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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RICHARD COLYEAR, Plaintiff and Appellant, v. ROLLING HILLS COMMUNITY ASSOCIATION OF RANCHO PALOS VERDES et al., Defendants and Respondents.	B278198 consolidated with B279671 (Los Angeles County Super. Ct. No. BS150539)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Hess, Judge. Reversed and remanded.

Law Offices of Michael D. Berk, Michael D. Berk; Greines, Martin, Stein & Richland, Kent L. Richland and Jonathan H. Eisenman for Plaintiff and Appellant.

Greenberg, Whitcombe, Takeuchi, Gibson & Grayver, Richard C. Greenberg and Samantha Fay Lamberg for Defendants and Respondents.

INTRODUCTION

This is the second appeal arising out of a dispute involving a homeowner, plaintiff and appellant Richard Colyear, and his homeowners association, defendant and respondent Rolling Hills Community Association of Rancho Palos Verdes (HOA). After Colyear's neighbor, Yu Ping Liu, attempted to invoke the HOA's dispute resolution process to force another neighbor to trim trees, Colyear sued, alleging that two of the offending trees were actually on his property. He further asserted that the relevant tree-trimming covenant did not encumber his property and therefore that Liu and the HOA were wrongfully clouding his title by seeking to apply such an encumbrance. We previously affirmed the trial court's dismissal of Colyear's claims against Liu pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute.

The trial court also sustained demurrers filed by the HOA, its board, and the individual board members (collectively, respondents), twice granting leave to amend. After Colyear filed a second amended pleading, the court against sustained respondents' demurrer, this time without leave to amend. The court found Colyear failed to state facts to support his claims for breach of fiduciary duty, slander of title, and quiet title. Further, the court concluded that Colyear failed to satisfy the pre-filing alternative dispute resolution (ADR) requirements for certain homeowners association enforcement actions, pursuant to Civil

Code section 5930.[1] The court therefore dismissed the action and granted respondents' motion for attorney fees.

On appeal, Colyear contends that he adequately alleged each cause of action. He also asserts that the ADR requirements of section 5930 do not apply. We conclude that Colyear sufficiently stated claims for breach of fiduciary duty and quiet title and accordingly reverse the court's order sustaining the demurrer as to those claims. Further, we remand to permit Colyear leave to amend his slander of title claim, to the extent he can allege facts barring respondents' assertion of the qualified common interest privilege. We therefore find that this action is not subject to the ADR requirements under section 5930. Finally, we vacate the order granting attorney fees as moot.

FACTUAL AND PROCEDURAL HISTORY

I. *Background*

We take the following facts from Colyear's second amended petition and complaint. Colyear is a longtime homeowner in the planned residential community of Rolling Hills, located in the city of Rolling Hills. All residents in the community are members of the HOA.

Each residential lot within the community is subject to a declaration of covenants, conditions, and restrictions (CC&Rs). The original declaration, Declaration 150, was executed by the property owner—Palos Verdes Corporation—and the HOA and recorded in 1936. Declaration 150 identified the parcel of land, subdivided into 84 lots, to be included in the community, conferred authority on the HOA to (among other things) "interpret and enforce" the CC&Rs, and detailed a number of

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[1] All further statutory references herein are to the Civil Code unless otherwise indicated.

CC&Rs applicable to the specified lots. As relevant here, in article I, section 11, Declaration 150 conferred upon the HOA "the right at any time to enter on or upon any part" of a property subject to that declaration "for the purpose of cutting back trees or other plantings which, in the opinion of the [HOA], is warranted to maintain and improve the view of, and protect, adjoining property." We refer to that provision as the tree-trimming provision.

The community expanded over time, ultimately becoming "almost coterminous with the boundaries of the City of Rolling Hills." As the community grew, the HOA entered into approximately 56 separate declarations covering approximately 671 additional properties; those declarations contained provisions that were similar, but not identical, to Declaration 150. Declaration 150-M, recorded in 1944, added 14 lots, including the lot now owned by Colyear. Many of the declarations, including Declaration 150-M, contain no tree-trimming provision.

The HOA is governed by a board of directors. In 1997, 2002, and 2009, the board adopted a series of superseding resolutions to "establish procedures for its members to utilize the authority of the [HOA] to correct view impairments created by trees or other plantings." Each resolution allowed the HOA to exercise its authority under Declaration 150 to trim offending trees pursuant to an application process. Resolution 181, adopted in 2002, recognized that some community lots did not contain the tree-trimming provision from Declaration 150 and stated the HOA's policy to accept tree-trimming applications "only in situations where the applicant and the affected parcel are subject to the same Deed Restrictions." Resolution 193, adopted in 2009, also recognized the existence of "different sets of

Deed Restrictions in Rolling Hills, some of which do not contain provisions relating to view maintenance."

The board adopted the most recent version, Resolution 220, in 2012. Resolution 220 quoted the tree-trimming provision in article I, section 11 of Declaration 150 and stated that it "applies to some, if not all, properties in the City of Rolling Hills." Resolution 220 further made the following findings: "WHEREAS, the [HOA] has held public meetings, circulated drafts of policy alternatives, and received numerous written and oral communications from its members; [¶] WHEREAS, Rolling Hills enjoys both beautiful views and an abundance of mature trees, and values both. . . .; [¶] WHEREAS, the [HOA] wishes to adopt both guidelines and establish procedures for its members to utilize the authority of the [HOA] to correct view impairments, which cannot be resolved between the parties; [¶] WHEREAS, the Deed Restrictions give the [HOA] '. . . the authority to exercise such powers of control, interpretation, construction, consent, decision, determination . . . and/or enforcement of covenants . . . as far as may legally be done.'" Based on these and other findings, Resolution 220 established guidelines for processing "all view impairment applications" submitted by homeowners to the HOA. Resolution 220 also noted that the "City of Rolling Hills Ordinance Chapter 17.26 provides a procedure for abatement of view impairment; so [HOA] members have another alternative for view restoration."

As early as 2002, Colyear began to inquire of the board whether it was the HOA's position (based on the predecessors to Resolution 220) that the tree-trimming provision was enforceable against his lot. At the time, he was told it was not because his property was "one of the few 'miscellaneous' parcels who are not

protected" and, therefore, that he would "have to use the City's Ordinance" to settle any view disputes.

II. *Colyear's Petition*

In January 2015, in accordance with the process outlined in Resolution 220, Liu filed an "Application for Assistance to Restore View" with the HOA, seeking to trim plantings on an adjoining lot. According to Colyear, two of the offending trees identified in the application were on Colyear's lot. Both Liu's lot and Colyear's lot were governed by Declaration 150-M.

Colyear filed the instant petition for alternative writs of mandate and prohibition on March 4, 2015, naming Liu, the HOA, its board, and the individual board members as respondents.[2]

In Colyear's petition, he sought a declaration that the tree-trimming provision of Declaration 150 was not enforceable against "residential lots not described in or covered by" Declaration 150. He also sought injunctive relief, rescission of any approval by the board to take further action on Liu's application, and attorney fees. Further, he alleged that the HOA had reached agreements with some homeowners subjecting their lots to the tree-trimming provision, even where those lots were not originally covered by Declaration 150. By his petition, Colyear sought a declaration voiding all such agreements.

Respondents demurred and requested judicial notice of the trial court's order denying a request for preliminary injunction in

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[2] Liu subsequently withdrew his application to the HOA. In our prior decision, *Colyear v. Rolling Hills Community Association of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, we affirmed dismissal of the claims against Liu pursuant to a special motion to strike under the anti-SLAPP statute.

Nunn v. Rolling Hills Community Association of Rancho Palos Verdes, LASC Case No. BC314522 (Sept. 14, 2004) (the *Nunn* ruling). In that case, the plaintiff homeowners, the Nunns, sued to stop the HOA from trimming trees on their property at the request of neighboring homeowners, the Lorigs. The Nunn property was subject to Declaration 150; the Lorig property was not. Citing *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345 (*Citizens*), the trial court found that the tree-trimming provision "need not be in the Lorig chain of title in order to be binding upon the Lorigs. It certainly should not be necessary for it to be in the Loring chain of title in order to be binding upon the Nunns . . . because it satisfies the requirements of the new rule enunciated in CITIZENS v. ANDERSON." This was so because, as articulated in *Citizens*, "Declaration No. 150, at the time that it was recorded, established a common plan for the ownership of all property then owned by PVC. No subsequent owner of any such property can claim exemption from such general plan provisions unless it can be shown that such owner did not have notice, actual or constructive, of a certain provision when he or she purchased the property."

Respondents here argued that their adoption of Resolution 220 was "consistent" with the ruling in *Nunn*. They also asserted that Colyear had failed to comply with the ADR requirements of section 5930.[3]

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[3] Pursuant to section 5930, a homeowner must engage in ADR prior to filing an "enforcement action" in superior court. However, this pre-filing requirement "applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages" under $25,000. (§ 5930, subd. (b).)

The court found that Colyear had not adequately pled any claims for monetary damages and had failed to either comply with section 5930 or plead the applicability of any exceptions to that statute. The court therefore sustained the demurrer with leave to amend. The court noted that it did appear Colyear could allege a declaratory relief claim against the HOA.

Colyear filed an amended pleading in September 2015, including a first amended petition for writ of traditional mandate and prohibition against the HOA and its board, and a complaint "for Declaratory Relief, Injunctive Relief, To Quiet Title, and for Damages" against Liu and respondents (FAC). The FAC sought to quiet title "to Colyear's lot against adverse claims" by defendants "in that each claims that Colyear's lot is covered by the Trees and Plantings Covenant in Declaration 150, although Colyear's lot is not covered by the Trees and Plantings Covenant, and seeks, or claims the right to seek, to enforce the Trees and Plantings Covenant against Colyear's lot." In addition, the FAC sought injunctive relief barring respondents from seeking to enforce the relevant covenant against Colyear's lot or any other lots not explicitly encumbered by Declaration 150, as well as compensatory and punitive damages from the HOA and the board for alleged fraud and breaches of fiduciary duty.

Respondents again demurred, arguing that Colyear failed to participate in ADR, as required, and further failed to adequately allege damages, fraud, or breach of fiduciary duty. They did not challenge the merits of the quiet title claim. Respondents also requested judicial notice of the *Nunn* ruling.

At the January 2016 hearing on the demurrer to the FAC, the court indicated it was "only going to give [Colyear] one more opportunity to amend this pleading." The court found that

Colyear had failed to state a claim for fraud or breach of fiduciary duty. As to the quiet title claim, the court again found that Colyear had failed to exhaust his administrative remedies under section 5930. The court sustained the demurrer, again granting leave to amend.

Colyear filed the operative verified pleading in February 2016, the second amended petition for alternative writs of traditional mandate and prohibition and first amended complaint "for declaratory relief, injunctive relief, to quiet title and remove cloud on title and slander of title and for damages" (SAC). He alleged claims for writ relief, declaratory relief, injunctive relief, quiet title, slander of title, and breach of fiduciary duty. In his tort claims, Colyear asserted that by enacting Resolution 220 and seeking to enforce the tree-trimming provision of Declaration 150 against his lot, the HOA acted in bad faith and in a manner that the board knew or should have known was an unreasonable exercise of its authority. Colyear further alleged that the HOA's actions clouded his title and caused damages exceeding $25,000 by decreasing the value of his property and by requiring him to incur attorney fees to clear his title. Colyear attached 31 exhibits to his pleading, including the applicable declarations and resolutions, as well as correspondence by several homeowners to the board.

Respondents again demurred, asserting that the HOA was enforcing the tree-trimming provision "in good faith" and in reliance on the *Nunn* ruling. As such, they argued that Colyear's tort claims failed and that the entire action should be dismissed for failure to exhaust administrative remedies pursuant to section 5930. Respondents also claimed that Colyear's quiet title

cause of action was insufficiently alleged. Once again, respondents requested judicial notice of the *Nunn* ruling.

At the June 2016 demurrer hearing, Colyear argued that his quiet title action was not an "enforcement" action subject to section 5930 because it was an action to "prevent" enforcement of the tree-trimming provision. The court found that to be a distinction without a difference, as both "equally arise from and pertain to enforcement." With respect to the tort claims, the court found that Colyear did not allege "how any individual member of the board personally participated in any of the tortious conduct." The court found the other allegations of breach of fiduciary duty insufficient. In particular, the court noted that the exhibits to the SAC "appear to show action in good faith, to wit, that the board circulated drafts of proposed policy changes, that there were public meetings on the changes, that the board received and considered numerous homeowner comments before adopting the new guidelines. They also show that the board was aware of and apparently considered the *Nunn* ruling and the *Citizens* [ruling] . . . in making its policy decisions." The court also found that Colyear failed to allege actual damages, as he had only alleged a "theoretical potential diminution of value" of his property.

With respect to the slander of title claim, the court found that the SAC alleged facts establishing the rival claimant privilege and the common interest privilege and that Colyear failed to adequately allege malice to rebut those privileges. The court also found Colyear failed to allege the elements of his quiet title claim. Finally, the court again found that Colyear failed to comply with the ADR requirements. The court therefore

sustained the demurrer without leave to amend in June 2016 and entered a judgment of dismissal of the SAC on July 19, 2016.

III. *Attorney Fees*

Respondents moved for attorney fees as prevailing parties pursuant to sections 1717 and 5975, subdivision (c). Colyear opposed, arguing, among other things, that respondents had no right to recovery of fees under either statute. The court granted the motion, awarding fees to respondents in the amount of $257,936.64. That amount was subsequently corrected to $249,861.50.

Colyear timely and separately appealed from the judgment of dismissal and the order granting attorney fees. We granted the parties' request to consolidate the appeals.

DISCUSSION

I. *Standard of Review*

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank–California* (1994) 27 Cal.App.4th 800, 807.) We review de novo the dismissal of a civil action after a demurrer is sustained without leave to amend. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879 (*Cantu*).) In doing so, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Ibid*.) We similarly accept as true the contents of exhibits attached to the complaint. (See, e.g., *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94 ["[E]videntiary facts found in recitals of exhibits attached to a complaint or superseded

complaint . . . can be considered on demurrer."].) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) To establish that a cause of action has been adequately pled, a plaintiff must demonstrate he or she has alleged "facts sufficient to establish every element of that cause of action. [Citation.]" (*Cantu, supra*, 4 Cal.App.4th at pp. 879-880.) If the complaint fails to plead any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. (*Ibid*.)

We review an order denying leave to amend for an abuse of discretion. "'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations.] Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citation.]' [Citation.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; see also, e.g., *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 [liberality in permitting a party to amend a pleading is the rule if a fair opportunity to correct the defect has not already been given and the pleading's deficiency can be easily corrected].)

II. *Breach of Fiduciary Duty*

Colyear contends that he adequately alleged breaches of fiduciary duty by the board, and that the trial court concluded otherwise only by improperly making factual inferences in respondents' favor. He also asserts that the court erred in finding he failed to allege a cognizable claim against the individual board members and failed to properly allege damages. We examine each contention in turn.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. [Citation.]" (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395.) The parties agree that respondents owed fiduciary duties of loyalty and good faith to the HOA members, including Colyear. (See *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 799 (*Raven's Cove*) [homeowners association directors and officers are fiduciaries of the homeowner members, including duty to "'exercise their powers in good faith, and with a view to the interests of the corporation'"].)

However, respondents argue that Colyear failed to establish any breach of respondents' fiduciary duty. The trial court agreed, concluding that Colyear had insufficiently alleged bad faith by respondents and that the exhibits to the SAC instead demonstrated their good faith. We are not persuaded that such a conclusion can be reached on a demurrer, based on the allegations of this pleading and the exhibits thereto.

Colyear alleged that prior to the adoption of Resolution 220 in 2012, respondents consistently took the position that the tree-trimming provision was not enforceable against his lot, as Declaration 150-M, which covered his property, did not contain

such a provision. This policy was expressly included in one of the predecessors to Resolution 220 and confirmed by the board in 2002 in response to Colyear's inquiry. By enacting Resolution 220, respondents reversed course, seeking to enforce the tree-trimming provision against every lot in the community. He further alleged that respondents sought to apply the tree-trimming provision to all lots without formally amending the CC&Rs by vote of the affected lot owners. Instead, respondents acted behind closed doors, and in the face of strident opposition by numerous homeowners. In addition, Colyear asserted that respondents misrepresented to some homeowners the presence of a tree-trimming provision in their applicable declarations and required some homeowners to record license agreements newly binding their property to CC&Rs including the tree-trimming provision, without informed consent. As such, he alleged that at the time respondents adopted Resolution 220, they knew or should have known that it was in excess of the board's authority and was therefore "unreasonable, arbitrary and in bad faith."

Respondents argue that they were entitled to rely on the *Nunn* ruling as the basis to adopt Resolution 220, and that such "reasonable reliance . . . provides clear indicia of the Board's good faith enforcement of Declaration 150 and its View Covenant relative to all Rolling Hills residents." Whether respondents reasonably *could* have relied on the *Nunn* court's discussion of the scope of Declaration 150 is beside the point. We disagree that the inference may be fairly drawn at this stage that respondents actually *did* rely on the *Nunn* ruling, or other authority, in deciding to adopt Resolution 220. There is no factual allegation in the SAC or its exhibits leading indisputably to that conclusion. In particular, the SAC attaches three letters from homeowners to

the board, dated 2002, 2005, and 2015, expressing concerns with the board's ongoing consideration (and ultimate adoption) of a resolution applying the tree-trimming provision to all lots in the community. According to the letters, the board was certainly aware of and considering the *Nunn* ruling, as well as two other appellate cases, *Citizens, supra*, 12 Cal.4th 345 and *Russell v. Palos Verdes Corporation* (1963) 218 Cal.App. 2d 754. However, if respondents relied on these decisions when enacting any of the resolutions preceding Resolution 220, they did not do so to expand the reach of Declaration 150; instead, those earlier resolutions recognize the existence of numerous declarations with differing CC&Rs. While one could infer that the board later relied on these legal authorities to adopt Resolution 220, we are required to draw all reasonable inferences in Colyear's favor on demurrer. (See, e.g., *Dubins v. Regents of University of California* (1994) 25 Cal.App.4th 77, 82 ["we must assume the truth of all material facts properly pleaded by the plaintiff-appellant or reasonable inferences that may be drawn from such facts"].) Doing so, we find that Colyear has adequately alleged facts to support the inference that respondents acted in bad faith. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 [holding "whenever a private association is legally required to refrain from arbitrary action, the association's action must be substantively rational and procedurally fair"]; *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [holding homeowners association seeking to enforce CC&R's to compel act by member owner must "show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is

reasonable, not arbitrary or capricious"].) Whether this inference may be disproven at a later date is an issue of fact rather than an issue of pleading.

Our conclusion is not altered by respondents' assertion of the "business judgment rule," which is ""'a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.'" [Citations.]" (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1045.) The rule "establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest." (*Ibid.*) Given Colyear's affirmative allegations of bad faith here, this presumption does not apply to bar his fiduciary duty claim. (See *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 715 [presumption under the business judgment rule may be rebutted by allegations of facts establishing "fraud, bad faith, overreaching or an unreasonable failure to investigate material facts"]; *Palm Springs Villas II Homeowners Association, Inc. v. Parth* (2016) 248 Cal.App.4th 268, 286 [reversing summary judgment and finding triable issues regarding application of business judgment rule]; *Affan v. Portofino Cove Homeowners Ass'n* (2010) 189 Cal.App.4th 930, 943 [no deference where there was no "evidence the Association acted 'in good faith . . .', because no one testified about the board's decisionmaking process"].)

Respondents also argue, as the trial court found, that Colyear failed to allege "how any individual member of the board personally participated in any of the tortious conduct." Colyear alleged that he was unable at the pleading stage to determine

which board members engaged in precisely which conduct, as "most if not all of the wrongful conduct of the Board . . . was undertaken, discussed and agreed during the course of so-called Executive Sessions of the Board," which were closed and purportedly confidential. Thus, he could not allege specifically which board members acted in breach of their fiduciary duty by, for example, voting to adopt Resolution 220; moreover, the resolution itself does not reflect who passed it. Instead, he alleged that each member of the board acted in bad faith and knew or should have known he or she was wrongfully seeking to impose the tree-trimming provision on his lot.

These allegations are sufficient to state a claim against the individual board members. "It is well settled that corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. [Citations.]" (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503 (*Frances T.*).) "Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct. [Citations.]" (*Id.* at p. 504.)

Here, the SAC alleges facts stating a cause of action against the individual board members for breach of fiduciary duty. Colyear alleged that each board member personally participated in the tortious conduct, including by voting to adopt Resolution 220, despite purported knowledge that it exceeded the board's authority. (See *Frances T., supra*, 42 Cal.3d at p. 504 ["'a director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the corporation'"].) Of course, Colyear ultimately will

have to prove that each director breached his or her fiduciary duty; at this stage, however, we test only the legal sufficiency of his allegations to state a claim and leave evidentiary questions for the finder of fact. (See *id*. at pp. 511-512 [finding plaintiff had alleged "that each of the directors participated in the tortious activity" and thus sufficiently stated claim]; see also *Landau v. Salam* (1971) 4 Cal.3d 901, 909 [plaintiff may join independent and successive tortfeasors by pleading facts demonstrating "a reasonable uncertainty as to the respective liabilities of defendants"].)

We disagree with respondents' contention that Colyear's allegations regarding the closed board sessions, added for the first time to the SAC, were inconsistent with the allegations in his earlier pleadings and with the exhibits referencing open board meetings and discussions with homeowners about proposed amendments. We see no allegations in the record that the ultimate discussion by the board and decision to approve Resolution 220 occurred in an open session. That the board held some open meetings and discussed the issues with the community is not necessarily inconsistent with Colyear's allegations that it also engaged in closed sessions at the time it approved Resolution 220.

Additionally, respondents assert—without citation to any authority—that "Colyear's damages allegations remain purely speculative." Similarly, the trial court found that Colyear had alleged only a "theoretical potential diminution of value." We conclude otherwise. A plaintiff may claim tort damages to real property, such as those arising from a breach of fiduciary duty, measured by "the difference between the market value of the land before and after the injury." (*Raven's Cove Townhomes, Inc.*

v. Knuppe Development Co., *supra*, 114 Cal.App.3d at p. 802, citation omitted); see also § 3333.)

Colyear alleged that the cloud on his title arising from respondents' conduct decreased the market value of his property. While the trial court expressed concern during the demurrer hearing over how Colyear would prove such diminution in value, the ability to prove damages is not at issue on this appeal. (See *Hill v. Allan* (1968) 259 Cal.App.2d 470, 489 ["it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property"].) Because the SAC alleged cognizable damages proximately caused by breaches of fiduciary duty, the court erred in sustaining the demurrer on this ground.

III. *Slander of Title*

Colyear also challenges the trial court's sustaining of the demurrer to his claim for slander of title.

The elements of the tort of slander of title are "(1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. [Citations.]" (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030.) "If the publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title. [Citation.]" (*Ibid.*) Direct pecuniary loss may include either the loss in market value to the plaintiff's property or attorney fees and costs where "litigation is necessary 'to remove the doubt cast' upon the vendibility or value of plaintiff's property," or both. (*Id.* at pp. 1030-1031; see also *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 865.)

Respondents argue that this claim fails because the SAC alleged facts establishing the existence of the rival claimant privilege and the common interest privilege; moreover, Colyear failed to adequately allege malice to rebut those privileges. The trial court agreed. We conclude that the rival claimant privilege is not established on the basis of the SAC. Further, we find that Colyear has shown he can amend his pleading with facts that may defeat the common interest pleading, and we remand to allow him to do so.

First, the rival claimant privilege permits a "rival claimant of property . . . to disparage . . . another's interest in the property by an honest and good faith assertion of an inconsistent legally protected interest in himself." (*Hill v. Allan* (1968) 259 Cal.App.2d 470, 490.) In light of our conclusion that Colyear adequately pled facts to support the inference that respondents acted in bad faith when they adopted Resolution 220, respondents cannot establish based on the SAC that they made a "good faith assertion" of an interest in the property by seeking to apply Declaration 150 to all lots in the community.

Second, respondents assert the common interest privilege pursuant to section 47. This privilege is "recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846.) The SAC alleges respondents' statements regarding the scope of Declaration 150 were made during board meetings and on other occasions to community members. On the basis of these allegations, respondents have met their initial burden to demonstrate that the statements were made on privileged occasions to recipients

with a common interest in the matter. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) However, Colyear now asserts that respondents destroyed the privilege when they "published the same defamatory statement to the entire world via [the HOA] website." Colyear did not allege this fact in the SAC, but requested that we take judicial notice of the website on appeal. We denied that request. On the other hand, we conclude that there is a reasonable possibility such an amendment could cure the defect in Colyear's pleading. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [reversing where "there is a reasonable possibility plaintiff could cure the defect with an amendment]; *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 797 [privilege may be destroyed "'by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest'"].) Accordingly, we find that the trial court abused its discretion in denying leave to amend and we reverse.

IV. *Quiet Title*

Colyear also contends the trial court erred in sustaining the demurrer to his quiet title claim. We agree.

Code of Civil Procedure section 760.020, subdivision (a), provides that a plaintiff seeking to establish title to real property against adverse claims may file an action to quiet title. The purpose of a quiet title action is to "'finally settle . . . all conflicting claims to the property in controversy,'" and to determine the interest to the property to which each party may be entitled. (*Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 284 (internal citation omitted).)

A plaintiff seeking to bring a quiet title action must file a verified complaint including the following: (1) a description of the

property, including—in the case of real property—both the legal description and the street address; (2) the basis for the plaintiff's claim of title; (3) the adverse claims to the title that the plaintiff seeks to adjudicate; (4) the date as of which determination of title is sought, which will be the date of the complaint unless plaintiff requests otherwise; and (5) a prayer for the determination of the plaintiff's title against the adverse claims. (Code Civ. Proc., § 761.020.)

Colyear's quiet title cause of action in the SAC comprised three paragraphs. In paragraph 58, Colyear realleged and incorporated by reference numerous preceding paragraphs in the pleading. In paragraph 59, Colyear identified defendants as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in Colyear's lot adverse to Colyear's title or any cloud on Colyear's title." Colyear further alleged that these defendants claim that Colyear's lot is covered by the tree-trimming provision of Declaration 150 and claim a right to enforce that provision against his lot. Finally, paragraph 60 alleged that "Colyear is entitled to a determination by this Court qlot [*sic*]."

The trial court found that Colyear had failed to sufficiently allege facts to support the elements of his quiet title claim, apart from the "supposed adverse claim." Taking into consideration the paragraphs of Colyear's pleading that were expressly incorporated into the quiet title claim, we conclude otherwise. In paragraph two of the amended complaint, Colyear alleged that he was the owner of the lot at issue and set forth both the legal description and the street address for the property, satisfying the first and second element required for a quiet title claim. As the trial court recognized, Colyear identified the adverse claims at

issue in paragraph 59 of his claim. Next, as he has not specified otherwise, the date of determination is the date Colyear filed his complaint. (Code Civ. Proc., § 761.020, subd. (d); see also *Deutsche Bank Nat. Trust Co. v. McGurk* (2012) 206 Cal.App.4th 201, 213.) Finally, while Colyear's prayer for a determination in paragraph 60 is marred by a typographical error, it is clear from the remainder of the pleading that Colyear is seeking to quiet title as to any claim of "the right to enforce the Trees and Plantings Covenant in Declaration 150 against Colyear's lot."

As such, we conclude that Colyear has adequately alleged a quiet title claim. We therefore reverse the trial court's order sustaining the demurrer at to this cause of action.[4]

V. *Administrative Remedies and Attorney Fees*

As part of the Davis-Stirling Common Interest Development Act (section 1350 et seq.), section 5930 requires a homeowners association or member to engage in an alternative dispute resolution process prior to filing an "enforcement action" in superior court. However, this pre-filing requirement "applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages" under $25,000. (§ 5930, subd. (b).)

In light of our conclusion that Colyear has sufficiently alleged his tort claims, including his allegation of damages over $25,000, the requirements of section 5930 do not apply to this

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[4] Respondents urge us to make the substantive determination that Declaration 150 "applies to all Rolling Hills homeowners." The trial court did not reach this issue, as it was not necessary for the determination of this demurrer. We decline to do so in the first instance.

action. We therefore reverse the trial court's dismissal of Colyear's pleading on this basis.

Likewise, we reverse the trial court's order granting respondents' motion for attorney fees, based on the reinstatement of the SAC. We need not reach Colyear's arguments regarding the applicability of sections 1717 and 5975 to this action.

DISPOSITION

We reverse the judgment as to all causes of action, with leave to amend the cause of action for slander of title. We further vacate the trial court's order granting respondents' motion for attorney fees. Colyear is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.