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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NATORE A. NAHRSTEDT, Plaintiff/Appellate, vs. LAKESIDE VILLAGE CONDOMINIUM ASSOC., INC., LAKESIDE VILLAGE HOMEOWNERS ASSOCIATION, BRADLEY L. BROWN, CHARLES YOUNGLOVE, GLORIA SHWARTS, ROBERT YOUNGLOVE, GLORIA SHWARTS, ROBERT LEBER, ED HARPER, DEBBIE GRAVES, MOSS BENMOSCHE, BARBARA HORN AND JERRI SPEED, Defendants/Respondents.	APPELLATE NO.: B053259 SUPERIOR COURT CASE NO. WEC 144478

APPELLANT'S OPENING BRIEF

Appeal From the Superior Court
Los Angeles County

HONORABLE LAWRENCE WADDINGTON, JUDGE

Counsel for Appellant:

JOEL F. TAMRAZ
LAW OFFICES OF JOEL F. TAMRAZ
429 Santa Monica, California 90401
213/475-4579

Counsel for Respondents:

WILNER, KLEIN, SIEGEL & KEHR
9601 Wilshire Boulevard, Suite 700
Beverly Hills, California 90210
213/272-8631

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STATEMENT OF THE CASE

A. Nature of the Action

This is an action filed by the owner of a condominium unit against the condominium association and its officers for invasion of privacy, declaratory relief, intentional infliction of emotional distress, negligent infliction of emotional distress, to invalidate penal assessments levied in excess of authority and damages, and for injunctive relief.

The Complaint was filed on February 20, 1990, (C.T. 1) and Demurrer thereto was filed by the defendant on April 27, 1990, (C.T. 160).

The Demurrer which was heard by the court was the first, and only Demurrer filed by the defendants and was heard by the Honorable Lawrence Waddington, on or about June 21, 1990.

Judge Waddington on August 9, 1990, issued his "Order of Dismissal of Complaint" (C.T. 264) and a "Judgment of Dismissal of Plaintiff's Complaint" dated August 9, 1990, (C.T. 269). The Demurrers of defendants, and each of them, were sustained without leave to amend although such leave was requested and no amendments were allowed to the initial Complaint by Judge Waddington.

This appeal followed with a Notice of Appeal being filed by plaintiff on September 18, 1990, (C.T. 276).

B. Statement of Facts.

Appellant, NATORE NAHRSTEDT, is the owner of a condominium specifically 7101 Summertime Lane, Culver City, California (C.T.

1 and 2). Ms. Nahrstedt obtained that property by Grant Deed on October 20, 1987, and recorded January 4, 1988.

At the time Ms. Nahrstedt purchased said condominium she was not provided with a copy of the Declaration of the Establishment of Convenants, Restrictions and Conditions (C.T. 5 and 6).

Upon obtaining title to the property Ms. Nahrstedt moved into her home with her three cats, all of which cats have remained, at all times, within the confines of Ms. Nahrstedt condominium unit to which she is entitled fee simple ownership. The cats have never been released in any common area including halls, gardens, walkways, or the like, and are her loving pets to which she is dedicated. Said cats are noiseless, create no nuisance, have not destroyed any portion of Ms. Nahrstedt condominium unit, nor any portion of the "common area" of the condominium complex and are Ms. Narhstedt's sole companions within her home (C.T. 6).

Beginning around July of 1988 the Board of Directors of the condominium association peered into and entered Ms. Nahrstedt's condominium unit, without any compelling interest to do so, and in violation of her rights of privacy, and discovered that Ms. Nahrstedt possesed her three cats (C.T. 6, lines 12 - 20).

Article 7 of the covenants, conditions and restrictions (hereinafter "CCR") entitled "Use Restrictions" specifically 11 thereof provides as follows:

> Pets. No animals (which shall mean dogs

and cats) livestock, reptiles, or poultry shall be kept in any unit except the usual and ordinary domestic fish and birds (and inside bird cages) may be kept as household pets within any unit; provided, (a) they are not kept, bred, or raised for commercial purposes or in any unreasonable numbers; and (b) prior written approval of the board is first obtained. As used herein "unreasonable numbers" shall be determined by the board, but in no event shall such terms be construed so as to permit the maintenance of any owner of more than two pets per unit. The association shall have the right to prohibit maintenance of any pet which constitutes, in the opinion of the board, a nuisance to any other owner. Notwithstanding the foregoing, nothing herein shall be construed in such a manner as to permit the maintenance of any animal contrary to any ordinance of the City of Culver City. (C.T. 5, lines 1 - 27.)

Commencing in July of 1988, without any provision in the CCR'S allowing such action, the Board of Directors of the defendant LAKESIDE VILLAGE began assessing penalties against Ms.

Nahrstedt, in violation of the CCR'S, beginning with the sum of Twenty-Five Dollars ($25.00) per month, increasing to One Hundred Dollars ($100.00) per month, Three Hundred Dollars ($300.00) per month, Four Hundred Dollars ($400.00) per month, and Five Hundred Dollars ($500.00) per month to penalize her for maintaining her cats.

These actions by LAKESIDE VILLAGE and the individual defendants brought about the filing of this litigation the Complaint for which seeks redress as follows:

1. For invasion of Ms. Nahrstedt's privacy in violation of California Constitutional Article I, Section 1;

2. For declaratory relief as to whether LAKESIDE VILLAGE has a right to assess the severe penalties that it has in connection with the maintenance of her pets and whether or not the quoted section of the CCR'S is overly broad as it applies to Ms. Nahrstedt in violation of the California Constitutional Article I, Section 1, insuring a legal and enforceable right of privacy and further whether the above quoted provision is "unreasonable" as the same is defined by Section 1354 of the Civil Code and an invasion of of Ms. Nahrstedt's exclusive separate interest as defined by Civil Code Section 1351(f);

3. For intentional inflication of emotional distress upon Ms. Nahrstedt by the actions of LAKESIDE CONDOMINIUM ASSOCIATION;

4. For negligent infliction of emotional distress upon Ms. Nahrstedt by the LAKESIDE VILLAGE CONDOMINIUM ASSOCIATION.

ASSOCIATION.

5. To invalidate the penal assessments which have been assessed against Ms. Nahrstedt in violation of Article 6, Section 1 of the CCR'S in which LAKESIDE VILLAGE is deemed to have the right to collect regular monthly assessments or charges, special assessments for capital improvements, and emergency assessments, no other assessments are authorized. Further that Article 6, Section 13 of the CCR'S provides that the purpose of assessments levied by the assocation is exclusively for the purpose of promoting the recreation, health, safety and welfare of its members, guests, and invitees and to be used for the purpose of improving, protecting, operating, and maintaining the <u>common area</u> and facilities. The punitive "pet assessments" of Five hundred Dollars ($500.00) each month are not provided in the CCR'S but are merely an imposition of punitive assessments to reduce the regular maintenance assessments and capital expenditures assessments for non pet owners and to offset expenses by gathering a pool of money for the benefit of the non pet owning defendants.

6. For injunctive relief, in that, LAKESIDE VILLAGE threatens to impose a lien upon Ms. Nahrstedt's condominium unit for failure to pay the punitive and non authorized pet assessments which could cause her to lose her property. The pet assessments total the sum of Six Thousand Dollars ($6,000.00) per year and Ms. Nahrstedt has no remedy at law or in damages in that she is in jeopardy of losing her home and property by reason of said unauthorized and illegal assessments.

C. The Trial Court's Judgment.

The trial court, the Honorable Lawrence Waddington, Judge presiding, heard the defendants Demurrers as to the Complaint (without any amendment thereto) and granted the Demurrers as to all causes of action without leave to amend. Judge Waddington entered his Judgment of Dismissal of Ms. Nahrstedt's Complaint on August 9, 1990, notice of which was given to Ms. Nahrstedt on September 10, 1990, (C.T. 269; C.T. 273) and this appeal followed Notice of Appeal having been filed on September 18, 1990.

D. Statement of Appealability.

The Judgment of Dismissal of Plaintiff's Complaint constitutes a final disposition of this action as to said Complaint and is appealable to this court. The trial court, essentially, eliminated Ms. Nahrstedt's Complaint and would not allow any further attempt to plead the Complaint and erroneously, and prejudcially, dismissed the same.

LEGAL DISCUSSION

I. THE TRIAL COURT DID NOT APPLY THE RULES APPLICABLE TO DEMURRERS, BUT ERRONEOUSLY REVERSED THE LEGAL POSITION OF PLAINTIFF AND DEFENDANTS

The California courts have universally held that even though a complaint is in some respects uncertain, a general demurrer will be overruled if the complaint contains allegations of every fact essential to a statement of a cause of action, regardless of mistake in theory or imperfections of form which make it subject to special demurrer. There were no special

make it subject to special demurrer. There were no special demurrers in the within action, all of the demurrers being general.

The court of appeal is not limited to Ms. Nahrstedt's theory of recovery in testing the sufficiency of the complaint against the demurrer, but must determine if the factual allegations of the complaint are adequate to state of cause of action under any legal theory. **Barquis v. Merchants Collection Asso. of Oakland** (1972) 7 Cal.3d 94, 101 Cal.Rptr. 745.

The reviewing court, on appeal from a judgment sustaining a demurrer to a complaint, is confined to the allegations of the complaint, and whether plaintiff will be able to prove the allegations made is entirely immaterial on appeal, since against a demurrer allegations of the complaint must be taken as true. **Shaeffer v. State** (1970) 3 Cal.App.3d 348, 83 Cal.Rptr. 347.

Further, on appeal from a judgment for the defendant after sustaining a demurrer without leave to amend, the particularity of the evidence required to sustain plaintiff's cause of action at trial is immaterial, but the sufficiency of the complaint is the only question before the court. **Guilliams v. Hollywood Hospital** (1941) 18 Cal.2d 97, 114 Pac.2d 1.

The question on appeal from an order sustaining a demurrer to a complaint without leave to amend is whether the plaintiff stated, or can state, a cause of action against the defendants under any view of the facts disclosed. **Simpson v. Gillis** (1934) 1 Cal.2d 42, 32 Pac.2d 1071.

It is critical for this court to remember that a general

demurrer admits the truth of all material factual allegations of the complaint; the question of plaintiff's ability to prove such allegations, or possible difficulty in making such proof does not concern the reviewing court, and the plaintiff need only plead facts showing that he may be entitled to some relief. Alcorn v. Anbro Engineering, Inc., (1970) 2 Cal.3d 493, 86 Cal.Rptr. 88.

On appeal the reviewing court is required to assume that the allegations of a petition or complaint are true. Bernstein v. Sumeutz (1948) 83 Cal.App.2d 108, 188 Pac.2d 48.

With regard to the standards to be applied by this court, all properly pleaded allegations of the complaint must be accepted as true on appeal from a judgment sustaining a demurrer to a complaint without leave to amend. American Philatelic Society v. Claibourne (1935) 3 Cal.2d 689, 46 Pac.2d 135.

In the case now before this reviewing court the trial court, rather than accepting the matters set forth in the Complaint as true, accepted the matters set forth in the demurrer as true and reversed the presumption in favor of Ms. Nahrstedt's Complaint. This is equally true to all six causes of action. It is, frankly, difficult to believe that a complaint could be deficient in all six causes of action upon general demurrers.

In any event, the trial court erred in applying the wrong standards for ruling on the demurrers, and prejudicially to plaintiff, and committed reversible error in that connection.

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II. EVEN ASSUMING, ARGUENDO, THAT CERTAIN DEMURRERS SHOULD HAVE BEEN SUSTAINED BY THE TRIAL COURT, THE TRIAL COURT COMMITED PREJUDICAL AND REVERSIBLE ERROR IN FAILING TO ALLOW PLAINTIFF LEAVE TO AMEND THE COMPLAINT ON THE FIRST HEARING OF DEFENDANTS DEMURRERS, AND THREW PLAINTIFF OUT OF COURT WITHOUT AN OPPORTUNITY TO AMEND HER PLEADINGS.

The Complaint which was demurrered to by the defendants was the first Complaint filed and was not amended in any manner since court refused to allow leave to amend.

Normally, trial courts grant the right to amend the pleading, except in exceptional circumstances, as a matter of course and it is not uncommon to find a fourth or fifth amended complaint as the basis for litigation. In this case the trial courts position was "one try and your are out." This was not appropriate.

The right to amend a complaint after a demurrer is sustained should not be lightly denied. Addiego v. Hill (1965) 48 Cal.Rptr. 240, 238 ACA 967.

If defects can be remedied by amendment it is an abuse of discretion to sustain demurrers without leave to amend. Division of Labor Law Enforcement v. Barnes (1962) 205 Cal.App.2d 337, 23 Cal.Rptr. 55.

The courts are loath to sustain demurrers to pleadings without leave to amend; if by any reasonable possibility allegations of the complaint may be remedied to state a cause of action, the courts will normally permit amendments. Carlise v. Fawcett Publications, Inc. (1962) 201 Cal.App.2d 733, 20 Cal.Rptr. 405.

A demurrer should not be sustained without leave to amend

A demurrer should not be sustained without leave to amend unless it appears that the Complaint cannot be amended to state <u>any</u> cause of action. <u>Ransom v. Los Angeles City High School District</u> (1955) 129 Cal.App.2d 500, 277 Pac.2d 455.

A trial judge commits an abuse of discretion sustaining a demurrer without leave to amend unless it is clear that no amendment could possibly state a cause of action. <u>Moore v. Morhar</u> (1976) 65 Cal.App.3d 896, 135 Cal.Rptr. 626. A demurrer should not be sustained without leave to amend where a defect may possibly be cured by supplying omitted and essential allegations and the plaintiff has not had a fair opportunity to do so. <u>McGee v. McNally</u> (1981) 119 Cal.App.3d 891, 174 Cal.Rptr. 253.

The courts have held that 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. <u>Haskins v. San Diego County Dept. of Public Welfare</u> (1980) 161 Cal.Rptr. 385, 100 Cal.App.3d 961.

On appeal from a judgment of dismissal after a demurrer to complaint was granted without leave to amend the appellant has the burden of showing either that the demurrer was sustained erroneously, or, the sustaining of the demurrer without leave to amend constituted an abuse of discretion. <u>Stanson v. Brown</u> (1975) 49 Cal.App.3d 812, 122 Cal.Rptr. 862.

In the case now before this court, for the purposes of demurrer, all the facts pleaded in the complaint and those which reasonably arise by implication from such facts must be deemed to be true. <u>Douglas v. E&J Gallo Winery</u> (1977) 69 Cal.App.3d 103,

137 Cal.Rptr. 797. As a reviewing court, the court of appeal is not bound by the construction placed upon the pleadings by the trial court, but must make its own independent judgment thereon even as to matters not expressly ruled upon by the trial court. Miller v. Bakersfield News Bulletin, Inc. (1975) 44 Cal.App.3d 899, 119 Cal.Rptr. 92.

In the case now before this court the court sustained demurrers to six causes of action of the Complaint and, rather than following the rules set down by law, that all well pleaded facts which reasonably arise by implication must be deemed to be true, erroneously, did not allow plaintiff to even file a first amended pleading. Certainly all six causes of action could not have been that defective, and, some causes of action could have been stated if allowed to be repleaded by the court, and the failure of the court to allow Ms. Nahrstedt to replead her action was, and is, reversible error, and must be corrected by this court.

III. THE FIRST CAUSE OF ACTION OF THE COMPLAINT SETS FORTH A CAUSE OF ACTION FOR INVASION OF PRIVACY, AND THE DEMURRER THERETO WAS ERRONEOUSLY SUSTAINED WITHOUT LEAVE TO AMEND

The first cause of action of the Complaint (C.T. 1 - 7) is for invasion of privacy. The demurrer to the Complaint attempts to recharacterize the first cause of action by stating that that Ms. Nahrstedt filed the Complaint "alleging that the pet restriction and its enforcement of it by the association and its directors somehow violate an inalienable constitutional right to maintain cats within her condominium" (C.T. 170, lines 16 - 19).

The trial court ignored the thrust of the first cause of action, completely, and sustained the demurrer.

The California State Constitution provides that all persons have a right to pursue and obtain privacy (California Constitution, Article I, Section 1.) This provision is intended to be self-executing and creates a legal and enforceable right of privacy for every Californian.

The constitutional right of privacy guaranteed by the California State Constitution is much broader than the privacy rights guaranteed by the Federal Constitution. **Planned Parenthood Affilate v. Van DeCamp** (1986) 181 Cal.App.3d 245, 226 Cal.Rptr. 361; **Wilson v. California Health Facility Commission** 1980) 110 Cal.App.d3d 317, 167 Cal.Rptr. 801.

The right of privacy exists on two levels. On the one hand it is the right of a person to be left alone at his or her private life and to be free from unwarranted and undesireable publicity exposing his or her private life. As such it is the basis of action in tort for invasion of privacy. **Cohen v. Superior Court** (1970) 5 Cal.App.3d 429, 85 Cal.Rptr. 354.

On the other hand it also the right of a person to live his or her private life without intrusion by government. A person's constitutionally protected right of personal privacy abides with him while he his a householder "within his own castle." **Britt v. Superior Court** 58 Cal.2d 469, 374 Pac.2d 817.

The thrust of the first cause of action is that Ms. Nahrstedt is entitled to a right of privacy within her own condominium unit and the only way that the condominium

association could determine that Ms. Nahrstedt actually had cats in her unit was to peer into her unit or enter the same which violated her rights. In that connection see Parris v. Civil Service Commissioner of the County of Alameda 66 Cal.2d 260, 57 Cal.Rptr. 623, in which the California Supreme Court held that the holding of unannounced dawn searches of homes of county welfare recipients for purposes of discovering "unauthorized males" within those homes was unconstitutional and clearly violated the rights of privacy and repose involved.

In the case now before this court Ms. Nahrstedt owned her condominium unit in fee simple. The responsibility for taking care of the interior of said unit resides with Ms. Nahrstedt and peering into her unit to ascertain whether or not she has pets, be it more than two fish, or more than two birds, or other types of pets, as long as the same are not constituting a nuisance, is an invasion of her privacy which is protected under the laws of the State of California.

The critical case in this area as it applies to Ms. Nahrstedt is Park Redlands Covanent Control Committee v. Simon (1986) 181 Cal.App.3d 87, 226 Cal.Rptr. 199. In that case the homeowners association brought an action against the owners of a home within a development alleging that the owners of that home violated two restrictive covenants:

> (a) This project is designed and intended for the use of residence and persons who have attained the age of 45;
>
> (b) The number of residences and

units shall be no more than three.

The defendants in the Park Redlands action allowed their 31 year old daughter and a small child and their 26 year old son to live with them periodically. The court of appeal held that the age restriction was invalid under the Unruh Act and the number restriction violated the California Constitutional right to privacy. The court stated:

> Plaintiffs first point here is that the Unruh Act only operates to outlaw discrimination by business enterprises, and because Park Redlands Homeowners Assocation is not such an enterprise, no limitation is created by the act. Not so. The California Supreme Court in O'Conner v. Village Green Owners Assocation (1983) 33 Cal.3d 790, 191 Cal.Rptr. 320, 662 Pac.2d 427, squarely held that a condominium homeowners association is a business within the pervue of the act stating "a theme running throughout the discription of the assocations powers and duties is that its overall function is to protect and enhance the projects economic value. Consistent with the legislature's intent to use the term "business establishments" in the broadest sense reasonably

> possible. (Citation.) We conclude that the Village Green Owners Association is a business establishment within the meaning of the act.

In <u>Park Redlands Covenant Control v. Simon</u> the court asked the question "is this covenant violative of Simons right of privacy."

The court answered the question in the affirmative stating the restriction operates to abridge the constitutionally guaranteed rights of privacy in a completely capricious fashion. The court held in said case, even assuming arguendo, that the interest advanced was compelling, and that the limitation was unenforceable against the defendants because it was not the least restrictive means of achieving the stated goal, that being the restriction of population density within <u>Park Redlands</u>.

The court further held that the right of privacy could be violated by a private restrictive covenant. The court held that there was an abundance of state action with regard to the private restrictive covenant in that a court's enforcement of a convenant and the prevention of the present use was unconstitutional because it lends affirmative aid of the courts, through an eviction order, to the furthering of an unconstitutional invasion of privacy.

In <u>City of Santa Barbara v. Adamson</u> (1980) 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 Pac.2d 436, the City of Santa Barbara enacted an ordinance which limited the use of homes in one family, two family and multi-family residences to families

defined as (1) "an indivdual or two or more persons related by blood, marriage, or legal adoption, living together as a single house keeping unit," and (2) "a group not to exceed five persons, excluding servants, living together as single house keeping unit."

In Santa Barbara v. Adamson, supra, the California Supreme Court formulated the question before it as follows:

> Do the ordinances restrictions, with those three exceptions, respect the commands of the California Constitution concerning peoples right to enjoy life and liberty, to possess property, and to pursue and obtain happiness and privacy?

The California Supreme Court then defined the right of privacy in the Santa Barbara v. Adamson case as follows:

> The court in White v. Davis (13 Cal.3d 757, 120 Cal.Rptr. 94, 533 Pac.2d) quoted these words from "a statement drafted by the proponents of the provision [that added "privacy" to the California Constitution] and included in the state's election brochure "the right of privacy is the right to be left alone." It is a fundemental and compelling interest, it protects our homes, our families, our thoughts, our

> emotions, our expressions, our personalities, our freedom of communion, our freedom to associate with the people we chose . . . the right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Nineth Amendments of the United States Constitution. This right should be abridged only when there is a compelling public need . . .

In the case now before this court, the covenants, conditions and restrictions recorded April 17, 1988, by LAKESIDE VILLAGE contained use restrictions in Article VII, Section 11, which is the restriction which is attacked herein. This ridiculous provision even provides that the keeping of more than two fish is an unreasonable number of pets to be maintained in a unit.

Ms. Nahrstedt, a homeowner, purchased her unit in January, 1988, and prior to her escrow closing did not receive a copy of the CCR'S nor was she aware of the fact that the CCR'S prohibited pets. Upon moving into her unit Ms. Nahrstedt moved in with her three cats, none of whom have ever left the confines of the unit with the exception of seeking treatment for illness if they have it. It is obvious that the purpose and interest of the homeowners of LAKESIDE VILLAGE is to prevent nusiances, that is, stray animals and livestock from wandering the premises

uncontrolled by anyone. That certainly is not the circumstance or result that relates to Ms. Nahrstedt.

The provision relating to pets, it is submitted, as it applies to plaintiff, and as it is enforced by LAKESIDE VILLAGE, invades Ms. Nahrstedt's right of privacy guaranteed to her by the California and United States Constitutions.

The trial court, it is submitted, erroneously ruled that Ms. Nahrstedt did not have a right of privacy. Certainly preventing persons from peering into her condominium unit is a legally protected interest. Further, no where is there granted to LAKESIDE VILLAGE the right to impose penalities of Five Hundred Dollars ($500.00) per month on Ms. Nahrstedt for keeping pets within her unit. There is no compelling need on the part of the homeowners assocation to force Ms. Nahrstedt to move her pets, companions that she loves, from her home, which is owned by her in fee simple. The use of the courts in enforcing these fines against Ms. Nahrstedt contitutes state action under **Shelly v. Kramer** (1948) 334 U.S. 1, 68 S.Ct. 836, which renders said action an unconstitutional invasion of the privacy of Ms. Nahrstedt.

It is submitted that the first cause of action of the Complaint set forth a properly stated cause of action and sustaining the demurrer, without leave to amend, was erroneous.

IV. THE SECOND CAUSE OF ACTION OF THE COMPLAINT SETS FORTH A CAUSE OF ACTION FOR DECLARATORY RELIEF AND THE DEMURRER THERETO WAS ERRONEOUSLY SUSTAINED WITHOUT LEAVE TO AMEND.

Pursuant to Code of Civil Procedure, Section 1060:

Any person interested under a deed, will, or other written instrument, or a contract, or who desires a declaration of his or duties with respect to another, or in respect to, and, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversary relating to the legal rights and duties of the respective parties, bring an original action in the Superior Court or file a cross-complaint in a pending action in the Superior, Municipal or Justice for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights and duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of final judgment. Such

declaration may be had before there is any breach of the obligation in respect to which said declaration is sought.

A complaint for declaratory relief should show a proper subject for declaratory relief within the scope of C.C.P. 1060 and an actual controversary involving judicial questions relating to the rights or obligations of a party. See Tiburon v. Northwest Pacific Railway Co. (1970) 4 Cal.App.3d 160, 170, 84 Cal.Rptr. 469.

The second cause of action sets a judicial controversary relating to contractual and property rights as encompassed by C.C.P. 1060. Additionally, Ms. Nahrstedt claimed that Article VI, Section 11, in addition to being unconstitutional was "unreasonable" as set forth in Civil Code Section 1354 and therefore unenforceable, and further, that Ms. Nahrstedt had an exclusive separate interest in her condominium as defined in Civil Code Section 1351(f) and that her right to maintain her cats did not impair the rights of others as set forth in Civil Code Section 1360.

The delaratory relief cause of action was properly pleaded, and, it is submitted, the sustaining of a demurrer, without leave to amend, was violative of the law, and deprived of substantial rights in the premises. This court must reverse the determination by the trial courts as set forth herein.

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V. THE THIRD CAUSE OF ACTION OF THE COMPLAINT SETS FORTH FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR INTENTIONAL INFLICATION OF EMOTIONAL DISTRESS AND THE DEMURRER THERETO WAS ERRONEOUSLY SUSTAINED WITHOUT LEAVE TO AMEND.

The third cause of action the complaint alleges that the defendants have engaged upon a course of conduct and a campaign of agression through an ever increasing and unauthorized assessments against Ms. Nahrstedt and and imposition of penalties for keeping her hree beloved cats in her private condominium unit. It is further alleged that the cats have never left the condominium units (with the exception of going to the veternarian) are kept clean at all times, constitute no nuisance, have not been complained about by any close neighbors of Ms. Nahrstedt and that the actions of the defendants, and each of them, were designed and calculated to inflict emotional damage upon Ms. Nahrstedt, to inflict emotional distress upon her, and to force her to sell her unit at unreasonable prices or alternatively to force her to remove her cats from the premises, all contrary to the provisions of the CCR'S. These actions, it is alleged, have caused Ms. Nahrstedt emotional distress and forced her to seek medical attention all to her damage as set forth in said complaint.

In <u>Bowden v. Speigel</u> (1950) 96 Cal.App.2d 793, 794, 216 Pac.2d 571, the court stated:

> The important elements are that the act is intentional, that it is unreasonable, and that the actor should

recognize it as likely to cause illness.

In the case now before this court the third cause of action alleges damages for intentional conduct which causes emotional distress (fright and shock) although the wrongful acts may not fit into any of the conventional grooves of assault, defamation and the like, the important elements are that the act is intentional, it is unreasonable, and the actor should have recognized it as likely to result in harm. Alcorn v. Ambro Engineering (1970) 2 Cal.3d 493, 86 Cal.Rptr. 88.

Section 312 of the Restatement of Torts reads as follows:

> If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause:
>
> (a) Although the actor had no intention of inflicting such harm and,
>
> (b) Irrespective of whether the act is directed against the other or a third person.

In the case now before this court the defendants have harrassed plaintiff by threatening to foreclose upon her property for the ridiculous unauthorized fines and penalties which have been unlawfully asserted by them causing, as should be well known

by said defendants, serious emotional harm and illness to plaintiff. A proper cause of action for intentional infliction of emotional distress was pleaded and a demurrer should not have been granted thereto or sustained thereto without leave to amend. The granting of said demurrer was, and is, improper and was, and is, reversiable error.

VI. THE FOURTH CAUSE OF ACTION OF THE COMPLAINT SETS FORTH A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND THE DEMURRER THERETO WAS ERRONEOUSLY SUSTAINED WITHOUT LEAVE TO AMEND.

The fourth cause of action for negligent infliction of emotional distress alleges that defendants assessed punitive penalties against plaintiff in increasing amounts and, finally, in the amount of Five Hundred Dollars ($500.00) per month for keeping her three cats within the confines of her condominium unit. It is further alleged in the fourth cause of action that defendants knew or should have known of Ms. Nahrstedt's emotional excitability, and her suseptibility to be easily upset, and her suseptibility to obsess about unfair and unprovoked actions against her, and each of said things. It is further alleged that Ms. Nahrstedt is entitled to live, in her unit, undisturbed, unharassed, and unprovoked. It is alleged that the actions of the defendant were negligent and violative of Ms. Nahrstedt's rights and caused injuries to her nervous system and body for which she sought the help of physicians and psychologists, all to her damage.

As can be seen from previously cited Section 312 of the <u>Restatement of Torts</u> the negligent infliction of emotional distress is defined therein and the case before this court comes

within that definition. To impose a fine of Five Hundred Dollars ($500.00) per month for keeping three cats, who are bothering no one, and threatening to initiate litigation or foreclose Ms. Nahrstedt from her home by the imposition of a lien, is, in fact, outrageous and dispicable conduct and sets forth at least negligent infliction of emotional distress based upon the defendants knowledge of Ms. Nahrstedt's susceptibility for such emotional distress. The demurrer to that cause of action should have been overruled, and sustaining the demurrer without leave to amend was, it is submitted, reversible error.

VII. THE FIFTH CAUSE OF ACTION OF THE COMPLAINT SETS FORTH FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION TO INVALIDATE ILLEGAL AND UNAUTHORIZED PENAL ASSESSMENTS LEVIED IN EXCESS OF AUTHORITY AND IN CONTROVENTION OF THE CONDOMINIUMS ASSOCIATION'S COVENANTS, CONDITIONS AND RESTRICTIONS AND THE DEMURRER THERETO WAS ERRONEOUSLY SUSTAINED WITHOUT LEAVE TO AMEND.

The fifth cause of action was to invalidate penal assessments which have been levied against Ms. Nahrstedt. The CCR'S provide only the payment of regular monthly assessments and charges, special assessements for capital improvements and emergency assessments. No other assessments are provided for in the CCR'S.

Further, the CCR'S provide that the purpose of the assessment evied by the association must be exclusively for the purpose of promoting the recreation, health, safety and welfare of its members, their guests and invitees, and in particular shall be used for the purpose of improving, protecting,

operating, and maintaining the common area and facilities improvements, landscaping and structures thereon. The fifth cause of action alleges that the assessments assessed against Ms. Nahrstedt in the sum of Five Hundred Dollars ($500.00) per month were punitive and not provided or allowed in said CCR'S, but purely a product of the evil minds of defendants to reduce the regular maintenance assessments and capital expenditure assessments for themselves as non pet owners and to offset other expenses by expending a pool of money for the benefit of the non pet owning defendants. The defendants actions were tortitious and consisted of converting Ms. Nahrstedt's funds without authority in the CCR'S and were designed to punish Ms. Nahrstedt and other pet owners in LAKESIDE VILLAGE in order to defray expenses and to maintain costs and assessments of the persons who did not own pets to a minimum.

The fines imposed by defendants for failure to comply with the improper pet restrictions are totally unauthorized. No where in any recorded document are such fines authorized. There is no power to fine any person for violation of a CCR restriction which is set either in the CCR'S or the by laws from which all power flows to the condominium assocation. Article VI, Section 1 of the CCR'S provides that the parties are deemed to convenant and agree to pay the associations regular monthly assessments or charges, special assessments for capital improvements, and emergency assessments. No other assessments are provided in said CCR'S.

Additionally, Article VII, Section 13 of the CCR'S provides

that the purpose of the assessments levied by the assocation shall be exclusively for the purpose of promoting the recreation, health, safety and welfare of its members, their guests and invitees, and in particular shall be used for the purpose of improving, operating and maintaining the common area and facilities, improvements, landscaping and structures.

The defendants, without any authority, an as punishment to Ms. Nahrstedt, have continued to assess their absurd Five Hundred Dollars ($500.00) per month punitive assessments in an attempt to reduce the regular maintenance assessments and capital expenditure assessments for themselves. Each fine is equivolant of almost four (4) months of general assessments and really pays for four (4) other condominium owners. These improper and invalid fines were attacked by the fifth cause of action and a proper cause of action set forth in that connection.

The courts granting of a general demurrer as to the fifth cause of action was erroneous, and its refusal to grant leave to amend the fifth cause of action was without justification and the trial court's actions were reversible error.

VIII. THE SIXTH CAUSE OF ACTION OF THE COMPLAINT SETS FORTH FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND THE DEMURRER WAS ERRONEOUSLY SUSTAINED WITHOUT LEAVE TO AMEND.

The sixth cause of action sets forth a proper cause of action for injunctive relief. The cause of action for injunction must plead the tort or other wrongful act constituting a cause of action and grounds for equitable relief showing the inadequacy of the remedy at law. <u>Porter's Bar Dredging v. Borders Co.</u> (1911 15

Cal.App. 751, 760. **San Juan Gold Co. v. San Juan Ridge Mutual Water Asso.** (1939) 34 Cal.App.2d 159, 172, 93 Pac.2d 582.

The trial court sustained the demurrer to the sixth cause of action without leave to amend. This, it is submitted, was improper and reversible error.

IX. CONCLUSION

Based upon the facts set forth in this brief, and the points and legal arguments raised, the trial court committed serious and prejudical error in dismissing plaintiff's complaint without granting even the right to amend her pleading and this court must reverse said judgment of dismissal and order appropriate action in the trial court.

Respectfully submitted by:
LAW OFFICES OF JOEL F. TAMRAZ

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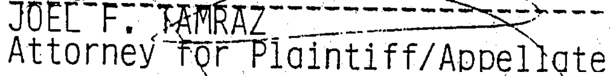
JOEL F. TAMRAZ
Attorney for Plaintiff/Appellate