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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. SKEEN, et al.,

Cross-Complainants and Respondents,

v.

ALBERT S. GIORGIS, as Trustee, etc., et al,

Cross-Defendants and Appellants.

LOUIS J. ALPINIERI, et al.,

Plaintiff, Cross-Defendants and
Appellants,

v.

JAMES E. SKEEN, et al.,

Defendants, Cross-Complainants
and Respondents.

D058394

(Super. Ct. No. GIC879650)

D059851

(Super. Ct. No. GIC879650)

CONSOLIDATED APPEALS from judgments of the Superior Court of San Diego
County, Richard E. L. Strauss, Judge. Reversed.

These appeals stem from a long standing feud between owners in La Jolla Shores Heights (Heights). Louis and Brenda Alpinieri (together Alpinieris) sued James and Lenora Skeen and the Skeen Family Trust dated November 20, 1990 (collectively Skeens) to, among other things, enforce a declaration of restrictions recorded in 1995 (1995 CC&Rs). The Skeens cross-complained against the Alpinieris also to enforce the 1995 CC&Rs (as well as asserting other claims). Several months later, the Skeens changed their theory of the case and filed an amended cross-complaint that sought a judicial declaration that the 1995 CC&Rs were invalid. The Skeens added all Heights's owners as cross-defendants in the amended cross-complaint.

The Skeens moved for summary adjudication against the Alpinieris's breach of contract claim on the grounds the 1995 CC&Rs were either void or voidable. The superior court granted the motion, finding the 1995 CC&Rs were void because they were entirely new CC&Rs and had not been approved by all Heights's' owners. The court subsequently entered an order not only granting summary adjudication as to the Alpinieris's breach of contract claim, but also in favor of the Skeens's declaratory relief claim against the rest of Heights's owners.

The Alpinieris and a subset of Heights's owners (Neighbors) appealed. We reverse.

FACTUAL AND PROCEDURAL HISTORY

The Original CC&Rs

In 1967, Travelers Insurance Company recorded a declaration of restrictions (1967 CC&Rs) covering Heights. The 1967 CC&Rs limited the use of all mapped lots to residential purposes, imposed size and quality minimums on buildings, and required many other esthetic and value-maintenance conditions on use of property. They also created an architectural committee to interpret, apply, and enforce the 1967 CC&Rs. Under their own terms, the 1967 CC&Rs would expire January 1, 1997, unless extended by a document executed by owners of a majority of lots and recorded before January 1, 1996. The 1967 CC&Rs also could be amended by a document signed by a majority of Heights's owners. Heights has 60 lots.

The 1967 CC&Rs were amended in 1986. The final document was entitled "First Amendment to Declaration of Restrictions of La Jolla Shores Heights, Map No. 5831."

The 1995 CC&Rs

In 1995, the Alpinieris organized an effort to extend the CC&Rs. After circulating drafts of the CC&Rs to Heights's owners, the Alpinieris invited various owners to their home on April 30, 1995 to sign a document entitled "Declaration of Restrictions of La Jolla Shores Heights Map No. 5831," which was recorded on May 23, 1995.

The 1995 CC&Rs begin with a "Grandfather Provision" that defines the relationship between the 1967 CC&Rs and the 1995 CC&Rs. Conditions on lots that do not comply with the 1995 CC&Rs are not violations of the 1995 CC&Rs unless they also

violate the 1967 CC&Rs. Violations under the 1967 CC&Rs continued to be governed by that document. However, after the purported effective date of the 1995 CC&Rs, all new uses of a lot, improvement or landscaping of a lot was to be governed by the 1995 CC&Rs.

The 1995 CC&Rs state they "replace" the 1967 CC&Rs and are a "new Declaration of Restrictions." The 1995 CC&Rs provide they will terminate on March 1, 2025 unless extended by owners of a majority of the lots in Heights. The 1995 CC&Rs state they can be "amended or replaced" by a writing signed by owners of a majority of the lots in Heights as well.

The 1995 CC&Rs change both procedures governed by the 1967 CC&Rs and the substance of some restrictions. Most of the substantive changes are updates to take into account technological advances, such as solar energy equipment and communications media that did not exist in 1967.

In 1997, the 1995 CC&Rs were amended. Owners of 31 lots signed the amendment with notary acknowledgement.

Operating Under the 1995 CC&Rs

According to a member of the architectural committee, who served on the committee from 2002 through 2006, the majority of Heights's owners treated the 1995 CC&Rs as valid and often requested the architectural committee to enforce them. For example, the architectural committee actively reviewed plans for new construction and improvements. Many owners, including the Skeens, participated in architectural

committee meetings by voting, attending meetings, and communicating with the committee. The Skeens petitioned the committee to stop an owner from building a two-story home. They also submitted home improvement plans to the architectural committee for approval. The Skeens participated in discussions with the architectural committee about their long-standing dispute with the Alpinieris.

In addition, the Skeens used the architectural committee to successfully oppose a proposed University of California machine shop in the canyon across from the Skeens's house. Indeed, James Skeen testified during deposition that he believed the 1995 CC&Rs became effective upon recording. Subsequently, the Skeens asserted the architectural committee did not exist and Heights was plagued with violations of the 1995 CC&Rs.

The Complaint and Cross-Complaint

The Alpinieris sued the Skeens for breach of the 1995 CC&Rs, nuisance, trespass, and injunctive and declaratory relief. Initially, the Skeens cross-complained against the Alpinieris to enforce the 1995 CC&Rs and included claims for trespass, nuisance, intrusion, and injunctive and declaratory relief. The Skeens amended their cross-complaint multiple times with the second amended cross-complaint being the operative pleading. The second amended cross-complaint named all the remaining Heights's owners as cross-defendants and alleged causes of action for injunctive and declaratory relief against all cross-defendants and a breach of fiduciary duty against Brenda Alpinieri only. The second amended cross-complaint alleged the 1967 CC&Rs expired as of January 1, 1997, and the 1995 CC&Rs did not extend their life. The Skeens also alleged

all CC&Rs could not be enforced because Heights's owners failed to enforce them in the past. The Skeens sought declaratory relief that all CC&Rs were invalid.

The Skeens moved for summary adjudication against the Alpinieris's complaint on the grounds that the CC&Rs were void because of procedural deficiencies and/or total abandonment. Neither the notice nor the legal memorandum mentioned applying the motion to the second amended complaint or to the cross-defendants.

The Alpinieris opposed the motion for summary adjudication. They argued the 1995 CC&Rs merely amended the 1967 CC&Rs and extended them as well. The Alpinieris also claimed the Skeens's challenges to the CC&Rs was barred by the statute of limitations, laches, and estoppel. Neighbors, except Marjorie Kalmanson, joined the Alpinieris's opposition.

The court issued a tentative ruling to grant the Skeens's motion for summary adjudication on the ground the 1995 CC&Rs constituted a new declaration of restrictions that was void because not all Heights's owners approved the document. The court declined to consider the Alpinieris's arguments on estoppel or laches because the Alpinieris did not plead those issues. At oral argument, the Alpinieris's counsel asked for an opportunity to file additional support for the position the 1995 CC&Rs validly extended and amended the 1967 CC&Rs, or that the issue involved a triable issue of disputed material fact. The court granted the request.

The Alpinieris filed additional materials, including evidence. The Skeens responded with both argument and evidence.

The court apparently considered the additional evidence, but announced that it had not found any reason to change its tentative ruling. The court then heard oral argument and confirmed its tentative ruling.

The Skeens circulated a written order for approval. The owners of 17 lots objected that the proposed order applied the court's ruling to them when the motion had not been made against them.

The court signed and entered the Skeens's proposed order applying its ruling to all cross-defendants. The order provides that "[a]ll requests for judicial notice are granted. All evidentiary objections are overruled."

The court entered judgment against all cross-defendants except the Alpinieris. Neighbors timely appealed.

Almost a year later, the court entered judgment against the Alpinieris. In the judgment, the court dismissed the Skeens's injunctive relief claim and noted the Alpinieris and Skeens voluntarily dismissed their remaining claims without prejudice. The Alpinieris then appealed.

We consolidated the Alpinieris's appeal with Neighbors's appeal.

DISCUSSION

I

WHETHER THE JUDGMENT AGAINST THE ALPINIERIS IS APPEALABLE

The judgment as to Neighbors is appealable as a final judgment. The Alpinieris state the judgment against them might not be appealable because both the Alpinieris and

the Skeens agreed to dismiss their remaining claims without prejudice. (See *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1469.) However, the Alpinieris ask us to treat their appeal as a petition for a writ of mandate. The Skeens do not address this issue.

We consolidated Neighbors's appeal with the Alpinieris's appeal because they share a common issue, namely the validity of the 1995 CC&Rs. Because that question is common to both appeals, has been fully briefed on the merits, and presents a question of law, we grant the Alpinieris's request. (See *Thornburg v. Superior Court* (2006) 138 Cal.App.4th 43, 49.) Moreover, it would not serve justice to decline to address the issue presented by these appeals. Especially, if we were to dismiss the Alpinieris's appeal, reverse the court's judgment as to Neighbors on the procedural ground they raise, and the court subsequently rules, on a properly noticed motion against Neighbors, the 1995 CC&Rs are void thus causing Neighbors to once again appeal the very issue in front of us now. As such, efficiency dictates we resolve the issue of whether the 1995 CC&Rs are void. (See *Campbell v. Alger* (1999) 71 Cal.App.4th 200, 206.)

II

THE INTERPRETATION OF THE 1995 CC&RS

The superior court granted summary adjudication in favor of the Skeens based on its interpretation of the 1995 CC&Rs: "The 1995 CC&Rs were not permitted under the 1967 CC&Rs because they purported to replace the 1967 CC&Rs rather than extending them; therefore, based upon the plain language of the 1995 CC&Rs, they were new

CC&Rs and were not permitted under the 1967 CC&Rs." In addition, the court ruled "[t]he 1995 CC&Rs were new restrictions on the land and therefore required the approval of all of the owners, which they did not receive, and are void ab initio."

The Alpinieris and Neighbors argue this ruling was in error because the 1995 CC&Rs amended and extended the 1967 CC&Rs; therefore, only a simple majority was needed to approve them. We agree.

A. Standard of Review

We review summary judgment de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 673, 767.)

Here, the court's granting of summary adjudication hinged entirely upon its interpretation of the 1995 CC&Rs. Recorded CC&Rs are contracts. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513; *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 575.) We review the interpretation of a contract de novo unless the interpretation turns on the credibility of extrinsic evidence. (*Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843.) Here, the court based its interpretation of the 1995 CC&Rs on "the[ir] plan language" explaining they "expressly state that they replace the 1967's CC&Rs." Thus, the court's order implies it found the 1995 CC&Rs unambiguous and interpreted them based solely upon the document's language.

However, it appears the Alpinieris offered and the court admitted extrinsic evidence regarding how and why the architectural committee developed the 1995

CC&Rs. As we discuss below, we conclude no conflicting extrinsic evidence was offered. Therefore, our standard of review remains de novo. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3.)

B. Legal Standards For Interpreting the 1995 CC&Rs

We interpret CC&Rs under contract principles (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380-381) and analyze them as contracts with each buyer of property subject to them (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 363).

The primary goal of contract interpretation is to give effect to the mutual intent at the time of contracting. (Civ. Code,¹ § 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Here, the parties dispute the meaning of certain terms in the 1995 CC&Rs. The Skeens contend the words "replace" and "new" compel only one interpretation of the 1995 CC&Rs: they are entirely new CC&Rs meant to replace the 1967 CC&Rs. To the contrary, the Alpinieris and Neighbors contend the words "replace" and "new" do not necessarily connote the 1995 CC&Rs are entirely new CC&Rs, but instead, merely amend and extend the 1967 CC&Rs.

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is "reasonably susceptible" to the interpretation urged by the party. If it is not, the case is over. [Citation.] If the court decides the

¹ Statutory references are to the Civil Code unless otherwise specified.

language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean?' " (*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448.)

C. The Language of the 1995 CC&Rs

The dispute regarding the interpretation of the 1995 CC&Rs hinges upon the meanings of the words "replace" and "new." The Skeens contend the words "replace" and "new" can only mean the 1995 CC&Rs are entirely new. They stress the 1995 CC&R's are entitled "Declaration of Restrictions of La Jolla Shores Heights Map No. 5831," and had the parties intended to merely amend the 1967 CC&R's, they would have entitled the document "Second Amendment to the Declaration on the Restrictions of La Jolla Shores Heights, Map No. 5831."² The Skeens, however, ignore the language of the 1995 CC&Rs that supports the Alpinieris's and Neighbors's urged interpretation the 1995 CC&Rs amended and extended the 1967 CC&Rs.

To interpret the 1995 CC&Rs, we do not merely read the words "replace" and "new" along with the title of the document and consider nothing else in the 1995 CC&Rs. These words cannot be defined in a vacuum, but must be considered in the context of the entire document (§ 1641) and the circumstances under which it was made, and the matter to which it relates (*McCaskey v. California State Automobile Assn.* (2010) 189

² The 1967 CC&Rs were amended in 1986 by a document entitled "First Amendment to Declaration of the Restrictions of La Jolla Shores Heights, Map No. 5831."

Cal.App.4th 947, 967). Further, we are mindful that "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (§ 1644.)

The words "replace" and "new" are not necessarily inconsistent with an amendment. Amended CC&Rs would replace the previous version of the CC&Rs. After amended CC&Rs are drafted and recorded, they also would be new. Thus, it would not be unreasonable to interpret the words "replace" and "new" as conveying an amendment. Further, other language in the 1995 CC&Rs supports this interpretation.

After the initial introductory language of the 1995 CC&Rs, they begin with a "Grandfather Provision." This provision refers to the 1995 CC&Rs as a "change." The parties do not address the meaning of "change" in their briefs. However, we find the meaning of the word "change" along with the rest of the language in the grandfather provision extremely helpful in interpreting the 1995 CC&Rs.

The word "change" can mean "to replace with another" or "to make different in some particular: alter." (Merriam Webster's Collegiate Dict. (11 Ed. 2006) p. 206, col. 1.) Thus, the word "change" could support both the interpretations urged by the parties, and we look to the rest of the grandfather provision to provide the necessary context to ascertain its meaning.

The grandfather provision explains that any lot that was not in compliance with the 1995 CC&Rs at the time they were recorded would not violate the 1995 CC&Rs

unless the lot also was in violation of the 1967 CC&Rs. The 1995 CC&Rs changes would only govern uses of lots, improvements or landscaping of lots, or other activity occurring after the 1995 CC&Rs went into effect with the 1967 CC&Rs still governing prior uses, improvements, landscaping, and other activity. In other words, the 1995 CC&Rs were a change going forward and the 1967 CC&Rs remained in effect and were to continue as long as the 1995 CC&Rs were in effect. The grandfather provision therefore elucidates the proper meaning of "change" is to alter. This provision explicitly states the 1995 CC&Rs were not completely replacing the 1967 CC&Rs, but instead the 1967 and 1995 CC&Rs were to coexist.

Because the 1995 CC&Rs specifically reference the 1967 CC&Rs, it is helpful to compare the two documents to gain a better understanding of the meaning of the words "replace" and "new." Moreover, if the 1995 CC&Rs did amend and extend the 1967 CC&Rs, the 1995 CC&Rs and the 1967 CC&Rs would be considered a single document and should be read together.

The 1995 CC&Rs are not created out of whole cloth. They contain many of the same restrictions, including the same language, as found in the 1967 CC&Rs. For example, the 1995 CC&Rs contain the same restrictions on minimum square footage of homes; fences, walls, and hedges; drying yards and storage; wells and machinery; set backs; drainage; and underground utilities as the 1967 CC&Rs. To this extent, the 1995 CC&Rs copy the language of the 1967 CC&Rs verbatim.

Many of the changes in the 1995 CC&Rs appear to address technological advances (e.g., revised prohibition of antennas) or the owners' experience in dealing with certain restrictions under the 1967 CC&Rs (e.g., allowing home offices; adding reasonableness concept to view interference; allowing the architectural committee to approve self-help measures by owners to remove, prune, or trim encroaching plants that substantially impair view). As such, the majority of the changes in the 1995 CC&Rs appear to be aimed at modernizing the 1967 CC&Rs while improving some of the provisions based on the owners' familiarity of living under restrictions found in the 1967 CC&Rs. In this sense, there is very little in the 1995 CC&Rs that would qualify as entirely new.

In short, reading the 1995 CC&Rs in their entirety, we are not convinced the language supports only the interpretation urged by the Skeens, namely they are entirely new CC&Rs. At the very least, the language of the 1995 CC&Rs appears to be reasonably susceptible to the interpretation offered by the Alpinieris and Neighbors: they amended and extended the 1967 CC&Rs.

C. The Parties' Intent

Because we conclude the 1995 CC&Rs language is reasonably susceptible to the interpretation urged by the Alpinieris and Neighbors, we next consider what the parties intended the language to mean. (See *Oceanside 84, Ltd. v. Fidelity Federal Bank, supra*, 56 Cal.App.4th at p. 1448.) "If the contract is capable of more than one reasonable interpretation, it is ambiguous [citations], and it is the court's task to determine the

ultimate construction to be placed on the ambiguous language by applying the standard rules of interpretation in order to give effect to the mutual intention of the parties [citation]." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798.) "That intent is to be inferred, if possible, solely from the written provisions of the contract." (*Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1352 (*Pardee*)). However, "extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.)

" 'All the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of the instrument.' " (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.) "Generally speaking, 'the rules of interpretation of written contracts are for the purpose of ascertaining the meaning of the words used therein' " (*Miscione v. Barton Development. Co.* (1997) 52 Cal.App.4th 1320, 1326; italics omitted.)

As we conclude above, the language of the 1995 CC&Rs is "reasonably susceptible" to the interpretation urged by the Alpinieris and Neighbors. Our interpretation also is aided by extrinsic evidence regarding the intent of the parties, which the superior court considered.

In opposing the Skeens's motion for summary adjudication, the Alpinieris presented evidence that the 1995 CC&Rs were intended to amend the 1967 CC&Rs. To this end, they offered the deposition testimony of James Skeen in which he stated it is

"absolutely not" his position the 1995 CC&Rs were invalid. James also testified he believed the 1995 CC&Rs became effective after they were recorded. In addition, the Alpinieris presented evidence showing the Skeens acted as if the 1995 CC&Rs were effective as they voted for members of the architectural committee in 2004, expressed concern that Lou Alpinieri could serve on the architectural committee, worked with other homeowners to enforce the 1995 CC&Rs, and used the architectural committee to challenge the University of California's plan to build a machine shop near Heights.

Also, a member of the architectural committee at the time the 1995 CC&Rs were drafted testified during deposition that some Heights's owners wanted the 1967 CC&Rs to remain in effect, thus, the architectural committee drafted some amendments and circulated them for comment. These circulated amendments became part of the 1995 CC&Rs that were ultimately recorded.

The Alpinieris also presented evidence that, after the 1995 CC&Rs were recorded, the majority of Heights's owners treated the 1995 CC&Rs as valid and often requested the architectural committee to enforce them. For example, the architectural committee actively reviewed plans for new construction and improvements.

The Skeens claim they presented extrinsic evidence that conflicted with the evidence provided by the Alpinieris. Specifically, the Skeens reference the 1997 amendment to the 1995 CC&Rs, deposition testimony, and the reporter's transcript of the December 4, 2009 proceedings before the superior court. The Skeens then contend the superior court considered this conflicting extrinsic evidence and found that it supported

their interpretation the 1995 CC&Rs were entirely new, and thus, void. As such, the Skeens suggest we apply a substantial evidence review of the superior court's resolution of the factual dispute. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2.) We struggle, however, to find examples of any conflicting evidence in the record.³

The Skeens's reliance on the reporter's transcript of the December 4, 2009 proceedings before the superior court is misplaced. The transcript contains the arguments of the parties. It is not extrinsic evidence of the parties' intent.

The deposition transcript cited by the Skeens also does not provide any extrinsic evidence of intent. The transcript contains no testimony regarding what the parties intended the 1995 CC&Rs to be. Instead, the testimony only concerns shrubs and trees on the Skeens's property that encroached upon the Alpinieris's property. This testimony does not conflict with the extrinsic evidence the Alpinieris offered.

The Skeens also claim the 1986 and 1997 amendments are conflicting extrinsic evidence of intent. Apparently, the Skeens believe the fact that the 1967 CC&Rs were amended in 1986 with a recorded amendment, and an amendment to the 1995 CC&Rs was recorded in 1997, somehow contradicts the extrinsic evidence the Alpinieris offered. We disagree. The fact that there were two recorded amendments to the CC&Rs does not

³ Even if we were to conclude conflicting extrinsic evidence exists, summary adjudication would be inappropriate. (See *Sterling v. Taylor* (2007) 40 Cal.4th 757, 771 ["Conflicts in the extrinsic evidence are for the trier of fact to resolve . . ."].)

somehow contradict the evidence offered by the Alpinieris that the intent of the 1995 CC&Rs was to extend and amend the 1967 CC&Rs. If anything, the two recorded amendments are evidence that the 1995 CC&Rs were poorly drafted and could have been clearer if they were labeled "amendment."

The Skeens also point out that a declarant (Thane Bauz) referred to the 1995 CC&Rs and the 1997 amendment to the 1995 CC&Rs instead of referring to them as the second and third amendments to the 1967 CC&Rs. The Skeens therefore reason that Bauz's declaration contradicts the Alpinieris's other evidence regarding intent. Bauz's failure to reference the 1995 CC&Rs as a second amendment to the 1967 CC&Rs does not contradict the evidence regarding intent. Indeed, throughout Bauz's declaration, he refers to the architectural committee existing and operating after the supposed expiration of the 1967 CC&Rs. He also discusses his interactions with the Skeens regarding the architectural committee and the 1995 CC&Rs. Considered in this context, Bauz's reference to the 1995 CC&Rs and the 1997 amendment to the CC&Rs merely seems to be a matter of convenience.⁴

Finally, the Skeens, without citing any authority, argue the Alpinieris's and Neighbors's intent argument fails because they did not present evidence that the 31

⁴ Neighbors argue we can decide the validity of the 1995 CC&Rs under the sham pleading doctrine. (See *Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.) Although we do not reach this issue, we are mindful the Skeens took over a year to amend their cross-complaint to challenge the validity of the 1995 CC&RS after they first sought to enforce them. This delay undermines their argument the language of 1995 CC&Rs is unambiguous.

individuals who signed the 1995 CC&Rs intended those CC&Rs to be an amendment to the 1967 CC&Rs. We are aware of no such requirement under California law, and therefore, reject this argument.

In short, we conclude that no conflicting extrinsic evidence of intent exists in the record. Moreover, the extrinsic evidence presented overwhelmingly establishes that Heights's owners understood the 1995 CC&Rs to amend and extend the 1967 CC&Rs. Even James Skeen's deposition testimony is consistent with this intent.

D. Conclusion

We conclude the 1995 CC&Rs amend and extend the 1967 CC&Rs. Our interpretation is compelled by the language of the 1995 CC&Rs as well as the abundance of extrinsic evidence of the parties' intent. Further, we have the benefit of the owners' subsequent conduct under the 1995 CC&Rs and compliance with same for over the past 10 years. (See e.g., *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Oceanside 84, Ltd. v. Fidelity Fed. Bank, supra*, 56 Cal.App.4th at p. 1449.) It is telling that about 13 years transpired since the 1995 CC&Rs were recorded and any owner challenged their validity. Moreover, this challenge occurred after the owners tried to enforce the 1995 CC&Rs in litigation for over a year. Simply put, our interpretation of the 1995 CC&Rs "make[s] [them] lawful, operative, definite, reasonable, and capable of being carried into effect . . . without violating the intention of the parties." (§ 1643; see *Poseidon Development, Inc. v. Woodland Lane Estates, LLC*

(2007) 152 Cal.App.4th 1106, 1115; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 852.)

IV

THE SKEENS'S REMAINING GROUNDS FOR SUMMARY ADJUDICATION

The Skeens advance two additional arguments that summary adjudication was warranted. They assert the 1995 CC&Rs were not executed by a majority of Heights's owners, and they claim Heights's owners have abandoned the 1995 CC&Rs. We conclude the Skeens attack on the execution of the 1995 CC&Rs is barred by the statute of limitations and a triable issue of fact exists as to abandonment. Thus, summary adjudication is not warranted under either of the alternative theories the Skeens proffer.

A. The Execution of the 1995 CC&Rs

The Skeens argue the 1995 CC&Rs were not properly executed. Specifically, the Skeens contend although signatures of 31 owners were required to approve the 1995 CC&Rs (if they were amendments), only 19 owners signed the 1995 CC&Rs "in the manner required for conveyance of real property." They claim the signatures of the owners of 11 lots were improper because they did not subscribe the names of their principals and specify their capacity as trustees or attorneys-in-fact. The Skeens also insist the signatures for three additional lots suffered from procedural errors, and thus, are invalid.

While both the Alpinieris and Neighbors argue they raised triable issues of fact as to each of these issues, they assert we need not reach these issues because the Skeens's

challenge is barred by the statute of limitations in Code of Civil Procedure section 343.

We agree.

We previously held the four-year limitations period provided in Code of Civil Procedure section 343 applies to a challenge that amendments to CC&Rs are invalid. (*Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1195 (*Costa Serena*); see also *Schuman v. Ignatin* (2010) 191 Cal.App.4th 255, 265 (*Schuman.*) The statute of limitations here began to run when the 1995 CC&Rs were recorded. (See *Costa Serena, supra*, 175 Cal.App.4th at p. 1196.) The 1995 CC&Rs were recorded in May 1995. The Skeens did not challenge the validity of the 1995 CC&Rs until some 13 years later. Thus, the Skeens's attack on the execution of the 1995 CC&Rs is time-barred unless the statute of limitations is somehow not applicable.

The Skeens contend *Costa Serena, supra*, 175 Cal.App.4th 1175 and *Schuman, supra*, 191 Cal.App.4th 255 are not applicable because both those cases dealt with amendments to CC&Rs while the instant matter concerns entirely new CC&Rs. The Skeens's argument would be persuasive had we determined the 1995 CC&Rs were entirely new CC&Rs. However, as we discuss above, we conclude the 1995 CC&Rs merely amend and extend the 1967 CC&Rs.

The Skeens also argue the statute of limitations does not apply to them because there is no requirement for a party to seek declaratory relief that a contract has expired. They contend the 1967 CC&Rs expired under their own terms, and they had no

obligation to bring a suit to establish their expiration. (See *Busch v. Globe Industries* (1962) 200 Cal.App.2d 315, 320 ["Contract remains in force until it has been terminated either according to its terms or through the acts of parties evidencing abandonment."].) We disagree for two reasons.

First, this argument is simply an alternative way of claiming the 1995 CC&Rs did not amend the 1967 CC&Rs. As we discuss above, we interpret the 1995 CC&Rs as amending and extending the 1967 CC&Rs. Second, the Skeens appear to be claiming they had no reason to challenge the 1995 CC&Rs until the instant action. We rejected the same argument in *Costa Serena, supra*, 175 Cal.App.4th at page 1196 and do so again here. This argument is all the more dubious because, unlike the plaintiff challenging the CC&Rs in *Costa Serena*, the Skeens used the 1995 CC&Rs to their advantage and originally brought a cross-complaint against the Alpinieris to enforce them.

The Skeens's next challenge to the application of the statute of limitations is that, even if we determine the 1995 CC&Rs are amendments to the 1967 CC&Rs, they are void because they were procured by fraud in the inception. (See *Costa Serena, supra*, 175 Cal.App.4th at p. 1192.) This argument is underdeveloped and includes no citation to the record or relevant authority.

" '[F]raud goes to the inception or execution of [an] agreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is void.' " (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14

Cal.4th 394, 415 (*Rosenthal*); italics omitted.) Fraud in the inception will render a contract "wholly void, despite the parties' apparent assent to it, when, ' "without negligence on his part, a signer attaches his signature to a paper assuming it to be a paper of a different character." ' [Citations.]" (*Id.* at p. 420; italics omitted.) Thus, "[i]f a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has a reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent." (Rest.2d Contracts, § 163; see also *Rosenthal, supra*, 14 Cal.4th at pp. 420, 423-424, 428-429 [quoting with approval and applying the Restatement doctrine]; *Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 837-838; *Larian v. Larian* (2004) 123 Cal.App.4th 751, 762-763; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 301, pp. 328-329.)

Here, the Skeens claim Richard Chen's signature on a draft of the CC&Rs, which was then affixed to the final draft, created a forgery and fraudulent recording. The Skeens, however, present no evidence that Chen did not assent to the use of his signature or did not intend to approve the 1995 CC&Rs in their final form. Instead, the Skeens simply assume they have proved fraud in the inception because Chen's signature was allegedly taken from a draft of the 1995 CC&Rs. The Skeens's assumption does not, however, establish a prima facie case of fraud in the inception.

Likewise, the Skeens's argument that fraud is shown by the holding out of 1995 CC&Rs as having been approved by a majority of Heights's owners lacks merit. The

Skeens fail to explain and we do not see how such an act could be considered fraud in the inception. There is no evidence before us that any of the signatories of the 1995 CC&Rs did not know what they were signing. (See *Rosenthal, supra*, 14 Cal.4th at pp. 415, 420.)

The Skeens next claim the Alpinieris's and Neighbors's statute of limitations argument is simply a rehash of a theory rejected by the superior court in denying the Alpinieris's and Neighbors's motions for summary adjudication of the Skeens's second and third causes of action in their cross-complaint. While it is true the court denied the Alpinieris's and Neighbors's motions, there is no indication in the record that it did so by finding the statute of limitations was not applicable. Instead, the court denied the motions because they would not resolve an entire cause of action. (See Code Civ. Proc., § 437c, subd. (f)(1).) In so ruling, the court did not reach the merits of the motions, and its orders do not somehow preclude the Alpinieris or Neighbors from making the statute of limitations argument here.

Finally, the Skeens argue the statute of limitations does not apply because of the discovery rule, which postpones accrual of a cause of action until a party discovers, or has reason to discover, the factual basis for the cause of action. (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 634.) They insist they did not have knowledge of, or reason to suspect, any wrongful conduct regarding the improper and inadequate execution of the signatures for the 1995 CC&Rs until after they were sued by

the Alpinieris and their investigation regarding the 1995 CC&Rs commenced.⁵ We are not persuaded.

Here, the Skeens challenge the validity of the signatures on the 1995 CC&Rs on three grounds. First, they argue Chen's signature is a forgery. Second, they contend Mary Weiner's signature is defective because she dated her signature on May 3, 1995, but the notary acknowledged the signature with a date of April 30, 1995. Third, the Skeens claim that several of the lots were owned in trust, and thus, had to be signed by the owners in their capacities as trustees, not as individuals. Because the owners signed in their individual capacities, the Skeens insist their signatures are invalid.

As a threshold matter, the Skeens do not argue they were unaware of the 1995 CC&Rs. At the latest, they were aware of the recorded 1995 CC&Rs by October 6, 1995, when Louis Alpinieri wrote to James Skeen seeking to enforce them. Moreover, James Skeen referenced provisions of the 1995 CC&Rs in his January 12, 1996 letter to the architectural committee.

The signature page of the 1995 CC&Rs includes Chen's signature. In fact, it is the first signature on the signature page. It is clearly dated April 7, 1995. The notary's acknowledgement of Chen's signature also is dated April 7, 1995 and states the document signed was 12 pages. The recorded CC&Rs were only 10 pages. In addition, all other

⁵ The discovery rule is typically a question of fact. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.) Thus, it is often an inappropriate issue to decide on summary judgment unless the facts are undisputed and only one reasonable inference can be drawn. (*Ibid.*)

signatures except for Weiner's, were dated April 30, 1995. Thus, simply by looking at the recorded signature pages, the Skeens could have deduced there was an issue with the timing of Chen's signature.⁶

The basis for the Skeens's challenge to Weiner's signature also is apparent on the document. Her signature page bears the date May 3, 1995 and the acknowledgement states she signed the document on April 30, 1995. Therefore, like Chen's signature, the Skeens were on notice of the discrepancy they now raise upon review of the 1995 CC&Rs. There was no need for discovery or investigation after the Alpinieris filed suit to discover these alleged defects, and the Skeens offer no valid argument the statute of limitations should be tolled. (See *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897 [the

⁶ The Skeens also attack Chen's signature because he purportedly did not execute the 1995 CC&Rs "in the manner required for conveyance of real property." Because the Skeens are the moving party, they bear the burden to make a prima facie showing of the lack of a triable issue of fact as to this issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*.) Lot 49 was owned by Yee-Ping Chenwang and Nai-Jen Chen-lin, Chen's parents. The Skeens claim Chen only had authority, as power of attorney, to secure a loan up to \$500,000 secured by his parents' home. To support this theory, they cite to a recorded power of attorney providing Chen this limited right. However, the existence of this limited power of attorney does not rule out the possibility that Chen had an additional power of attorney or Chen's parents otherwise authorized him to sign the 1995 CC&Rs. The Skeens provide no deposition testimony of Chen or his parents indicating that Chen did not have authority to sign the 1995 CC&Rs. The signature page of the CC&Rs includes the names of Yee-Ping Chenwang and Nai-Jen Chen-lin with Chen's signature followed by the acronym "POA." Thus, simply by reviewing the first signature page of the 1995 CC&Rs, the Skeens could have ascertained Chen was signing the document in his capacity as power of attorney. The Skeens, however, fail to explain how Chen's signature did not comply with the statutory requirements. Further, they have neither established that a triable issue of fact does not exist as to Chen's authority to sign the 1995 CC&Rs nor the discovery rule would apply to this alleged improper signing.

statute of limitations begins to run "no later than the time the plaintiff learns, or should have learned, of facts essential to his claim"], italics omitted.)

Finally, the Skeens claim that several of the lots were owned in trust, and the 1995 CC&Rs were not properly signed by individuals in their capacities as trustee. The Skeens correctly point out that any amendment to the CC&Rs must be signed in a manner required for the conveyance of real property. Section 1091 provides: "An estate in real property . . . can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of same, or by his agent thereunto authorized by writing." The Skeens assert the failure of the various individuals to sign as trustees violates section 1091 and the signatures are ineffective. This argument, however, does not trigger the discovery rule.

The Skeens base their contention on a comparison between the signatures on the 1986 amendment to the 1967 CC&Rs and the 1995 CC&Rs. Thus, the Skeens had the information to discover the purported issue with the signatures of these lots upon review of the 1995 CC&Rs.⁷

In addition, the Skeens have not sufficiently developed their challenge of the signatures for purposes of summary adjudication. The 1986 amendment does not establish how the subject lots were held in 1995 when the 1995 CC&Rs were signed. To establish this fact, the Skeens would have had to offer the deeds of trust or testimony

⁷ The Skeens do not claim they were unaware of the 1986 amendment and offered it as an exhibit in support of their motion for summary adjudication.

from the subject owners regarding how the property was held. By merely relying upon the 1986 amendments to establish the owners of certain lots, the Skeens, at best, have raised a triable issue of fact regarding some of the signatures on the 1995 CC&Rs. Simply put, they have not satisfied their "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of fact . . ." (*Aguilar, supra*, 5 Cal.4th at p. 850.)

B. Abandonment

The Skeens also argue summary adjudication is proper because the 1995 CC&Rs have been abandoned. To this end, the Skeens provided declarations, deposition testimony, photographs, and purported expert opinion supporting their theory. Much of this evidence concerns alleged violations under the 1995 CC&Rs, which include fences, rails, or hedges that exceeded the maximum allowable height; storage area and sheds that are not completely screened from view; and improvements that had not received architectural committee approval.

The Alpinieris responded with declarations, documents, and interrogatory responses evidencing various owners operating under the 1995 CC&Rs, which includes the Alpinieris.

"The right to enforce a restrictive covenant may be deemed generally waived when there are 'a sufficient number of waivers so that the purpose of the general plan is undermined,' in other words, when 'substantially all of the landowners have acquiesced in a violation so as to indicate an abandonment.' " (*Alfaro v. Community Housing*

Improvement System & Planning Assn., Inc. (2009) 171 Cal.App.4th 1356, 1380, quoting *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1189.)

Although the Skeens purport to have presented evidence that at least 44 of 60 Heights lots have violated the 1995 CC&Rs, the Alpinieris also presented evidence that many owners have complied with the 1995 CC&Rs. As such, we conclude the Alpinieris have raised a triable issue of fact because we cannot determine on the record before us that substantially all Heights's owners have acquiesced in a violation so as to indicate abandonment. Indeed, both the Skeens and the Alpinieris sued each other to enforce the 1995 CC&Rs. The issue of abandonment thus presents a question of fact that cannot be resolved on summary judgment. (Cf. *Rice v. Heggy* (1958) 158 Cal.App.2d 89, 91.)

IV

SUA SPONTE SUMMARY ADJUDICATION

Because we are reversing the superior court's judgments, we need not address Neighbors's contention the court sua sponte granted summary adjudication. However, we do agree with Neighbors that the court cannot apply a summary adjudication result to parties who were not expressly made opposing parties to a summary adjudication motion under Code of Civil Procedure section 437c. (See, e.g., *Dvorin v. Appellate Department* (1975) 15 Cal.3d 648, 650-651.) Here, the Skeens did not move for summary adjudication as to their cross-complaint, and summary adjudication as to Neighbors was inappropriate.

DISPOSITION

The judgments are reversed. The Alpinieris and Neighbors are awarded their costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.