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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARY LOU MANKOWSKI, Plaintiff and Appellant, v. LA CUMBRE OWNERS ASSOCIATION, INC., Defendant and Respondent.	2d Civil No. B236025 (Super. Ct. No. 1343277) (Santa Barbara County)

Mary Lou Mankowski appeals a judgment entered in favor of La Cumbre Owners Association, Inc. (LCOA) following a summary adjudication motion and court trial. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In 2003, Mankowski inherited a townhome within the Casa La Cumbre common interest development in Santa Barbara. In 2004, Mankowski's sister, Joyce Murrell, occupied the townhome and stored a dilapidated automobile in the driveway. LCOA viewed the automobile as a violation of its covenants, conditions, and restrictions (CC&R's), demanded its removal, and employed a towing company to remove the vehicle.[1]

[1] Article VI, section 5 of the CC&R's states, "No mobile home, boat, trailer, recreational vehicle, commercial vehicle, dilapidated or inoperable vehicles shall be stored anywhere on the premises or in the development. . . . The Board has the authority to adopt reasonable rules and regulations regarding parking in the development and impose discipline upon Owners for violations of the provisions herein and any such rules and regulations."

Murrell then brought an action against the towing company which eventually was decided against her. LCOA defended the towing company in the lawsuit and subsequently sought its attorney fees and costs from Mankowski.

On June 9, 2005, Mankowski brought an action against LCOA, seeking a declaration that she was not required to reimburse LCOA for its attorney fees and costs in defending the towing company. Following a court trial, the court ruled that Mankowski had violated the CC&R's by failing to remove the automobile and therefore was required to reimburse LCOA for $17,726.45 fees and costs.

On April 29, 2010, Mankowski brought this action alleging causes of action for slander of title and declaratory and injunctive relief.[2] She later filed an unsuccessful motion for summary adjudication concerning the characterization of her driveway as her separate property. In denying Mankowski's motion, the trial court concluded that the driveway was neither the common property of LCOA nor the exclusive "private property" of Mankowski.

On January 24, 2011, LCOA brought a motion for summary adjudication or summary judgment, contending that the statute of limitations barred Mankowski's action for slander of title and that the driveways within Casa La Cumbre are common areas subject to the CC&R's. The trial court granted summary adjudication regarding application of the three-year statute of limitations to the slander of title action, reasoning that Mankowski submitted a court document in March 2006 challenging LCOA's characterization of the driveways as common area property. The court also rejected Mankowski's argument that LCOA's republication of statements following the filing of the complaint in this action created a new cause of action for slander of title. Following the court's ruling, Mankowski sought a petition for writ of mandate in this court. (*Mankowski v. La Cumbre Owners Assn., Inc.* (B230779).) We denied the writ petition on March 10, 2011.

The trial court denied LCOA's motion for summary adjudication regarding the nature of the driveways within Casa La Cumbre. Following a court trial on the issue, the court ruled that "the driveways are properly described as a fee simple interest, but that this

[2] The appellate record does not contain the complaint filed in this action.

interest is limited and defined by the content of the CC&R's." The court ordered that LCOA's recent amendment to the CC&R's denominating the driveways as "exclusive use common area" be struck. The court also found that neither party prevailed for purposes of attorney fees and ordered that Mankowski and LCOA bear their own attorney fees and costs.

Mankowski appeals and contends that the trial court erred by: 1) deciding that her driveway is not her "private property"; 2) concluding that the three-year limitations of action bars her cause of action for slander of title; and 3) not awarding her attorney fees and costs as the prevailing party in the action.

DISCUSSION

I.

Mankowski argues that the trial court erred by determining that her separate property interest is an interest less than "private property" by reason of the CC&R's. She relies upon Civil Code section 654, providing that "ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."[3] Mankowski adds that she holds a "separately owned lot" within the LCOA planned development and reasons that she therefore has an exclusive right to occupy her property, including the driveway. (§ 1351, subd. (l)(3) ["In a planned development, 'separate interest' means a separately owned lot, parcel, area, or space"].) She also reasons that her driveway is private property within the meaning of Vehicle Code section 22658, subdivision (l)(1)(A), prohibiting a towing company from towing a vehicle "from private property" without the written consent of the property owner.

A common interest development is created "whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed . . . ." (§ 1352.) The governing documents of the development must state the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes. (§ 1353; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 237.) "Having a

[3] All further statutory references are to the Civil Code unless stated otherwise.

single set of recorded covenants and restrictions that applies to an entire common interest development protects the intent, expectations, and wishes of those buying into the development and the community as a whole by ensuring that promises concerning the character and operation of the development are kept." (*Pinnacle Museum Tower Assn.*, at pp. 237-238.) Those persons buying into a common interest development accept "'the risk that the [association's discretionary] power may be used in a way that benefits the commonality but harms the individual.'" (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 374.) Subordination of individual property rights to the collective judgment of the owners association, together with restrictions on the use of real property comprise the chief attributes of owning property within a common interest development. (*Ibid.*)

For example, *Sui v. Price* (2011) 196 Cal.App.4th 933 involved a homeowner's action against his homeowners association for towing his disabled vehicle. *Sui* concluded that the association acted appropriately in towing the vehicle: "One wonders - how else would the prohibition on parking disabled vehicles be enforced against a recalcitrant homeowner? Moreover, Vehicle Code section 22658, subdivision (a), permits an association of a common interest development to remove a vehicle parked on the property under a variety of circumstances . . . ." (*Id.* at p. 940.)

The trial court did not err by concluding that Mankowski held a fee interest in her driveway, but that the driveway was not "private property." In light of the laws regarding common interest developments and the CC&R's here, the court properly decided that Mankowski had exclusive use of her driveway for ingress, egress, and vehicle parking, subject to the CC&R's, but she could not exclude LCOA from the driveway. Mankowski cites no judicial decisions in the context of a common interest development to the contrary.

II.

Mankowski contends that the trial court erred by concluding that her action for slander of title is precluded by the three-year statute of limitations. (Code Civ. Proc., § 338, subd. (g).) She relies upon three publications that occurred *after* she filed this lawsuit on April 29, 2010: 1) a letter dated June 16, 2010, from LCOA to Casa La Cumbre

homeowners advising them of the lawsuit and the issues Mankowski raised; 2) an e-mail dated October 4, 2010, advising six homeowners that LCOA will be replacing six driveways as part of "common area maintenance"; 3) a December 22, 2010, declaration by the LCOA president offered in support of LCOA's summary judgment motion, with a copy of a statement signed by homeowners stating that they believe the driveways are common areas.

Slander of title occurs when "there is an unprivileged publication of a false statement which disparages title to property and causes pecuniary loss." (*Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 929.) The parties here agree that the three-year limitations period set forth in Code of Civil Procedure section 338, subdivision (g) applies to actions for slander of title.

In ruling that the statute of limitations precludes Mankowski's action, the trial court stated that the complaint alleges that LCOA made unprivileged publications in 2003 and 2004, and that Mankowski became aware of the publications in 2006. The court also stated that the publications made following the filing of the complaint were "not statements made to a new audience, but repetitions of the same . . . claim that LCOA has made to this audience at least since 2002." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1243 [repetition of a defamatory statement may give rise to a new cause of action if made to a new audience].)

We do not decide the issue of republication, however, because LCOA's post-complaint statements are privileged communications within section 47 as a matter of law.[4] The litigation privilege '"applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved."' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) The privilege is not limited to statements made during trial or other proceedings, but may extend to steps taken prior thereto or afterwards. (*Ibid.*; *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [publication privileged when "required or permitted by law in the course of a judicial proceeding to

[4] The trial court did not rely upon this reason in granting summary judgment. Nevertheless, we affirm the court's order based upon the litigation privilege because the parties have discussed this issue in their briefs. (Code Civ. Proc., § 437c, subd. (m)(2).)

achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked"], partially abrogated on another point as explained in *Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 569, fn. 1.) Moreover, the privilege applies to a communication made without malice by an interested person to another interested person. (§ 47, subd. (c) [privilege communication is one made without malice to an interested person by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent].)

Here the post-complaint documents are privileged because they satisfy a legitimate litigation objective. The June 16, 2010, letter to LCOA homeowners advises them of the Mankowski lawsuit and the allegations of her complaint. The December 22, 2010, declaration of the LCOA President was submitted as part of LCOA's summary judgment motion. These communications are obviously related to the present lawsuit and LCOA's defense thereto. The October 4, 2010, e-mail advises six Casa La Cumbre homeowners (not Mankowski) that their driveways will be replaced as "part of the common area maintenance." This communication is not defamatory and is protected by section 47, subdivision (c) as a communication by an interested person to another interested person, made without malice. The trial court properly granted summary judgment because Mankowski cannot rely upon the post-complaint communications to avoid the bar of the statute of limitations.

III.

Mankowski argues that she prevailed in the litigation and is thus entitled to her attorney fees and costs. She relies on various statutes to argue that she is the "prevailing party." (Code Civ. Proc., § 1032, subd. (a)(4); §§ 1717 [prevailing party entitled to attorney fees and costs in an action on a contract (CC&R's)]; 1354, subd. (c) [prevailing party entitled to attorney fees and costs in an action to enforce governing documents]; 1363.09, subd. (b) [prevailing party entitled to attorney fees and court costs in action to enforce election rights].) Mankowski contends that she was successful in quieting title to her driveway as a fee interest and not as common area. (*Heather Farms Homeowners Assn. v.*

Robinson (1994) 21 Cal.App.4th 1568, 1574 [trial court should determine prevailing party within section 1354 "on a practical level"].)

As a general rule, we review the trial court's ruling regarding attorney fees and costs for an abuse of discretion. (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 94.)

Here the trial court decided that neither party prevailed in the litigation because "[n]othing of significance was gained or lost by either side." The court added that Mankowski lost on the slander of title cause of action, "the central cause of action in the Complaint [causing] a substantial quantity of the litigation activity." Although Mankowski was correct that her driveway was not common area, it was not "private property" as she asserted. LCOA also suggested that the court order it to delete the recent amendment to its CC&R's regarding driveways as "exclusive use common area," and to amend the CC&R's further to remove a reference to driveways as subject to common area maintenance. The court's decision concerning the prevailing party was made "on a practical level." (*Heather Farms Homeowners Assn. v. Robinson*, *supra*, 21 Cal.App.4th 1568, 1574.)

The judgment is affirmed. LCOA shall recover costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

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