

JUDGE: THOMAS J. HUTCHINS

DATE: June 8, 1999

CLERK: SANDY MC CARTY

CASE NO. CIV 159037

TITLE OF CASE:

SIMI VALLEY LE PARC H.O.A.,

Plaintiff/Respondent,

v.

**ZM CORPORATION, dba
QWIKRESPONSE DISASTER
CONTROL AND CONSTRUCTION,**

Defendant/Petitioner.

**NATURE OF PROCEEDINGS: RULINGS ON SUBMITTED MATTERS
TAKEN UNDER SUBMISSION ON 6/4/99:**

- 1) ZM's Motion to Amend Judgment to include "Le Parc Community Association" as Judgment Debtor;**
- 2) ZM's Motion for an Order Directing the Levy of a Special Assessment;**
- 3) Simi Valley Homeowners Association Application for Preliminary and Permanent Injunction.**

RULINGS:

The Court SUSTAINS objection and GRANTS Plaintiff's motion to strike Exhibits A, B, and C of ZM's Reply filed June 2, 1999.

- 1) The Court GRANTS motion of judgment creditor ZM CORPORATION to amend the judgment to include LE PARC COMMUNITY ASSOCIATION as an additional judgment debtor.**
- 2) The Court GRANTS motion of judgment creditor ZM CORPORATION for order requiring judgment debtor LE PARC COMMUNITY ASSOCIATION to levy a special assessment against each homeowner member of \$166/month, payable to the receiver appointed in this action.**
- 3) The Court DOES NOT RULE on Simi Valley Homeowner Association's application for injunction as that application has been rendered MOOT.**

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SIMI VALLEY LE PARC H.O.A. v. ZM CORPORATIONDISCUSSION:

1) ZM's motion to add Le Parc Community Association as an additional judgment debtor:

Defendant ZM CORPORATION contracted to complete earthquake repairs for plaintiff SIMI VALLEY LE PARC HOA. SIMI's insurer paid the amount of ZM's bid, but after ZM began construction, SIMI terminated the contract and retained a contractor to do the repairs for less. ZM petitioned for arbitration, but during arbitration, SIMI sought a declaration in this court that the arbitration agreement was void. ZM prevailed in this action, and the arbitration was completed with ZM winning an award of \$6 million, which was confirmed as a judgment in 8/98. A receiver was appointed by the court to collect the monthly assessments of the homeowners. In 3/99, the homeowners voted 75% to "fire" SIMI and to create LE PARC COMMUNITY ASSOCIATION, which has instructed the homeowners to make assessment payments to LE PARC instead of the receiver. ZM seeks to amend the judgment to add LE PARC as a judgment debtor.

Per Ray v. Alad Corp. (1977) 19 Cal.3d 22, 28, a successor entity is liable for the debts of its predecessor if any of the following criteria are applicable:

- (1) There is an express or implied agreement of assumption;
- (2) The transaction amounts to a consolidation or merger of two corporations;
- (3) The acquiring entity is a mere continuation of the seller; or
- (4) The transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the sellers' debts.

The members of LE PARC are the same as the judgment debtor. Transfer of management responsibilities and assessment powers to the new entity was done without any provision for payment of the judgment debtor's debts and was done for the very purpose of avoiding the ZM judgment.

The purpose of LE PARC is the same as SIMI and it has the same duties and was merely substituted for SIMI in the CC&Rs. See Blank v. Olcovich Shoe Corp. (1937) 20 Cal.App.2d 456, 461.

SIMI argues that the members of SIMI did not vote to change the name and board members of the association, but gathered as a different entity, a subdivision, and voted to "fire" the SIMI association and "create" the LE PARC association. Per Park Place Estates HOA v. Naber (1994) 29 Cal.App.4th 427, 432, the condo project cannot exist without an association. When the SIMI members gathered and voted to "fire" the SIMI Association and "create" the Le Parc association, they were acting as members of the association. "Le Parc" is the successor to SIMI. It collects the same assessments levied by SIMI, it pays the same bills paid by SIMI, it shares the same identity.

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This situation involves, at best, an acquiring entity that is clearly a mere continuation of its predecessor, under which circumstance this court may add the successor as a judgment debtor. At worst, the change of entities in name and leadership only is a transfer of assets for the improper purpose of escaping liability to the original association's creditor, which also warrants inclusion in the judgment as a debtor. The California Supreme Court in Ray only required that one of these criteria be present for the court to add the successor entity as a judgment debtor, and this court may add LE PARC as a debtor on the judgment of ZM on either basis, or both.

2) **ZM's motion for an order directing the levy of a special assessment:**

A homeowners' association has no purpose other than to maintain the premises on behalf of the homeowners. It takes no action on behalf of itself, but acts in a fiduciary capacity on behalf of the homeowners. The Legislature has created a scheme for assessments against homeowners recognizing that the common development cannot exist without a common HOA, and "Homeowners associations would cease to exist without regular payment of assessment fees." Park Place Estates HOA v. Naber (1994) 29 Cal.App.4th at 432. "These statutory provisions reflect the Legislature's recognition of the importance of assessments to the proper functioning of condominiums in this state." Park Place at 432. Civ. Code 1366 and 1367 were summarized by the Park Place court as follows: "Condo homeowners associations must assess fees on the individual owners in order to maintain the complexes. The assessment 'shall be a debt of the owner...at the time the assessment...[is] levied.'" Park Place at 432 (emphasis in original).

That this assessment power extends to assessments for liability judgments against the HOA is expressly and recognized in California case law. Per Franklin v. Marie Antionette Condominium Owners Association (1993) 19 Cal.App.4th 824, 833, "The condominium owners are, after all, the ones who are assessed to pay for improvements, insurance premiums, liability judgments not covered by insurance, and the like." Civ. Code 1366(b) expressly exempts from the limitations on increased annual assessment [i.e., *percentage limits and approval of the members*] "assessment increases necessary for emergency situations. For purposes of this section, an emergency situation is any one of the following: (1) an extraordinary expense required by an order of a court..."

Civ. Code 1366 expressly provides that the HOA "shall" impose special assessments for extraordinary court orders, and Park Place recognized that HOA "must" make assessments for HOA liabilities.

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CCP 128 provides the court with broad powers sufficient to authorize an order requiring a HOA to do so involuntarily. CCP 128 provides "Every court shall have the power to do all of the following: (4) To compel obedience to its judgments,...[and] (8) To amend and control its processes and orders so as to make them conform to law."

Under Civ. Code 1366, control over the payment of a debt is statutorily placed in the hands of the judgment debtor and its co-obligors, which is inherently unfair to the judgment creditor, unless interpreted to permit the court to order the HOA to impose an assessment.

ZM Corporation to prepare, serve, and submit proposed orders consistent with the Court's rulings.

The clerk is directed to give notice.

DATED:

June 8, 1999

Thomas J. Hutchins
THOMAS J. HUTCHINS

SHEILA GONZALEZ, Superior Court Executive Officer and Clerk

By:

Edy McCarly
Deputy Clerk