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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DIEM T. NGUYEN,

Plaintiff and Appellant,

v.

SUMMERGREEN HOMEOWNERS  
ASSOCIATION et al.,

Defendants and Respondents.

G046445

(Super. Ct. No. 07CC00188 )

O P I N I O N

DIEM T. NGUYEN

Plaintiff,

v.

HOANG HUY NGUYEN et al.,  
Defendants.

(Super. Ct. No. 05CC08432)

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Diem Trang Nguyen, in pro. per., for Plaintiff and Appellant.

Soltman, Levitt, Flaherty & Wattles, Stephen D. Flaherty and Steven S.

Nimoy for Defendants and Respondents.

Plaintiff Diem T. Nguyen, a disgruntled condominium resident, sued defendants (a homeowners' association, its board of directors, and a property management firm) for allegedly failing to maintain the complex's common areas. Plaintiff appeals a judgment of dismissal entered after the trial court granted defendants' *unopposed* motion for summary judgment. Defendants established in their motion for summary judgment that plaintiff no longer owned a condominium within the association as of 2010 and she therefore lacked standing to seek declaratory relief with regard to maintenance of the common areas. Moreover, defendants established that plaintiff had not suffered monetary damages as a result of defendants' alleged failure to maintain common areas. We affirm.

## FACTS

In January 2007, plaintiff filed a complaint for breach of contract, breach of fiduciary duty, negligence, violation of Civil Code section 1364, declaratory relief and an accounting against defendants Summergreen Homeowners Association (Summergreen), Amber Property Management (Amber), Bill Hencke, Olga Marquez, Victor Enciso, Richard Leynes, and Libertad Torrico. The latter five defendants were directors of Summergreen and shall be referred to as the Director Defendants. The gravamen of the complaint was that defendants failed to maintain the common areas of the complex. In particular, defendants did not adequately address pipe problems and termite infestations. Plaintiff alleged she was an owner of a condominium unit and was a member in good standing with Summergreen. Plaintiff sought damages, declaratory relief, and an accounting.

Defendants filed a motion for summary judgment in June 2011. Plaintiff did not file any opposition papers.

Defendants submitted a copy of the declaration of covenants, conditions, and restrictions (CC&R's) for Summergreen. The CC&R's define "'Common Areas'" to "mean all areas on the Project, except the Units. Common Areas shall include, without limitation, for maintenance purposes of the Association, but not necessarily by way of fee title, all gas, water and waste pipes, all sewers, all ducts, chutes, conduits, wires and other utility installations of the Project Improvements wherever located . . . , the land upon which the Project Improvements are located and the airspace above the Project Improvements, all bearing walls, columns, unfinished floors, the roofs, foundation slabs, party walls, utility walls, foundations, private streets or driveways, walkways, security gate, common stairways, parking areas and landscaping on those areas of the Project which are not defined as a part of the Units." The CC&R's define "'Unit'" to mean, in relevant part, "the elements of a Condominium not owned in common with the Owners of other Condominiums in the Project. . . . Each such Unit consists of a living area or spaces . . . bounded by and contained within the interior unfinished (meaning exclusive of wall coverings, floor coverings, fixtures or decorations) surfaces of the perimeter walls, floors, ceilings, windows, and doors . . . ." As defendants note in their brief, the only separate property owned by condominium owners like plaintiff was the "'air space'" within the individual unit and not any portion of the structure of the building. (See *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 906.)

The CC&R's define "'Common Expenses'" to "mean those expenses for which the Association is responsible under this Declaration, including the actual and estimated costs of: maintenance, management, operation, repair and replacement of the Common Property . . . ." "'Common Property'" is defined to include "Common Areas." As to maintenance and repair of "Common Areas," the CC&R's state "the Association shall paint, maintain, repair and replace the Common Property and Improvements thereon or shall contract for such . . . to assure maintenance of the Common Property and

Improvements thereon in a clean, sanitary and attractive condition, reasonably consistent with the level of maintenance reflected in the most current Budget on file with and approved by the California Department of Real Estate . . . . Association maintenance, repairs and Improvements shall include . . . if determined by the Board to be economically feasible, a monthly inspection and preventative program for the prevention and eradication of infestation by wood-destroying and other pests and organisms in the Property.”

Defendants’ separate statement of undisputed facts established that plaintiff was no longer the owner of a condominium at Summergreen. A notice of trustee’s sale of the condominium had been recorded, which indicated plaintiff’s interest in the property was extinguished. Defendants’ separate statement also established (by citing to an attached transcript of plaintiff’s deposition) that plaintiff’s alleged “damages” were based on plaintiff observing termites in the building and an alleged failure of defendants to fix this problem; plaintiff could not identify any damage to her living space or personal property, or any expenditures she had made as a result of an alleged failure to maintain common areas.

Defendants argued plaintiff was no longer an owner of a separate interest in Summergreen and therefore lacked standing to bring a lawsuit based on her allegations that defendants failed to maintain the common areas of Summergreen. (See Civ. Code, § 1354.) Defendants also argued plaintiff failed to comply with Code of Civil Procedure section 425.15, which provides procedural protections for volunteer directors of nonprofit corporations. Defendants’ separate statement of undisputed facts established that Summergreen is a nonprofit corporation and the Director Defendants serve as volunteers without compensation.

The court granted defendants’ motion for summary judgment. “Moving parties have met their burden and by failing to file an opposition, plaintiff has failed to establish a triable issue of fact.”

## DISCUSSION

Plaintiff's briefs are not a model of clarity, but, charitably construed, plaintiff contends (1) plaintiff is engaged in other litigation against various parties in connection with the foreclosure on her interest in the condominium, and thus she still potentially retains an ownership interest in Summergreen; (2) plaintiff has standing to recover damages for the period of time during which she owned a condominium at Summergreen, even if she currently lacks standing to pursue declaratory relief with regard to the enforcement of Summergreen's CC&R's; and (3) Code of Civil Procedure section 425.15 applies only to negligence causes of action and does not affect her other causes of action against the Director Defendants.<sup>1</sup>

### *Standard of Review*

"We review a grant of summary judgment de novo. [Citation.] We assume the role of the trial court and redetermine the merits of the motion." (*Calemine v.*

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<sup>1</sup> Plaintiff requests we take judicial notice of documents she asserts will show Summergreen was a suspended corporation as of April 6, 2007, and therefore lacked the capacity to defend this action. (See Rev. & Tax Code, § 23301.) But plaintiff acknowledges in her reply brief that Summergreen applied for and was granted a revivor on September 17, 2011. (See Rev. & Tax Code, § 23305.) "Our Supreme Court has held that the revival of corporate powers during the course of litigation validates earlier acts occurring prior to judgment, as well as matters occurring postjudgment." (*Center for Self-Improvement & Community Development v. Lennar Corp.* (2009) 173 Cal.App.4th 1543, 1553.) "Subsequent corporate revivor retroactively validates actions in the course of litigation such as" "making and opposing of motions and engaging in discovery . . . ." (*Ibid.*) "[T]he revival of corporate powers enables the previously suspended party to proceed with the prosecution or defense of the action and validates a judgment obtained during suspension." (*Ibid.*) "Corporate incapacity is nothing more than a legal disability, depriving the party of the right to come into court and represent its own interest. As such, lack of capacity is not a jurisdictional defect and is waived if not properly raised." (*Id.* at p. 1552.) Plaintiff did not raise the alleged incapacity below. She may not do so now. Moreover, plaintiff acknowledges Summergreen's corporate status has been revived, thereby validating all actions taken during the course of litigation as well as the judgment. The request for judicial notice is denied.

*Samuelson* (2009) 171 Cal.App.4th 153, 160-161.) A court cannot grant summary judgment based purely on the lack of opposition papers; the moving party must meet its “initial burden of proof.” (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085-1086.)

“The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) A cause of action has no merit if “[o]ne or more of the elements of the cause of action cannot be separately established . . . .” (Code Civ. Proc., § 437c, subd. (o)(1).) “A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established . . . . Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action . . . . The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .” (Code Civ. Proc., § 437c, subd. (p)(2).)

#### *Claims Based on Improper Common Area Maintenance*

“Unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common areas, other than exclusive use common areas, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to that separate interest.” (Civ. Code, § 1364, subd. (a).) This statutory default setting is consistent with the Summergreen CC&R’s. It is clear Summergreen had the duty to maintain common areas.

“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.” (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246.) This rule applies to an association’s (and its agents’) failure to maintain common areas. (See *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 252-253, 255 [in context of owner seeking injunctive relief regarding termite infestation maintenance, establishes rule of deference owed to association for good faith maintenance decisions made by board of directors]; *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 932-933, 935-936 [claim for damages by homeowners against association and property management company for common area plumbing issues that resulted in sewage overflow into separate property of plaintiffs]; see also *White v. Cox* (1971) 17 Cal.App.3d 824, 828-831 [tort damages also available to homeowners for injuries suffered on improperly maintained common areas].) Thus, it is clear that if plaintiff still owned her condominium, she could (generally speaking) sue Summergreen for both damages and to compel Summergreen to fulfill its duty to enforce the CC&R’s.

The trial court correctly concluded defendants met their initial burden to show plaintiff no longer had an ownership interest in the condominium in which she resided. Thus, plaintiff no longer has the right under Civil Code section 1354 to sue to enforce the Summergreen CC&R’s. (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1036-1038 [non-owner residents do not have standing to enforce CC&R’s, even if owner purports to assign right to them to do so].) Plaintiff’s effort on appeal to claim otherwise is unavailing, as her claim is dependent on the dubious proposition that she still has standing because other lawsuits she has filed might vindicate her continued ownership interest in the condominium. Even assuming the plausibility of her argument, plaintiff was obligated to bring this evidence forward in an opposition to defendants’ motion for summary judgment at the trial court level.

The trial court also correctly concluded defendants met their initial burden of showing plaintiff did not have cognizable damages, an element of her remaining causes of action. One cannot glean from the complaint the precise basis for a damages claim. Plaintiff alleged she was damaged “in having to make [her] own repairs or having to live with dangerous conditions . . . .” She also alleged in her complaint (in 2007) that “[i]f the repairs are not made, the damages could increase substantially.” The complaint did not allege diminution in value of plaintiff’s condominium. Plaintiff is correct that her loss of ownership did not preclude her from suing for damages incurred while she was an owner of her condominium. (See *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 146.) But defendants met their initial burden in their summary judgment motion by showing they had extracted admissions by plaintiff indicating she lacked any cognizable damages. Basically, plaintiff saw some termites and thought there was a problem that was not being addressed by Summergreen, its board of directors, and its property manager. Plaintiff had not spent any money to address the termite issue. Plaintiff could not identify any damage to her separate property. Plaintiff did not identify any other monetary harm. Despite including claims for damages in the complaint, plaintiff had no answer at her deposition to requests for her to specify her actual damages. This is not a case in which actual damage was inflicted upon plaintiff’s person or property as a result of a failure to maintain common areas.

Because the court correctly granted summary judgment for lack of standing to bring a claim for declaratory relief and lack of cognizable damages, we need not address the parties’ contentions with regard to Code of Civil Procedure section 425.15.

## DISPOSITION

The judgment is affirmed. Plaintiff's request for judicial notice of documents not presented to the trial court is denied. Defendants shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.