Brutocao v. Hunt Club Community Ass'n
Cal.App. 4 Dist.,2008.
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Court of Appeal, Fourth District, Division 3, California.
Roberto G. BRUTOCAO et al., Plaintiffs and Respondents,
v.
The HUNT CLUB COMMUNITY ASSOCIATION, Defendant and Appellant.
No. G037266.
(Super.Ct.No. 04CC09163).

Feb. 29, 2008.

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed.

Haight Brown & Bonesteel, Bruce Cleeland, Rita Gunasekaran, Stephen M. Caine, Gray Duffy, Gary S. Gray, Wendy Lin Suh, Kinkle, Rodiger & Spriggs, and A.J. Pyka for Defendant and Appellant.
Klein & Wilson and Gerald A. Klein for Plaintiffs and Respondents.

OPINION

SILLS, P.J.
***1** Homeowners obtained a judgment against their homeowners' association for breach of contract and fiduciary duty based on the association's repudiation of its approval of their remodeling plans. The association appeals; we affirm.

FACTS

The Hunt Club is an upscale community of custom single-family homes in San Juan Capistrano. The homeowners' association for the community is The Hunt Club Community Association (the Association), and the parties are subject to its covenants, conditions and restrictions (CC & R's) and Architectural and Landscaping Standards & Association Rules (Rules).

Roberto and Margaret Brutocao moved to one of the two houses on Ascot Lane, a short cul-de-sac street in The Hunt Club, in February 2000. The other house on the street was occupied by the Picerne family. After a few months in the home, the Brutocaos noticed water problems in the form of "ponding" and "permeating up" to the surface of the soil. They discovered that water had also percolated up through the asphalt and saturated the street in front of their house. These problems were chronic, and the Brutocaos complained to the Association.

In the summer of 2001, the Association, the Brutocaos and the Picernes tried various methods to solve the water problems on Ascot Lane, to no avail. Brutocao wrote a letter to Jim Shubsda, the Association's property manager, in August 2001 to remind him about the problem. "Water is surfacing through the asphalt in various locations causing rapid deterioration, and in some locations, mud and algae slicks.... I am concerned that drainage in this area is insufficient."Shubsda attributed part of the Brutocaos' water problem to "over watering and [a] clogged drain on the Picernes' property."In July 2002, the Brutocaos obtained an easement from the Picernes "for grading, drainage, irrigation and landscaping over a very small sliver of [the] backyard."

Several years before the Brutocaos moved in, the Association had decided to begin a comprehensive program to repair or repave the streets in the community. Shubsda testified, "[T]hey hired LaBelle & Marvin[, a professional pavement engineering company,] to consult with them and tell them how they could prepare for the next 15 years of road wear

and asked him for a plan on how to do that."On July 25, 2002, LaBelle Marvin sent a memo to the Association written by Ed Perez, its project engineer. Perez advised, "Improvement of Ascot Lane should not proceed until the roadway has been permitted to drain free of what is subsurface water. This can be accomplished by the construction of a French type drain along the south curb face for a distance of 200 feet.... I propose that the French type drain be installed and that the remainder of the roadway repairs be delayed for a minimum period of 1 year. The delay in construction will permit the pavement to freely drain. If after 1 year it is determined that the improvements are still needed, they may be performed. It is possible that they may not be required."

***2** In the meantime, the Brutocaos decided to remodel and expand their home, which included plans to modify the landscaping and drainage. They submitted plans to the Architectural Committee (the Committee) in June 2001, and after making corrections relating to easements and setbacks, resubmitted them in January 2003. On February 14, 2003, the Committee stamped the plans "approved with conditions outlined in the accompanying letter of approval."The accompanying letter stated, "The Committee approves the plans with the following notes and conditions: [¶] 1. Supply grading plan if required by city and identify if there is soil import or export. [¶] 2. Supply soils report if grading plan is necessary. [¶] 3. Submit landscape including hardscape at least 3 months before construction is complete. [¶] 4. Need $2000 deposit. [¶] 5. Applicant to sign association maintenance agreement."

The Brutocaos met with a contractor who suggested plan modifications that they liked. Brutocao testified, "This change affected only the right side of my property where the garage was anticipated. It moved the garage from under the structure I was building and it slid it out to the side and put it effectively on the grade...." The Brutocaos had the plans redrawn and submitted them to the Committee in November 2003.

By this time, the Picernes had sold their property to Benjamin and Cheryl Trosky. The Troskys claimed the Brutocaos had obtained the easement over their property by defrauding the Picernes. They ultimately sued the Brutocaos, but they lost and were ordered to convey a portion of their property to the Brutocaos. The Troskys actively opposed the Brutocaos' remodeling plans. Also in November 2003, Roberto angered the Association's attorney, Martin Lee. The Association had been sued in a case unrelated to this one, and Lee had filed an answer and tendered the defense to its insurance carrier. Brutocao, who was a member of the Association's Board at that time and was also an attorney, was asked by the Board to consult with the insurance defense attorney to monitor the progress of the defense. The insurance defense attorney was critical of Lee, and Roberto passed the information along to the Board, recommending Lee be replaced by more sophisticated counsel for complicated matters.

The Brutocaos' proposed modifications were considered at the Committee's December 2003 meeting. The Brutocaos received a letter dated December 16 denying approval of the plans "with the following notes and or conditions: [¶] 1. Prior approvals are only good for one year[.][¶] 2. Setbacks do not match those as recorded in the CC & Rs for lot 11[.][¶] 3. Must show plans (provide neighbor awareness) to Trosky, Fees, and Shaffer[.][¶] 4. Proposed driveway and other hardscape is not approved[.][¶] 5. Split garage is not approved and driveway/trash/utility area on side of house seems aesthetically unpleasing. [¶] 6. After final plans are approved, applicant shall agree to, and record against his property, a license agreement with the association for landscape maintenance area."

***3** The Brutocaos responded in a letter to the Committee on January 4, 2004, saying they would bring plans that corrected the problems to the Committee's January 8 meeting. The letter stated, "We will initiate work under the previously approved plans as to areas where modifications are not requested, as we can not entertain further delay. We have

more compelling safety concerns and drainage and movement concerns respecting our home."

The Brutocaos started work on the project immediately by "engag[ing] the contractor to come out," and "pull[ing] the permit." The permit from the City of San Juan Capistrano was dated January 14, 2004, and was for the work being done on the left side of the house.

The Brutocaos presented their modifications again to the Committee at its meeting on January 15. The Troskys attended and opposed the plans, advising the Committee that Brutocao "had misappropriated an easement and they asked that ... all consideration of [the Brutocaos'] plans be halted for a period of two weeks to give them time to figure out how they wanted to respond ." Brutocao told the Committee, "I was concerned that any continuation could cause, potentially, a lapse in my approval process.... [¶] ... By this point in time ... I was under construction as of January 15th. [¶] So I told the committee I was moving forward, I hoped that they would approve my modifications, I hoped they would not delay me, but whether I got the modifications or not I was moving forward on [the February] 13, 2003 approved plans unless they agreed to my modifications in which case I'd take those modifications into account."

Approval of the modified plans was denied again in a letter dated February 3, 2004, which noted eight "notes and or conditions." The letter continued: "It is further noted that your architect represented that you have obtained a building permit for only part of the plans that received conditional approval. The committee notes that construction cannot begin until and unless the applicant has received final approval from the association. Applicant is hereby notified that previous approval was conditional and the committee understands that all of the conditions have not been met. [¶] Therefore, I have been asked to return you[r] deposit check un-cashed since the committee understands that you are not yet ready to begin construction...."

On February 5, 2004, Lee wrote a letter to the Brutocaos' attorney on behalf of the Association, telling them to "cease and desist from any and all exterior modifications on and/or at their [house]." The Brutocaos stopped construction, but asked the Association to agree to a " 'standstill understanding,' " whereby neither party would "claim that the other has waived any rights, remedies, or claims by refraining from filing litigation. Further, we have agreed that the running of any period is tolled as of February 11, [2004]." The Association agreed. Less than a week later, however, Lee wrote a letter to the Brutocaos' attorney responding to a question or statement about setback measurements. "I am in receipt of your second letter dated February 17, 2004 and have confirmed with the association that it has never adopted any setback measurements from the City of San Juan Capistrano. If what you are referring to is the conditional approval given a year ago by the Architectural Committee, your clients failed to meet the condition of that approval." Brutocao believed the Association's position was that his plan approval had expired.

***4** The Brutocaos filed this lawsuit in September 2004, seeking declaratory relief and damages based on the Association's refusal to allow them to build according to the originally approved plans. Trial was originally set for December 2005. In the interim, the parties engaged in mediation and a voluntary settlement conference, and counsel for the Association urged the Brutocaos to resubmit their plans. In April 2005, at the settlement conference, Brutocao handwrote some revisions on the January 2004 plans in response "to specific comments counsel for [the Association] made...." Brutocao understood that the Association's counsel was going to take the handwritten revisions back to the board of directors, but these revisions were rejected. Later in 2005, the Brutocaos submitted plans which were ultimately approved in January 2006.

In November 2005, the Association finally made some repairs to Ascot Lane. No French drain had been installed and the drainage problems continued

as before. Nonetheless, the Association repaved over the moisture without installing a French drain. During the street repaving, the Association replaced the existing asphalt curb and gutter with a new cement curb and gutter along half of the Brutocaos' property, ending the new curb and gutter right before the entrance walkway. Explaining a photographic exhibit, Brutocao testified, "[Y]ou can see [the new cement curb and gutter] comes up Ascot Lane terminating in the middle of my home here and it becomes the asphalt swale that had the water and muck and debris in front of it. You can still see the muck and debris there."

Most of the homes in the community had cement curbs and gutters; all of those ran the entire length of the property. The Brutocaos were very upset with the appearance of the curbing and complained to Shubsda. "I met with Mr. Shubsda with my architect and we said if you are going to put the swale in, please put it all the way along the continuous front of my property, just like everybody else in the community. We are asking to be treated like everybody else here."Shubsda said he would "try and get it done," and took it to the Board. According to Shubsda, the members of the Board "felt that it should be negotiated."In other words, the Association would pay the full cost of extending the swale "[c]onditional if-if we could come to an agreement to settle this lawsuit."Trosky also testified he "remember[ed] hearing" at a Board meeting "that the swale would be installed at The Hunt Club's expense entirely around the Brutocaos' property if the Brutocaos would be willing to drop their lawsuit."

The Brutocaos' third amended complaint, on which the case went to trial, was filed in late December 2005. The complaint sought damages for breach of contract and breach of fiduciary duty based on (1) the Association's refusal to allow them to remodel pursuant to the plans approved in February 2003; (2) the Association's refusal to install a French drain; and (3) the malicious installation of the partial curbing, "creating an absurd look to the property when viewed from the street, diminishing the value of the ... residence."

***5** The case was tried without a jury in March 2006 over seven court days. The trial court indicated it intended to rule in favor of the Brutacaos and asked them to prepare a statement of decision. The Association filed objections, and the court issued its statement of decision in May 2006. In the statement of decision, the trial court found the Association formally approved the plans on February 14, 2003, subject only to five conditions set forth in the approval letter. It found the conditions did not need to be satisfied before construction began, and "the Brutocaos satisfied all conditions of approval that had to be satisfied prior to being told to stop construction."The court found that Lee's February 5, 2004 letter to the Brutocaos demanding they cease and desist from all construction was an unauthorized "repudiation of [the Association's] agreement to allow the Brutocaos to build according to the February 14, 2003 plan approval."

The court found the Association had breached its fiduciary duty to the Brutocaos by refusing to install the French drain because "[g]iven the history of water problems on Ascot Lane, the recommendations of its own experts, and the water problems Ascot Lane has continued to experience despite 'repairs,' a reasonable homeowners' association would have installed a[F]rench drain on Ascot Lane."The Association had a clear duty under the CC & R's to maintain and repair the streets in the community. The court also found the Association breached its fiduciary duty to the Brutocaos by refusing the install a rolled curb and gutter along the entire front of their home unless the Brutocaos dismissed the litigation, although the complete installation was suggested by the Association's property manager, Jim Shubsda.

The court awarded the Brutocaos damages for increased construction costs in the amount of $163,078. It also ordered the Association to "install 200 feet of [F]rench drain along the south side of Ascot Lane" and "install a rolled curb and gutter along the entire front of the Brutocao home," both

within three months from the judgment. The Brutocaos were awarded contractual attorney fees in the amount of $176,603.27 and costs in the amount of $17,976 .75.

DISCUSSION

Standard of Review

Where a statement of decision is requested after a nonjury trial, and where ambiguities and omissions in the proposed statement of decision are brought to the attention of the trial court, the appellate court will not infer factual findings to support the judgment. Rather, all factual findings necessary to support the judgment must be included in the statement of decision and must be supported by substantial evidence. (See *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58-60.)We review the Association's claims of error with this framework in mind.

The Association breached its contractual and fiduciary duties by stopping construction.

The Association's theory on appeal is that the Brutacaos' January 2003 application for remodeling approval was an offer to enter into a contract with the Association; its "conditional approval" was a counter-offer to the Brutacaos, offering them "an opportunity to create an enforceable contract if they met the conditions that [the Association] spelled out."When the Brutacaos submitted revised plans, they made "counteroffers that [the Association] could either accept or reject."We reject this theory. It is the CC & R's that constitute the contract between the Association and the Brutocaos, not the back-and-forth plan approval process.

***6** CC & R's are the sole source of authority for a homeowners' association. "[A]n association may not exceed the authority granted to it by the CC & R's. Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a 'reasonable' response to a particular circumstance. Where a circumstance arises which is not adequately covered by the CC & R's, the remedy is to amend the CC & R's." (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 627.)

The CC & R's here provide for the appointment of an architectural committee to establish "reasonable procedural rules" for the review of plans submitted by a homeowner for architectural improvements to his or her property. Upon receipt of a complete application, the Committee shall "either approve or disapprove the application based upon compliance with the Standards set forth herein" within 30 days. If the Committee fails to take action on a properly completed and submitted application within thirty days, approval is deemed granted. "All project approvals issued by the Architechural Committee, as evidenced by the Committee's official stamp of approval or other writing signifying approval by the Committee, shall be valid for a period of one (1) year from the date of approval.... [I]f construction is not commenced in good faith on the approved project before the expiration of the one-year period, the approval ... shall automatically expire and become void...." An owner submitting plans to the review process must sign the Submission Checklist, which includes the following: "*I/WE FURTHER AGREE THAT IF THE PROJECT IS APPROVED BY THE ARCHITECTURAL COMMITTEE, NO CHANGES OR REVISIONS TO ALL OR ANY PORTION OF THE PROJECT SHALL BE MADE WITHOUT THE ADVANCE KNOWLEDGE AND APPROVAL OF THE COMMITTEE.*"

The foregoing language states that Committee approvals are valid for one year. There is no language suggesting that an approval will be invalidated if the homeowner proposes modifications, so long as the homeowner agrees to build according to the approved plans if the modifications are rejected. Jim Shubsda testified at trial that requesting modifications of approved plans does not void their approv-

al.

There is no dispute here that the Association formally approved the January 2003 plans, as shown by its stamp and formal letter of approval. The Association argues, however, that the approval was merely conditional and could not become final (or a binding contract between it and the Brutocaos) unless the Brutocaos met all the conditions and began construction within one year. But nothing in the letter indicated any of the specified "notes and conditions" had to be performed before construction could begin. Jim Shubsda testified in deposition that if a homeowner needed to come back to the Committee before initiating construction, it would have been noted in the approval letter. If there is no such note, "[t]hen it's assumed that the applicant will comply with what's noted ... in the notes."

*7 The trial court found the Brutocaos began construction on the approved plans, not on a modified set as the Association contends. Their requested modifications were to only the right side of their house; as to the left side, the approved plans remained unchanged. The Brutocaos obtained a permit only on the unchanged portion of the plans in January 2004 because their modification request for the right side was pending before the Committee. The Brutocaos told the Committee at least twice that if the Committee denied approval of their requested modifications, they would build the project entirely in accordance with the approved plans. There was no evidence supporting the Association's argument that the Brutocaos had withdrawn their approved plans in favor of the requested modifications.

Because the Brutocaos had the right to begin construction on the approved plans, the trial court correctly concluded that the Association breached the CC & R's when its attorney sent the "cease and desist" letter on February 5, 2004 demanding they stop "any and all" construction.

The Association breached its fiduciary duty by refusing to install a French drain.

The Association had a clear duty to remedy the water problem on Ascot Lane.Article VII of the CC & R's provides: "[T]he Association shall have the duty to accomplish the following upon the Covered Property ... in such manner and at such times as the Board shall prescribe: [¶] (a) Maintain, repair, restore, replace and make necessary improvements to the Community Facilities, including, without limitation, the following: [¶] ... [¶] (ii) private streets and adjacent streetscapes within the Covered Property; [¶] (iii) drainage facilities and easements in accordance with the requirements of the County Flood Control District...." (Art. VII, § 7.1(a).) The Association is obligated to "maintain ... Community Facilities in a neat, orderly and safe condition and in such a manner as to facilitate the orderly discharge of water by means of same."(Art. VII, § 7.4(c).)

There was substantial evidence to support the trial court's finding that Ascot Lane's water problem had not been solved and that a French drain was necessary to do so. The Brutacaos presented photographs and testimony demonstrating the roadway continued to be wet, even at the time of trial. LaBelle Marvin's project engineer, Ed Perez, recommended a French drain in 2002, after other attempts to solve the problem had failed. The Brutocaos' expert, Robert Harding, testified a French drain was a "widely used" drainage system to redirect subsurface water. After inspecting the site and reviewing documentary evidence, Harding opined a French drain was needed under Ascot Lane "to control that water in a manner that it won't continue to come up through the asphalt which will continue to deteriorate the roadway."

The trial court accepted an offer of proof near the end of trial stating if Perez were recalled, he would testify that after the asphalt was removed from Ascot Lane in 2005, LaBelle & Marvin determined there was no need for a French drain. The Association contends this offer of proof constitutes evidence that Perez changed his mind about the French

drain in 2005 and it was no longer necessary. But Perez had been badly impeached earlier in the trial when he gave testimony that was inconsistent with his deposition. Furthermore, both Perez and Shubsda testified that no one told Shubsda a French drain was no longer necessary. Although the offer of proof was accepted, the trial court was free to disbelieve it.

The Association's decision not to extend the cement curb and gutter was arbitrary and a breach of fiduciary duty.

***8** A homeowners' association has a fiduciary duty to treat the homeowners fairly. "[I]n recognition of the increasingly important role played by private homeowners' associations in such public-service functions as maintenance and repair of public areas and utilities, street and common area lighting, sanitation and the regulation and enforcement of zoning ordinances, the courts have recognized that such associations owe a fiduciary duty to their members. [Citation.]" (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650-651.)Membership in a homeowners' association is mandatory, and the association has the power to levy assessments, make rules and deny certain uses of the property. "Therefore, the Association must be held to a high standard of responsibility: 'The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.'[Citations.]"(*Id.* at p. 651.)

The evidence showed there is no house in The Hunt Club other than the Brutocaos' where both a cement curb and gutter and an asphalt curb and gutter are installed along the front of the property where it meets the street. Both Shubsda and Trosky testified the Board would pay for the extension if the Brutocaos dismissed this lawsuit. This constitutes substantial evidence to support the trial court's conclusion that the refusal to extend the curb was arbitrary and not made in good faith. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 264;*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 978.)

The Association argues the decision by the Board to install a cement curb and gutter across only half of the Brutocao's street frontage is insulated from liability by the common-law business judgment rule: "Generally, 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."(*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 374.)But the trial court concluded the Board did not act in good faith, and that conclusion is supported by substantial evidence.

DISPOSITION

The judgment is affirmed. The Brutocaos are entitled to costs on appeal.

WE CONCUR: ARONSON and FYBEL, JJ.
Cal.App. 4 Dist.,2008.
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Not Reported in Cal.Rptr.3d, 2008 WL 542843 (Cal.App. 4 Dist.)

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