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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALEXSEI DURACK et al.,

Plaintiffs and Respondents,

v.

ADA WANG,

Defendant and Appellant.

B276086

(Los Angeles County  
Super. Ct. No. BC557122)

APPEAL from an order of the Superior Court of  
Los Angeles County, Susan Bryant-Deason, Judge. Reversed and  
remanded with directions.

The Durringer Law Group, Stephen C. Durringer and  
Edward L. Laird for Defendant and Appellant.

Law Office of Christie Gaumer and Christie Gaumer for  
Plaintiffs and Respondents.

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## **INTRODUCTION**

Alexsei Durack and Colin Fulford brought an action against their condominium homeowners association and several individual defendants, including Ada Wang, alleging wrongful conduct related to their residence. A settlement disposed of all causes of action against all of the defendants except Wang. Shortly before trial, Durack and Fulford dismissed their complaint against Wang. Wang filed a motion for attorneys' fees, which the trial court denied after finding there was no prevailing party. Because Wang was entitled to statutory attorneys' fees for prevailing on two causes of action against her, we reverse.

## **FACTS AND PROCEDURAL HISTORY**

A Declaration of Covenants, Conditions and Restrictions (CC&Rs) governed condominium ownership for a property in Los Angeles known as Formosa Gardens. The CC&Rs set forth the "limitations, restrictions, easements, covenants, conditions, liens and charges" for the use and occupation of the property and created the Formosa Gardens Homeowners Association to carry out the duties specified in the CC&Rs and the Association's bylaws, including the duty to control the common areas. The CC&Rs vested authority in the Board of Directors to conduct the affairs of the Association.

Durack and Fulford, owners of one of the units in Formosa Gardens, brought an action against the Association and individual members of the Board of Directors, including Wang, for conduct they alleged interfered with their efforts to renovate, lease, and sell their unit. Durack and Fulford alleged in their first amended complaint seven causes of action against Wang: negligence, intentional infliction of emotional distress,

intentional interference with contractual relations, negligent interference with contractual relations, intentional interference with economic relations, negligent interference with economic relations, and breach of fiduciary duty. The trial court sustained Wang's demurrers to all but the causes of action for negligence and breach of fiduciary duty.

In their negligence cause of action, Durack and Fulford alleged Wang and the other "individual defendants breached their duty of care in that they failed to rebuild and/or otherwise repair the common areas and to repair and/or rebuild the water damage, termite damage and the balcony and exterior landing of Plaintiffs' Unit A, and failed to pay for the damages to Plaintiffs. Additionally, . . . the individual defendants breached their duty of care in that they harmed Plaintiffs by managing the Association in a way that harmed Plaintiffs . . . ." Durack and Fulford also alleged Wang and the other individual defendants blocked access to their garage, placed soiled mattresses against the doors, impeded construction, lied to homeowners, and improperly assessed and misused dues.

In their breach of fiduciary duty cause of action, Durack and Fulford alleged Wang and the other defendants "owe[d] a fiduciary duty to plaintiffs as owners of the Property to manage the condominium building and to do so in a manner that does not harm the individual ownership rights of plaintiffs and/or to prevent emotional or other harm to plaintiffs. [¶] . . . Additionally, . . . the individual defendants breached their duty of care in that they harmed Plaintiffs by managing the Association in a way that harmed Plaintiffs . . . ." Durack and Fulford further alleged that "[t]hese actions were taken by defendants with full knowledge of their breach of the CC&R's and in willful, conscious and reckless disregard for their fiduciary duty owed to plaintiffs."

At a mandatory settlement conference, Durack and Fulford reached a settlement with all defendants except Wang. The remaining parties (Durack, Fulford, and Wang) proceeded to prepare for trial. Shortly before the start of trial, however, Durack and Fulford filed a request for dismissal without prejudice of their complaint against Wang.

Wang filed a motion for a determination that she was a prevailing party and for an award of \$35,420 in attorneys' fees under Civil Code section 5975, subdivision (c).<sup>1</sup> The trial court found there was no prevailing party and denied the motion. Wang appealed.

## DISCUSSION

There is no attorneys' fees provision in the CC&Rs. Wang contends she was the prevailing party under section 5975, subdivision (c), because Durack and Fulford dismissed their action against her. Durack and Fulford argue section 1717, subdivision (b)(2), precludes an award of attorneys' fees against them because under that statute there is no prevailing party where the plaintiff voluntarily dismisses the action, which they did. The trial court did not specify whether it was denying the motion under section 1717 or section 5975.

### A. *Standard of Review*

“““““An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the ‘determination of whether the criteria for an award of attorney fees and costs have been met is a question of

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<sup>1</sup> Undesignated statutory references are to the Civil Code.

law.””””” (Chodos v. Borman (2014) 227 Cal.App.4th 76, 91; see *Department of Health Care Services v. Office of Administrative Hearings* (2016) 6 Cal.App.5th 120, 156; *Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378.) We review the trial court’s determination of prevailing party status under an abuse of discretion standard. (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 94; *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1154 (*Salehi*); *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574 (*Heather Farms*).)

B. *Section 5975 Applies; Section 1717 Does Not*

Section 5975, subdivision (c), provides: “In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney’s fees and costs.”<sup>2</sup> The Davis-Stirling Act, which “consolidated the statutory law governing condominiums and other common interest developments” (*Villa De Las Palmas Homeowners Assn. v. Terifaj, supra*, 33 Cal.4th at p. 81), defines “governing documents” as “the declaration and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.” (§ 4150.) Under this definition, the CC&Rs and bylaws of Formosa Gardens are “governing documents” of the common interest development. (See *Ostayan v. Nordhoff Townhomes Homeowners Assn., Inc.* (2003) 110 Cal.App.4th 120, 127 [“[t]he

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<sup>2</sup> The predecessor to section 5975, subdivision (c), was section 1354, subdivision (c). In 2012, the Legislature repealed and reenacted without change section 1354, subdivision (c), as section 5975, subdivision (c). (See *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1138, fn. 1.)

primary governing document of the association is the declaration—the document that contains a legal description of the development and ‘the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes,’” which “is frequently referred to as the ‘covenants, conditions, and restrictions,’ or the ‘CC&R’s”].) Under section 5975, subdivision (c), Wang was entitled to recover her reasonable attorneys’ fees if the negligence and breach of fiduciary duty causes of action were actions to enforce the CC&Rs and if she prevailed on those causes of action.<sup>3</sup>

Durack and Fulford rely on section 1717, subdivision (b)(2), which provides, “Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.” Section 1717, however, only applies to an “action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce the contract, shall be awarded . . . .” (§ 1717, subd. (a).) Because there is no attorneys’ fees provision in the CC&Rs (or in any other relevant document), section 1717 is inapplicable. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 280 [“by its terms section 1717 applies only to contracts specifically providing that attorney fees ‘which are incurred to enforce that contract’ shall be awarded,” italics omitted]; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 63, fn. 16 [section 1717 “only comes into play where a contract specifically provides for attorney fees”]; *Heather Farms, supra*, 21

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<sup>3</sup> Wang argues only that she is entitled to attorneys’ fees on the two causes of action that survived demurrer, negligence and breach of fiduciary duty.

Cal.App.4th at p. 1572 [“section 1717 only applies ‘In any action . . . where the contract specifically provides that attorney’s fees and costs . . . shall be awarded’”]; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 [section 1717 “covers *only* contract actions . . . where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract”].) Where, as here, a party seeks to recover attorneys’ fees under a statute, section 1717, subdivision (b)(2), does not apply. (See *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 260 & fn. 6; *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 878.)

C. *The Negligence and Breach of Fiduciary Duty Causes of Action Were Actions To Enforce the Governing Documents*

To determine whether an action is “an action to enforce the governing documents,” courts look to the gravamen of the complaint. (*Salehi, supra*, 200 Cal.App.4th at p. 1151; see *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker, supra*, 2 Cal.App.5th at pp. 259-260 [in determining whether an action is one “to enforce the governing documents’ in the meaning of section 5975,” courts should focus on the “gravamen” of the complaint, the “nature of the dispute between the parties,” and “the nature of the relief sought”]; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 671 [an action is one to enforce the governing documents if “the essence of the claim falls within the enforcement of the governing documents”].)

The gravamen of the cause of action for negligence was to enforce the CC&Rs. Durack and Fulford alleged Wang was negligent in breaching her duties to repair and rebuild the common areas and to properly manage the Association, duties

that were created by the CC&Rs. For example, Article IV, subdivision (2), of the CC&Rs authorized the Board of Directors to conduct the affairs of the Association “in all instances,” except as to matters not relevant here. Article IV, subdivision (3)(d), provided that the Association, “acting by and through the Board,” had various obligations, including “Operation and Maintenance of the Common Area.” Article IV, subdivisions (3)(b)(i) and (iv), assigned to the Board a variety of specific duties, including “[e]nforcement of applicable provisions of the Declaration, Bylaws, and other instruments for the ownership, management and control of the subdivision,” and “[c]ontracting for goods and/or services for the common areas, facilities and interests . . . .” Similarly, Article IV, subdivision (3)(b)(vii), required the Board of Directors to “[f]ormulat[e] . . . rules of operation of the common areas and facilities owned or controlled by the Association,” and Article IV, subdivision (3)(b)(ix), authorized the Board of Directors to “[e]nter[ ] upon any privately owned subdivision interest as necessary in connection with construction, maintenance or emergency repair for the benefit of the common area, or the owners in common.” Conversely, Durack and Fulford did not allege Wang breached any duty independent of the CC&Rs to repair or rebuild the common areas or to manage the Association. Therefore, because the essence of Durack and Fulford’s negligence cause of action against Wang was that she, as a member of the Board of Directors, breached duties imposed by the CC&Rs, their negligence cause of action was an action to enforce the CC&Rs. (See *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1381 [“causes of action for breach of a contractual obligation alleged to have been created by the CC&R’s . . . were actions brought to enforce the CC&R’s”]; *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1012 [the “essence of [the plaintiff’s] claim”



that the CC&R's required the homeowners' association to repair the roof was "an attempt to enforce the CC&R's"].)

The fact that Durack and Fulford did not in their negligence cause of action expressly allege a violation of the CC&Rs or claim they were seeking to enforce the governing documents does not change the nature of the claim. Regardless of the title, the gravamen or gist of their negligence cause of action was to enforce the CC&Rs. (See *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker*, *supra*, 2 Cal.App.5th at pp. 259-260 [even though the complaint "was framed as an action to enforce [a settlement] agreement," the "gravamen" of the complaint was to enforce the governing documents because the plaintiff claimed the defendants did not take steps to bring the property into compliance with the CC&Rs]; see also *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1389 [for statute of limitations purposes, even though the plaintiff labeled his cause of action "nuisance," the association's violation of its duty to the plaintiff under the CC&Rs "gave rise to liability for the nuisance"].)

Similarly, in their breach of fiduciary duty cause of action, Durack and Fulford alleged Wang breached a duty to "manage the condominium building . . . in a manner that [did] not harm" their ownership interests. In general, a director's fiduciary duty is statutory. "Directors of nonprofit corporations such as [a homeowners' association] are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code. [Citation.] This fiduciary relationship is governed by the statutory standard that requires directors to exercise due care and undivided loyalty for the interests of the corporation." (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513; see *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 799 [directors of

nonprofit corporations are fiduciaries under the Corporations Code and have a duty of undivided loyalty when considering maintenance and repair contracts].) Durack and Fulford alleged, however, that Wang breached her fiduciary duty by engaging in conduct that violated the CC&Rs, including mismanaging the Association, improperly collecting and then misappropriating Association dues, and ratifying, as a “Board Member,” wrongful conduct by the other individual defendants. They also alleged that the actions of Wang and the other defendants “were taken . . . with full knowledge of their breach of the CC&R’s.” Thus, the “gist” of Durack and Fulford’s cause of action for breach of fiduciary duty was to enforce the CC&Rs. (See *Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 Cal.App.4th 715, 719-720 [homeowners association was entitled to attorneys’ fees under the predecessor to section 5975, even though the plaintiffs had alleged a breach of the Corporations Code rather than a breach of the governing documents, where the “gist of the action” was to enforce proxy and voting rights under the bylaws].)

E. *Wang Prevailed on the Negligence and Breach of Fiduciary Duty Causes of Action*

“The Davis-Stirling Act does not define ‘prevailing party’ or provide a rubric for that determination. In the absence of statutory guidance, California courts have . . . concluded that the test for prevailing party is a pragmatic one, namely whether a party prevailed on a practical level by achieving its main litigation objectives.” (*Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 773; see *Villa De Las Palmas Homeowners Assn. v. Terifaj*, *supra*, 33 Cal.4th at p. 94.) On a “practical level,” Wang achieved her litigation objective: She is not liable for negligence or breach of fiduciary duty.

In her court papers, Wang asked the court to dismiss the complaint and enter judgment in her favor. (See *Hsu v. Abbata* (1995) 9 Cal.4th 863, 876 [litigation objectives “disclosed by the pleadings, trial briefs, opening statements, and similar sources”].) That is essentially what occurred: The trial court sustained her demurrer to five of the seven causes of action without leave to amend, and Durack and Fulford voluntarily dismissed the remaining causes of action against her. Durack and Fulford sought but did not recover any damages from Wang. On a practical level, Wang prevailed. (See *Salehi, supra*, 200 Cal.App.4th at p. 1156 [homeowners association was the prevailing party and entitled to attorneys’ fees after the plaintiff voluntarily dismissed most of her causes of action].) As the prevailing party on the negligence and breach of fiduciary duty causes of action, Wang was entitled to recover her attorneys’ fees incurred in successfully defending those causes of action. (See *Almanor, supra*, 246 Cal.App.4th at p. 773 [section 5975, subdivision (c), “reflect[s] a legislative intent that [the prevailing party] receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied”].)

Durack and Fulford argue that the settlement they reached with all of the defendants other than Wang precluded an award of attorneys’ fees. Although the settlement agreement stated the parties to it were reaching a “global settlement of \$45,000,” Wang was not a party to the settlement agreement, and the agreement expressly excluded her. The settlement agreement provided that Durack and Fulford would “dismiss their claims against all defendants except Ada Wang” and “release[ ] all claims arising from this lawsuit against all defendants except Wang.” Wang obtained the dismissal in this case independent of the settlement with the other defendants. (Cf. *Heather Farms, supra*, 21

Cal.App.4th at p. 1574 [settlement disposed of all causes of action against all parties and “required” the plaintiff to dismiss its lawsuit against the individual defendant].)

Citing *Salehi*, *supra*, 200 Cal.App.4th 1146, and *Heather Farms*, *supra*, 21 Cal.App.4th 1568, counsel for Durack and Fulford asserted at oral argument that, in addition to determining which party achieved its litigation objectives, the court must also consider the reasons for the voluntary dismissal and weigh the evidence to make an assessment of who would have prevailed at trial. *Salehi* and *Heather Farms* do not support counsel’s assertion. In *Salehi* the reason for the dismissal was irrelevant to the determination of who had prevailed. The court in that case held that, even though the plaintiff had dismissed most of her causes of action against the association for reasons unrelated to “the probability of success on the merits,” the homeowners’ association prevailed because it “realized its litigation objectives.” (*Salehi*, *supra*, 200 Cal.App.4th at pp. 1154, 1156.)<sup>4</sup> In *Heather Farms* the court noted the homeowners’

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<sup>4</sup> The quote “probability of success on the merits” in *Salehi* is from *Santisas v. Goodin* (1998) 17 Cal.4th 599, 621, a case that involved only contractual attorneys’ fees under section 1717. (See *id.* at pp. 606-607 [noting the distinction between contractual attorneys’ fees and attorneys’ fees “grounded in a statute or other noncontractual source of law”]; see also *Parrott v. Mooring Townhomes Assn., Inc.*, *supra*, 112 Cal.App.4th at p. 878 [*Santisas* does not apply to attorneys’ fees under the predecessor to section 5975].) Moreover, while the Supreme Court in *Santisas* observed in the context of contractual attorneys’ fees that it would be “inaccurate to characterize the defendant as the ‘prevailing party’ . . . if the plaintiff dismissed for reasons . . . that have nothing to do with the probability of success on the merits,” the Supreme Court stated that “scarce judicial resources should

association dismissed the individual defendant “as part of a global settlement agreement” and cited a finding by the settlement conference judge that “there [were] no winners.” (*Heather Farms, supra*, 21 Cal.App.4th at pp. 1571, 1574). The court in *Heather Farms* stated the test was “which party had prevailed on a practical level,” not what the reason was for the dismissal. (*Id.* at p. 1574.)

Finally, even if the law required the court to examine the reasons Durack and Fulford dismissed their complaint in this case against Wang, the record does not support their argument. Counsel for Durack and Fulford stated at oral argument the reason Durack and Fulford dismissed Wang was that they had settled the “lion’s share” of the litigation and they had “no choice” but to dismiss Wang or go to trial even though they essentially had already received what they wanted. The record reflects, however, that Durack and Fulford, after settling with the other defendants, wanted more from Wang. Durack and Fulford refused to settle with Wang, even though counsel for the other defendants wanted the settlement to include her. Just before trial, counsel for Durack and Fulford demanded a payment from Wang of up to \$5,000. Durack and Fulford prepared for trial and filed a trial brief arguing they were entitled to recover monetary damages from Wang and, when they dismissed their remaining causes of action against her, Wang escaped any liability for those claimed damages. Durack and Fulford may now say they recovered the “lion’s share” of what they sought in the case, but

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not be used to try the merits of voluntarily dismissed actions merely to determine which party would or should have prevailed had the action not been dismissed.” (*Santisas*, at p. 621.)

the record shows that, even after settling with the other defendants, they still wanted a “cub’s share” from Wang.

## DISPOSITION

The trial court’s order denying Wang’s motion for attorneys’ fees is reversed. The matter is remanded with directions to enter a new order granting Wang’s motion for attorneys’ fees in connection with the third cause of action for negligence and the ninth cause of action for breach of fiduciary duty. On remand, the trial court is to determine the reasonable amount of attorneys’ fees Wang incurred in connection with these two causes of action and to exercise its discretion in apportioning attorneys’ fees between these two causes of action and the other causes of action, including determining whether the causes of action “involve a common core of facts or are based on related legal theories” and whether “the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney’s time” among the various causes of action. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 159.) Wang is to recover her costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.