Not Reported in Cal.Rptr.3d, 2006 WL 3072159 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2006 WL 3072159 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 4, California.
T.D. SERVICE COMPANY, Plaintiff,
v.
Valerie Hudson GURICH, Defendant and Appellant;
Westwood Royale Hoa, Defendant and Respondent.

No. B180149.
(Los Angeles County Super. Ct. No. BC296952).
Oct. 31, 2006.

APPEAL from orders of the Superior Court of Los Angeles County, Conrad Aragon, Judge. Reversed.
Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Defendant and Appellant.

Wolf, Rifkin, Shapiro & Schulman and Mark J. Rosenbaum for Defendant and Respondent.

EPSTEIN, P.J.

***1** Appellant Valerie Hudson Gurich owned a condominium unit; respondent Westwood Royale Homeowners Association (Association) is a homeowners organization for the development that includes Gurich's unit. Gurich failed to remain current on assessments and fees. The appeal is from an adverse judgment in an interpleader action in which Gurich and the Association each claimed a right to the surplus from a foreclosure sale instituted by Gurich's lender. She argues there is a triable issue of material fact precluding summary judgment as to whether she received the notice required by Civil Code section 1367, [FN1] a part of the Davis-Stirling Common Interest Development Act (§ 1350 et. seq., the Act). (Stats.1985, ch. 874, § 14, p. 2774.) Gurich also challenges the calculation of the late charges and the award of fees. We find a triable issue of material fact as to the validity of the Association's lien because it did not demonstrate compliance with section 1367, requiring reversal of the award of summary judgment and related attorney fees. In light of that conclusion, we need not and do not reach Gurich's other arguments on appeal.

FN1. All statutory references are to the Civil Code unless otherwise indicated.

FACTUAL AND PROCEDURAL SUMMARY

In 1985, Gurich and her then husband purchased a condominium in Los Angeles. The unit was subject to the authority of the Association. When the couple divorced in 1993, Gurich became full owner of the unit.[FN2] She failed to pay her monthly assessments between December 2000 and August 2001. In June 2001, the Association retained Accelerated Foreclosure Service (Accelerated) to commence foreclosure proceedings to recover the unpaid charges.

FN2. In her declaration, Gurich refers to herself by her maiden name, "Hudson," but provides no evidence that she legally resumed that name when her dissolution was finalized in 1993. Since the interpleader complaint refers to her as "Gurich" we follow that practice here.

In September 2001, Accelerated recorded a notice of default and election to sell. Gurich had filed a Chapter 13 bankruptcy petition the month before. That proceeding was dismissed in early 2002. Shortly thereafter, Gurich filed a second Chapter 13 bankruptcy petition. It was dismissed in March 2003. T.D. Service Company substituted in as trustee on a 1998 deed of trust on the unit, in the amount of $93,000. It foreclosed on the condominium. The property was sold at a trustee's sale pursuant to section 2924 in April 2003, resulting in a surplus of $291,203.81.

T.D. Service Company initiated this interpleader action in June 2003 to resolve the claims of Gurich and the Association to the surplus.[FN3] The Association sought summary judgment, claiming a right under the Act, and under its recorded declaration of covenants, conditions and restrictions (CC & Rs), to foreclose on its lien for unpaid assessments, late charges, interest, fees, and attorney fees and costs. The Association's papers showed this as amounting to $41,818.29. The Association asserted that the provisions of its CC & Rs regarding notice of delinquent assessments had been

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drawn in conformity with the Act, specifically sections 1366 and 1367. The separate statement of undisputed facts was silent as to the Association's compliance with section 1367 of the Act. The Association argued in its supporting points and authorities that it had complied with the requisites of the Act and the CC & Rs in creating the assessment lien on Gurich's unit. It quoted only a portion of the first sentence of section 1367, subdivision (a), omitting the notice requirements we have noted above. The Association asserted that it had complied with all legislative requirements and the requirements of its CC & Rs in establishing a valid lien against Gurich's unit.

> FN3. Apparently T.D. Service Company was discharged of liability and dismissed from the case.

***2** Gurich opposed summary judgment on several grounds, including a claim that the Association had failed to comply with the notice requirements of section 1367. According to her declaration, Gurich first learned that Accelerated had recorded a notice of lien against her for $2,950 when she received a preliminary title report in September 2001. She also argued that Accelerated failed to comply with the notice requirements of section 1367 when it recorded a notice of sale of the property in September 2001 and recorded a notice of default for $9,000 in March 2002. She denied ever receiving an itemized statement of the amounts due in connection with the notice of default.

In her separate statement, Gurich disputed several of the Association's claimed undisputed facts on the ground that, notwithstanding the language of the CC & Rs, the Act governs delinquent assessments. She contested the validity of the lien recorded by the Association for noncompliance with section 1367. She also disputed the amount claimed by the Association. She declared: "From the moment I became delinquent to the current date [the Association] has failed to provide me with the fee and penalty procedures of the association, a correct itemized statement of the charges owed, including items on the statement that include; the principal owed, any late charges, and the method of calculation, any attorneys fees, and the collection practices used by [the Association]."

In response, the Association filed supplemental declarations by Alex Almeida and Richard M. Marcus. Almeida was president of the Association, and maintained the books and records which reflected all assessments, late charges, interest, costs, fines, and attorney fees charged against the homeowners. He stated that he had sent a certified letter to Gurich on April 20, 2001, enclosing a copy of the Association's account history and its collection policy. A copy of the letter was attached. Also attached was an account history current to April 2003, a date well beyond the date of the certified letter. According to Almeida, a copy of the Association's collection policy is distributed to owners as part of their annual packet in November of each year. Gurich's signed return receipt for the letter also was attached.

Almeida's April 20, 2001 letter to Gurich states in its entirety: "Dear Valerie: [¶] After numerous conversations with you, about your monthly association fees that have been past due since, January 10, 2001 and being unable to formalized an acceptable solution. The Westwood Royale Homeowners Association must place you on notice of our intentions. [¶] On May 11, 2001 The Westwood Royale Association will place a **LIEN** on your interest in condominium, described as unit 302.[¶] This action can be avoided by bringing your monthly dues to current status." The letter notes that there is a single "Enclosure." There is no reference in the letter to an enclosure of the collection policy of the Association.

***3** Richard Marcus is the president of Accelerated. It is his responsibility to maintain records of charges, costs and attorney fees charged against Association members. His firm was retained in March 2001 by the Association to commence foreclosure proceedings against Gurich. He prepared the notice of lien on Gurich's condominium which was recorded on June 19, 2001. A copy of the lien was attached as an exhibit.

Marcus was vague about the notice to Gurich. He declared: "4. Since January, 2000, I have caused to be recorded hundreds of notices of lien[s] and in each case, I have sent a demand letter to the owner by certified mail with a copy of the Association's collection policy and an itemization of the delinquent balance. In those cases where I did not send the initial letter I have requested proof that the association sent the letter. [¶] 5. Unfortunately, the computer on which I had stored my letters for [Gurich's] case has crashed and I do not have hard copies of the letters previously sent. However, based upon my pattern and practice, either I sent

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a letter to [Gurich] by certified mail. Said letter would have included a copy of the Association's collection policy and an itemization of the delinquent amounts or I would have required evidence from the Association that said demand letter was sent prior to recording the Notice of Lien. Said letter would have been addressed to [Gurich] at the property address since this is the address listed in the Notice of Lien."

The trial court noted that the Association failed to establish compliance with the Act in its summary judgment motion, a point Gurich had raised in her opposition. While the trial court initially questioned the adequacy of Almeida's supplemental declaration to establish compliance, it ultimately concluded that compliance was established. The court granted the motion for summary judgment because "the additional reply materials, including the Marcus declaration and supporting exhibits demonstrate no irregularity in the recordation of the notice of lien and subsequent notice of default, and because the court otherwise finds no dispute as to facts set forth in [the Association's statement of undisputed facts]...." It awarded the Association $41,818.29 and fees and costs of $15,451.25. The record does not contain a judgment. Gurich filed a timely appeal from these orders.

DISCUSSION

I

" ' " 'A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action].... In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court.... We must determine whether the facts as shown by the parties give rise to a triable issue of material fact.... [T]he moving party's affidavits are strictly construed while those of the opposing party are liberally construed.' ... We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence." ' (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 901 [32 Cal.Rptr.3d 373].)" (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130.)

***4** The primary issue in this case is whether the Association established compliance with section 1367, subdivision (a), a requisite to validity of its lien.

In 1985, the Legislature enacted the Act, which by its terms applies to all common interest developments, including those that were created before the Act was adopted. (Stats.1985, ch. 874, § 14, p. 2774; § 1352; *Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1480-1481.) Section 1367, subdivision (a) is the applicable provision governing notice to be given by a homeowners association when a homeowner becomes delinquent on assessments and monthly fees. Before an association may place a lien to collect delinquent assessments, section 1367, subdivision (a) requires that it notify the owner in writing by certified mail of (1) the fee and penalty procedures of the association, (2) an itemized statement of the charges owed by the owner, including items on the statement which indicate the assessments owed, (3) any late charges and the method of calculation, (4) any attorney's fees, and (5) the collection practices used by the association, including the right of the association to the reasonable costs of collection.[FN4]

> FN4. In 2002, after the notice of lien was filed in this case, the Act was significantly amended and sections 1365.1 and 1367.1 were enacted. These provisions further specify the mandatory content for notices of assessment, foreclosure, and lien. These provisions were effective January 1, 2003, and are not applicable here. (Stats.2002, ch. 1111, §§ 4, 8.)

Gurich declared that the Association failed to provide her with any of the items required by section 1367, subdivision (a). The Association attempted to establish compliance through the supplemental declarations filed by Marcus and Almeida. The Marcus declaration is too vague to serve its purpose. It stated Marcus's general practice with respect to notices of liens, but Marcus was unable to provide any evidence as to what he actually did in this case. The Association does not argue that we may infer that Marcus satisfied the statutory requirements because of his statement concerning his pattern and practice. Even if it had done so, the Marcus declaration failed to address compliance with three specific requirements of section 1367, subdivision (a).

The letter sent by Almeida on April 20, 2001 and its attachment also fail to satisfy the notice requirements of section 1367, subdivision (a). As we have

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discussed, that statute requires a homeowners association to give the homeowner written notice of specified items before a lien can be placed for delinquent assessments. The first requirement is that the fee and penalty procedures of the association be provided. The letter is silent on this, as is Almeida's accompanying declaration.

The second item required by section 1367, subdivision (a) is an "itemized statement of the charges owed by the owner, including items on the statement which indicate the principal owed." [FN5] Almeida enclosed a copy of "the Association's account history" with the April 20, 2001 letter. This document is titled "Ledger" and has columns for "monthly payment," "Late fee," and "Total." There are other notations on the document in unlabeled columns which are not explained by Almeida's declaration. We need not determine whether this somewhat vague document satisfies the statutory requirement because of the other deficiencies in the Association's evidence of compliance.

> FN5. At the relevant time, section 1367, subdivision (a) referred to "principal owed." The 2002 amendment changed that to "assessment owed." (Stats.2002, ch. 1111.)

***5** The third item required by section 1367, subdivision (a) is "any late charges and the method of calculation." While the ledger shows entries of late fees, it does not explain how they were calculated. Almeida does not cure this deficiency in his declaration. The fourth item required is notice of attorney's fees. (§ 1367, subd. (a).) There is no evidence of compliance with this requirement.

Finally, Almeida's declaration states that he enclosed a copy of the Association's collection policy with the April 20, 2001 letter. Applying the principle that we must construe the moving party's declarations strictly (*Gottlieb v. Kest, supra*, 141 Cal.App.4th at p. 130), we note that the letter itself states there was an "Enclosure" in the singular. The nature of the enclosure is not identified, and there is no reference to the collection policy in the body of the letter. Gurich declared that she did not receive a copy of those procedures.

On appeal, the Association attempts to excuse these evidentiary deficiencies. Although Gurich argued in her opening brief that the original notice of lien was invalid for failure to comply with section 1367, the Association characterizes her argument as relating to the recording of the notice of delinquent assessment on June 19, 2001. After quoting a truncated version of section 1367, subdivision (a) (omitting the last 3 requirements) the Association argues "The CC & Rs in Article VII, Section 2 (page 31) do *not* require the fee and penalty procedures be sent to the owner." The Association cites no authority for the novel proposition that its CC & Rs supersede the statutory requirements of the Act, and we reject its argument. The Act is binding on the Association. (§ 1352; see *Bear Creek Master Assn. v. Edwards, supra*, 130 Cal.App.4th at pp. 1480-1481.) The notice requirements of section 1367, subdivision (a) are mandatory. This disposes of the Association's argument that Gurich fails to cite authority for her position that the omission of the fee and penalty procedure renders the lien invalid. Section 1367, subdivision (a) states clearly: "Before an association may place a lien upon the separate interest of an owner to collect a debt which is past due under this subdivision, the association *shall* notify the owner in writing by certified mail" of the items specified in the subdivision which we have discussed. (Italics added.)

The Association argues that it is irrelevant that Gurich claims not to have received the notice required by section 1367 because the mailing of the notice satisfies the Act's requirements. This is beside the point. There is a triable issue of material fact as to the validity of the Association's lien because it cannot establish compliance with section 1367, subdivision (a).

Alternatively, the Association argues the lien was valid and was listed as a debt in Gurich's two bankruptcy petitions in which the Association was listed as a creditor. It cites *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, a case applying the doctrine of judicial estoppel. " ' "Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from 'asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding....' " It is an " 'extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.' " ' (*Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 490-491 [28 Cal.Rptr.3d 566].)" (

Gottleib v. Kest, *supra*, 141 Cal.App.4th 110, 130-131.) The *Gottlieb* court identified the test for application of the doctrine: "In California, courts consider five factors in determining whether to apply judicial estoppel: 'The doctrine [most appropriately] applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." ' [Citations.]" (*Id.* at p. 131.)

***6** In *Gottlieb*, the defendant obtained summary judgment because the plaintiff had failed to list the legal claim at the heart of that action as an asset in a prior Chapter 11 bankruptcy case. The prior bankruptcy petition had been dismissed when no reorganization plan was timely submitted. (*Gottlieb v. Kest*, *supra*, 141 Cal.App .4th at p. 126.) The Court of Appeal refused to apply the doctrine of judicial estoppel because the third element could not be satisfied. "In sum, judicial estoppel is an extraordinary remedy that should rarely apply to positions taken in Chapter 11 cases absent evidence that the bankruptcy court adopted or accepted the truth of the debtor's position. The doctrine is most appropriate ' "[w]here a party assumes a [prior] position in a legal proceeding, and *succeeds* in maintaining that position." ' (*New Hampshire [v. Maine* (2001)] 532 U.S. [742,] 749, italics added.)" (*Id.* at p. 145.)

The same analysis applies here. Gurich's bankruptcy petitions were dismissed by the bankruptcy court. She therefore cannot establish the court's adoption or acceptance of her position, which is the third requisite for judicial estoppel. (*Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at p. 131.) Gurich's identification of the lien as a debt and identification of the Association as a creditor do not constitute her admission as to the validity of that lien precluding her from challenging it in this appeal. The Association cites the trial court's reliance on the bankruptcy filings as evidence of the validity of the lien. The trial court's ruling is not binding on us. "On appeal, 'our review is de novo, and we independently review the record before the trial court.' [Citation.] 'The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale.' " (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316, quoting *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878 [116 Cal.Rptr.2d 158].)"

In sum, there remain triable issues of material fact as to the validity of the Association's lien against Gurich which preclude summary judgment. It follows that the award of attorney fees to the Association also must be reversed. In light of this conclusion, we need not and do not reach the other arguments raised as to the amount awarded by the trial court or the attorney fees awarded.

DISPOSITION

The orders granting summary judgment and awarding attorney fees are reversed. Gurich is to have her costs on appeal.

We concur: WILLHITE and MANELLA, JJ.

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