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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SAN VICENTE VILLAS HOMEOWNERS ASSOCIATION, INC., Plaintiff and Respondent, v. MARCI COHEN, Defendant and Appellant.	B162053 (Los Angeles County Super. Ct. No. SC066787)

APPEAL from a summary judgment of the Superior Court of Los Angeles County, Lorna Parnell, Judge. Affirmed.

The Law Offices of Joel F. Tamraz and Joel F. Tamraz for Defendant and Appellant.

Swedelson & Gottlieb, David C. Swedelson and Melanie J. Bingham for Plaintiff and Respondent.

This is an appeal from a summary judgment in favor of plaintiff San Vicente Villas Homeowners Association, Inc.[1] (the Association) against Marci Cohen (Cohen), a member of the Association, declaring that Cohen is in violation of an Association prohibition on pets weighing more than 15 pounds, and requiring her to remove her dog from the premises because of that violation. We hold that the Association's prohibition is valid and properly applied, and therefore affirm the summary judgment.

FACTS AND PROCEDURAL HISTORY[2]

The Association was established July 1, 1975. The Declaration of Covenants, Conditions, and Restrictions (CC&R's) for the condominium property was recorded on July 18, 1975. In 1985, Cohen acquired title to a unit in the condominium and, as an owner of and resident in the unit, became a member of the Association.

In November 1999, Cohen took in a sick young dog, believing it would pass away or that she would find a home for it. After the dog recovered under Cohen's care, it grew to a size larger than 15 pounds---50 pounds. The CC&R's provide that: "No dog, cat or other household animal in excess of 15 pounds in weight may be kept on any CONDOMINIUM or the COMMON AREA without the written consent of the BOARD of Directors of the ASSOCIATION . . . ." Cohen did not obtain such written consent prior to acquiring the dog or thereafter. Upon being reminded of the rule, she initially stated she intended to find a home for the dog, and the Board of Directors (Board) allowed her time to do so; she then decided to keep the dog. On March 15, 2000, the Board sent Cohen a letter stating: "It has come to the attention of the Board that you are

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1 The Association is now known as San Vicente Villas Condominium Association, Inc. Its corporate status had been suspended, but reinstated, adopting the new name. A motion to amend the judgment to reflect the new name was denied because a notice of appeal had been filed.

2 We state the evidence supplied by appellant in accord with the summary judgment standard of review, which standard we discuss *post*.

in possession of [sic] dog that may be in violation of the San Vicente Villas' CC & R's rule Section E, Sub Section 1. [¶] This rule states specifically, 'Individuals may keep no more than one pet, weighing not more than 15 pounds, per condominium unit.' [¶] The board is sensitive to your desire to find another home for the dog, and will allow a one time 45 day extension in support of that effort. If the information received by the board is correct, you are required to remedy the above violation by April 28, 2000. The dog must vacate the premises by the above mentioned date to prevent any further action as directed by the association's governing documents. [¶] Due to the close living conditions within the development, it is imperative that the governing documents for the Association be respected and followed. As a member of the Association, you too will agree that these regulations are intended to protect your property values as well as the safety and enjoyment of all homeowners. [¶] Please view this letter in the positive and helpful manner in which it is intended. The cooperation of each homeowner is necessary so that all owners may receive the maximum benefits of condominium living."

On June 12, 2000, four members of the Association signed a complaint that Cohen was violating the CC&R's by having in her unit a dog weighing in excess of 15 pounds. On July 5, 2000, two Board members conducted a hearing in response to Cohen's request for a hearing with regard to the alleged violation. Both had signed the complaint concerning her dog.[3] On July 15, 2000, the Board wrote Cohen as follows: "After considering all relevant evidence presented at the hearing on July 5, 2000, it is the ruling of the Board of Directors that you are in violation of Section I, Subsection E 1 of the San Vicente Villa Homeowners Association Rules and Regulations. [¶] In a letter sent to you and all other homeowners on July 29, 1998, it was made clear that from that point on, this section of our documents would be vigorously enforced by the Board, as is required. You had knowledge at the time you acquired your dog that to keep a pet in excess of 15

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3 Cohen asserts that one of them was not a valid member of the board. The individual apparently had title to the unit in his father's name for a period but lived in the unit and was elected to the board.

pounds in your unit would be a violation. At that time you conveyed your intention to find another home for him. [¶] Section II, Subsection A 1 of the Rules and Regulations states that a $50 fine may be imposed for a second violation, a $100 fine for a third violation, and a $150 fine for a fourth and subsequent violations of the same rule, not to exceed $2500 in any one calendar year. The Board is comprised of your neighbors who believe that it is in all our best interests to respect and comply with the documents we agreed to follow when we bought into this Association. In that spirit, no further action will be taken if the violation is remedied within ten days of receipt of this letter."

On May 24, 2001, the Association brought an action against Cohen for declaratory and injunctive relief to enforce the CC&R's and to recover attorneys' fees and costs. It alleged it had submitted the matter to mediation as required by law. (Civ. Code, § 1354.) The Association filed a motion for summary judgment on June 25, 2002. Cohen opposed the motion on the grounds that the restriction was unreasonable and has been applied in an arbitrary manner and conflicts with Civil Code section 1360.5. She submitted evidence that two other condominium owners had owned dogs that weighed over 15 pounds, although one of the owners had been given violation notices and fined for keeping such a dog. No further action was taken against that owner, although the dog ultimately died. The trial court granted summary judgment in favor of the Association and judgment was entered. This appeal followed.

DISCUSSION

I. *Standard of Review*

We review the grant of summary judgment *de novo*, making "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) The court strictly construes declarations of the moving party, liberally construes those of the opposing party, and

resolves all doubts as to whether a summary judgment should be granted in favor of the opposing party. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865-866.) "'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107, citations omitted.) The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

II. *Restrictions are upheld so long as they are not against fundamental public policy, arbitrary, or the burdens outweigh the benefit, and are applied in good faith, fairly and uniformly*

Civil Code section 1354, subdivision (a) provides that "[t]he covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." In *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361 (*Nahrstedt*), in upholding the validity of CC&R's prohibiting pets in a condominium, the court held "[a]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (*Nahrstedt, supra,* 8 Cal.4th at p. 382.) The court added "such restrictions

should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Ibid.*) The court accorded "recorded use restrictions" "a presumption of validity" and "deferential standards of equitable servitude law." (*Id.* at p. 383.) This, it said, "discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions. This also promotes stability and predictability in two ways. It provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project's recorded CC&R's. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions. . . .[¶] . . . [¶] There is an additional beneficiary of legal rules that are protective of recorded use restrictions: the judicial system. Fewer lawsuits challenging such restrictions will be brought, and those that are filed may be disposed of more expeditiously, if the rules courts use in evaluating such restrictions are clear, simple, and not subject to exceptions based on the peculiar circumstances or hardships of individual residents in condominiums and other shared-ownership developments." (*Ibid.*)

In *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 264 (*Lamden*), the court said, "In *Nahrstedt*, moreover, some of our reasoning arguably suggested a distinction between originating CC&R's and subsequently promulgated use restrictions. Specifically, we reasoned in *Nahrstedt* that giving deference to a development's originating CC&R's 'protects the general expectations of condominium owners "that restrictions in place at the time they purchase their units will be enforceable."' [Citation.]"

Here, the CC&R's from the outset have provided that no condominium owner may keep on the premises a dog weighing in excess of 15 pounds "without the written consent of the Board of Directors." Thus, this was an originating CC&R to which Cohen acceded when she acquired her unit. As the court said in *Nahrstedt, supra,* 8 Cal.4th at p. 374, "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used in

a way that benefits the commonality but harms the individual.'" Moreover, "'[g]enerally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.'" (*Lamden, supra,* 21 Cal.4th at p. 265 [Quoting *Nahrstedt, supra,* 8 Cal.4th at p. 374].)

The cases leave unclear to what extent the issue of whether a CC&R is enforceable is a question of fact or law. In *Nahrstedt, supra,* 8 Cal.4th at 383, the court makes a point that the presumption of validity and deferential standard are to reduce the likelihood of "costly and prolonged legal proceedings." The court held that the restriction prohibiting cats and dogs but allowing other pets was valid as a matter of law. In *Lamden, supra,* 21 Cal.4th at pp. 264-265, the court said that after its review of the record the board's action fell within the good faith discretion and power of the board.

The court's tests of arbitrariness, public policy and relationship between the burden and the benefit suggest that the issue is one of law. At one point, the court in *Nahrstedt, supra,* 8 Cal.4th at p. 386 says that the plaintiff alleges "no facts" that could support a "finding" that the burden of the restriction far outweighs the benefit. Although the court appears to suggest that the determination of the validity of a CC&R, including its reasonableness under the standards set forth is a legal one, it did say in referring to *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 754, in which a jury found that an association had acted unreasonably, "putting aside the question of whether the jury, rather than the court, should have determined the ultimate question of the reasonableness *vel non* of the association's actions . . . ." (See *Palos Verdes Homes Assn. v. Rodman* (1986) 182 Cal.App.3d 324, 328 [whether CC&R restriction on solar energy systems reasonable under Civil Code section 714 a question of fact]; *Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600 [court determined validity of a CC&R]; *City of Oceanside v. McKenna* (1989) 215 CalApp.3d 1420, 1424 [issue of reasonableness of a CC&R one of law]; cf. *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001)

90 Cal.App.4th 335, 350 [if no dispute over underlying facts issue of whether insurer had "proper cause" for its treatment of a claim was one of law].) We need not resolve this question because we hold that even if the issue of reasonableness of the CC&R's can be a question of fact, the Association is still entitled to summary judgment because, based on the uncontradicted evidence, there are no triable issues as to any material fact. (Code of Civ. Proc., § 437c, subd. (c).) Cohen has not submitted evidence from which a reasonable trier of fact could find that the CC&R and its enforcement are not in compliance with the law.

The reasonableness of a use restriction governed by Civil Code section 1354 "is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Nahrstedt, supra,* 8 Cal. 4th at p. 386.) As noted, there is presumption of the validity of the restriction. Thus, restrictions are valid unless they are "wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Id.* at p. 382.) Enforcement of restrictions are valid so long as the board's action in inding a violation was done "in good faith, not in an arbitrary or capricious manner, and its enforcement procedures [were] fair and applied uniformly." (*Id.* at p. 383.)

A. Not Arbitrary

In *Nahrstedt, supra,* 8 Cal.4th 361, the court held that a total ban on cats and dogs was not arbitrary. Here, the Association banned only pets weighing over 15 pounds. The Board said that "our building was not conducive to having large dogs. . . . There are very narrow hallways. There's a single elevator. There's a narrow back stairwell" and there were "safety concerns." In addition, the Board in its notice to Cohen alluded to the "close living conditions within the development." Thus, the distinction between large and small dogs is reasonable.

Also, the Association did not wish to be in the position of determining which large dog was safe and which was not. That is certainly a justifiable position. There is no basis to conclude that the restriction was arbitrary.

B. No Violation of Public Policy

The only argument that Cohen makes about public policy is the 2001 enactment of Civil Code section 1360.5, which provides as follows: "(a) No governing documents shall prohibit the owner of a separate interest within a common interest development from keeping at least one pet within the common interest development, subject to reasonable rules and regulations of the association. This section may not be constructed to affect any other rights provided by law to an owner of a separate interest to keep a pet within the development. [¶] . . . [¶] (e) This section shall become operative on January 1, 2001, and shall only apply to governing documents entered into, amended, or otherwise modified on or after that date."

The CC&R's in question were promulgated in 1975. Cohen contends, however, that the "governing documents" were amended or otherwise modified on or after January 1, 2001. Cohen refers to a change of the Association's name[4] and a change in the format of the Association's meetings. It would appear that the amendment or modification referred to in Civil Code section 1360.5, subdivision (e) applies to the governing document containing the CC&R's. The fact that the statute was not retroactive and the Supreme Court had approved a total ban on dogs, suggests that the subject is not one of fundamental public policy. Moreover, even if the statute was applicable, it makes the prohibition "subject to reasonable rules and regulations." As noted, a limitation on size, at least for this condominium, appears to be reasonable.

A "fundamental public policy" involves such statutory and constitutional violations as discrimination (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 890), airline safety (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66), and reporting sexual harassment (*Ganut v. Sentry Insurance* (1992) 1 Cal.4th 1083). The ban on large

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[4] The corporation had been suspended. It was revived after the trial court's summary judgment.

pets—at least in the circumstances of this case—does not rise to a contravention of fundamental public policy.

C. Burden Does Not Outweigh Benefits

The benefits of the restriction are safety and convenience and the assurance of not having to deal with large animals. The restriction simply requires an owner to seek permission to have a larger dog or, if he or she wants a pet, the pet must be a small one. Cohen purchased her condominium with full knowledge of the restriction. We recognize her devotion to this particular pet, but others may well have relied on the restriction when purchasing their units. Cohen has the choice of finding another home for the dog and, if she wishes, obtaining a smaller dog or finding another home for herself and her dog. Thus, Cohen cannot establish that the burden of the restriction to her or others outweighs the benefit of the restriction.

D. Procedures Were In Good Faith, Fair and Uniform

Cohen had the opportunity to seek consent for the oversized dog when she acquired it and when she possessed it. Instead, she informed the Board that she would be giving it away. She did not fulfill her promise. Even if Cohen had a right to request and receive a hearing on whether she could have a pet that exceeded 15 pounds, she never made such a request. Thus, she was in clear violation of the CC&R's.

After the Board gave notice of a violation and a right to request a hearing, Cohen had a hearing before Board members. That hearing was on whether Cohen was in violation of the CC&R's. Cohen stated, "I requested a hearing with regard to this alleged 'violation' . . . " She had not requested a hearing to specifically request consent. The Board determined that she was in violation. The Board did refer to its earlier statement that "all owners should be advised that we will vigorously enforce the governing documents and from this point on [July 29, 1998] no owner may acquire ant [sic] pet in excess of 15 pounds." Cohen's failure to seek consent makes it unnecessary for us to

determine whether this policy is inconsistent with the CC&R that provides that there can be no pet over 15 pounds without consent of the Board of Directors.

Cohen complains that members of the Board had been original complainants. Being a complainant under these circumstances does not disqualify them. All members of the Association are affected by matters that must be dealt with by the Board. There is no one else to determine the matter. Cohen questions the propriety of the exclusion of one Board member from certain proceedings. This was a member who had been disciplined for having an oversized dog. But it appears that the Board acted by committee as authorized by the by-laws. Cohen does not develop any argument that the Association did not have reasonable procedures or failed to follow them. (See 1 Sproul & Rosenberry, Advising California Common Interest Communities (CEB 2003), § 7.10, pp. 400-401 (Sproul); Civ. Code, § 1363.)

Cohen claims the rule was not applied uniformly because the Board had allowed oversized dogs in two instances in the past. The Association in 1998 acknowledged that there had been two instances of oversized dogs but asserted that it would thereafter "not tolerate" any further violations and that every homeowner was "put on notice" that the restriction would be "vigorously enforced." Cohen claims not to have received this notice. Even prior to that time, the Board had sought to enforce the rule by giving notice of a violation of the rule and imposing a fine on an owner.

One authority has written that "[o]ne issue not expressly resolved by the *Nahrstedt* case is the availability of the defense of waiver or estoppel. Specifically, if an association has failed to enforce a use restriction in the past, or has enforced the restriction selectively, is a defense of waiver or estoppel still available after *Nahrstedt*? Apparently, it is. The court stated that 'when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly.' [Citation.] Thus, even if a challenger cannot establish that a restriction is 'unreasonable' as applied to the development as a whole, he or she may still be successful because of the manner in which the association has elected to enforce or not enforce the restriction." (Wagner,

California Condominium and Planned Development Practice (Update April 2003), § 6.53, p. 206.) Also, it is unclear as to the effect of the provision in the CC&R's that "Failure to enforce any provision hereof shall not constitute a waiver of the right to subsequently enforce said provision or any other provision hereof." Presumably this would not immunize the Board from the assertion of unfair selective enforcement.

But the evidence does not suggest any waiver or lack of uniform application that would preclude enforcement here. The Board made it clear before Cohen even acquired her dog that notwithstanding that it may have allowed overweight dogs in the past it was going to vigorously enforce the rule. It did so against another member, although it did not bring a legal action. Cohen has not supplied evidence from which it could reasonably be found that there was any improper, selective enforcement of the restriction.

One cannot help being sympathetic to Cohen. Her act of taking in a sick puppy was noble and her attachment to the dog understandable. We are aware of the value of a pet to the health and welfare of its master. In his well-known tribute to the dog, United States Senator Vest characterizes him as "'the one absolutely unselfish friend a man may have in this selfish world, the one that never deserts him, never fails him, the one that never proves ungrateful or treacherous.'" (*Roos v. Loeser* (1919) 41 Cal.App. 782, 784.)

Some might wish that Cohen would have had a sympathetic response from the Board had she made a timely request, but under the circumstances, the Board had the right to act as it did. Other owners rely on the CC&R's when they choose to live on the premises. Indeed, they might have a claim if the restrictions had not been enforced. (Sproul, *supra,* § 7.5, p. 396.) There are justifiable reasons for the restriction. Cohen was at all times aware of the restriction and chose to ignore it.

Based on the record, Cohen did not legally sustain her burden to produce evidence from which a reasonable trier of fact could find that the Association's action was not uniformly applied, or not in good faith..

DISPOSITION

The summary judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.