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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SEVEN

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| SUSAN QUICK, et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>THE WOMAN'S CLUB OF HOLLYWOOD, etc. et al.,<br><br>Defendants and Appellants. | B233530<br><br>(Los Angeles County Super. Ct. No. BC446641) |

APPEAL from an order of the Superior Court of Los Angeles County. Ramona G. See, Judge. Affirmed.

The Law Office of Alda Shelton and Alda Shelton for Defendants and Appellants.

Harris & Ruble, Alan Harris and Abigail Treanor for Plaintiffs and Respondents.

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The Woman's Club of Hollywood, California, Jennifer Morgan, and Nina Van Tassell (collectively defendants) appeal from an order appointing a receiver. We affirm.

## *FACTUAL & PROCEDURAL BACKGROUND*

The Woman's Club of Hollywood (the Club) is a California corporation which was founded in 1905. According to its 2005 Bylaws, its object is the promotion of cultural, civic and philanthropic interests. The Club owns several parcels of real property. The main lot is located on La Brea Avenue in Hollywood and contains several buildings, some of which are leased for residential purposes. Other parcels are located on Detour Drive and Glen Holly Walk in Los Angeles.

Plaintiffs and respondents Susan Quick, Nadine Smith and Christine Zardeneta (collectively plaintiffs) are members of the Club. Quick joined in 1987, Smith joined in 1988, Zardeneta joined in 2010.

In October 2010, plaintiffs filed a complaint against the Club, Nina Van Tassell and Jennifer Morgan.[1] The First Amended Complaint, filed November 2, 2010, alleged inter alia, that Morgan and Van Tassell became members of the Club and thereafter called several unauthorized meetings and elections, installing themselves as officers of the Club and undertook several ultra vires actions for an improper, illegal and fraudulent purpose of destroying the Club and taking over its assets for personal profit. Plaintiffs alleged that these acts were unfair business practices in violation of Business and Professions Code sections 17200 et seq., and requested the appointment of a receiver.[2]

On January 7, 2011, plaintiffs filed an ex parte application for an order appointing a receiver. They submitted over 15 declarations supporting the application which contained numerous allegations against Morgan and Van Tassell, including that they did the following:

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[1] The complaint initially was filed as *Adams v. Woman's Club* and included Laura Adams as a plaintiff, but she was later omitted in the First Amended Complaint.

[2] The complaint has been amended since then; see footnote 4, *infra*.

1. Held a series of meetings which were not properly noticed or authorized by the Club's bylaws;

2. Appointed themselves as Executive Director and President of the Club, dismissing other existing directors;

3. Admitted new members without going through the proper procedures;

4. Dismissed the club's business manager, changed the locks on the buildings and attempted to take possession of the Club's property;

5. Attempted to enact new bylaws without proper notification of the membership and authorization;

6. Falsely represented to others that Hollywood Heritage, a preservation organization, was going to take over the Club and "planned to run it into the ground in order to declare Bankruptcy and then sell the property";

7. Attempted to change the tax status of the corporation without approval from the membership;

8. Evicted long-term tenants of the property and raised rental fees for remaining tenants;

9. Made plans to give one of the buildings away to the City of Los Angeles without proper authorization;

10. Allowed the property to lapse into disrepair, failed to obtain proper insurance and necessary permits;

14. Authorized an inordinately high salary with an expense account for Van Tassell;

11. Illegally used the Club's petty cash funds;

12. Hired their own staff and converted rental property on the premises to an executive suite; and

13. Applied for several bank loans without membership approval and without proper authorization.

Plaintiffs alleged that all of these actions were taken with the intent of selling the Club's property for redevelopment, in order to profit Morgan and Van Tassell.

The ex parte application proposed that Stephen McAvoy be appointed as receiver.

On January 11, 2011, the court ruled there was good cause to grant the application for a receiver, and prohibited defendants from any sale or alienation of Club assets, or making any changes to the corporate status, structure or governance of the Club until an election was completed in conformance with the 2005 Bylaws and under the supervision of the receiver. It requested that the parties submit a list of three potential receivers.

On April 7, 2011, defendants filed an opposition to the ex parte application on the basis that the Club had filed a petition under Chapter 11 of the U.S. Bankruptcy Code on January 20, 2011.

Plaintiffs and defendants submitted a Joint List of Three Potential Receivers on January 19, 2011. The names on the list were Evelyn Carlson, Stephen Moses and Dennis Rook.

The bankruptcy case was dismissed on April 13, 2011.

On April 26, 2011, the court signed an order which had been jointly submitted by the parties, appointing Evelyn Carlson as Receiver, preventing defendants from selling or alienating assets or making changes to the Club's corporate status until an election was held in accordance with the bylaws. The receiver was given the authority to hold an election on or after May 4, 2011.

Thereafter, on April 26, 2011, defendants filed an "Ex parte Application of Defendants . . . to Authorize Receiver to Oversee Election. . . ." This document stated, "pursuant to the Court's order of January 11, 2011 appointing Evelyn Carlson as receiver," defendants requested an immediate order appointing Evelyn Carlson as the receiver "to oversee an election of the Board of Directors of the Club by May 4, 2011 in conformance with the 2005 Bylaws." The document also stated that the parties agreed that Evelyn Carlson should be the receiver.

Defendants filed their notice of appeal from the order entered on April 26, 2011, "appointing a receiver [] and issuing a mandatory and prohibitory injunction."

## *CONTENTIONS ON APPEAL*

Defendants initially contend that Department 69 of the Los Angeles Superior Court had no jurisdiction to appoint a receiver. Next, they contend the order appointing the receiver was in fact a preliminary injunction, and because plaintiffs did not comply with the requirements for injunctive relief and failed to state a valid cause of action in their complaint, there was no basis for the court's orders. Finally, they claim that the injunction was in violation of the business judgment rule and that the court had no jurisdiction to order the receiver to hold an election.

Plaintiffs contend in their respondents' brief that the opening brief should be stricken because there is no statement of appealability.

## *DISCUSSION*

### *1. Statement of Appealability*

We first address plaintiffs' claim that the opening brief should be stricken for failure to include a statement of appealability.

California Rules of Court, rule 8.204(a)(2) provides that an appellant's opening brief must: "(A) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from; [¶] (B) State that the judgment appealed from is final, or explain why the order appealed from is appealable."

Plaintiffs cite the case of *Lester v. Lennane* (2000) 84 Cal.App.4th 536, an appeal filed from temporary custody orders in a family law case. There was no statutory or constitutional basis for the appealability of those orders, and the court of appeal observed that appellant "serves the question of appealability onto the court's side of the net and invites the court to undertake an independent analysis of appealability." (*Id.* at p. 557.) The court of appeal recognized the unfairness of dismissing the appeal, but noted that future failures to comply with the requirement of a statement of appealability "may result in our striking of the appellant's opening brief." (*Ibid.*)

In their reply brief, defendants concede that although there is no section entitled "statement of appealability" in their opening brief, the brief refers to their Notice of

Appeal. The Notice of Appeal states that the appeal is from an order appointing a receiver, citing Code of Civil Procedure section 904.1, subdivisions (a)(7) and (a)(6), which provide that an appeal may be taken from an order appointing a receiver and an order issuing an injunction. In addition, defendants' opening brief describes in its introductory section that the order appealed from is the order appointing Evelyn Carlson as receiver on April 26, 2011. It identifies three issues on appeal, including: "Is the court's April 26, 2011, order, which appoints Evelyn Carlson as receiver to enforce an injunction and hold an election of unspecified parties, an abuse of discretion?" The other two issues on appeal concern the lower court's jurisdiction to make the order and to review a challenge to a corporate election. The following section, entitled "Standard of Review" addresses the standard of appellate review of the three identified issues.

Because the appealability of an order appointing the receiver is specifically granted by statute, and defendants specifically identified the order appealed from in their opening brief and identified the statute which permits an appeal of that order in their Notice of Appeal, we elect not to strike the opening brief and proceed to determine the appeal on the merits.

***2. Powers of Department 69***

Defendants contend that Department 69 of the Los Angeles Superior Court had no jurisdiction to issue the receivership order because "Los Angeles Superior Court Rule 2.6(7)(1)(H)(ii)" provides that motions for the appointment of a receiver are assigned to Department 85 or 86.

Defendants appear to be referring to Superior Court of Los Angeles County, Local Rules, former rule 2.5(j) which provides that: "(2) In all civil actions that are assigned for all purposes to an unlimited jurisdiction trial department in the Central District, the following procedures are to be noticed and heard in Department 85 or Department 86: . . . (c) An application for the appointment of a receiver and all matters pertaining thereto. . . ." (Adopted eff., Jan. 1, 1994, as amended, eff. July 1, 2009, repealed July 1, 2011.) However, the Superior Court of Los Angeles County court rules in effect at the time this matter was filed also provide that: "A pro rata share of all cases filed in or transferred to

any district shall be assigned for all purposes to each civil bench officer assigned to hear I/C cases [cases assigned to an individual calendar] in that district. . . . . [¶] (i) Cases are assigned for all purposes, including trial. Except as the Presiding Judge may otherwise direct, each Judge shall schedule, hear and decide all matters, including law and motion, default prove-ups and minor's compromises for each Case assigned." (Former Super. Ct. L.A. County, Local Rules, rule 7.3.)[3]

As indicated by the pleadings, this case was assigned for all purposes to Department 69 (the Honorable Ramona See), and thus that department had the authority to hear the motion for an order appointing a receiver.

Defendants also cite *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044 for the proposition that a court in one department of a superior court cannot interfere with the exercise of jurisdictional power of a department to which the proceeding has been assigned. The case, however, refers to the authority of the court which appointed a receiver to determine all issues relating to the receivership. (*Id*. at p. 1062.) Furthermore, *O'Flaherty* specifically cites *Glade v. Glade* (1995) 38 Cal.App.4th 1441, which provides that "Even though a superior court is divided into branches or departments, pursuant to California Constitution, article VI, section 4, *there is only one superior court in a county and jurisdiction is therefore vested in that court, not in any particular judge or department. Whether sitting separately or together, the judges hold but one and the same court*. [Citation.] Because a superior court is but one tribunal, '[a]n order made in one department during the progress of a cause can neither be ignored nor overlooked in another department [Citation.] '" . . . It follows, . . . where a proceeding has been . . . assigned for hearing and determination to one department of the superior court by the presiding judge. . . and the proceeding. . . has not been finally disposed of . . . it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the

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[3] New Los Angeles County Court Rules for the Superior Court were enacted and became effective July 2011, after the order appointing the receiver was granted.

proceeding has been so assigned. . . . If such were not the law, conflicting adjudications of the same subject-matter by different department of the one court would bring about an anomalous situation and doubtless lead to much confusion.'" [Citations.]" (*Id.* at pp. 1449-1450, italics added.) It is clear from a complete reading that *O'Flaherty v. Belgum* does not stand for the proposition cited by defendants and that jurisdiction to appoint a receiver is not vested in a particular department.

***3. Jurisdiction to appoint a receiver***

Defendants raise several issues with respect to the propriety of the order appointing the receiver.

The appointment of a receiver in this case is authorized under two statutes.

Code of Civil Procedure section 564 provides that a receiver may be appointed, "by the court in which an action or proceeding is pending, . . . in the following cases: . . . (9) In all other cases where necessary to preserve the property or rights of any party."

Business and Professions Code section 17203 provides that "the court may make such orders or judgments, including the appointment of a receiver, as . . . may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."[4]

On appeal, we will not reverse an order appointing a receiver unless there is a clear showing of an abuse of discretion. (*Gold v. Gold Realty Co.* (2003) 114 Cal.App.4th 791, 808; *City & County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 744.)

***a. Judicial estoppel***

We begin with the claim made by plaintiffs in their respondents' brief that defendants are judicially estopped from objecting to the appointment of a receiver. "'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is

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[4] The broad powers of this section may be used to make prejudgment orders under certain circumstances. (See e.g. *People v. iMERGENT, Inc.* (2009) 170 Cal.App.4th 333.)

contrary to a position previously taken in the same or some earlier proceeding.'" (*Jackson v. City of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) There are five requirements in applying the doctrine of judicial estoppel: "'"(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."'" (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 169, quoting *Jackson*, *supra*, at p. 183.)

In their pleading filed April 26, 2011, defendants not only agreed that Evelyn Carlson should be appointed receiver, they requested that the superior court order her to immediately oversee an election.

Plaintiffs argue that this pleading prevents defendants from objecting to the order on appeal. Defendants contend in their reply brief that they were simply agreeing to the appointment of Evelyn Carlson, and that they still contest the power of the court to order the appointment and to grant the receiver the authority to conduct an election and to prohibit defendants from certain acts.

A close reading of the April 26th pleading filed by defendants reveals that they specifically requested that the court order Evelyn Carlson to oversee an election. Because defendants were the ones who moved for the ex parte order authorizing the receiver to oversee the election and jointly submitted a proposed order appointing Carlson as a receiver, they cannot now complain about the order appointing her and authorizing her to conduct an election.

Although we find that defendants are judicially estopped from objecting to the appointment order to the extent it authorized Evelyn Carlson to conduct an election, we nevertheless address defendants' arguments about the propriety of the court's order and the powers it granted to the receiver.

***b. Were plaintiffs entitled to an order appointing a receiver?***

The trial court did not abuse its discretion in appointing the receiver because plaintiffs followed the necessary steps in making their application.

A receiver may be appointed "in all other cases where necessary to preserve the property or rights of any party." A motion for a receiver can be brought "in an action between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund . . . is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." (Code Civ. Proc., § 564, subds. (b)(1) and (b)(9).)

California Rules of Court, rule 3.1175 provides that an applicant for an ex parte appointment of a receiver must show in a verified complaint: "(1) The nature of the emergency and the reasons irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice; [¶] (2) The names, addresses, and telephone numbers of the persons in actual possession of the property for which a receiver is requested, or of the president, manager, or principal agent of any corporation in possession of the property; [¶] (3) The use being made of the property by the persons in possession; and [¶] (4) If the property is part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business and facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business. [¶] If any of the matters listed above are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant's declaration or verified complaint must fully state the matters unknown and the efforts made to acquire the information."

California Rules of Court, rule 3.1177 provides that "[a]t the hearing of an application for appointment of a receiver on notice or at the hearing for confirmation of an ex parte appointment, each party appearing may, at the time of the hearing, suggest in writing one or more persons for appointment or substitution as receiver, stating the reasons. A party's suggestion is without prejudice to its objection to the appointment or confirmation of a receiver."

Plaintiffs, as members of the Club, established they were interested parties with a probable right to the Club's property, that there had been harm to the Club, and that there was a danger that the Club's property would be lost, removed, or injured. They were thus

entitled to bring the application. Their application and supporting declarations properly set forth the basis for the order and provided a potential receiver's name. There was no abuse of discretion in granting the order appointing the receiver.

***c. Power of Receiver to hold an election***

Code of Civil Procedure section 568 provides the receiver has the "power to bring and defend actions in his [or her] own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the Court may authorize."

California Rules of Court, rule 3.1179 provides that "The receiver is the agent of the court . . . , and as such: [¶] (1) Is neutral; [¶] (2) Acts for the benefit of all who may have an interest in the receivership property; and [¶] (3) Holds assets for the court and not for the plaintiff or the defendant."

"Typically, . . . court rulings on receivership matters are afforded considerable deference on review. [Citing cases which have granted receiver powers to act in particular ways.] Such deference is the rule, even where the court confirms extraordinary action by the receiver, . . . ." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 931 [concluding that the receiver has the power to approve a receiver's application to demolish a building].)

Article XI of the Club's 2005 Bylaws is entitled "Nominations and Elections" and provides in pertinent part: "Section 3. The Nominating Committee shall select one candidate for each office to be filled, carefully studying their qualifications and capabilities for the office; each of whom shall have consented to serve if elected. . . . [¶] Section 5. The Election Board shall at once have prepared forms to be used at the election on which shall be placed the names of all candidates for the Board and the Nominating Committee. In default of a candidate, or candidates, the Election Committee shall complete the ticket, present one or more names for each office. [¶] Section 6. Election shall be held at the Clubhouse on the first Wednesday in May. The polls shall be open from 10:00 a.m. to 3:00 p.m. All members in good standing shall be entitled to

vote. . . . [¶] Section 9. A vacancy occurring in the office of the President or Vice-President shall be filled by the plurality vote of the members present at a regular meeting of the Club. Other vacancies shall be filled by the President, with the approval of the Board."

The January 2011 order appointing the receiver authorized an election in accordance with the 2005 Bylaws. As indicated by defendants in their April 26th pleading, the annual elections were scheduled to be held in May 2011. Because there were allegations that defendants had conducted elections at unauthorized times without proper notice, the order authorizing the receiver to hold an election on or after May 4, 2011, was within the broad scope of powers afforded by Code of Civil Procedure sections 564 and 568 and within the scope of the Club's bylaws.[5]

***4. Preliminary injunction.***

Defendants contend that although plaintiffs based their ex parte application on the receivership statute, what they obtained was an order for the receiver to enforce a preliminary injunction, and thus plaintiffs "sidestepped the requirement for obtaining a preliminary injunction" by not demonstrating a probability of prevailing on the merits.

A preliminary injunction is issued when a plaintiff presents evidence of irreparable injury or interim harm that will occur if an injunction is not issued pending an adjudication of the merits. (Code Civ. Proc., § 526). There must be a showing of a likelihood of success on the merits. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) In contrast, Code of Civil Procedure section 564 does not require that a plaintiff prove a probability of success on its claim in order to secure the appointment of a receiver.

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[5] At oral argument, the parties reported that two other receivers had been appointed since Evelyn Carlson and two elections had occurred. Both parties raised the issue of dismissal for mootness. Since the order appealed from gave the receiver the authority to hold an election and prohibited defendants from taking certain actions until after the election, the appeal is not moot.

Although the language in the order could be interpreted to be giving the receiver powers to control the defendants' actions, it was not automatically transformed from an order authorized by Code of Civil Procedure section 564 et seq. to a preliminary injunction. As discussed *ante*, Code of Civil Procedure section 568 and Business and Professions Code section 17203 give the court the latitude to grant extremely broad powers to the receiver.

"'The availability of other remedies does not, in and of itself, preclude the use of a receivership. [Citation.] Rather, a trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership. [Citation.]' (*City and County of San Francisco v. Daley, supra,* 16 Cal.App.4th at p. 745.)" (*Gold v. Gold Realty Co., supra,* 114 Cal.App.4th at p. 807.)

The order appealed from prohibited sale of assets, or changes to corporate structure and ordered the receiver to conduct an election in accordance with the Bylaws. Even though it contained language granting the receiver powers to stop defendants' actions, in essence, what it did was to preserve the status quo. Since defendants were allegedly transferring Club property, evicting tenants and changing locks, the order was necessary to prevent them from doing so until a properly noticed election was held.

Defendants have not alleged that the order authorized the receiver to perform any duties which are not in the best interest of the club or in bad faith. "Where there is no evidence of fraud, unfairness, or oppression, the court has wide direction in approving the receiver's proposed actions. [Citations.]" (*City of Santa Monica, supra*, 43 Cal.4th at p. 931.)

The order provided that the receiver was empowered to prevent the sale or alienation of the Club's assets or from making any changes to the Club's corporate structure. It was well within the superior court's discretion to make the order.

***5. Adequacy of complaint***

Defendants filed a demurrer to the First Amended Complaint on December 6, 2010. It is unclear from the record whether this demurrer was ever ruled on. The

complaint was amended twice thereafter, but at the time the motion for receiver was brought, the operative complaint was the First Amended Complaint.[6]

Defendants' contentions regarding the adequacy of the complaint, raised in their opening brief filed February 16, 2012, are therefore not properly before this court since they have only appealed from the April 26, 2011, order appointing the receiver.

## *DISPOSITION*

The order appointing the receiver is affirmed. Plaintiffs and respondents Quick, Smith, and Zardaneta shall recover their costs on appeal from defendants and appellants Morgan and Van Tassell.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.** **JACKSON, J.**

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[6] After the order appointing the receiver was entered (April 26, 2011), a Second Amended Complaint was filed on August 3, 2011, and a Third Amended Complaint was filed October 17, 2011. The Third Amended Complaint, filed October 17, 2011, alleges four causes of action: (1) unfair business practices (Bus. & Prof. Code, § 17200); (2) unlawful election (Corp. Code, § 5617); (3) shareholders derivative action (Corp. Code, § 5710); and (4) fraud.