.3, subd. (b).) And, according to *Windham*, "it would be inefficient to require or allow only those owners, rather than their association, to sue . . . to recover for damage to common areas." (*Windham*, at p. 1174.) Neither the statute nor the case law suggests, however, that the Association has exclusive standing, and neither the statute nor the case law precludes the owner from initiating litigation on his own behalf for redress of wrongs done to him. In other words, to say that the Association has standing in litigation involving the common area is not to say condominium owners have no standing, whatever the nature of their claims.

Morse and the Association would immunize themselves from any liability for mismanagement or tortious conduct involving the common area. Quite simply, that is not the law, as the legion of cases mentioned above attests. Certainly, there are many cases, like *Windham*, in which it is most efficient and cost-effective to allow an association to represent the collective interests of the owners in litigation. But there may be many others, as here, where an owner can state a cause of action against an association or a board member for breach of a duty against him individually. Neither Civil Code section 1368.3 nor *Windham* confers wholesale immunity on a board or individual members by denying an owner standing to pursue his individual claim. Homeowners associations may be "mini-governments" with expansive powers, but they are not totalitarian states with unlimited power to strip common areas with impunity.

In sum, plaintiff has demonstrated a reasonable chance of amending his complaint to state viable causes of action against both defendants. Exclusive ownership of the pine tree is not necessary to state a cause of action, even though the tree was rooted in a common area. Essential to each cause of action is a clear allegation of duty and how each defendant breached its duty to plaintiff. Because each demurrer was sustained on a false legal premise, the trial court abused its discretion by refusing to give plaintiff the opportunity to amend the complaint to state viable causes of action.

DISPOSITION

The judgment is reversed. Plaintiff shall recover costs on appeal.

RAYE, P. J.

We concur:

NICHOLSON, J.

MAURO, J.