Filed 1/17/18 Leisure Village Assoc., Inc. v. Kulick CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LEISURE VILLAGE ASSOCIATION, INC., Plaintiff and Respondent, v. ROBERT J. KULICK, Defendant and Appellant.	B271709 (Super. Ct. No. 56-2013-00444977-CU-BC-VTA) (Ventura County)

Robert J. Kulick, appellant, owns a home in Leisure Village (Village) in Camarillo. Village is a planned, senior citizen community consisting of 2,136 homes on approximately 415 acres of land. Leisure Village Association, Inc., respondent, controls and administers Village. Appellant is a member of respondent.

Appellant appeals from the judgment entered in favor of respondent. He contends that the trial court erroneously (1) ordered the issuance of a preliminary injunction, (2) overruled

his demurrers, (3) denied his pretrial motion in limine, and (4) denied his motions to continue the trial. We affirm.

Procedural Background

In November 2013 respondent filed a complaint consisting of five causes of action. The complaint alleged that appellant had breached respondent's Declaration of Covenants, Conditions, and Restrictions (CC&Rs), had intentionally interfered with respondent's contractual relations with its insurers, and had created a nuisance. Respondent sought general and punitive damages. In addition, it sought preliminary and permanent injunctive relief.

In January 2014 the trial court issued a preliminary injunction prohibiting appellant "from directly contacting any and all of [respondent's] insurance carriers." The court overruled appellant's demurrers to the first four causes of action.

A jury trial was set to begin in November 2015. In October 2015 appellant filed an ex parte motion to continue the trial for at least six months and to reopen discovery. The court denied the motion but continued the trial to January 4, 2016. In December 2015 appellant filed a new motion to continue the trial for at least six months and to reopen discovery. The court denied the motion, but the trial did not start until April 5, 2016. The day before the trial began, the court denied appellant's motion in limine to exclude "any evidence on nuisance damages."

The jury returned special verdicts in respondent's favor. It awarded compensatory damages of $86,429.20 and punitive damages of $284,660. The trial court reduced the punitive damages to $43,214.60 - half the amount of the compensatory damages. Thus, the judgment awards damages totaling $129,643.80. The court issued a permanent injunction

prohibiting appellant "from contacting any and all of [respondent's] past, present and future insurance carriers."

Preliminary Injunction

Appellant contends that the trial court erred in ordering the issuance of the preliminary injunction. Appellant could have taken an immediate appeal from the order. (Code Civ. Proc., § 904.1, subd. (a)(6); *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013, 1019, fn. 4.) Because appellant did not appeal from the order, he cannot seek review of the order in this appeal from the judgment. (*Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1082 ["on an appeal from an appealable ruling, an appellate court will not review earlier appealable rulings"]; *Morrissey v. City and County of San Francisco* (1977) 75 Cal.App.3d 903, 906 ["'The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken'"].)

Demurrers

Appellant claims that the trial court erroneously overruled his general demurrers to the first and fourth causes of action. The ground for the demurrers was that the causes of action failed to "state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "'The standard of review . . . is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled. [Citation.]' [Citation.]" (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1190.) "'We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law.' [Citation.]" (*People ex rel. Lungren v. Superior Court*

(1996) 14 Cal.4th 294, 300-301.) "The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial. [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437, fn. 4.)

"In considering the sufficiency of a pleading, we are bound by the rule that . . . the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties. (Code Civ. Proc. § 452.) . . . [A] plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action. [Citation.]" (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 244-245.)

First Cause of Action for Breach of CC&Rs

The first cause of action alleged that appellant had breached a clause of section 2.4 of Article II of the CC&Rs (section 2.4). The clause provides: "Lawful Use. No Owner shall permit or suffer anything to be done or kept *upon any Lot or the Common Area* which will . . . result in the increase of rates or cancellation of insurance maintained by [respondent] . . . ." (Italics added.) [1] In his demurrer, appellant argued that the

[1] The full text of section 2.4 is as follows: "Lawful Use. No Owner shall permit or suffer anything to be done or kept upon any Lot or the Common Area which will increase the rate of insurance on the Dwelling Units, or the contents thereof, or the Common Area, which will result in the increase of rates or cancellation of insurance maintained by the [respondent], or which is in violation of any law or ordinance. No owner shall permit or suffer anything to be done or kept upon any Lot or the

italicized language "shows that [section 2.4] applies only to the *use* of the physical property owned by [appellant] (his unit), or *use* of the common areas," e.g., "allowing a hazardous activity, or storing dangerous items" such as "dynamite or caustic chemicals." (Italics added.)

Appellant maintains that the demurrer to the first cause of action should have been sustained because the cause of action was not based on appellant's use of the property. Instead, it was based on meritless claims made against respondent and its board of directors, as well as threats made against respondent's insurer. The complaint alleged that appellant had "threatened legal action for claims such as election fraud, malicious prosecution, defamation, extortion, terrorism, various statutory violations and so forth." Appellant made "a 'demand' from each of the Board members, individually, for $10 million in alleged damages." "[E]ach money demand made by [appellant] requires [respondent], pursuant to the terms of its insurance policies, to tender said claims to its insurance carrier, regardless of their lack of merit. . . . [T]his pattern of conduct has caused [respondent] to be virtually un-insurable."

The complaint further alleged that appellant had "threatened and harassed" a representative of respondent's insurer and had "made a threat against" the insurer's president.

Common Area which will obstruct or interfere with the rights of other Owners, or annoy other Owners by unreasonable noises or otherwise, nor shall any Owner commit or permit any nuisance or immoral or illegal act on any Lot of the Common Area. Each Owner shall comply with all requirements of applicable governmental authorities respecting the use and occupancy of the Lots and the Common Area."

The insurer refused to "renew [its] insurance policy because of [appellant's] improper behavior, his past and present interference with the insurance contracts and the great exposure to liability . . . due to [his claims]." Respondent "was forced to purchase an insurance policy with a deductible for all claims that is twice the amount [of] its prior policy so that [its] insurance would not lapse." Respondent "was also forced to purchase a tail coverage policy at an additional expense due to [appellant's] actions."

The issue here involves a matter of contractual interpretation: whether section 2.4 should be interpreted as applying only to an owner's use of the property. "CC&R's can reasonably be 'construed as a contract.'" (*Treo @ Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055, 1066.) We have a "duty to interpret a declaration of covenants, conditions and restrictions in a way that is both reasonable and carries out the intended purpose of the contract. [Citation.]" (*Dieckmeyer v. Redevelopment Agency of City of Huntington Beach* (2005) 127 Cal.App.4th 248, 259.) "California recognizes the objective theory of contracts [citation], under which '[i]t is the objective intent, as evidenced by the words of the contract, . . . that controls interpretation' [citation]." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.)

The CC&Rs are attached as Exhibit A to the complaint. "When [as here] a complaint is based on a written contract which it sets out in full, a general demurrer to the

complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. [Citation.]" (*Martinez v. Socoma Companies*, *Inc.* (1974) 11 Cal.3d 394, 400.) "'"So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement."' [Citation.]" (*Rutherford Holdings*, *LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 229.)

In overruling the demurrer to the first cause of action, the trial court concluded that "the language of Section 2.4 is reasonably susceptible to the interpretation that no owner . . . may do *anything* [including making meritless claims against respondent] that causes [respondent's] insurance rates to increase." (Italics added.) We disagree. Section 2.4 applies only to an owner's use of the property. Section 2.4 is part of Article II. The heading for Article II is "**Use Restrictions**." The subheading for section 2.4 is "Lawful Use." Article XI, section 11.12 of the CC&Rs provides that any heading "shall be deemed to have been made for [the] purpose of clarity." The heading for Article II and subheading for section 2.4 clarify that the section covers the use of the property. Moreover, the introduction to Article II provides, "The *use* of the Lots and the Common Area shall be restricted in accordance with the following provisions . . . ." (Italics added.) Section 2.4 is one of those provisions.

Other parts of section 2.4 not relating to insurance show that the section is concerned only with an owner's use of the property: "No owner shall permit or suffer anything to be done or kept upon any Lot or the Common Area which will . . . annoy

other Owners by unreasonable noises or otherwise, nor shall any Owner commit or permit any nuisance or immoral or illegal act on any Lot or the Common Area. Each Owner shall comply with all requirements of applicable governmental authorities respecting the *use and occupancy* of the Lots and the Common Area." (Italics added.)

Finally, pursuant to the "last antecedent rule," the phrase "upon any Lot or the Common Area" should be construed as modifying "done" as well as "kept" in the first sentence of section 2.4: "No Owner shall permit or suffer anything to be *done or kept upon any Lot or the Common Area* which will . . . result in the increase of rates or cancellation of insurance . . . ." (Italics added.) The last antecedent rule is "a rule of statutory and contractual interpretation." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 529.) The rule "'provides that "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote."' [Citation.]" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.) The words "done or kept" immediately precede the phrase "upon any Lot or the Common Area." Even if the word "done" were deemed to not immediately precede the phrase, it would still be modified by the phrase under an exception to the last antecedent rule. The exception "provides that when several words are followed by a clause that applies as much to the first and other words as to the last, ""the natural construction of the language demands that the clause be read as applicable to all."" [Citation.]" (***Ibid***.) The phrase "upon any Lot or the Common Area" applies as much to "done" as to "kept." The trial court therefore erroneously construed the first sentence of section 2.4

as meaning, "No Owner shall permit or suffer anything to be done . . . which will . . . result in the increase of rates or cancellation of insurance . . . ." Had the drafters of the CC & Rs intended that the first sentence be so construed, they would have added commas so that it would have read as follows: "No Owner shall permit or suffer anything to be done**,** or kept upon any Lot or the Common-Area**,** which will . . . result in the increase of rates or cancellation of insurance . . . ."

Accordingly, the trial court should have sustained the demurrer to the first cause of action on the ground that it failed to state a cause of action for breaching section 2.4.

Fourth Cause of Action for Creating a Nuisance

The fourth cause of action alleged that appellant's "conduct . . . has intentionally disrupted the Leisure Village community to the extent that it qualifies as a nuisance within the meaning of Civil Code Section 3479 et seq. and Article II, Section 2.4 of [respondent's] CC&Rs." "As a consequence of [appellant's] actions, [respondent] and its members have sustained damages, including but not limited to the increased rates of [respondent's] insurance policies as well as being prevented from the quiet enjoyment of their property." Respondent requested that appellant "cease interfering with [its] vendors, especially its insurers, [and] cease from disrupting and interfering with [respondent's] insurance contracts and to otherwise abate the nuisance directly and proximately caused by [appellant's] conduct."

Section 2.4 provides in part that no owner shall "commit or permit any nuisance or immoral or illegal act on any Lot or the Common Area." Article XI, section 11.2 of the CC&Rs provides, "Every act or omission whereby any provision of this

Declaration is violated in whole or in part is hereby declared to be a nuisance and may be enjoined or abated . . . by [respondent] or any owner."

The trial court overruled the demurrer in a minute order. The order states: "Overrule [appellant's] general demurrer to the fourth cause of action for nuisance, on the grounds that (a) [respondent] alleges that Section[] 11.2 . . . of the CC&Rs provide[s] that any violation of [respondent's] governing documents constitutes a nuisance . . . ; and (b) given that [respondent] alleges facts indicating that [appellant] violated Section 2.4 of the CC&Rs, [respondent] . . . alleges facts indicating that [appellant's] conduct constitutes a nuisance."

The complaint does not state a cause of action for nuisance within the meaning of section 2.4. It does not describe any action by appellant that created or permitted a "nuisance . . . on any Lot or the Common Area." (§ 2.4.) Nor does it describe any action by appellant that violated section 2.4. (See the discussion of the first cause of action in the preceding section of this opinion.) The alleged nuisance arose not because of appellant's use of a lot or the common area, but because he "continuously engaged in a pattern of harassing, threatening and inappropriate conduct against [respondent], its directors and officers, members, staff and vendors." For example, he "consistently bombarded [respondent] and its management on nearly a daily basis with detailed correspondence, making incendiary and harassing complaints, idle threats and meritless accusations against [respondent], its Board and vendors alleging all sorts of wrong-doing." He "sent hundreds of letters to [respondent] and its members, which have functioned to prevent the Board of Directors and its staff from attending to Association

business and have caused [respondent] to expend valuable funds and resources in order to respond to [his] claims."

The complaint also does not state a cause of action for nuisance within the meaning of Civil Code Section 3479, which provides in relevant part, "Anything which is . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance." Code of Civil Procedure section 731 provides, "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment [of the property] is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined or abated as well as damages recovered therefor."

Pursuant to a modified version of CACI No. 2021, the jury was instructed on the law pertaining to a private nuisance. A "private nuisance [is] a nontrespassory interference with the private use and enjoyment of land. [Citation.]" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937; see also *Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 ["the essence of a private nuisance is its interference with the *use* and *enjoyment* of land"].) Examples of a private nuisance are "smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery. [Citation.]" (*Ibid*.)

Appellant argues that his conduct, as described in the complaint, does not constitute a nuisance under Civil Code section 3479 because the conduct did not obstruct the free use of any property so as to interfere with its enjoyment. (See *Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1243 ["'conduct or activity cannot amount to a nuisance unless it substantially interferes

with the use and enjoyment of the land'"].) We agree. Appellant did nothing to obstruct the free use of the common area or the other owners' lots. His meritless claims and accusations did not invade the other owners' "interest in the use and enjoyment of the land" so as to lessen their enjoyment. (*San Diego Gas & Electric Co. v. Superior Court*, *supra*, 13 Cal.4th at p. 938; see also Code Civ. Proc., § 731.)

Accordingly, the complaint does not state a cause of action for nuisance within the meaning of section 2.4 or Civil Code section 3479. The trial court therefore should have sustained the demurrer to the fourth cause of action.

Appellant Has Not Shown that He Was Prejudiced by the Trial Court's Failure to Sustain the Demurrers

"Before a case will be reversed for error in overruling a demurrer . . . , it must appear that the appellant was prejudiced by the error. Otherwise, under section 4 1/2 [now section 13], article VI of the Constitution, the judgment must be affirmed." (*Kaufman v. Pacific Indem. Co.* (1936) 5 Cal.2d 761, 768.) Article VI, section 13 provides: "No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (See *Taboada v. Sociedad Espanola De Beneficencia Mutua* (1923) 191 Cal. 187, 193 ["no miscarriage of justice having resulted, the error, if any, of the trial court in overruling the demurrer, cannot be availed of to secure a reversal of the judgment"]; *Ades v. Brush* (1944) 66 Cal.App.2d 436, 444 ["the failure of a complaint to state a cause of action is not fatal to a judgment for the plaintiff unless the

appellant can show that the error has resulted in a miscarriage of justice"]; *Mortgage Guarantee Co. v. Smith* (1935) 9 Cal.App.2d 618, 621 ["When a defendant does not stand on his demurrer, but elects to answer and go to trial on the merits, the overruling of his demurrer will not support a reversal of the judgment unless the defendant shows he was prejudiced by the order"].)

"'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800.) "The burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice. [Citation.]" (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82.) "Further, 'appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice.' [Citation.]" (*County of Los Angeles v. Nobel Insurance Co.* (2000) 84 Cal.App.4th 939, 945.)

Appellant has not carried his burden. He does not spell out in his brief how the erroneous overruling of his demurrers to the first and fourth causes of action resulted in a miscarriage of justice. He does not even discuss the issue of prejudice. Nor does he discuss the evidence presented during the four days of trial testimony. (See *Cassim v. Allstate Insurance Co.*, *supra*, 33 Cal.4th at p. 800 [in determining whether a miscarriage of justice has occurred, reviewing court must examine "the entire cause, including the evidence"].)

On the issue of prejudice, we must consider that the jury found in respondent's favor on the third cause of action for

intentional interference with respondent's contractual relations with its insurers. The third cause of action alone provided a basis for the jury's award of general and punitive damages. Respondent requested both types of damages for this cause of action.

Appellant has not shown there is a reasonable probability that the jury would have reached a result more favorable to him had only the third cause of action been before it for decision. Pursuant to the jury's special verdict, the breakdown of general damages was as follows:

Change in Insurance Premiums	$50,595
Purchase of Tail Policy	$10,313
Preparation/Mailing of Letters to Membership	$21,360
Preparation/Mailing of Letters to Vendors	$1,250
Out of Pocket Expenses to Defend EPLI [Employment Practices Liability Ins.] Claims	$2,911.20
TOTAL:	$86,429.20

It appears that all of the above general damages, including the "Preparation/Mailing of Letters to Membership," resulted from appellant's interference with respondent's contractual relations with its insurers as alleged in the third cause of action. At the hearing on the pretrial motion in limine, respondent's counsel said that his client had sustained damages for "having to prepare four separate letters to the membership directly caused by appellant's conduct." Counsel explained: "[A] homeowners' association is required to give . . . written notice to the entire membership when there is a significant change in insurance coverage for the association. [¶] In this case, due to [appellant's conduct], there were several changes. . . . [T]his is a membership consisting of two thousand one hundred thirty-six members. It's

very expensive to send out these types of notices, but we had to do it."

The sustaining of the demurrers to the first and fourth causes of action would not have affected the trial court's issuance of a permanent injunction. In the second cause of action "for preliminary and permanent injunction," respondent requested that appellant be ordered to "[r]efrain from interfering with [respondent's] insurance contract(s)." The court's permanent injunction was limited to the insurance issue. It "enjoined [appellant] from contacting any and all of [respondent's] past, present and future insurance carriers."

Motion in Limine

The day before the trial began, appellant made a motion in limine to exclude "any evidence on nuisance damages, or in the alternative, for a special jury instruction concerning the nuisance cause of action." The motion was based on appellant's claim that respondent "will be unable to prove that [he] has interfered with its use and enjoyment of its land." (Bold omitted.) Appellant argued, "[T]he acts complained of in the Fourth Cause of Action constitute neither a nuisance as defined by law . . . nor as defined by the . . . CC & Rs." Appellant contends that the trial court erroneously denied the motion in limine.

The trial court did not err. The motion in limine was an improper attempt to relitigate appellant's previously overruled demurrer to the fourth cause of action for nuisance. In his opening brief appellant acknowledges that he "sought, through an In Limine Motion, to preclude evidence on the Nuisance Cause of Action on the basis, essentially, of the arguments made in the demurrer to that cause of action."

Denial of Appellant's Initial Request to Continue the Trial for Six Months and to Reopen Discovery

In October 2015 appellant, appearing in propria persona, requested "at least" a six month continuance of the trial, which had been set for November 2, 2015. He also requested an order reopening discovery. Appellant claims that the trial court erroneously denied the requests.

"Trial courts generally have broad discretion in deciding whether to grant a request for a continuance. [Citation.] . . . [A]n abuse of discretion results in reversible error only when the denial of a continuance results in the denial of a fair hearing, or otherwise prejudices a party. [Citation.]" (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527.) "There is no presumption of prejudice. [Citation.] Instead, the burden to demonstrate prejudice is on the appellant. [Citation.]" (*Id*. at p. 528.)

We need not decide whether the trial court erred in refusing to grant a six-month continuance of the trial. If the trial court erred, the error would not be reversible. Appellant has failed to show that the error prejudiced him. The trial began on April 5, 2016, six months after the initial trial date of November 2, 2015. Thus, appellant in effect received a six-month continuance of the trial.

The trial court's decision to deny appellant's request to reopen discovery is also subject to review for abuse of discretion. (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 418-419.) We need not decide whether the trial court abused its discretion because appellant has failed to show that the alleged error resulted in "a miscarriage of justice." (*Cassim v. Allstate Insurance Co.*, *supra*, 33 Cal.4th at p. 800.)

Denial of Appellant's Second Request to Continue the Trial for Six Months and to Reopen Discovery

In December 2015 appellant substituted his present counsel in place of himself as attorney of record. On December 22, 2015, counsel requested that the trial, then set for January 4, 2016, be continued "for at least six months" and that discovery be reopened. During the hearing on the request, counsel asked the court to grant "at least a three-month continuance." The trial court granted a one-week continuance and did not allow the reopening of discovery.

Once again, appellant has failed to show that he was prejudiced by the trial court's allegedly erroneous ruling. The trial did not begin until April 5, 2016, three months after the January 4, 2016 trial date. Thus, appellant in effect received the three-month continuance he had requested at the hearing.

Disposition

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

Law Offices of Steven Rein and Steven Rein, for Defendant and Appellant.

Beaumont Gitlin Tashjian and Lisa A. Tashjian, Christy Gargalis and Tara Radley, for Plaintiff and Respondent.