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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JERALD R. DAVIS, as Successor Trustee, etc., et al.,

Plaintiffs and Appellants,

v.

IRVINE TERRACE COMMUNITY ASSOCIATION et al.,

Defendants and Respondents.

G057682, G058266

(Super. Ct. No. 30-2018-00982956)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas A. Delaney, Judge. Affirmed.

Brown Rudnick, Ronald Rus, Leo J. Presiado and Shoshana B. Kaiser for Plaintiffs and Appellants.

Hatton, Petrie & Stackler, Authur R. Petrie II and Dan E. Heck for Defendant and Respondent Irvine Terrace Community Association.

Palmieri, Tyler, Wiener, Wilhelm & Waldron, Don Fisher and Elise M. Kern for Defendants and Respondents R. Scott Tucker and Karen Tucker.

* * *

This is an appeal following judgment after the trial court granted summary judgment against plaintiffs Jerald R. Davis as Successor Trustee of the Mary Louise Schwennesen Trust, and George Eadington and Mary D. Eadington, Trustees or Successor Trustees of the George Eadington and Mary D. Eadington Family Trust (collectively plaintiffs)[1] and in favor of defendants Irvine Terrance Community Association (IRTA or the Association) and R. Scott Tucker and Karen Tucker (the Tuckers; collectively IRTA and the Tuckers are referred to as defendants). Plaintiffs' claims against defendants relate to property owned in a development known as Irvine Terrance in Corona del Mar. Plaintiffs sued the Tuckers and the Association for, respectively, building and allowing the Tuckers to rebuild or modify their existing home in a manner that blocked plaintiffs' views. The trial court's decision to grant summary judgment was appropriate because plaintiffs failed to establish, as a matter of law, that the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) guaranteed a right to an unimpaired view.

We agree. The CC&Rs simply do not support plaintiffs' argument, and accordingly, summary judgment was properly granted. Plaintiffs also appeal the attorney fees awarded pursuant to the CC&Rs, arguing both that defendants are not entitled to their fees, and even if they are, the fees awarded were excessive. We disagree on both points and therefore affirm the judgment.

[1] Although the properties are owned by their respective trusts, which are the legal plaintiffs, when necessary, we refer to "Schwennesen" and "the Eadingtons" for ease of reference.

I

FACTS

A. Relevant Background

Irvine Terrace is composed of 384 single-family homes. As plaintiffs describe the property, at the time it was built, the topography was contoured and terraced, which created scenic views. Schwennesen and the Eadingtons are neighbors on a street called Tahuna Terrace. The Tuckers own a home located on the street below the Schwennesen and Eadington properties, known as Sabrina Terrace. According to plaintiffs, prior to the Tuckers' purchase of the lot, their views were "observable."

B. Governing Documents

The CC&Rs were recorded in 1971. Plaintiffs and defendants take somewhat different views as to which portions are relevant, but we shall set them all forth here. The following first two paragraphs are from the recitals section, before any binding requirements are set forth:

"WHEREAS, Declarant has deemed it desirable to establish covenants, conditions and restrictions upon said real property and each and every lot and portion thereof, and upon the use, occupancy and enjoyment thereof, all for the purpose of enhancing and protecting the value, desirability and attractiveness of said Tracts; and

"WHEREAS, Declarant has deemed it desirable for the efficient preservation of the value, desirability and attractiveness of said tracts to create a corporation to which should be delegated and assigned the powers of maintaining and administering the common area and administering and enforcing these covenants . . . ."

The next relevant provisions are in Article VI, Architectural Control:

"Section 1. Architectural Approval. No building, fence, wall or other structure shall hereafter be commenced or erected upon the properties subject to this Declaration, nor shall any exterior addition to or change or alteration therein, including patio covers, hereafter be made until the plans and specifications showing the nature, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Architectural Committee provided for in Section 3 hereof. . . .

"Section 2. Landscaping Approval. The Architectural Committee shall have the right to require any member to remove, trim, top, or prune any tree or shrub which in the reasonable belief of the Architectural Committee unduly impedes or detracts from the view of any lot . . . .

"Section 3. Appointment of the Architectural Committee. The Architectural Committee shall be appointed by the Board of Directors . . . ."

Article VII, section 1(a) discusses enforcement, and notes "the Association shall: (a) Enforce the provisions of this Declaration. . . ."

Article IX sets forth limitations on walls and fences, and states, as relevant here:

"In the event that an owner desires to construct a fence or wall of a height in excess of three (3) feet, and in the event that the construction of such a fence or wall would impair the view of the owner of another lot, the height of such fence or wall shall be subject to Architectural control and Architectural approval, as set forth in Article VI of this Declaration."

Under Article X, General Provisions, section 4 (Construction) states:

"The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a residential community or tract and for the maintenance of the properties and the common recreational facilities and common areas. The Article and Section headings have been inserted for convenience only, and shall not be considered or referred to in resolving questions of interpretation or construction."

In addition to the CC&Rs, the Association also has Architectural Guidelines. In sum, the Architectural Committee's (the Committee) responsibilities included evaluating homeowners' applications and approving or denying them, based on the following:

"a) Character of the structure or landscape with respect to its harmony of exterior design and location in relation to surrounding structures and topography of Irvine Terrace Community Association as a whole.

"b) The Irvine Terrace Architectural Guidelines.

"c) Relevant deeds, regulations, Covenants, Conditions and Restrictions of record."

If the Committee disapproves plans as submitted, it returns the plans to the homeowner applying for architectural approval (applicant) accompanied by a letter explaining its reasons. The applicant may then either submit revised plans, or appeal. An appeal to the Committee requires a $1,000 deposit toward any costs or fees incurred for the review. According to the Association, only applicants may appeal to the Committee; an aggrieved neighbor or other member must appeal directly to the Board of Directors (the Board). Further, an unhappy applicant may also appeal directly to the Board.

C. Approval of Plans for the Tucker Residence

In 2017, the Tuckers submitted plans to the Committee, which plaintiffs characterize as "demolition of the existing residence at the Tucker Property and construction of an entirely new residence." Prior to submitting their plans, the Tuckers' architect met with both Schwennesen and the Eadingtons to discuss the plans and provided them with copies.

Plaintiffs objected to the plans based on the proposed increased height of the roof that would obstruct or otherwise block their views. The proposed roof line would have a height of 14 feet, as measured from the original pad. According to defendants, the Tuckers' architect subsequently revised the plans by lowering the roof height on two-thirds of the proposed home to 12 and a half feet, while the remainder stayed at 14 feet. Plaintiffs continued to object.

The Committee granted preliminary approval of the Tuckers' plans. Plaintiffs point out that in the past, the Committee had considered arguments which it characterizes as the same as those raised here. Relying on a declaration by George Eadington, they state that in 2010, a construction project was proposed at the property next door to the Tucker property. That proposal would have increased the roof height above 12 feet, which the declaration stated would have harmed their views. The Eadingtons challenged the project, which was initially approved, but the Committee changed its decision thereafter. The Committee's reasoning was set forth in an e-mail to the Eadingtons as follows: "[The Committee] reviewed against CC&Rs and find the plan in conflict with provisions of Article VI, Section 1 stated on page 62 of the IT handbook dated 2006 as relates to harmony of external design and location in relation to surrounding structures and topography. The [Committee's] conclusion is that the 14'

height stated in the Architectural Guidelines is an upper limit available when to do so, does not conflict with the mandates of the CC&Rs."

Plaintiffs requested an appeal of the Committee's preliminary approval to the Committee itself. This appeal was denied, and plaintiffs appealed to the Board. The Board denied the appeal. The minutes of the meeting reflect: "After two hours of discussion from all parties, and comments from the homeowners present that were sent notification of the appeal, the Board made the following motion. [¶] . . . [¶] Resolved: That the Board deny the appeal and encourage all the parties involved to work together to find a resolution. [¶] The motion carried . . . ." The denials of both the Committee and the Board were based on advice of the Association's counsel.

D. The Instant Case

Plaintiffs filed the instant action in March 2018. They subsequently filed a first amended complaint (the complaint) stating causes of action for breach of the CC&Rs against all defendants, breach of fiduciary duty against the Association, and for declaratory relief. In November 2018, the defendants each filed a motion for summary judgment or summary adjudication. The motions were fully briefed by both sides, with voluminous supporting evidence and objections. The court held a hearing on the motions in January 2019, and subsequently granted them. Judgment was entered thereafter for defendants. Plaintiffs filed a notice of appeal.

Defendants then filed motions for attorney fees. After briefing, the court held a hearing and subsequently issued an order granting the Association's fee motion for $159,363 and the Tuckers' for $333,229. Plaintiffs appealed, and we consolidated the appeal on the merits and the attorney fee appeal.

II

DISCUSSION

A. Summary Judgment Standard of Review and Statutory Framework

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To prevail on the motion, a defendant must demonstrate the plaintiff's cause of action has no merit. This requirement can be satisfied by showing either one or more elements of the cause of action cannot be established or that a complete defense exists. (Code Civ. Proc., § 437c, subds. (o), (p); *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 499-500.)

"[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Ibid.*) "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." (*Id.* at p. 850, fn. omitted.)

In performing our de novo review, we use the same procedure as the trial court. We first consider the pleadings to determine the elements of each cause of action. Then we review the motion to determine if it establishes facts, supported by admissible evidence, to justify judgment in favor of the moving party. Assuming this burden is met,

we then look to the opposition and "decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

B. Moving Party's Burden

As noted above, the party moving for summary judgment has the "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) In order to make this determination, we review the law and evidence relevant to the pleaded cause of action.

1. Interpretation of the Governing Documents

We begin by noting: "When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to 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. [Citations.] [¶] 'The criteria for testing the reasonableness of an exercise of such a power by an owners' association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner.'" (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) These criteria do not include

adherence to documents no longer in effect, nor do they include rigid adherence to what plaintiffs consider "precedent" of earlier decisions made years prior.

It appears to us that the key cause of action and the primary legal ground that forms the basis of plaintiffs' appeal is defendants' purported violation of the CC&Rs. Specifically, plaintiffs claim the CC&Rs were violated because "plans for new construction may only be approved if the [Committee] determines that the height, location, and other aspects of the construction are in 'harmony of external design and location in relation to surrounding structures and topography.'" Further, plaintiffs argue the CC&Rs must be interpreted in accordance with their purpose, and the Association must "subjectively" evaluate the impact of a proposed project on nearby homes because criteria such as "'harmony,' 'desirability,' and 'attractiveness' cannot be assessed by objective measures." They claim the Association failed to do this and replaced the CC&Rs standard with "objective criteria," specifically, the height limit.

Defendants (and the trial court) noted a problem with plaintiffs' use of the preamble language in the CC&Rs, which forms the basis for their contention that architectural review must take into consideration impact on individual homes (and by extension, individual homeowners) rather than the community. The language relied upon in the preamble states the CC&Rs "all for the purpose of enhancing and protecting the value, desirability and attractiveness of said *Tracts*" and the "Declarant has deemed it desirable for the efficient preservation of the value, desirability and attractiveness of said *tracts* . . . ." (Italics added.) Later in the CC&Rs, the term "tracts" is equated to "residential community:" "The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a residential community or tract and for the maintenance of the properties and the common recreational facilities . . . ."

Accordingly, interpreting the language of the CC&Rs under the general contract principles, as plaintiffs urge, we reject their contention that the CC&Rs or the Architectural Guidelines are intended to protect individual homeowners' interests. They are intended to protect the community as a whole.

Plaintiffs claim the Architectural Guidelines cannot conflict with the CC&Rs, which is generally correct. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1124 (*Ekstrom*).) The Architectural Guidelines "state the 'Maximum roof height shall not exceed 14 feet (14'0") above the primary floor slab . . . .'" Plaintiffs assert this conflicts with the general CC&R provisions about "attractiveness" and other language found in the preamble, which, as stated, applies to the community as a whole. But it does not. In *Ekstrom*, the CC&Rs required trimming all trees, but the defendant Association decided to exempt palm trees. "The only reasonable construction to be given to the provision is that homeowners are afforded protection from having their views obstructed by vegetation, including trees. Nothing in the CC&Rs permits the Association to exclude an entire species of trees from [the CC&Rs relevant provision] simply because it prefers the aesthetic benefit of those trees to the community." (*Id.* at p. 1123.)

But here, the only CC&R provision is a general one in the preamble that applies to the community as a whole. We therefore find no conflict between the CC&Rs and Architectural Guidelines.

Second, Architectural Guidelines are, just as they state, *guidelines*. They certainly have a subjective component to them, but there is nothing in the CC&Rs (or the Guidelines themselves) which states how much of the Committee's decision must be based on subjective or objective criteria. The Committee is within its discretion to decide that a proposed plan meets the criteria of "harmony of external design" if it meets certain

objective criteria such as height, color, and design scheme when compared to existing structures, for example. Plaintiffs' contention that the Association "breached the CC&Rs by approving the Project without subjectively considering whether its height and location—and resulting obstructions of Appellants' views—will cause disharmony with surrounding structures, including Appellants' homes" is not supported by any reasonable interpretation of the CC&Rs or Architectural Guidelines.

2. View Protection under California Law and Governing Documents

Despite all the language they employ about "harmony" and "attractiveness," plaintiffs' true complaint is this: "[The Association] breached the CC&Rs by approving the Project without evaluating its impacts on the value, attractiveness, and desirability of Appellants' homes, including impacts that will be caused by the loss of Appellants' valuable views." Neither the CC&Rs, under their plain language, nor California law, however, protects plaintiffs' views.

"[U]nder California law, a landowner has no right to an unobstructed view over adjoining property." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1250; see *Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212, 1219.) The CC&Rs protect views only as to landscape, fences, and walls—not building height.

Accordingly, neither the CC&Rs nor the Architectural Guidelines required any analysis of the impact of the proposed construction on plaintiffs' views. "Height" is one of the factors that must be considered, and plaintiffs do not dispute the Association considered height (indeed, they complain the Association relied on it too much). The project complied with the limit of 14 feet set forth in the Guidelines.

The cases plaintiffs rely on do not help them. In *Clark v. Rancho Santa Fe Assn*. (1989) 216 Cal.App.3d 606, 618-619, a case which involved subdividing a property

and not view protection, the court held that the defendant Association was acting within its discretion to apply subjective and objective criteria in light of specific CC&R language. Plaintiffs omit key language when discussing this case and fail to explain how a height limit of 14 feet violates the principles set forth therein. Plaintiffs also cite *Ekstrom*, *supra*, 168 Cal.App.4th 1111, claiming that ignoring subjective analysis of height obstruction violated the CC&Rs. But as we already explained, *Ekstrom* was a case where a board decision and the CC&Rs explicitly conflicted. (*Id.* at p. 1124.) It does not apply here.

Citing *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726 (*Ticor*), plaintiffs argue an association cannot ignore the CC&Rs express language or the subjective analysis "mandated by the CC&Rs." *Ticor* was a case about minimum setbacks. The CC&Rs provided for 20-foot setbacks in side yards, which could not be changed or modified without approval of two-thirds of the owners. The defendant Association adopted a 50-foot setback rule, arguing the CC&R setback was a minimum only. (*Id.* at pp. 728-730.) The court noted it "must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach'" (*id.* at p. 730), and rejected the defendant Association's approach. "Had the covenanting parties intended the result urged by the Association, they could easily have said so . . . ." (*Id.* at pp. 732-733.)

To the extent *Ticor* helps here, it assists defendants. As the Association points out, the trial judge used similar language at the hearing on the motions for summary judgment: "[T]he CC&Rs don't have [any reference to house-related view obstruction], and if they wanted to put it in[] they should have[,] and they could have[,] and they didn't."

Accordingly, under both California law and the governing documents, plaintiffs have no valid claim here regarding their views or the criteria the Association used to approve the proposed project.

3. Breach of Fiduciary Duty and Due Process

Plaintiffs also assert the Association breached its fiduciary duty by not allowing a direct appeal to the Architectural Committee. First, we agree with defendants that whatever happened previously with respect to another matter plaintiffs were involved in, that does not serve as some sort of binding precedent as if it were a Supreme Court case. What matters here is adequate notice and a reasonable chance to respond, the pinnacles of due process. "Specific requirements for procedural due process vary depending upon the situation under consideration and the interests involved." (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657.) Plaintiffs indisputably had both notice and an opportunity to participate in the process, which they did.

The parties argue back and forth about whether nonapplicant homeowners – in other words, parties besides those whose plans were being reviewed by the Architectural Committee – had any right, under the Guidelines, to appeal a decision to the Architectural Committee. As plaintiffs admit, any decision by the Architectural Committee was "virtual[ly] certain[]." Accordingly, they suffered no harm by going directly to the Board for their appeal. What the Architectural Committee might or might not have decided is therefore irrelevant; while plaintiffs say it raises questions about good faith, they do not provide any argument regarding why this case would not be in precisely the same posture today in any event. We therefore find no breach of fiduciary duty in failing to allow an appeal to the Architectural Committee before sending the appeal to the Board.

Indeed, the undisputed evidence demonstrates there was no due process issue. Plaintiffs were given proper notice and the opportunity to participate in the process at every appropriate step. In sum, we conclude the moving parties have met their burden of production on a motion for summary judgment.

C. Opposing Party's Burden

The burden then shifted to plaintiffs to demonstrate a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-851.) Plaintiffs offer many purportedly disputed facts, but these are either issues of law, not disputed by the evidence, or not material. For example, plaintiffs claim "there are disputed factual questions about whether the CC&Rs intended to protect views by prohibiting the approval of new construction that is not 'in harmony of external design and location in relation to surrounding structures and topography.'" But plaintiffs previously argued that the CC&Rs must be interpreted according to the rules governing interpretation of contracts, and we agree. As plaintiffs' reply brief makes clear, this is simply another argument about whether the CC&Rs protect views, which we have already rejected. The CC&Rs state they protect views only as to walls, fences, and landscaping. It is not a triable issue of fact as to whether the CC&Rs protect other views when such protection is included nowhere in their language.

Further, outdated handbooks and Architectural Guidelines do not create triable issues of fact. The only issue is whether the Committee and the Board followed the procedures and the substance of the documents in effect at the time relevant to this matter. There are no material triable issues as to whether they did. The Architectural Guidelines in effect state the maximum height is 14 feet, and no structure exceeding that height was approved. These are simply plaintiffs' legal arguments restated in a different way, and they fail to raise a triable issue of fact.

Accordingly, we find the court properly granted summary judgment in defendants' favor.

D. Fee Order

As noted above, the trial court granted the Association's attorney fee motion for $159,363 and the Tuckers' for $333,229. We review entitlement to fees under a statute de novo, but the amount, generally, for abuse of discretion. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

1. Entitlement to Fees

Plaintiffs claim that defendants are not entitled to attorney fees because the Association is not a "planned development" as defined by the Davis-Stirling Common Interest Development Act (the Act; Civ. Code, § 4000, et seq.).[2] Their principal argument is that section 4175, which defines planned developments, does not apply. Defendants argue the relevant fee statute, section 5975, should apply under principles of mutuality and estoppel even if the Act does not apply.

It is unclear from the evidence before us whether the Association is a "planned development" within the meaning of the Act. What is clear, however, are the legal principles involved. Since the inception of this case, plaintiffs have referred to the Association as "a common interest development" and "a planned development," citing provisions of the Act and claiming entitlement to attorney fees under the Act (§ 5975,

[2] Subsequent statutory references are to the Civil Code.

subd. (c)), if they prevailed.[3] Plaintiffs' complaint, various declarations, applications, motions, and briefs have all asserted the Act's applicability to this case. The status of the Association was undisputed in the motion for summary judgment. It was not until the motion for attorney fees that plaintiffs changed their position on this matter.

A recent California Supreme Court case is directly on point. In *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135 (*Kemp*), the parties' positions were reversed. The plaintiff Association sued homeowner Kemp, alleging the Association was a common interest development, Kemp had violated the CC&Rs, and the plaintiff Association was entitled to attorney fees under the Act. (*Id.* at pp. 1139-1140.) Kemp argued the plaintiff Association was not a common interest development, and the trial court eventually agreed, entered judgment, and awarded attorney fees. (*Id.* at p. 1141.) The Court of Appeal reversed the fee award, concluding that because the Act did not apply, no fees could be awarded. (*Ibid.*)

The California Supreme Court granted review. "In this case, each of the parties contends that the plain meaning of the statutory language supports its interpretation of the statute. To repeat, the applicable statute reads in full: 'In an action to enforce the governing documents [of a common interest development], the prevailing party shall be awarded reasonable attorney's fees and costs.'" (*Kemp, supra,* 60 Cal.4th at p. 1143.) The court noted: "Plaintiffs contend that even when an action is brought to enforce what the complaint expressly alleges is a governing document of a common interest development, if it is ultimately determined in the course of the litigation that a common interest development does not exist, the action cannot properly be found to be

[3] At oral argument, plaintiffs argued the relevant fact is how many times they claimed entitlement to attorney fees if they prevailed, which they stated was only once in the complaint. But that is not the pertinent fact here – it is how many times they claimed that the Act applies to Irvine Terrace.

'an action to enforce the governing documents' of a common interest development within the meaning of former[4] section 1354(c). Plaintiffs assert in this regard: 'In order for [former] section 1354(c) to apply, there must be an action to "enforce" governing documents. This necessarily means that there must be valid "governing documents" that are compliant with the Davis-Stirling Act to be "enforced" in the first instance. Otherwise, the Act never applies, and the general rule that fees are not recoverable controls. . . . If there is nothing to enforce, then there can be no action to enforce.'" (*Ibid.*)

Defendants, meanwhile, argued "the plain language of the statute supports their position. Defendants maintain that because the statute says that 'the prevailing party' is entitled to recover attorney fees, the statute must be interpreted to be reciprocal, and '[r]ecovery is hinged solely on the basis of plaintiff's action, not whether a court ultimately determines that a subdivision is a common interest development.' '[Plaintiffs] filed this action to enforce the governing documents. . . . Thus, the reciprocal, mandatory fee-shifting should kick in, whether [plaintiffs or defendants] prevailed.'" (*Kemp, supra*, 60 Cal.4th at pp. 1143-1144.)

Ultimately, the Court adopted Kemp's argument: "When a lawsuit is brought to enforce what the complaint expressly alleges are the governing documents of a common interest development, the action would ordinarily be understood to be 'an action to enforce the governing documents [of a common interest development]' as that clause is used in former section 1354(c). Whether or not the plaintiff in the action is ultimately successful in establishing that the documents relied upon are in fact the

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[4] The Supreme Court was considering the old version of the Act prior to its renumbering; no substantive distinction exists. (Former § 1354, subd. (c) is now § 5975, subd. (c); Stats. 2012, ch. 180, § 2, eff. Jan. 1, 2014.)

governing documents of a common interest development would not affect the character or type of action that has been brought." (*Kemp, supra,* 60 Cal.4th at p. 1144.)

There is no dispute here that the "character" of the action, within the meaning of *Kemp,* is that of an action against a common interest development to enforce the CC&Rs. Plaintiffs' attempt to distinguish *Kemp* is far off the mark, incorrect, and unsupported by any subsequent authority citing *Kemp.* Fees were properly awarded.

2. Amount of Fees

Plaintiffs spend only one paragraph arguing the fees awarded were unreasonable, stating the trial court abused its discretion by failing to reduce the award as a result of defense counsel's "pervasive improper block-billing practices." Rather than providing specific examples in their opening brief, they string cite to hundreds of pages of record. This is improper. It is not our responsibility to comb the appellate record for facts to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) "The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) Plaintiffs have failed to demonstrate error as to the amount of the fee award.

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.