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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NATHAN T. CHEN, Plaintiff and Appellant, v. FAIRMONT TERRACE HOMEOWNERS ASSOCIATION, Defendant and Respondent.	G026371 (Super. Ct. No. 798565) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Ernest C. Chen for Plaintiff and Appellant.

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

* * *

Nathan Chen, a member of Fairmont Terrace Homeowners Association (Association), sued for declaratory relief to establish that maintenance of a wrought iron fence behind his home was the Association's responsibility. After a bench trial, the court

ruled in the Association's favor and awarded attorney fees and costs to the Association. (CC&R's). Chen appeals both rulings. We affirm.

I

FACTS

Chen owns one of the homes in the Association, which is a planned unit development. A wrought iron fence runs behind Chen's property, dividing his lot from the common area. Due to an error during construction, the fence is not on the boundary line between Chen's lot and the common area, but encroaches upon the common area. Chen contends the Association must maintain the fence because it is in the common area. The Association argues that if the fence had been placed on the boundary line as intended, Chen would be responsible for its maintenance, and the fact that an error has benefited Chen by providing him with additional space on his lot should not relieve him of that responsibility.

The trial court agreed with the Association and granted judgment in its favor. The court also awarded the Association $25,520.25 in attorney fees and costs pursuant to a memorandum of costs.

II

DISCUSSION

Standard of Review

As the issue of whether Chen or the Association is legally responsible for maintenance of the fence presents a question of law not involving the resolution of disputed facts, we review the trial court's decision de novo. (*Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal.App.4th 1, 5.)

Chen is Responsible for Maintaining the Fence

The applicable Civil Code provisions and the Association's Declaration of Covenants, Codes and Restrictions (CC&R's) determine which party is responsible for the fence's maintenance. Civil Code section 1364 states: "Unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common areas, other than exclusive use common areas, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to the separate interest." Because the fence is indisputably in the common area, Chen would have us end the inquiry there, but we must look further.

The CC&R's support the Association's contention that owners are generally responsible for maintaining the fences on their lots. The Association is responsible for maintaining certain walls as defined by section 1.8 of the CC&R's, but we have no evidence before us that the fence at issue here is one of those walls. Owners, however, are responsible for maintaining "fences." Moreover, section 1.29 of the CC&R's includes "fences" in the definition of "Improvements." Section 8.2(a)(1) requires the owner of each lot to "[m]aintain his Dwelling and all other Improvements on his Lot (except for any Common Area thereon) in good condition. . . ." Thus, if the fence had been placed on the boundary line as the developer had intended, Chen would be responsible for its maintenance.

The question, then, is whether the developer's mistake relieves Chen of what would otherwise be his responsibility. We hold that it does not. Section 6.4 of the CC&R's grants Chen an easement for encroachments that occur as a result of construction errors. However, "the rights and obligations of Owners shall not be altered

in any way by such encroachments. . . ." Therefore, the CC&R's do not support Chen's contention that the placement of the fence on the common area relieves him from responsibility for its maintenance.

Nor do equitable considerations support such a conclusion. Due to an error, Chen has been given the exclusive use of additional space in his yard, and he apparently has no complaint about the extra square footage. To grant him the benefit of the error while relieving him of a responsibility that would otherwise be his would contradict logic, equity, and common sense.

Attorney Fees and Costs

Section 18.9 of the CC&R's states attorney fees and costs are available to the prevailing party in any action "to interpret or enforce any of the provisions of this Declaration." Therefore, Chen argues, attorney fees and costs are contractual and may only be awarded after a noticed motion. We would agree with Chen if fees and costs were only available based on the CC&R's, but they are also available under statute. Civil Code section 1354, subdivision (f), states that in any action "to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." While contractual fees may only be fixed after a noticed motion, statutory fees may be fixed "upon application supported by affidavit made concurrently with a claim for other costs. . . ." (Code Civ. Proc., § 1033.5, subd. (c)(5).) This is precisely how the Association sought attorney fees here, citing Civil Code section 1354, subdivision (f) and Code of Civil Procedure section 1033.5. The award of attorney fees and costs was therefore proper.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.*

*Judge of the Orange Super. Ct., assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.