

Allowing Pets in a No-Pet Community Is a Reasonable Accommodation

***Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission*, 121 Cal. App. 4th 1578, 18 Cal. Rptr. 3d 669 (2004)**

State and Local Legislation and Regulations/Covenants Enforcement: A condominium association's failure to allow companion dogs for the relief of severe depression is a violation of the California Fair Employment and Housing Act.

Jayne and Abdelfatah Elebiari were members of the Auburn Woods I Homeowners Association ("association"). Despite the association's ban on dogs within the condominium, the Elebiaris purchased a small dog. Once the board became aware of the dog's presence, it sent the Elebiaris a notice warning them they were violating the covenants by keeping the dog. The Elebiaris gave the pet to friends and proceeded to seek permission from the board to keep a small dog to alleviate symptoms of depression -- both of the Elebiaris suffered from severe depression, and, in their view, the dog helped alleviate their symptoms. Based on this, the Elebiaris asked the association to provide a reasonable accommodation for them by waiving the prohibition on dogs.

The association refused the request, and the Elebiaris filed a claim with the California Fair Employment and Housing Commission ("FEHC"). The FEHC ruled in favor of the Elebiaris, and the association filed an administrative writ of mandate to overturn the decision. The trial court granted the association's writ, and the Elebiaris and the FEHC appealed.

Siding with the FEHC, the appeals court determined that the FEHC did not abuse its discretion. In granting the Elebiaris' claim, the FEHC had proceeded in the manner required by law, and its finding of discrimination was supported by substantial evidence. In reviewing the record, the court found that the Elebiaris had contacted the association on several occasions seeking a reasonable accommodation for the pet. In fact, the Elebiaris had provided the association with a letter from Jayne Elebiari's psychiatrist stating that the companion animal had improved her condition. In response to the requests, the association's manager acted indifferently and even joked about the Elebiaris' condition. The association continually denied the Elebiaris' requests, and eventually the Elebiaris sold their unit.

Finding that the FEHC's decision was supported by substantial evidence, the court found that the FEHC had determined the Elebiaris had established "that a companion dog was a reasonable accommodation." In the court's view, people with mental disabilities are protected under California's Fair Employment and Housing Act ("FEHA"). Furthermore, the Elebiaris had established that they suffered from an FEHA disability, the association knew of the disability, a reasonable accommodation was available, and the association failed to provide the accommodation. In its opinion, the court noted, "[t]here was abundant evidence introduced at the hearing that the Elebiaris' disabilities interfered with the use and enjoyment of their home, and that having a dog improved this situation."

Insurance Provider Must Honor Property Insurance Policy *Hebrew School Condominium Association v. Distefano, Control No. 04-82869, Pa. Common Pleas Ct., (October 21, 2004)*

Powers of the Association: Individual condominium association members may have standing to bring certain causes of action against an insurance company that contracted with the association.

Hebrew School Condominium Association ("association") is an unincorporated association that owns the common elements of Hebrew School Condominium. All owners in the condominium are members of the association. The association contracted with Republic-Franklin Insurance Company ("RFIC") to provide property insurance services for the common elements of the condominium as well as, the board and some owners believed, for some portions of the individual units. After a fire damaged the common elements and units owned by several individuals, the association and those owners made a claim to RFIC related to damages caused by the fire. When RFIC refused to pay on the claim, the association and the affected owners sued the company for, among other things, breach of contract and bad faith. In this opinion, the court ruled on preliminary objections submitted by RFIC.

RFIC's first preliminary objection was that the association is the only proper party to assert a claim under the policy. The court ruled that Pennsylvania statutes dictate that an unincorporated condominium association, subject to limits set out by the condominium's declaration, is required to enter into contracts for property insurance on the common elements and units against fire and extended-coverage perils. The Pennsylvania statute at 68 Pa. C.S. 3312(a)(1) states, "Any loss covered by the property policy...shall be adjusted with the association" and that the association, "shall hold the insurance proceeds in trust for unit owners and lienholders as their interest shall appear." In this case the court determined the association is empowered by statute to institute litigation, so there is no need for individual unit owners to prosecute duplicative claims against the insurer. The court did not completely preclude owners from asserting a claim because those owners may have standing as third-party beneficiaries of the RFIC property policy. The court found that, while not expressly listed in the property policy, if at least some portion of the units are covered under the property policy, the unit owners could be viewed as third-party beneficiaries of the contract. Therefore, the court did not dismiss the plaintiff's claim until the court reviewed the pertinent documents.

RFIC also objected to the breach-of-contract claim, contending that it was not sufficiently specific. In Pennsylvania, a cause of action for breach of contract must be established by pleading these essential terms: 1) the existence of a contract, 2) a breach of duty imposed by its essential terms, and 3) resultant damages. The association and owners maintained that RFIC contractually obligated itself to insure the condominium property, that the contract required RFIC to compensate them for damage caused by fire, that RFIC refused to compensate them, and that because of that refusal, the association and owners had been damaged. The court found that the association and owners pleaded all the necessary elements for the breach-of-contract claim.

In dealing with RFIC's preliminary objection against the claim for bad faith, the court stated that only insureds under a policy can bring a cause of action for bad faith. As the association was the insured and not the individual owners, the owners' claim was dismissed. The court sustained RFIC's preliminary objections in part and overruled in part.

Bylaws Are Moot and Unjusticiable When New Bylaws Are Adopted

***Marsh v. Miami Beach Association*, No. CV044000075, Conn. Superior Ct. (April 28, 2005)**

Risks and Liabilities: In an unreported opinion, a Connecticut court ruled it did not have the power to rule on the merits of a case and that the case must be dismissed because of mootness when new bylaws superseded a suit based on old bylaws.

Bylaws adopted in 2002 were a source of controversy between the Miami Beach Association ("association") and Phyllis Marsh, a property owner. Marsh sued the association and members of its board of governors, asserting that the individual board members breached their duty to act in a reasonable manner in compliance with the articles of incorporation when they adopted the bylaws. She contended that adoption of the bylaws possibly resulted in financial harm due to potentially higher assessments as well as through other means, and she sought a declaratory judgment and injunction against the association. Marsh claimed that the board members did this by changing notice requirements, extending officers' terms of office, refusing to conduct elections, compensating board members, and creating executive committees.

One of the board members, Robert Vanesse, asked the court to dismiss Marsh's complaint because the issue was moot -- he contended that the controversy was in the past and that the court could not remedy the situation now. Vanesse argued that the original bylaws were superseded by new bylaws adopted in 2004 ("2004 bylaws"). The court stated that mootness is a question of justiciability that determines whether the court has subject-matter jurisdiction, defined as the power to hear a case based on the type of dispute. Whether the cause of action was moot had to be discussed before determining the merits of the case.

Citing a Connecticut case, the court noted that justiciability requires an actual controversy, in which the interests of the parties are adverse, the matter in the controversy is capable of being adjudicated by a judicial power, and the determination of the controversy will result in practical relief to the complainant. The last requirement of justiciability, the ability of the court to grant practical relief, cannot be satisfied when the controversy is moot. Since the original bylaws were superseded by the 2004 bylaws, the court determined the controversy was moot, and granted Vanesse's motion to dismiss the case.

Sub-Association Cannot Sue on Owners' Behalf to Withdraw From Master Association

Riverbend At Cascades Condominium Unit Owners Association v. Cascades Community Association Inc., No. 24262, Vir. Cir. Ct. (April 12, 2005)

Powers of the Association: Contrary to federal law, Virginia law allows a party to sue in a representative capacity only if a statute specifically allows such representation.

Riverbend At Cascades Condominium is the name given to one phase of the Cascades, a master-planned community. Under the community's master declaration, a phase can withdraw from the master declaration, surrendering use of facilities and services and avoiding assessments and other obligations imposed on property owners. To withdraw, 66 percent of the owners in a phase and 66 percent of their mortgagees must consent.

The board of directors of Riverbend At Cascades Condominium Unit Owners Association ("Riverbend") approached the Cascades Community Association's ("master association") board of directors and asked that the master declaration be amended to withdraw Riverbend from the master association. Riverbend's board indicated that more than 66 percent of its owners consented to the withdrawal.

The master declaration included a provision that if mortgagees failed to respond to notice of a proposed amendment to the master declaration, they would be deemed to have approved the withdrawal. Relying on this provision, Riverbend's board claimed it notified all mortgagees of its intent to withdraw and no lender had responded. Consequently, Riverbend's board asserted, more than 66 percent of the mortgagees should be deemed to have approved the withdrawal.

The master association's board of directors refused to consent to the withdrawal of the phase or to execute and record an instrument withdrawing Riverbend from the master association. Riverbend then sued the master association, asking the trial court to withdraw Riverbend from the master declaration.

In response, the master association filed a motion to dismiss, contending Riverbend was not an "owner" as defined by the master declaration and, therefore, had no standing to sue for the relief sought. The master association also asserted the suit could not go forward because it lacked necessary parties. Specifically, the master association claimed that each Riverbend unit owner and each Riverbend mortgagee was a necessary party because a ruling in favor of the Riverbend's board would affect each of their property interests.

Riverbend responded to the motion to dismiss by arguing that it was suing in a representative capacity on behalf of its owners. It cited provisions of the Virginia Condominium Act that permit a condominium association to sue on behalf of the owners to enforce the provisions of its condominium instruments, and also cited a precedent, *Frantz v. CBI Fairmac Corporation*, 229 Va. 444, 331 S.E.2d 390 (1985) (CALR November 1985). Based on these authorities, Riverbend argued that it had a statutory right to sue on behalf of individual owners.

The trial court first noted that, under Virginia law (and in contradiction to federal law), a party may sue in a representative capacity only if expressly authorized by the statute. The court found that Riverbend had no right to sue directly because it was not an owner under the master declaration, and that the master declaration afforded a sub-association no direct right to withdraw. In addressing Riverbend's claim that it had a right to sue as a representative of its unit owners, the court found that the code section and the case Riverbend cited authorized a condominium association to engage in suits that involve a right or obligation common to all unit owners. Since there was no allegation in this case that all Riverbend owners were seeking to withdraw, the court concluded that the statute did not authorize the association to sue in a representative capacity.

Since the association was found to have no direct right to sue to withdraw and there was no statutory basis for it to sue in a representative capacity, the court dismissed the case and ruled that the dismissal would be with prejudice.

Board's Decision Must Comply With Covenants

***Berezowski v. Schuman*, 112 P.3d 820 (Id. 2005)**

Architectural Control/Documents: Association members must use their land in compliance with the subdivision's CC&Rs.

Best Hill Ranch is a planned community in Coeur d'Alene, Idaho. Each of the lots in the community is subject to a declaration of covenants, conditions, and restrictions. The declaration established a homeowner association with a board of directors empowered to enforce the declaration, adopt rules and regulations, and establish an architectural control committee ("ACC"). The declaration states that lot owners wishing to construct improvements on their property must first obtain permission from the board or the ACC.

In June 1999, Dale and Renee Schuman purchased a lot in Best Hill Ranch. The Schumans received approval from the board to construct additional sections of wooden fencing and an unattached storage shed. In October 2002, association members Rafal and Danuta Berezowski sued the Schumans, alleging that the fence, shed, and an RV parked on the Schumans' property were violations of the declaration.

The court interpreted the declaration using the same rules it would have used to interpret contracts, and cited *Pinehaven Planning Board v. Brooks*, 138 Idaho 825, 70 P.3d 664 (2003) (CALR June 2003), which sets out the rule that "covenants restricting the free use of land are valid and enforceable in Idaho." However, since covenants restricting the use of land for all lawful purposes are in contravention to the common law, the court determined not to extend any restriction by implication and noted that any doubt will be resolved in favor of the free use of land.

The declaration further provides that in the event of noncompliance with the declaration, rules and regulations, articles of incorporation, or bylaws, a property owner shall have a cause of action in favor of the association and any aggrieved property owner for the recovery of damages, injunctive relief, or both.

The court also noted that when the declaration, rules, and regulations were viewed

together, they provided that the appeals process was the sole remedy for actions for which board approval was required, and the private right of action to enforce the declaration did not apply in cases where a property owner must seek approval for a particular use. The declaration provides for a private right of action only in the event any lot owner fails to comply with provisions of the declaration. The declaration provides an appeals process for applicants to contest approval or disapproval of an application by the board.

In dealing with the shed and the fence, the court found that the declaration required the Schumans to petition the board and receive approval to construct those improvements, and that the Schumans followed that requirement. No other property owners in Best Hill Ranch appealed the approval of the shed construction, and the declaration provided no restrictions against the construction of an unattached shed.

The court found that the Berezowskis' contention that the unattached shed should not be allowed because the board had not approved other unattached sheds was not compelling. Regarding the fence, the court found that the declaration did not limit the style of the fence so long as it was constructed of wood and approved by the board. The board's approval of the Schumans' petition to construct a fence was not appealed by any Best Hill Ranch property owners, and therefore the fence was not in contravention of the declaration.

Section 4.6 of the declaration provides that all RVs parked longer than 48 hours must be parked in the owner's garage or in an area screened from the street, and Section 7.1 requires that RVs be kept in the owner's garage or off the property. The Schumans went to some effort to screen their RV, but it was still visible from the street. When other property owners complained, the board met in a special session to determine whether the Schumans' effort to screen their RV was adequate, and determined that it was. No other property owners appealed the board's decision.

The court concluded that language from the declaration was clear in not allowing an RV to be visible from the street. The declaration did not provide for an application or approval process, and provisions relating to RV visibility are contractual requirements and therefore not subject to the board's discretion. With respect to the RV, the court ruled that even though the board ruled that the Schumans' effort to screen their RV was adequate, the Schumans were nonetheless in violation of the declaration.

Association Is Obligated to Protect Its Residents

Vazquez v. Lago Grande Homeowners Association, 900 So. 2d 587 (Fla. Dist. Ct. App. 2004)

Association Operations/Risks and Liabilities: A condominium development that marketed units with an emphasis on security is liable for the death of a resident for its failure to provide security.

The Lago Grande complex was developed and marketed on the basis of safety, and portions of the assessments were earmarked for the provision of security guards. In an attempt to provide security services, Lago Grande Homeowners Association ("association") hired a security company to provide guard services and created specific protocols and standards for the security company to follow. The security protocol required guards check the identification of each person entering the complex and obtain a resident's permission before letting any visitors enter the complex.

Frank and Victoria Valle did not live in Lago Grande, but their former neighbor, Carmen Martin, had moved there because of the security it offered. Victoria Valle and her children visited Martin almost daily, and Frank Valle visited Martin to pick up the children after the couple became estranged. After an argument between Martin and Frank Valle that occurred when Frank Valle made a routine visit to pick up the children, Martin told him not to return to her home. When Frank Valle continued to enter Lago Grande, Martin told the guards to call her if Frank Valle attempted to enter the community again.

Despite Martin's request and the security protocol, Frank Valle was again allowed access into the complex. After gaining entry to Lago Grande, Frank Valle walked into Martin's house, where he confronted Victoria Valle, then shot and killed her. He also shot Martin as she tried to flee, then he committed suicide. As the personal representative of Victoria Valle's estate, Juan Vazquez filed a wrongful-death and personal-injury suit against the association and the company hired to provide security services. The jury ruled in favor of Vazquez. However, the court, notwithstanding the jury verdict, entered a verdict in favor of the association and the security company. Finding that the association undertook its duty with reasonable care, and due to lack of prior such crimes, the trial court granted the association's motion for directed verdict. Vazquez appealed.

In reversing the judgment, the appeals court determined that the association and the security company had the responsibility for the safety of residents. Because both parties agreed to exercise reasonable care to prevent harm to residents, the association's and security company's liability arose not from knowledge of prior acts but from their breach of contract or voluntary undertaking to provide these services. This duty arose at the outset of the development, when the developer advertised safety and security as a selling point for the development.

In the court's view, once the complex advertised security and charged a fee to provide that security, the association was burdened with the duty to provide such security with reasonable care. Regardless of any prior acts or lack thereof, the association's liability is based on "particular undertakings" and obligations of the association to provide these

services. Furthermore, the association's president stated that the guards "were there to protect the safety of residents and guests, and that the residents and guests has a right to expect that the complex would be safe...." The court noted that the association assumed and contracted to fulfill a duty to provide for the safety of its residents and guests, and that the security company assumed a contractual obligation to protect residents. The court reversed the trial court's decision and remanded the case, directing the court to rule in favor of Vazquez and to enter judgments against the association and security company.

Developer's Failure to Provide Lake Is Breach of Contract

Boles v. National Development Company Inc., No. M2003-00971-COA-R3-CV, Tenn. App. Ct. (April 26, 2005)

Developer Liability: A Tennessee court ruled that a breach of contract occurred when a developer failed to construct a lake on a residential property.

Purchasers of more than 3,000 lots in Hidden Valley Lakes Development sued Hidden Valley Lakes' developer, National Development Company Inc. ("National"), and the company's owner and alleged alter ego, Clyde Engle. The purchasers claimed that National breached a contract with them by National failing to provide the centerpiece of the development, a 30-acre lake. Additionally, the purchasers sought to hold Engle personally liable. The trial court bifurcated the trial into two phases, first addressing the damages claim and awarding compensatory damages of \$2,540,867 to the owners.

It then addressed the owners' claim that Engle was the development company's alter ego and that, as such, Engle was responsible for the compensatory damages the court assessed to the development company. The court ruled in favor of the owners, holding Engle personally liable. Engle appealed, claiming that the owners' proof of damages was erroneous, that the wrong legal standard was applied, that the proof was insufficient, and that the trial court did not have personal jurisdiction over him.

The appeals court noted that the contractual language was contained in the lot-sales contracts, which included a clause rendering the developer responsible for constructing roads, lakes, and related facilities such as a bathhouse, beach, and boat ramps. The hole in the ground that was to become the lake failed to hold water, and it was determined that, for technical reasons, it would never hold water and would forever remain a hole. Although Engle constructed five other small lakes in Hidden Valley Lakes, the 30-acre lake was to have been the centerpiece of the development. The failure of the lake's construction and subsequent realization of the eternal futility of its construction had a devastating effect on the value of the properties.

The trial court determined that the value of the lots was diminished by 55 percent. The appeals court found that 50 percent of the diminishment was due to National's failure to complete the lake and that the remainder of the devaluation was due to other factors such as loss of interest, lack of marketing expertise, and unwillingness to incur expenses involved in marketing the lots. Due to these other factors, the appeals court agreed with the trial court's finding that 50 percent of the 55 percent diminishment, or 27.5 percent of the total consideration, was due to the owners because of the developer's breach of contract. Thus, the appeals court agreed that the judgment against the developer should be \$2,540,867.29.

In addition to the sufficiency of proof of damages for the breach of contract, the court also considered the trial court's action holding Engle personally liable. Engle claimed that the trial court erred by applying Tennessee law, which does not require a showing of fraud to hold him personally liable. The appeals court ruled that the choice of law was proper since the court had previously applied Tennessee law to hold an out-of-state principal

liable for the debts of the corporation in another case.

Furthermore, the court ruled that evidence was also sufficient for the trial court to hold Engle personally liable. The owners alleged that Engle caused his corporations to make fraudulent transfers of assets to defraud creditors of those corporations. The owners' discovery efforts in these matters were met with substantial strategic and improper obstruction and delay by Engle. The trial court thus sanctioned Engle for his repeated hindrance of discovery, and the appeals court upheld those sanctions.

In determining sufficiency of evidence to hold Engle liable, the court reviewed the standards for piercing the corporate veil. In Tennessee, the question of when an individual should be held liable for corporate obligations is largely factual. Although there is a presumption that a corporation is a distinct legal entity, piercing the corporate veil is appropriate when the corporation is liable for a debt but is without funds to pay the debt, and when the lack of funds is due to some misconduct by the officers and directors.

Citing Tennessee case law, the court further noted that the factual question of piercing the corporate veil should be considered in light of certain factors. These factors include whether an entity was used to work a fraud or injustice in contravention of public policy, whether there was a failure to collect paid-in capital, whether the corporation was grossly undercapitalized, the nonissuance of stock certificates, the sole ownership of stock by one individual, the use of the same office or business location, the employment of the same employees or attorneys, the use of the corporation as an instrumentality or business conduit for an individual or another corporation, the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, the use of the corporation as a subterfuge in illegal transactions, the formation and use of the corporation as to transfer to it the existing liability of another person or entity, and the failure to maintain arm's-length relationships among related entities.

The court determined that many of these factors matched the factual situation of Engle, since he owned 100 percent of the corporations, the corporations shared the same business office and phone line, National is not listed in the phone book, and the many circumstances that indicated Engle exercised complete dominion over the corporations, including Engle's causing National to accept an unsecured note for \$2.4 million of receivables.

Engle's final issue on appeal was that the trial court did not have personal jurisdiction over him because he is not a resident of Tennessee and never conducted business in Tennessee. The fiduciary-shield doctrine precludes jurisdiction over an individual acting exclusively as a corporate officer on behalf of a bona fide corporation, but the obverse of this doctrine can be applied to warrant a finding of personal jurisdiction by attributing the corporate contracts of a non-bona fide corporation to the individual behind the veil. The court found this application appropriate in this case, and further remarked that a suit against an alter ego is not a separate and independent cause of action, and that when a plaintiff obtains a judgment against the corporate entity, it also obtains a judgment as to any of its alter egos. Based on the consideration of these issues, the appeals court affirmed the trial court's decision, with costs of the appeal assessed against National.