

FILED

Superior Court of California
County of San Francisco

JUL 22 2010

CLERK OF THE COURT

BY: 
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DENNIS McDANIEL & JANE CHURCH-
McDANIEL,

Plaintiffs

vs.

TELEGRAPH LANDING NORTH
ASSOCIATION, *et al.*,

Defendants.

Case No. CGG-08- 476354

STATEMENT OF DECISION

Introduction

Plaintiffs the McDaniels own a condominium apartment on Lombard Street in San Francisco, and are members of their homeowners' association, the defendant here, Telegraph Landing North Association. The McDaniels sued the Association because their roof leaked, and the leak was not fixed for many years. During much of that time, the McDaniels did not live in their apartment; the parties differ as to why that was so.

The McDaniels sue for breach of fiduciary duty, negligence and nuisance. Other claims (for an injunction and negligent infliction of emotional distress) were earlier resolved by motion.

The trial was held before me sitting without a jury on various days from March 29, 2010 to April 14, 2010. The parties agreed to a post trial briefing schedule which ultimately produced briefs by June 4, 2010. I issued a written tentative decision on June 23, and held argument on July 2, 2010, at which time the matter was submitted. I issued a proposed statement of decision on July 6, and received and reviewed plaintiffs' Objections served July 21, 2010.

Factual Background

The McDaniels live on the top floor of their building, and thus their ceiling is the underside of the roof. In mid October 2004, part of the McDaniels' 'popcorn' ceiling in the living room detached and fell to the ground. (Exs. 45A, 2; 9D) This was obviously the result of rain penetrating the roof, and very likely related to an older leak manifesting in the same location. Consultants reported that because the ceiling material contained asbestos, they would have to remove and repair the ceiling, during which period the McDaniels would have to vacate the apartment. At the time, all concerned believed that the McDaniels would be out perhaps for a matter of weeks or months¹ to allow for this remediation work.

But it was not until September 2006 that the McDaniels moved out, and the apartment remained vacant until they moved back in during February 2009 after the

¹ The time period contemplated was perhaps four to five weeks according to the Association's Barry Schiller, up to 8 weeks according to Ms. McDaniel, and up to three months according to the Association's Morton Beebe.

repairs on the leaks were ultimately successful in October of 2008. The saga of those years was the subject of testimony at trial, and liability here depends in great part on the allocation of responsibility for the delays.

Plaintiffs' Post-Trial Brief (PB) cites certain variations on this basis for liability: The McDaniels suggest that the Association is liable as a result of (i) a 6 year delay in fixing the leaking roof and/or windows (PB at 4; 7; 8 lines 10 *et seq.*); (ii) making misrepresentations or threats not to repair (*id.*, lines 18 *et seq.*), and (iii) delays generally (PB at 6, lines 16 *et seq.*).

Before I turn to the reasons for the delay, I address the McDaniels' suggestion that they were in effect forced out of their home, and that the roof repairs could have been done with them continuing to reside in their apartment. This is not so. The Association had been told by its consultants that dislodged asbestos was dangerous and required attention before roof repairs could be completed (reflected at e.g., 108: 34),² which in turn required the plaintiffs to move out. Mr. McDaniel recognized this, without complaint, numerous times. E.g., 108: 4, 15, 23, 18, etc. Plaintiffs' July 21, 2010 Objections (Objections) contend that the Association might have left the McDaniels in their home with, perhaps, some sort of 'hold harmless agreement' because the McDaniels were perfectly happy to be exposed to asbestos. The record is otherwise, i.e., the contractors required the move out; and only speculation supports the notion the McDaniels would have signed a hold harmless agreement.

I turn to the reasons for delay, noting a distinction between the delay to September 2006 when the McDaniels moved out, and the delay thereafter.

² Many of the relevant exhibits are located in a mass exhibit marked at trial as Ex. 108. Here, I refer to those pages in that exhibit thusly, for e.g. page 28 and 29: 108: 28, 29).

Prior to the move out date, the McDaniels essentially lived under conditions similar to those which obtained between their original purchase and move in³ and October 2004 when a portion of the ceiling fell onto their living room floor. The leak had until then been an on-and-off affair, and had not substantially interfered with their ability to enjoy the premises. Thereafter, an unsightly ceiling aside, their use of the premises was not substantially diminished.

In any event, the Association was not responsible for delays in arranging for the move out. The plaintiffs decided, reasonably, that they would take the opportunity presented by the ceiling repairs to have the rest of the apartment refinished and repainted (at their own expense)(e.g., 108: 8), and they did not feel it was an urgent matter to commence those repairs and move out (108: 28, 29). As of November 16, 2004, Mr. McDaniel thought it would be best to wait until after the winter rains of 2004-05, and have the work done around June of 2005 (108: 15; see also 108: 23). During the fall of 2004, plaintiffs spent a good deal of time determining whether they wished to move to another of their properties (Cleary Court), to another unit they owned at Telegraph Landing (unit 45), or to a hotel (108: 12, 13). The Association offered to pay for a hotel during the asbestos repair, but the McDaniels ultimately rejected this in favor of, first, moving into the Cleary Court residence and ultimately to unit 45. The McDaniels told the Association they would decide where to go by June 15, 2005 (108: 28, 29), but they did not then move out. Adele Lawrence, the Association's property manager, noted that plaintiffs changed their minds repeatedly between October 2004 and August 2005 on the subject of where they desired to move to during the repairs. By September 2005, Mr.

³ Mr. McDaniel noted the leak was 'ancient' as of 2002 (108: 1). The leak apparently goes back to 1976 (108: 49).

McDaniel was writing the Association to secure a hotel (108: 35), but after the Association agreed he later refused this. Ultimately, as noted above, he decided to move to unit 45 (108: 45). At trial, Ms. McDaniel was emphatic that she never would have agreed to move into a hotel.

The Association was attempting to clarify the McDaniels' wishes in September 2005, hoping to move them out and have the work done before the 2005-06 rainy season. (108: 37) Plaintiffs confirmed their determination to move to unit 45 by February 2006 (108: 45, 50). It was then discovered that there were plumbing failures in unit 45 (108: 48, "water damage"), and the Association undertook and paid for repairs there, required before the McDaniels could move in. This work was done in May 2006 (108: 50, 53).

The McDaniels moved in to unit 45 in September of that year. Between May and September, the McDaniels and the Association (including through Barry Schiller) discussed the logistics of the move out, how to take care of the plaintiffs' valuable painting collection, and the coordination of the McDaniels' own redecoration work with the ceiling repair.

After the McDaniels moved out, an asbestos team was sent in to do removal and repairs. In October 2006, the team and Mr. McDaniel engaged in a kerfuffle concerning the team's alleged use of his personal bathroom (e.g., 108: 76), and it was another month before a new company (PAS) was on the premises. Roof repairs were finally done by December 2006, but within a month it was plain the repairs had not been successful (108: 91). The McDaniels made it clear they would not move back in until the repairs were complete (108: 82). As the Association's Mr. Beebe reported, Mr. McDaniel, a former licensed contractor and president of a piping construction company, was convinced that

he knew the proper solution: The injection of materials into the roof slab (e.g., 108: 82). None of the Association's consultants recommended the idea,⁴ and architect Nadia Anis maintained it was a bad idea. (In the event, the injection method was never used, although the leak was ultimately stopped.)

Further repairs and tests were done by March 2007, after the winter rains, and it then appeared the McDaniels' unit was ready for re-occupancy. As Mr. Daniels noted, the testing did not show leaks, although he believed the testing had not been sufficiently thorough (108: 137; 147 first page). But around this time, Mr. McDaniel determined that he would not move back until he had a certification from a registered engineer that the ceiling had been *permanently* repaired (108: 130), as well as a city inspection (108: 148). Indeed, Mr. McDaniel had been under the impression just after the ceiling portion fell, back in October 2004, that the ultimate problem was structural (108: 4). He decided that absent a guarantee that those deficiencies had been remedied, he would not move back in.⁵ (As it happens, he was wrong here as well: there was no structural issue causing the leaks.) Mr. McDaniel repeated his demand for the engineering certification in April 2007 (108: 143) as the Association was trying to move him back in.⁶

There was no reoccurrence of the leak through May of 2007, and the Association's consultants opined that the leak was fixed. But the Association was unable to secure plaintiffs' agreement to move back in. In May, Mr. McDaniel repeated his

⁴ Another architect, Allen Schafer, noted that after examination, such as by x-rays which had not yet occurred, injection might then be an option ("...when investigations are complete"). 108: 211. In the event, Schafer did not recommend injection. *See infra*, n.9.

⁵ E.g., 108: 130. While this and other correspondence from Mr. McDaniel suggests the existence of an agreement that the Association would obtain a "certification by a Registered Engineer," no such agreement existed. By sometime around October 2007, in an effort to get the McDaniels back into their apartment, the Association had agreed to an inspection and report by a structural engineer, but not to any form of 'certification' or guarantee. (108: 222)

⁶ At this point the Association hoped to complete touch-up painting and promptly move the plaintiffs back into their apartment. (108: 144)

demands for the engineer's certification before any work towards his move in — including the painting of the interior of the apartment—could even commence (108: 82, 149-50, 154),⁷ although at that time there was no evidence of a structural problem nor of a leak, and the Association's consultants (i.e., Nadia Anis) opined that there was no structural problem. As the Association reasonably understood him, based on his voluminous communications, McDaniels was asking for a *permanent guarantee* that no leak would ever occur again (e.g., 108: 148),⁸ something which, as Morton Beebe testified without contradiction, no contractor could possibly provide.

In August 2007, the Association had their counsel send the McDaniels a letter in an effort to get them to move back into their unit, and indeed threatened to stop paying storage fees as part of that effort (108: 184, see *id.* at 203).

In an effort to address Mr. McDaniel's desire for a written report on the structural integrity of the roof, the Association had an architect make an inspection and report in July, probably received by Mr. McDaniel sometime before or in September 2007 (108: 210-12).

The parties finally made some progress on a move back in September 2007 (108: 217) but as of October the leak reappeared. As a result, the McDaniels would not move back in (108: 221). Probably as a result of the leak, the Association agreed to continue to pay storage fees (108: 222), and in a bow to the McDaniels' continued demands for structural analysis of the roof (e.g., 108: 221), the Association in February 2008 retained

⁷ By this time, Mr. McDaniel also insisted on a report from a building inspector. 108: 147. The Association did not agree to this demand, although in an effort to placate McDaniel, efforts were made to have a city inspector come out. The city rebuffed these efforts, noting the request fell outside its jurisdiction.

⁸ As opposed to, for example, a warranty for a term of years where the remedy for breach would be a new repair.

an expert to x-ray the roof (Ex. 70, 71), but the examination showed no structural problems. Ex. 60.⁹

A new roofing contractor was retained by May 2008; work started in August (108: 291) and finished in October 2008. As the contractor (Jeffrey Foreman) testified, the roof problem had been very difficult to diagnose. Plaintiffs could conceivably have then returned to their apartment, but a series of factors combined to further delay that event. First, plaintiffs engaged in discussions concerning their continued demands for a *structural* repair and certification (108: 50: April 2008 demand for engineer report and certification), how their possessions would be returned, and related negotiations. As Ms. McDaniel testified in her deposition, she would not move back without professional assurances that the roof was structurally sound. Secondly, as the Association's Mark Moreno testified, he hoped to determine after the onset of the fall rains that the roof repairs were, in fact, complete this time. During the fall of 2008, interior repairs were accomplished, and the McDaniels moved back in February 2009.

The McDaniels never through this entire period demanded to be moved back in earlier, and never did receive any formal "certification" regarding the structural integrity of the roof.

The delays between the October 2004 report of the fallen portion of the ceiling and the 2009 return to the apartment were serious. With the benefit of 20/20 hindsight, it may be obvious that the Association's roofing contractors should have determined and fixed the cause of the leak earlier. Of course, after the fact many things become obvious

⁹ Two cracks were observed, but these posed no structural issues. Ex. 54, 55, 60. According to the Association's property manager Mark Moreno, the Association's architectural expert said the cracks were likely not the cause of the leak, and that a roof repair was the proper approach to fix the leak. Moreno reasonably followed this advice.

which were not so at the time. At each step in the painful saga, however, the Association acted reasonably. It made rapid inspections, obtained and relied on the advice of its many contractors, architects, and engineers. The Association tried repeatedly to put the McDaniels back in their apartment.

The dithering leading up the 2006 move out was almost exclusively the fault of the plaintiffs making up their minds on a suitable residence and how to coordinate their own interior renovations with the Association's ceiling repairs.

The delays thereafter fall into essentially two categories: (a) repeated, including failed, efforts to repair the roof, and (b) the McDaniels' refusal to move back, or indeed to schedule any event towards a move back (such as interior repairs and painting), without an engineer's certification, buildings inspector reports (e.g., 108: 148, 154), and an eternal guarantee on the roof. I find the McDaniels' insistence on these items unreasonable. The Association acted reasonably and in good faith regarding the repairs, relying as it did on consultants and contractors; the McDaniels are responsible for the latter circumstances.

As further detailed below, it follows that plaintiffs have not met their burden of proof.

Discussion

Generally speaking, the classic business judgment rule applies in suits between homeowners' associations and their members. As long as the Association operates in good faith, errors and other faults normally are not actionable. *See generally, Frances T. v. Village Green Owners Ass'n.*, 42 Cal.3d 490, 514 (1986); *Beehan v. Lido Isle*

Community Ass'n., 70 Cal.App. 3d 858 (1977). Thus, courts normally defer to Associations' decisions on repairs and maintenance. *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n.*, 21 Cal.4th 249, 265 (1999).¹⁰

At argument, the McDaniels suggested that the business judgment rule does not insulate homeowners' associations from nuisance claims. This follows because nuisance is based solely on the condition of the property, independent of the negligence *vel non* of the defendant. By contrast, the McDaniels argue, the business judgment rule at best insulates negligence or other fault of the defendant.

No authority for the proposition is provided, nor have I found any. Indeed, it would be odd if *Lamden* could so simply be evaded.

Plaintiffs' argument supposes a sort of 'no fault' nuisance, reminiscent of the eighteenth century textbook case where liability was predicated solely on the fact of overflowing sewage and the breach of defendant's wall. Wm. Prosser, LAW OF TORTS at 574 (4th ed. 1971), quoting, *Tenant v. Goldwin*, 1705, 1 Salk. 360, 91 Eng.Rep. 314. No mental fault or *mens rea* (negligence, recklessness, willfulness, etc.) was required. These days, nuisance is more generally predicated on negligence and intentional acts. PROSSER at 574 *et seq.* It is true that strict liability may in some cases undergird a nuisance claim, but only when strict liability, on independent grounds, obtains, such as when carrying on

¹⁰ The McDaniels suggest *Lamden* is limited to protection of individual Board members, not the Association. PB at 3, lines 16 *et seq.* Not so. Its version of the business judgment rule protects the Association as well. 21 Cal. 4th at 264-265. To be sure, *Lamden* does not quite call its test the 'business judgment rule,' but it is certainly analogous, *id.* at 266 n.8, and an important case on which *Lamden* relies provides a classic example: "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.*, 8 Cal.4th 361, 374 (1994). See generally, Paula A. Franzese, "Common Interest Communities: Standards Of Review And Review Of Standards," 3 WASH. U. J.L. & POL'Y 663, 678-679 (2000) (*Lamden* very close to business judgment rule). I also note that the defendant Association here is a corporation, First Amended Complaint at ¶ 2, and thus likely enjoys the deference of the usual business judgment rule in any event.

“abnormally dangerous activity”. *Id.* at 575-76. *See e.g., Dufour v. Henry J. Kaiser Co.*, 215 Cal.App.2d 26, 29-30 (1963). As the word “abnormally” signals, a balancing test lurks here. The test, in turn, is likely no more than the classic nuisance balancing of (i) gravity of the harm with (ii) the utility of the defendant’s conduct. As one case arising from the homeowners’ association context notes,

“Nuisance is the interference ‘with the comfortable enjoyment of life or property.’ ... [T]o recover damages for nuisance the plaintiff must prove the defendant’s ‘invasion of the plaintiff’s interest in the use and enjoyment of the land was *substantial*, i.e., that it caused the plaintiff to suffer “substantial actual damage.”’ The interference ‘ “must also be *unreasonable*.” ’ The test for determining whether the plaintiff has suffered an unreasonable interference with the use and enjoyment of his [or her] property ‘is whether the gravity of the harm outweighs the social utility of the defendant’s conduct.’ ”

Haley v. Casa Del Rey Homeowners Ass’n., 153 Cal.App.4th 863, 876-877 (2007), quoting *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal.App.4th 1138, 1154 (2004).

In the end the analysis loops back to the reasonableness and social utility of defendant’s conduct. One may not, under the guise of applying nuisance law, evade consideration of the reasonableness of the Association’s actions. The business judgment rule is shorthand for those sorts of evaluations in this context, for the rule’s deference reflects the default in the balancing alluded to above.

I turn to the application of the rule here.

The Association here acted reasonably, if on occasion ineffectually. The Association at its own expense employed property managers, retained multiple contractors and architects, and ultimately hired an engineer, all in efforts to determine and repair the failure leading to the roof leak. The Association paid for the storage of the McDaniels’ art works and other possession, asbestos remediation, and for the costs of

moving in and out of their apartment. The failures here were of the original roofing contractors who did not determine the cause of the leak; the McDaniels were not able to demonstrate to me that the Association was at fault or acted in bad faith in its reliance on those contractors. It is not good enough for the McDaniels to argue, as they do in their post trial brief, that there was a “six year” delay and that this alone demonstrates the Association breached its fiduciary duty. (PB at 4, lines 15-17) *Post hoc* determinations of error or ineffectual action are not enough for liability under the business judgment rule. *E.g., Hill v. State Farm Mut. Auto. Ins. Co.*, 166 Cal.App.4th 1438, 1492 (2008).

The McDaniels also suggest that a lack of good faith is evidenced by a series of apparently unrelated “misrepresentations.” PB at 4 *et seq.* These are (i) the August 17, 2005 letter from Ms. Lawrence informing the McDaniels the Association would not repair until they move out, (ii) delaying the provision of an architect’s report from July through September of 2007, and (iii) around that time threatening to stop paying storage if the McDaniels continued to refuse to move back into their apartment (a position promptly reversed when the leak reappeared).¹¹ The first and third acts were reasonable, and second, like the first and third, was essentially harmless and led to no damage.

Plaintiffs have failed to establish the Association did not act in good faith.

The claims for nuisance and negligence do not fare better. Despite their occasional protestations to the contrary at trial, the McDaniels knew they had to move out for the asbestos remediation, and as discussed above the delays both prior to the move out

¹¹ I note the irony in plaintiffs’ claim of injury from this pressure to *move back* into their apartment in the context of litigation claiming *delay* in the move back.

and thereafter cannot fairly be laid at the feet of the Association.¹² Furthermore, it does not appear that an ordinary negligence case can be brought against the Association, at least absent the showing needed to overcome the business judgment rule. *E.g., Heiman v. Workers' Comp. Appeals Bd. of State*, 149 Cal.App.4th 724, 739 (2007).

With respect to damages, I note that the Association is not responsible for the costs of temporary relocation. C.C. § 1364 (a) & (c). The Association here never agreed to pay these costs. Nor did the McDaniels suffer any diminution of rent: although they displaced renters from unit 45, they continued to collect the rent because those renters moved to the Cleary Court address, which was not otherwise occupied, and had no other prospect of occupancy.¹³

At argument, counsel for the McDaniels suggested that they had established a second leak and basis for recovery, i.e., a leak from the solarium windows. This, it is suggested, constitutes a loss of enjoyment of the property tantamount to nuisance. Mr. McDaniel's testimony alluded to this as a 'seepage' which formed on occasion, perhaps condensation, dating back to at least 2002. He and his wife use saucers to catch the drips. It was unrelated to the move out or the move back, and I find the inconvenience *de minimis*. Compare *Haley v. Casa Del Rey Homeowners Ass'n.*, 153 Cal.App.4th 863, 876-877 (2007)(nuisance requires *substantial* interference).

The McDaniels also claim \$1,209.34 for late payment fines, as a result of a single episode in February of 2007. Mr. McDaniel was then late in mailing in his monthly

¹² Indeed, had the McDaniels moved back in, for example, May 2007, as the Association then sought, they would have been subject to essentially the same leak they suffered for years leading up to their move out, which did not substantially interfere with their enjoyment of the property.

¹³ The McDaniels made a motion to amend the pleadings to conform to proof. They did so very near the end of the trial, seeking to (i) plead the Association promised to pay for their lost rents, and (ii) recoup \$1201 in fines the Association imposed for a late payment. I took the matter under submission. In the interests of judicial economy, and because the matters were fairly litigated at trial, I grant the motion to amend and determine the merits here.

homeowners' assessments, which were normally mailed to an address in Southern California. In an effort to place the payments in the Association's possession as soon as possible, he left them with an agent of the Association, Nancy Spero, and asked *her* to mail them. Ms. Spero understandably found this unprecedented request peculiar, and declined, returning the checks to Mr McDaniel for him to mail (e.g., 108: 97, 103, 106). The payments were received late and he was fined. This all occurred after Mr McDaniels found himself in some financial difficulties, and after he had requested the Association to credit him over \$9000 against future assessments (which was declined by the Association). Mr McDaniel had also been unequivocally told that payments left at the desk, not mailed to the Southern California address, would not be accepted. As far as this record goes, all the members of the Association had always mailed in their payments thusly. The McDaniels now note that the requirement of a mailed-in payment is not found in the CC&Rs¹⁴ or other written contracts binding the Association and its members. That is so, but I find the practice was in fact adopted and agreed to among the members (including the McDaniels) and the Association through long standing practice. C.C. § 1621.

Conclusion

Judgment should be entered for the defendant Association and against plaintiffs the McDaniels. The Association's motion for judgment or partial relief under CCP §

¹⁴ These are the covenants, codes and restrictions, the "enforceable provisions of an association's governing documents." *Ritter & Ritter, Inc. v. Churchill Condominium Ass'n*, 166 Cal.App.4th 103, 118 n.12 (2008).

631.8(a) and (b) is moot. Defendant is directed immediately to prepare a proposed judgment and provide it to plaintiffs' counsel for approval as to form.

Dated: July 22, 2010



Curtis E.A. Karnow
Judge of the Superior Court

**SUPERIOR COURT OF CALIFORNIA
County of San Francisco**

DENNIS MCDANIEL et al

PLAINTIFF

VS.

TELEGRAPH LANDING NORTH ASSOCIATION et al

DEFENDANT

Case Number: CGC-08-476354

**CERTIFICATE OF MAILING
(CCP 1013a (4))**

I, Dennis D. Vegas, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On 7-23-10 I served the attached Statement Of Decision by placing a copy thereof in a sealed envelope, addressed as follows:

RODNEY A.MARRACCINI
1225 ALPINE ROAD, SUITE 204
WALNUT CREEK, CALIFORNIA 94596

MARK G. INTRIERI
2236 MARINER SQUARE DRIVE THIRD FLOOR ,
SUITE 300
ALAMEDA, CA 94501

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: 7/23/10

By: 

Dennis D. Vegas, Deputy Clerk