

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

ENTERED
PK

DATE: 05/07/10

DEPT. 36

HONORABLE GREGORY W. ALARCON

JUDGE B. GREGG

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

P. MAPSTEAD, C.A.

Deputy Sheriff

NONE

Reporter

12:00 pm

BC347095

Plaintiff
Counsel

SAIED KASHANI ET AL
VS

NO APPEARANCES

CASTLELAMMARE MESA HOME OWNERS

Defendant
Counsel

CONSOLIDATED WITH BC355861

ENTERED

NATURE OF PROCEEDINGS:

DATE: 05/07/10

NOTICE OF RULING OF MATTER TAKEN UNDER SUBMISSION:
MOTION FOR DEFENDANTS DOREEN AND JERRY ROCHMAN,
AS TRUSTEE OF THE ROCHMAN FAMILY TRUST; DOREEN
ROCHMAN; AND HARVEY ROCHMAN, FOR SUMMARY JUDGMENT
OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION;

HONORABLE

HONORABLE

ELECTRONIC MONITOR

12:00 pm

The court, having taken the matter under submission
on 5-5-2010, hereby makes its ruling as
follows:

Defendants Doreen and Jerry Rochman, as
Trustees of the Rochman Family Trust, Doreen Rochman
and Harvey Rochman for Summary Judgment is granted.
Defendant Castellammare Mesa Homeowners Inc.'s
Joinder in the Rochman's Motion for Summary
Judgment/Summary Adjudication is denied.

The causes of action in the Kashanis' Second
Amended Complaint which remain against Defendants
Doreen and Jerry Rochman following the Court's
November 30, 2007 Statement of Decision and October
29, 2009 Order on the Rochman's demurrer are the
Tenth Cause of Action for Breach of Fiduciary Duty,
Eleventh Cause of Action for Negligence and
Sixteenth Cause of Action for Nuisance. On April
23, 2010, the Court continued the hearing on
Defendants' motion for summary judgment/summary
adjudication in order to review the Plaintiffs'
opposing papers which, due to the Court's staff
shortage in the scanning department, had not been

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made available for the Court's review in a timely manner.

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"A motion for summary judgment must be granted if all of the papers submitted show 'there is no triable issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'" Weber v. John Crane, Inc. (2006) 143

HONORABLE

Cal.App.4th 1433, 1437, citing CCP § 437c(c). "A defendant has met its burden of showing a cause of action has no merit if it has shown that one or more elements of the cause of action cannot be established, or there is a complete defense to that cause of action. Once the defendant has met that burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action." Id., citing CCP § 437c(p) (2).

12:00 pm

1. TENTH CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY

HONORABLE

The motion for summary adjudication of the Tenth Cause of Action is denied as to Harvey Rochman and granted as to Doreen Rochman.

HONORABLE

"Breach of duty is usually a fact issue for the jury. (Citation omitted.) Breach may be resolved as a matter of law, however, if the circumstances do not permit a reasonable doubt as to whether the defendant's conduct violates the degree of care exacted of him or her. (Citation omitted.)" Harvey v. The Landing Homeowners Assn. (2008) 162 Cal.App.4th 809, 822. To maintain a tort claim

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against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct (citation omitted); or that although they specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff, they negligently failed to take or order appropriate action to avoid the harm (citations omitted). The plaintiff must also allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.

Frances T. v. Village Green Owners Assn. (1986) 42 Cal.3d 490, 509.

Here, Defendants have shown that they did not engage in any conduct which could be considered a breach of any fiduciary duty they may have owed to Plaintiffs. Defendants have shown that they were not involved in the Architectural Committee's review of the Kashani's plans or story pole request. See Defendants' Separate Statement Facts Nos. 33, 34. Defendant Harvey Rochman's only conduct was, as a lawyer, to assist the Castellammare Mesa Homeowners, Inc. ("CMHO") tender the Kashani's complaint to the insurance carrier for the CMHO, to contact the CMHO's existing counsel to seek help regarding the lawsuit pending the insurance carrier's appointment of counsel (see Defendants' Separate Statement of Facts No. 37), and to forward the Kashani's written discovery demands to the existing counsel for CMHO.

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TERMINATED

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Fact No. 38. See also Fact No. 39. He has not taken any actions as a Board member with respect to the Kashani case since his recusal as of September 22, 2006. Separate Statement Facts Nos. 42, 43.

HONORABLE

HONORABLE

Neither Defendant Doreen Rochman nor Defendant Harvey Rochman took any action to prevent the CMHO Board from considering any matter that a Board member wished to consider relating to the Kashani lawsuit. Separate Statement, Nos. 44, 45.

12:00

Accordingly, Defendants have met their burden under CCP § 437c(p) (2) of showing that the Tenth Cause of Action has no merit, and the burden shifts to Plaintiff to demonstrate that triable issues of material fact exist as to this cause of action.

In turn, Plaintiffs have met their burden of showing that a triable issue of material fact exists as to whether Harvey Rochman breached his fiduciary duty by acting in furtherance of his conflict of interest. Directors of nonprofit corporations such as the [condominium owners] Association are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code. (Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal.App.3d 783, 799 [171 Cal.Rptr. 334].) This fiduciary relationship is governed by the statutory standard that requires directors to exercise due care and undivided loyalty for the interests of the corporation. (Mueller v. MacBan (1976) 62 Cal.App.3d 258, 274 [132 Cal.Rptr. 222]; Corp. Code, § 309, subd. (a), § 7231, subd. (a); 6 Witkin, Summary of

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Cal. Law, supra, § 80, p. 4378.)

HONORARY

Frances T. v. Village Green Owners Assn. (1986)
42 Cal. 3d 490, 513 (italics added).

HONORABLE

Here, Plaintiffs have shown that there is evidence raising a triable issue of material fact as to whether Harvey Rochman acted in violation of his fiduciary duty of undivided loyalty to the homeowners association, of which the Kashanis were members. In their response to Defendants' Undisputed Facts, Plaintiffs cite evidence that the CMHO Board of Directors exercises control and the power of removal over the Architectural Committee members, and that Harvey Rochman, as a director on the Board, was actively involved in the Kashani story pole requirement. Plaintiff's Revised Opposing Separate Statement at Nos. 12, 287-312 and evidence cited therein. This is evidence that he breached his fiduciary duty by acting in furtherance of his conflict of interest between his fiduciary duty to the homeowners' association and his own interest in preserving his parents' unimpeded view by blocking the Kashani's project.

12:00 pm

As to Doreen Rochman, there is no evidence that she participated in official board actions in violation of her fiduciary duty, other than that she "supported" everything Harvey Rochman did on the CMHO board. See Plaintiff's Revised Opposing Sep. State. at No. 33, 311. Plaintiffs' cited evidence does not support the proposition that Doreen Rochman influenced the Architectural Committee to adopt the changes proposed by her architect, Barbara

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Callas. No. 33.

HONORABLE

2. ELEVENTH CAUSE OF ACTION - NEGLIGENCE

HONORABLE

The motion for summary adjudication of the Eleventh Cause of Action is denied as to Harvey Rochman and granted as to Doreen Rochman.

12:00

"To prevail on their negligence claim, plaintiffs must show that Navegar owed them a legal duty, that it breached the duty, and that the breach was a proximate or legal cause of their injuries. (Citation omitted.)" Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 477.

In their Separate Statement in support of their motion for summary adjudication as to the third cause of action for breach of fiduciary duty, Defendants relied on the undisputed facts applicable to their motion for summary adjudication of the breach of fiduciary cause of action. Thus, the same ruling applies to the negligence cause of action.

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3. NINTH, ELEVENTH AND FOURTEENTH AFFIRMATIVE DEFENSES-NO LIABILITY FOR VOLUNTEERS OF A NON-PROFIT ORGANZIATION

HONORABLE

Defendants' motion for summary adjudication is granted as to the Fourteenth Affirmative Defense and denied as to the Ninth and Eleventh Affirmative Defenses.

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FOURTEENTH AFFIRMATIVE DEFENSE - VOLUNTEER PROTECTION ACT OF 1997

42 U.S.C. § 14503 provides a limitation on the

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liability of volunteers:

HONORABLE

(a) Liability protection for volunteers. Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if--

HONORABLE

12:00 pm

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred.

DATE

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

HONORABLE

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle. . . .

HONORABLE

Here, the Rochman Defendants have submitted evidence that any action they took was within the scope of their duties as director acting as a board member, and was not done to harm the rights or safety of an individual. Undisputed Fact Nos. 47, 48. Even if the Rochman Defendants did object to the Kashani's project, and exerted influence on the Board or Architectural Committee to impose a story

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pole requirement, the imposition of such a requirement does not constitute "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety" of the Kashanis. 42 U.S.C. § 14503(a)(3).

42 USCS § 14505 defines "nonprofit organization" as follows:

(4) Nonprofit organization. The term "nonprofit organization" means--

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) of such Code [26 USCS § 501(a)] and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).
(Italics added.)

Here, Defendants have met their burden of demonstrating that the Franchise Tax Board has determined that CMHO is organized and operating exclusively as a civic league. See

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Undisputed Fact No. 16-17 and supporting evidence. Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.
26 USCS § 501(c) (4) (A) (italics added).

Plaintiffs fail to submit evidence rebutting the CMHO's civil league status, instead only arguing that there is no evidence that the civil league finding made in 1953 still applies. However, there is no reason offered as to why it does not still apply, and Plaintiffs have the burden of showing that it no longer applies. Plaintiffs also point out that the specific and primary purpose of the CMHO is to "promote, improve, maintain and protect the community interests, general welfare and property values of the home owners of Castellammare Mesa area. . . ."

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However, this is "promotion of social welfare" sufficient for purposes of 26 USCS § 501(c) (4) (A).

42 USCS § 14505(b) defines volunteer as follows:

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The term "volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive--

(A) compensation (other than reasonable reimbursement or allowance for expenses actually

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incurred); or
(B) any other thing of value in lieu of
compensation,
in excess of \$ 500 per year, and such term
includes a volunteer serving as a director, officer,
trustee, or direct service volunteer.

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Defendants have demonstrated that the Directors
of the CHMO, including the Rochman Defendants, are
unpaid volunteers who serve without compensation.
Undisputed Fact No. 18 and supporting evidence.
Plaintiffs claim that the Rochmans received
compensation in being able to select architectural
committee members and were able to influence the
outcome of the Kashani's application to protect the
Rochman's property interests. This may have been a
benefit of being a board member, but does not
constitute "compensation."

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Given the foregoing, the Rochman Defendants
are entitled to immunity under the
Volunteer Protection Act Of 1997 for their alleged
actions as volunteer Board members.

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NINTH AND ELEVENTH AFFIRMATIVE DEFENSES

12:00

Defendants have not demonstrated that they
qualify for the limitation on liability set forth
in Corp. Code § 5047.5 because there are triable
issues of material fact as to good faith.

Corporations Code § 5047.5 provides:
(a) There shall be no personal liability to a third
party for monetary damages on the part of a
volunteer director or volunteer executive officer of

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a nonprofit corporation subject to this part, caused by the director's or officer's negligent act or omission in the performance of that person's duties as a director or officer, if all of the following conditions are met:

HONORABLE

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(1) The act or omission was within the scope of the director's or executive officer's duties.

12:00

(2) The act or omission was performed in good faith.

(3) The act or omission was not reckless, wanton, intentional, or grossly negligent.

Defendants have not demonstrated that they qualify for the limitation on liability set forth in Corp. Code § 7231.5 because there are triable issues of material fact as to good faith and acting in the best interests of the CMHO.

Corp. Code §7231.5 provides:

(a) Except as provided in Section 7233 or 7236, there is no monetary liability on the part of, and no cause of action for damages shall arise against, any volunteer director or volunteer executive officer of a nonprofit corporation subject to this part based upon any alleged failure to discharge the person's duties as a director or officer if the duties are performed in a manner that meets all of the following criteria:

(1) The duties are performed in good faith.

(2) The duties are performed in a manner such director or officer believes to be in the best interests of the corporation.

(3) The duties are performed with such care,

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including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

HONORA

For the foregoing reasons, Defendants have failed to show that no triable issue of material fact exists as to good faith for purposes of their Ninth Affirmative Defense based on good faith, valid legitimate purposes, and exercise of good and reasonable judgment.

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12:00

4. SIXTEENTH CAUSE OF ACTION - NUISANCE

The motion for summary adjudication of the Sixteenth Cause of Action is granted.

Where a plaintiff seeks to abate a private nuisance, without seeking any damages, plaintiff need only allege a nontrespasory interference with the private use and enjoyment of land. See San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 937. In addition: "[A] nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. ... [T]o rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." (Citation omitted.) "[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made" (Citation

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omitted.) "'Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.' [Citations.]" (Citation omitted.)

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City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153, 1164.

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Here, ¶ 155 of the Second Amended Complaint alleges that the height of the Rochman's hedge is in violation of Los Angeles Municipal Code § 12.22(C)(20)(f)(2), which prohibits hedges on front yards in excess of 3 1/2 feet high (42 inches) and limits hedges on side yards to six feet. However, LAMC § 12.22(C)(20)(f)(2) does not expressly declare violations of this height restriction to be a nuisance. Thus, Plaintiffs cannot rely upon a nuisance per se theory and must show an interference with the private use and enjoyment of land. At ¶¶ 153, 154, Plaintiffs allege that the Rochman's hedge creates a view blockage hazard for persons or cars driving off the Kashani's lot and onto Tramonto Drive.

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However, Defendants have established that there has never been any use of the Kashani's lot which renders the hedge a view blockage hazard. See Separate Statement at Nos. 50-55.

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Thus, there is no interference with the use and enjoyment of the Kashani's undeveloped lot. This cause of action is prematurely brought. "[A] private nuisance action cannot be maintained for an interference in the use and enjoyment of land caused solely by the fear of a future injury."

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Koll-Irvine Center Property Owners Assn. v. County of Orange (1994) 24 Cal.App.4th 1036, 1041-42. Plaintiffs' response to Undisputed Fact No. 53 and the Declaration of Saied Kashani at ¶ 43 purport show that the hedge presents a hazard to pedestrians walking off the lot. ¶ 43 of the Kashani Declaration cites Exhibits 307, 308, 309 and 310 attached thereto to depict this hazard. However, the photograph attached as Exhibit 307 shows that the hedge is adjacent to a portion of the property which does not appear to be presently suitable for pedestrian use. Absent evidence that the Kashanis or their guests currently use that portion to walk right next to the hedge such that their view of traffic is obstructed, there is no nuisance. The Court also notes that the photograph attached as Exhibit 308 shows that the hedge would not immediately obstruct traffic heading toward a pedestrian stepping off the curb-Exhibit 308 shows a car parked facing away from the area in dispute. There is no indication that a person stepping off the curb would have insufficient room to see traffic coming from the opposite side of the street.

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12:00

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5. JOINDER

Defendant Castellammare Mesa Homeowners, Inc.'s Joinder in the Rochmans' Motion for Summary Judgment/Summary Adjudication as to the First through Ninth, Twelfth and Thirteenth Causes of Action is denied. The Rochmans' Motion

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HONORABLE GREGORY W. ALARCON

JUDGE

B. GREGG

DEPT. 36

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

P. MAPSTEAD, C.A.

Deputy Sheriff

NONE

Reporter

12:00 pm

BC347095

Plaintiff

Counsel

SAIED KASHANI ET AL

NO APPEARANCES

VS

Defendant

CASTLELAMMARE MESA HOME OWNERS

Counsel

CONSOLIDATED WITH BC355861

NATURE OF PROCEEDINGS:

DATE: 05/07/10

addressed only the Tenth, Eleventh and Sixteenth Causes of Action, and their arguments applied only to their actions as individuals, not the Castellammare Mesa Homeowners' actions as an entity.

HONORABLE

HONORABLE

**CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER**

12:00 pm

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 5-7-2010 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

DATE: 05/07/10

HONORABLE

Date: 5-7-2010

HONORABLE

John A. Clarke, Executive Officer/Clerk

DATE: 05/07/10

12:00 pm

By: B. GREGG

SAIED KASHANI ESQ

<p align="center">MINUTES ENTERED 05/07/10 COUNTY CLERK</p>

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/07/10

HONORABLE GREGORY W. ALARCON

JUDGE B. GREGG

DEPT. 36

HONORABLE

JUDGE PRO TEM

DEPUTY CLERK

P. MAPSTEAD, C.A.

Deputy Sheriff

NONE

ELECTRONIC RECORDING MONITOR

Reporter

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Counsel

SAIED KASHANI ET AL
VS
CASTLELAMMARE MESA HOME OWNERS

NO APPEARANCES

Defendant
Counsel

CONSOLIDATED WITH BC355861

NATURE OF PROCEEDINGS:

DATE 05

800 W. FIRST STREET, #400
LOS ANGELES, CA 90012

HONORABLE

HONORABLE

DON ERIK FRANZEN ESQ
KEITH J. TURNER ESQ
FUNSTEN & FRANZEN
9595 WILSHIRE BLVD., #305
BEVERLY HILLS, CA 90212

12:00

<p>MINUTES ENTERED 05/07/10 COUNTY CLERK</p>
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