

E.D. MUSTAFA, Plaintiff, Cross-complainant and Appellant,
v.
MOUNTAIN VIEW PARK HOMEOWNERS ASSOCIATION, INC., Defendant, Cross-complainant and Respondent;
EXCALIBRE MANAGEMENT, Defendant and Respondent.

E063529

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

August 8, 2017

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

(Super.Ct.No. CIVVS1201584)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

Smart Law, Dean Edward Smart, Ursula McDonnell and Sandra Ellen Lillard for Plaintiff, Cross-complainant and Appellant.

Law Offices of Thomas N. Jacobson and Thomas N. Jacobson for Defendant, Cross-complainant and Respondent.

No appearance for Defendant and Respondent.

E.D. Mustafa (Mustafa) sued Mountain View Park Homeowners Association, Inc. (HOA), Excalibre Management (Manager), and others for (1) breach of fiduciary duty, (2) breach of the governing documents, (3) intentional infliction of emotional distress, and (4) negligence. HOA brought a cross-complaint against Mustafa for (A) breach of fiduciary duty, and (B) interference with a prospective business advantage.

The trial court granted Manager's motion for nonsuit against all four of Mustafa's causes of actions. The trial court granted HOA's motion for nonsuit against three of Mustafa's causes of action, allowing the negligence cause of action to be decided by the jury. The jury found against Mustafa on the negligence cause of action.

The trial court denied Mustafa's motion for nonsuit. The jury found in favor of HOA on HOA's two causes of action. The jury found HOA suffered \$1,881 in damages for the interference cause of action and \$1,881 in damages for the breach cause of action. The trial court awarded HOA \$1,881 in damages and \$201,750 for attorney's fees.

Mustafa contends: (1) the trial court erred by granting HOA's motion for nonsuit on the causes of action for breach of the governing documents, breach of fiduciary duty, and intentional infliction of emotional distress; (2) the trial court erred by denying Mustafa's motion for nonsuit on HOA's cause of action for intentional interference with a prospective business advantage; and (3) the trial court erred by awarding HOA \$201,750 in attorney's fees. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. THIRD AMENDED COMPLAINT

In Mustafa's Third Amended Complaint (TAC), he alleges he owns a condominium, in particular unit 56, that is within the HOA. In

2006, Mustafa served as HOA's president. He continued to serve in that position until early 2011. In May 2010, a \$2,400 per unit special assessment for emergency roof repairs was approved by the HOA Board. Mustafa requested to pay the \$2,400 pursuant to a payment plan. No one responded to Mustafa's multiple requests for a payment plan which he made "[f]rom approximately October 2010 through 2011." In the meantime, he was charged late fees and interest on the \$2,400.

At one point, Mustafa's bill had grown to more than \$7,000. Mustafa alleged the "late fees were inappropriately applied in violation of [HOA's] Covenants Conditions and Restrictions and Civil Code § 5650(b)(2) (3) which solely permits the imposition of late fees in the event that [Mustafa's] account was not paid in full within 30 days of the due date." Mustafa alleged his "account for Unit 56 was always paid in full within 30 days of the due date."

B. CROSS-COMPLAINT

In HOA's cross-complaint, it alleged Mustafa failed to pay the required assessments, and, while HOA president, prevented HOA from attempting to collect on his delinquent account. HOA further alleged that during 2010 and 2011, Mustafa intentionally interfered with the holding of HOA elections. HOA also alleged Mustafa engaged in self-dealing by causing HOA to hire a security company owned by Mustafa without competitive bidding taking place.

DISCUSSION

A. HOA'S MOTION FOR NONSUIT

1. *CONTENTION*

Mustafa contends the trial court erred by granting HOA's motion for nonsuit on the causes of action for breach of the governing documents, breach of fiduciary duty, and intentional infliction of emotional distress.

2. *STANDARD OF REVIEW*

When reviewing the grant of a motion for nonsuit, we apply the de novo standard of review and the same procedural rules as those used in the trial court. ""A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor." [Citation.] In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff's claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458.)

3. *RECORD ON APPEAL*

Testimony in the case began on January 13, 2015. Mustafa testified that day. A reporter's transcript from January 13 is not included in the record on appeal. Mustafa's testimony resumed on January 14. Two other witnesses also testified that day: Scott Smith and Roland S. Jefferson, M.D. A January 14 reporter's transcript containing only Mustafa's testimony is included in the record. On January 15, the following people testified: Roland S. Jefferson, M.D., Mustafa, and Duane Dyar. A January 15 reporter's transcript containing only Mustafa's testimony is included in the record on appeal.

HOA's motion for nonsuit was heard on January 16, after Mustafa rested his case. That same day, the trial court granted the motion in favor of HOA on the causes of action for breach of covenant, breach of fiduciary duty, and intentional infliction of emotional distress.

4. ANALYSIS

We cannot review whether the trial court erred by granting HOA's motion for nonsuit on the causes of action for breach of the governing documents, breach of fiduciary duty, and intentional infliction of emotional distress because we do not have an adequate record. We are missing portions of testimony that preceded the motion for nonsuit.

A review of a grant of nonsuit requires this court to determine if the plaintiff has presented sufficient evidence, while making all evidentiary inferences in favor of the plaintiff. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214-1215.) We cannot perform that evidentiary review when the record does not include the testimony provided by the plaintiff's witnesses. (*Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [court cannot review nonsuit issue when reporter's transcript is not provided].)

For example, Mustafa's appellant's appendix includes documents that he refers to as exhibits. It is possible the oral testimony would provide insight into the exhibits, but we cannot perform that review because we do not have an adequate reporter's transcript. Because Mustafa has failed to provide an adequate record, his contentions concerning the trial court granting HOA's motion for nonsuit must be resolved against him. (See also *Foust v. San Jose Cost. Co., Inc.* (2011) 198 Cal.App.4th 181, 186 [appellant's burden to provide a reporter's transcript].)

B. MUSTAFA'S MOTION FOR NONSUIT

1. CONTENTION

Mustafa contends the trial court erred by denying his motion for nonsuit on HOA's cause of action for intentional interference with a prospective business advantage.

2. RECORD ON APPEAL

On January 20 the defense began its case-in-chief. The following witnesses testified: Ronnika Bassett, Reginald Paul Berry, and Michele Cohn. The reporter's transcript on appeal for January 20, includes only argument—no testimony is included. On January 21, the following witnesses testified: Latasha Paschal, Melvin O. Briggs, Robyn Hottenroth, and Duane Dyar. The record includes a January 21 reporter's transcript with the testimony of Robyn Hottenroth and Duane Dyar.¹ On January 26, Duane Dyar and Helen Walter testified. The reporter's transcript on appeal includes the January 26 testimony of Duane Dyar, but not of Helen Walter.

The defense rested its case on January 26. That same day, Mustafa moved for nonsuit on both the breach and interference causes of action. The trial court denied Mustafa's motion.

3. ANALYSIS

As explained *ante*, this court cannot examine an evidentiary issue, such as a ruling on a motion for nonsuit when the appellate record is inadequate. (*Hodges v. Mark, supra*, 49 Cal.App.4th at p. 657 [court cannot review nonsuit issue when reporter's transcript is not provided].)

For example, on appeal, Mustafa contends the trial court erred by denying his motion for nonsuit on the cause of action for interference with a prospective business advantage because HOA failed to provide proof of a relationship with a third party. Because the record includes only a segment of HOA's evidence, we cannot properly review this issue. It is possible evidence of a third party relationship is contained in the excluded portion of the reporter's transcript. Because Mustafa has failed to provide an adequate record on appeal, we must presume the judgment is correct. (*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1507.)

C. ATTORNEY'S FEES

1. PROCEDURAL HISTORY

a) Declaration of Restrictions

The HOA's Declaration of Restrictions provides, "In the event the Association, declarant, or any owner shall commence litigation to enforce any of the covenants, conditions, or restrictions herein contained, the prevailing party in such litigation shall be entitled to costs of suit and such attorney's fees as the Court may adjudge reasonable and proper."

b) Third Amended Complaint

In Mustafa's TAC, he wrote, in the section entitled, "Factual Allegations Common to All Counts," "[Mustafa] and [HOA] are subject to Governing Documents as that term is defined in California Civil Code § 4150 including but not limited to its Declaration of Restrictions of Mountain View Park Homeowners Association, Inc., recorded in the official records of San Bernardino as document number 80-278052, Bylaws dated December 24, 1980, Rules and Regulations Dated December 2009, and its most recently approved Assessment Collection Policy."

Mustafa further alleged in the common facts section, "[Mustafa] is informed and believes and based thereon alleges that each month, between March 2011 and February 2012, [HOA and Manager] inappropriately applied late fees and interest charges to [Mustafa's] account for Unit 56. Said late fees were inappropriately applied in violation of [HOA's] Covenants Conditions and Restrictions and Civil Code § 5650(b)(2) (3) which solely permits the imposition of late fees in the event that [Mustafa's] account was not paid in full within 30 days of the due date." Mustafa incorporated the foregoing two paragraphs of allegations into all of his causes of action.

In the breach of fiduciary duty cause of action, Mustafa alleged, "[Mustafa] is informed and believes, and based thereon alleges that Defendant [HOA] in performing or not performing, in committing and not committing the actions alleged in the above paragraphs breached its fiduciary duty of due care to act with the utmost good faith and in the best interest owed to [Mustafa]."

In the intentional infliction of emotional distress cause of action, Mustafa alleged, "Commencing in January 2011, Defendants sent incorrect account statements and demand letters to [Mustafa], at some point demanding monies in excess of Seven Thousand Dollars for Unit 56 not owed by [Mustafa]." Mustafa further alleged HOA "continued in their refusal to correct the amounts in dues demanded from [Mustafa]. [HOA and Manager's] repeated inaccurate demands and threats of repercussions to [Mustafa] caused [Mustafa's] mental and physical health to decline."

In the negligence cause of action, Mustafa alleged, "Prior to the filing of this action, [Mustafa] sent multiple letters, as late as in May 2011, to [HOA and Manager] disputing the amount in assessments demanded and requesting an accounting. Further, in June and July 2011, [Mustafa's] counsel sent similar letters to [HOA and Manager]. Despite [Mustafa's] demand, [HOA and Manager] failed to correct the incorrect invoices and continuously show [Mustafa's] account for Unit 56 delinquent as of the present date." For each cause of action, Mustafa requested an award of attorney's fees.

c) Cross-Complaint

In HOA's cause of action for breach of fiduciary duty, it alleged "Mustafa failed to pay assessments levied in accordance with the provisions of the Davis-Sterling Act and the Covenants Conditions and restrictions (CC&Rs) of [HOA]." HOA further alleged,

"Mustafa took affirmative action to intentionally interfere in the holding of elections required by the CC&Rs and bylaws of [HOA]."

In HOA's cause of action for intentional interference with a prospective business advantage, HOA alleged that Mustafa did not pay his dues and fees in a timely manner, and, as president of the HOA, did not permit the HOA to collect his delinquent payments. HOA asserted that the lack of payment by Mustafa caused HOA substantial harm by not having money available to pay its bills. HOA sought attorney's fees for both causes of action.

d) Motion for Attorney's Fees

HOA moved for an award of attorney's fees. HOA asserted all of Mustafa's causes of action were based upon HOA's CC&Rs, and therefore, HOA was entitled to all of its attorney's fees for defending against Mustafa's lawsuit.

e) Opposition

Mustafa opposed HOA's motion for attorney's fees. Mustafa asserted that three of his four causes of action were tort claims, and thus were not designed to enforce the CC&Rs, and therefore were not eligible for an award of attorney's fees. Mustafa asserted HOA would only be entitled to fees for the breach of governing documents cause of action.

f) Ruling

The trial court issued a tentative ruling, which is not included in the record on appeal. The parties argued the attorney's fee motion. A reporter's transcript of the argument is not included in the record on appeal. The trial court granted the motion, awarding HOA \$201,750 in attorney's fees.

2. ANALYSIS

a) Contention

Mustafa contends the trial court erred by awarding attorney's fees in the amount of \$201,750 because HOA is only entitled to fees that relate to Mustafa's cause of action for Mustafa's breach of the governing documents—HOA is not entitled to fees related to Mustafa's claims for breach of fiduciary duty, intentional infliction of emotional distress, and negligence. In other words, Mustafa contends the trial court erred by awarding attorney's fees for tort causes of action because HOA is only entitled to fees related to contract law causes of action.

b) Standard of Review

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1176.) Because we are primarily interpreting a contract, complaint, and cross-complaint, we will apply the de novo standard of review.

c) Law

Civil Code section 1717, subdivision (a), provides, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Our Supreme Court wrote, "Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's



fees under section 1717 only as they relate to the contract action. [Citations.] Describing the attorney's fees provision, section 1717 specifically refers to fees 'incurred to enforce the provisions of [the] contract.' A litigant may not increase his recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper. . . . [¶] Conversely, [a] plaintiff's joinder of causes of action should not dilute its right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.)

Thus, apportionment between contract and tort causes of action is not required when the issues in the different causes of action arise out of the same operative facts. (*Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 951.) "All expenses incurred on the common issues qualify for an award. [Citation.] When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required." (*Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1133 (*Akins*).

d) Breach of the Governing Documents

Mustafa concedes the breach of governing documents cause of action is a contract claim for which attorney's fees may be properly assessed. In his TAC, in regard to the breach of governing documents cause of action, Mustafa alleged HOA breached the CC&Rs by improperly assessing late penalties and interest on his account.

e) Breach of Fiduciary Duty

""The elements of a cause of action for breach of fiduciary duty are: (1) existence of a

fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach."" (*Tribeca Companies, LLC v. First American Title Insurance Company* (2015) 239 Cal.App.4th 1088, 1114.)

In the TAC, Mustafa alleged HOA breached its fiduciary duty by performing or not performing the acts described in the common facts section of the TAC. In the common facts section, Mustafa alleged HOA "inappropriately applied late fees and interest charges to [Mustafa's] account for Unit 56. Said late fees were inappropriately applied in violation of Mountain Views Covenants Conditions and Restrictions. "

Mustafa's allegation in the breach of fiduciary duty cause of action is nearly identical to his claim in the breach of governing documents cause of action. Mustafa is asserting a fiduciary duty was breached when HOA incorrectly imposed late fees in violation of the CC&Rs. In both causes of action he is asserting HOA breached the CC&Rs by incorrectly imposing late fees and penalties. Accordingly, the breach of fiduciary duty cause of action is interrelated with the contract cause of action, and fees were properly awarded. (*Akins, supra*, 79 Cal.App.4th at p. 1133 [allocation is not required when claims are interrelated].)

f) Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

In the TAC, Mustafa alleged HOA "sent incorrect account statements and demand letters to [Mustafa], at some point demanding monies in excess of Seven Thousand Dollars for Unit 56 not owed by [Mustafa]." Mustafa further alleged, "When even the intervention of [Mustafa's] counsel in July 2011 was unsuccessful in persuading [HOA] to correct the invoices and to stop collection procedures, [Mustafa] became severely distraught in light of the seemingly hopeless situation and he suffered severe emotional distress."

Mustafa alleges that HOA's extreme conduct consisted of violating the CC&Rs. Mustafa asserts HOA repeatedly violated the CC&Rs by seeking to collect money from him and incorrectly adding late penalties and interest to his bill. This cause of action is connected to the contract claim because both causes of action are based upon HOA allegedly breaching the CC&Rs by seeking to collect late penalties and interest from Mustafa. Thus, the emotional distress cause of action and the contract cause of action are interrelated because they both are based upon the issue of whether HOA breached the CC&Rs. Accordingly, fees were properly awarded. (*Akins, supra*, 79 Cal.App.4th at p. 1133 [allocation is not required when claims are interrelated].)

g) Negligence

The elements of negligence are "the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*McIntyre v. Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671.)

In the TAC, Mustafa alleged HOA "owed a duty to [Mustafa] to ascertain the accuracy of assessments allegedly owed by [Mustafa] before commencing lien procedures." Thus, Mustafa asserted HOA owed a duty to correctly carryout the CC&Rs. Mustafa alleged HOA breached its duty by "fail[ing] to correct the incorrect invoices and

continuously show[ing] [Mustafa]'s account for Unit 56 delinquent as of the present date." Mustafa's negligence-breach allegation is the same as that in the contract cause of action—that HOA breached the CC&Rs. Therefore, the negligence cause of action is interrelated with the contract cause of action, and fees were properly awarded. (*Akins, supra*, 79 Cal.App.4th at p. 1133 [allocation is not required when claims are interrelated].)

h) Cross-Complaint: Relevant Law

"Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. If based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious." (*Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322 (*Sachs*)). Although CC&Rs are generally enforced as equitable servitudes, they are also contracts. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 239-240.)

i) Cross-Complaint: Breach of Fiduciary Duty

"The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." (*Tribeca Companies, LLC v. First American Title Insurance Company, supra*, 239 Cal.App.4th at p. 1114.)

In HOA's cross-complaint, it alleged, "Commencing on or about January 1, 2010 Mustafa failed to pay assessments levied in accordance with the provisions of the Davis-Sterling Act and the Covenants Conditions and restrictions (CC&Rs) of [HOA]." HOA asserted that Mustafa, as president of HOA, sought to collect assessments from other members of HOA, but shielded himself from such collection procedures, in violation of the CC&Rs. Further, HOA asserted that Mustafa,

as president of HOA, "intentionally interfere[d] in the holding of elections required by the CC&Rs and bylaws of [HOA]."

HOA's cause of action concerns two breaches of the CC&Rs: (1) the payment of an assessment, and (2) the holding of elections. HOA's allegations seek to enforce the CC&Rs because HOA is asserting Mustafa breached the CC&Rs and HOA is seeking to recoup the money it lost from Mustafa not paying his assessments, late penalties, and interest. The collection of money is meant to bring Mustafa into compliance with the CC&Rs. Thus, HOA's breach of fiduciary duty cause of action concerns enforcement of the CC&Rs, and fees were properly awarded. (*Sachs, supra*, 151 Cal.App.3d at p. 322 [claim based on breach of promise is a contractual claim].)

j) Cross-Complaint: Intentional Interference

The elements of an intentional interference with prospective business advantage cause of action are ""(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant."" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.)

In its cross-complaint, HOA alleged Mustafa's intentional act was not "pay[ing] his dues and assessments in a timely manner" and "not allow[ing HOA] to pursue collection of the delinquent assessments against him." Thus, the act at issue was Mustafa's alleged breach of the CC&Rs. HOA sought to enforce the CC&Rs by asserting the breach of the CC&Rs was damaging other economic relationships. Because the claim is based upon a breach of the CC&Rs, it is contractual,

and fees were properly awarded. (*Sachs, supra*, 151 Cal.App.3d at p. 322 [claim based on breach of promise is a contractual claim].)

k) Conclusion

The trial court did not err by awarding \$201,750 in attorney's fees.

DISPOSITION

The judgment is affirmed. Respondent, Mountain View Park Homeowners Association, Inc., is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

RAMIREZ

P. J.

FIELDS

J.

Footnotes:

¹ The reporter's transcript reflects Marion Duane Dyer testified, while the clerk's register of actions reflects Duane Dyer testified. We infer that Duane Dyer and Marion Duane Dyer are the same person.

