

Case Law Review
2009 Epstein Grinnell & Howell Legal Symposium
by
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I. INTERPRETATION OF CC&RS

Ekstrom v. Marquesa at Monarch Beach HOA (2008) 168 Cal.App.4th 1111.

Homeowners in this planned residential development in Dana Point alleged that their views were blocked by palm trees. Some of the trees were planted by the developer, some were added thereafter by the homeowners. The palms had grown to a height over the roofline.

The CC&Rs required that "all trees" on a lot be trimmed not to exceed the roof of the house on the lot, unless the tree did not obstruct views. Because trimming a palm tree essentially means the tree would have to be removed, the Board had for many years simply excluded palm trees from the blanket trimming requirement.

When homeowners began to complain about the palm trees blocking views, the board sought an opinion from a willing attorney who opined that the Board could refuse to trim the trees because one provision of the CC&Rs required homeowners to relinquish claims of view when obstructed by new construction or improvements. When it later turned out that this attorney was not skilled in HOA law, and was a close personal friend of the board president (an "anti-view" advocate), a second attorney was hired who opined (1) the CC&Rs clearly protected views from obstruction by trees, and required trimming of all trees; (2) that the view waiver relied on by the first attorney only extended to construction, not to trees (because there was a specific provision requiring tree trimming), (3) the board had no power to create rules which conflicted with the CC&Rs, (4) that if it wanted to exempt palm trees, the Board would have to get the CC&Rs amended to do so, and (5) that homeowners who had planted palm trees with the approval of the ARC might have an affirmative defense to forced removal.

The Board's response was *not* to order trimming/removal of the palm trees. Rather, the Board created a new rule that defined view as "that which is visible from the back of the house, six feet above ground level, looking straight back...between lot lines." Unfortunately (and perhaps inevitably) that definition meant "no view at all" for some of the plaintiff homeowners, since their lots were pie-shaped.

When the Board continued to refuse to order the trimming of palm trees blocking plaintiff homeowners' views, the homeowners sued for declaratory relief and a mandatory injunction forcing the HOA to trim the palms.

The trial court granted an injunction requiring the trimming of the palm trees, and the Court of Appeals upheld the order. The DCA indicated the CC&Rs were clear, and

required the trimming of all trees reasonably determined to interfere with a view. Further, the Board could not create an exception (by means of a rule) for palm trees, simply because it preferred palm trees to views.

Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857.

Homeowner was a self-described "world renowned Homeopathic Nutritionist and religious counselor" who resided in a homeowners association. When he became ill, he transferred his practice to his home. The association's CC&Rs precluded running a home business unless the Homeowner had both a city license and the consent of the association.

The HOA alleged, in part, that he had seen over 1000 clients in his home in a single year, that many of his neighbors objected to the practice and that he was selling products from his home. When the HOA sought to discipline him, he asked to be able to continue the practice for 6-12 months until he recovered. The HOA refused, fined him, revoked all guest passes, but did allow him to receive and send goods from his home until he could return to his office.

At some point, the Homeowner filed a DFEH action, and received a "right to sue" letter.

The homeowner then filed for a preliminary injunction. He admitted in his papers that he was conducting a home business, but claimed that the Association's refusal to let him do so was discrimination on the basis of disability or religion. The court denied the homeowner's request for an injunction, and he appealed. The DCA affirmed the denial of the injunction. Homeowner had failed to obtain the requisite city and association consents before he began operating out of his house, which meant that there was not a substantial likelihood that he would prevail if the matter went on to trial.

Starlight Ridge South HOA v. Hunter-Bloor (2009)177 Cal.App.4th 440.

The CC&Rs for Starlight Ridge created a series of landscape maintenance easements (LME) and assigned to the association the responsibility for maintaining those LMEs, including any improvements located thereon. However, the CC&Rs also assigned to the homeowner the responsibility for maintaining the portion of specified "drainage facilities" located on the homeowner's lot.

Hunter-Bloor's portion of the drainage facility (a V-ditch which was part of a storm drain system required by the MWD during development) happened to be located within the landscape maintenance easement area of her yard. She maintained the HOA was responsible for repairing, the HOA contended the V-ditch was the owner's responsibility.

The court focused on how the language of the CC&Rs should be interpreted, and held for the association, that is, that the maintenance of the V-ditch was the owner's responsibility.

The court correctly noted that it was fortuitous that the homeowner's portion of the drainage system happened to be located on the LME in her yard, that for many, many years the documents had been interpreted by the parties and enforced by the association to allocate maintenance of the ditch to the owner rather than the association, and finally, that it would not be fair to make all the other homeowners pay for her portion of the ditch.

II. Americans with Disabilities Act

Birke v. Oakwood Worldwide (2009) 169 Cal.App.4th 1540.

Birke, a minor, resided in an apartment complex owned and operated by Oakwood Worldwide. While Oakwood had banned smoking in its units and indoor common areas for some time, it continued to allow smoking in outdoor common areas. It also furnished ashtrays, permitted its own agents/employees to smoke in those outdoor areas, and resisted the suggestion of Birke's father to prohibit outdoor smoking. It admitted it had allowed outdoor smoking as a business decision, wanting to market the rentals to an international clientele. Birke sued for public nuisance, and violation of the ADA. In response to defendant's demurrer, the trial court dismissed Birke's complaint without leave to amend, and she appeals.

On appeal, the DCA reversed the dismissal, holding that Birke adequately pleaded a cause of action for public nuisance, and (though not expressly set forth in the complaint) also pleaded facts sufficient to support a cause of action for private nuisance. However, because the housing in question was an apartment complex, an ADA claim could not be pleaded. Case remanded to trial court for further proceedings.

Carolyn v. Orange Park Community Association (2009) 177 Cal.App. 4th 1090

Association's common areas included portions of a large system of trails, some owned by other associations and some by various governmental entities. The trails were intended for horseback riding and trail hiking. In 2007, citing safety concerns, the Association installed barricades to prevent vehicular traffic on its portion of the trail system.

Plaintiff, a disabled person, was neither a member nor a resident of Association. After the barricades were erected, he sought to use the trails by means of a horse-drawn carriage. When he could not do so, he sued the Association alleging violations of the ADA, and state laws dependent on a finding of ADA violation.

The court held that the Association's portion of the trail system was not a public accommodation, because it did not actively encourage public use of the trails: "We do not think [Association's] private trails transform into public accommodations merely because [Association] does not actively exclude members of the public from using the trails."

III. Disclosures

Calemine v. Samuelson (2009) 171 Cal.App.4th 153.

Samuelson sold his condominium unit to Calemine. Prior to that, the development had been involved in a construction defects suit which concerned drainage. Samuelson was the president, and in other years, the treasurer, of the Board, first during the construction defects suit, and later during the remediation work. Samuelson had noted water intrusion into his garage and reported that as part of the CD suit.

The remediation work was not successful, and a second suit was brought against the contractor. After the successful conclusion of the second suit, repairs were made, which concluded in November 1998. After that time, Samuelson did not notice any further flooding or water intrusion in his unit.

Samuelson contracted to sell his unit in 2002. As part of the transaction, Samuelson did disclose there had been flooding and drainage problems, noting water damage and urging buyer to obtain a separate physical inspection from a licensed contractor. Buyers did so, and the inspector noted leakage in garage and at lower levels. Buyers then went to Samuelson for an explanation. He stated "We've had some water intrusion near the bottom of this [garage] wall and through the slab..." He described the association's repairs, and concluded with, "Haven't had a problem since. Problem solved."

Escrow closed in July 2002. In January 2005, the garage flooded, and buyers first learned of the prior CD suit and the repairs.

Plaintiff-buyers filed suit, alleging Samuelson breached a duty to make full and complete disclosures of past actions, that he had failed to disclose he was a member of the board at the time of the second lawsuit, and that he failed to describe the repairs made as a result thereof.

Defendant seller moved for summary judgment, which the trial court granted. On appeal, the court reversed, remanding the matter for trial. The court noted "Samuelson had not disclosed the litigation in the transfer disclosure because he believed he was obligated only to disclose pending actions. Nor did Samuelson ever mention the lawsuits..." The court nevertheless held that the seller was required to disclose the existence of the prior suits concerning water intrusion and repairs. Although the real estate disclosure statement required by Civ. Code 1102.6 might not require the disclosure of past litigation, the common law obligation of a seller to disclose "information materially affecting the value or the desirability of the property.." might require the seller to disclose the past litigation. Because the materiality of that disclosure is a question of fact, not law, the case must be remanded for trial on that issue.

IV. Standing

Martin v. Bridgeport Community Association (2009) 173 Cal.App.4th 1024.

Plaintiffs' parents bought a house in the community association while the developer was still in construction. The plaintiffs and the parents agreed that the plaintiffs would live in the house and bear all the expenses related to the house and its maintenance. When they noticed their lot was smaller than it was supposed to have been per the purchase documents, the plaintiffs approached the builder (Richmond) who agreed to do two lot line adjustments to increase the size of the lot. Before the lot line adjustments had been completed, however, the developer conveyed the other lots to the Community Association as part of its common area.

The plaintiffs negotiated with the Community Association, and a series of letters indicated the association would allow the lot line adjustment to go through, provided the homeowners pay for the Community Association's legal fees and costs, as well as for the relocation of common area sprinklers.

In reliance on the agreement, plaintiffs invested in fencing, landscaping and additional dirt; they also claimed they could not complete their front yard landscaping in the required amount of time because of delays in completion of the lot line adjustment. The Association cooperated with one lot line adjustment, but not the second. In response, the plaintiffs sued for breaches of the agreement to adjust the lot line, and breaches of the CC&Rs and related rules, violation of the Association's duties to the plaintiffs, and failure to maintain the Association's common areas.

The Association demurred to the complaint on the ground that the plaintiffs were not the owners of the property. On granting leave to amend, the parents substituted in as plaintiffs. The Association then sought entry of judgment against the original plaintiffs, and requested its attorney fees and costs.

The trial court held in favor of the Association on the request for fees and costs, awarding it \$29,000+ against the original plaintiffs. On appeal, the judgment was affirmed, in Association's favor, because the plaintiffs lacked "standing" (a legal right to sue.) The claims advanced by the plaintiffs (such as a right to enforce the agreement to expand the size of the lot by lot line adjustment, and the right to enforce the CC&Rs) are claims held only by owners of property. Neither did the plaintiffs have rights as "third party beneficiaries," because there was no evidence that the agreement was made for their benefit.

V. Easements

Gray v. McCormick (2008) 167 Cal.App.4th 1019.

The Grays and the McCormicks owned adjoining lots in Coto de Caza, a very upscale community near San Juan Capistrano. The CC&Rs had granted the Grays an "exclusive easement" ("an exclusive easement of access, ingress and egress") over McCormick's property, for the purposes of constructing a very long driveway to his home.

The McCormicks were in the habit of using the portion of their lot subject to the easement for moving supplies, walking their horses, moving rubbish and manure.

The Grays contemplated construction of an expensive driveway and wished to exclude the McCormicks from any use whatsoever. The McCormicks contended that under California law, the owner of property subject to an easement may make any use of the easement area not inconsistent with the easement owner's use.

The trial court sided with the McCormicks (allowing them to use the easement.) However, the DCA reversed. The terms of the easement in the CC&Rs were not vague. The CC&Rs clearly contemplated an easement "exclusive" to the Grays, exclusive even of the McCormicks. It was therefore appropriate to bar the McCormicks from any use of the portion of their property subject to the easement.

VI. Debt Collection and Foreclosure

Kachlon v. Markowitz (2008) 168 Cal.App.4th 316.

In 1998, the Kachlons sold a house to the Markowitzes, who gave back a promissory note for \$53,000, secured by a deed of trust in the Kachlons' favor. Thereafter, there were numerous transactions between the parties (contracting work done by the sellers for the buyers, legal work performed by the buyers for the sellers, transfer of a car, and finally, an affair between seller husband and buyer wife.)

In 2002, things broke down (!) and sellers (Kachlon) began a nonjudicial foreclosure against buyers. The parties entered into a written agreement, dealing with the various cross-claims, resulting in a reduction of the principal amount of the note by \$41,000.

Later in 2002, buyer (Markowitz) wanted to get a new line of credit secured by the home. As part of that transaction, the seller's debt was to be paid off. The lender's trustee sent the seller a beneficiary demand. Seller completed and returned it, along with the original promissory note and a request for reconveyance (that is, for surrender of the lien.) The beneficiary demand executed by sellers indicated \$12,000 was the balance due on the note. It later turned out that buyer's wife (an attorney) had forged the name of seller-wife on the documents.

Sellers (Kachlons) did receive the amount they had indicated was due, and cashed the check. However, when the trustee later contacted the sellers about the reconveyance, the sellers denied the debt had been fully paid. Sellers then stated that wife's signature had been forged by the buyers. As a result, the escrow did not record the request for reconveyance.

In 2003, the sellers again attempted to foreclose the trust deed. The original trustee refused to proceed, and sellers substituted in a new trustee. The new trustee began foreclosure, even though it only had photocopies of the note (since the original trustee had continued to hold the original note.) Buyer's attorney contacted the new trustee and explained the dispute. New trustee then stopped pursuing the foreclosure, but it did not dismiss the proceeding.

Seller (Kachlon) sued buyer for breaching the home improvement contract and failing to repay personal loans. Buyer (Markowitz) then sued sellers, and the new trustee (and the old trustee) for slander of title and negligence. The cases were consolidated.

While the jury found the new trustee liable, the judge entered judgment in favor of the new trustee "notwithstanding the verdict", exonerating the trustee.

On appeal, the court affirmed judgment for the trustee. The act of mailing, publication, and delivery of notices for nonjudicial foreclosures, and the performance of such other acts as are required by law for nonjudicial foreclosure, are "qualifiedly" privileged. That means, even if the actions turn out to be incorrect, unless there is a showing of malice on the part of the foreclosing entity, those actions cannot serve as the basis for a claim of damages.

VII. Attorney Fees and Costs

Garcia v. Santana (2009) 174 Cal.App.4th 464:

Tenants of a low-income housing cooperative sued the managers and board of the housing complex alleging violations of the Davis-Stirling Act and the community's bylaws. The trial court granted summary judgment against the tenants, but refused to award the prevailing party its attorney fees and costs. The trial court based its decision on the fact that the tenant had no money (she was proceeding *in forma pauperis* and was representing herself.)

The manager and board appealed the denial of fees. However, the DCA ruled that it is appropriate to award no fees where the losing party, despite Davis-Stirling's direction that fees "shall" be awarded to the prevailing party, where an analysis of all the factors, including the losing party's financial condition, indicates that "zero" is the proper amount of fees to award.