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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DONALD BURNETT et al., Plaintiffs and Appellants, v. GALE MAIWANDI, Defendant and Respondent.	B237549 (Los Angeles County Super. Ct. No. GC041906)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. De Vanon, Judge. Reversed.

Jones & Lester, James G. Jones, and Greg May for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jason J. Scupine, and Alexander J. Harwin for Defendant and Respondent.

Plaintiffs/appellants Donald and Joan Burnett (the Burnetts) sued several of their neighbors, including defendant/respondent Gale Maiwandi (Gale),[1] for damages and to determine who owns a gate and adjoining wall at the eastern end of the gated community in which plaintiffs and defendants live. The trial court granted summary judgment for Gale, concluding that there were no disputed issues of fact as to any cause of action asserted against her. The Burnetts appeal the grant of summary judgment, as well as the award of attorney fees in Gale's favor. We reverse with directions.

FACTUAL AND PROCEDURAL BACKGROUND

I. Complaint

The Burnetts filed the present action against Gale and others on December 1, 2008. The operative verified complaint alleges that the Burnetts and defendants Yosuf Maiwandi (Yosuf), Gale, Nafissa Maiwandi (Nafissa), Michael Zimmerman, and Donna Zimmerman reside in homes in a common interest development governed by the Woodlyn Lane Improvement Association (Association) in Bradbury, California. At all relevant times, Yosuf and Nafissa owned 53 Woodlyn Lane; the Zimmermans owned 48 Woodlyn Lane; and the Burnetts owned 4 Woodlyn Lane. The Burnetts purported to bring the action "individually and as members of [the Association] suing derivatively on behalf of themselves and all other members of the association (other than defendants Maiwandi and Zimmerman) and for the benefit of the Association."[2]

The complaint alleges that in 1950, plaintiffs' and defendants' predecessors-in-interest executed a "Grant of Easement and Protective Covenant" (original covenant) that

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[1] Because several defendants share the same surname, Maiwandi, for the sake of clarity, we will refer to the Maiwandis by their first name, with no disrespect intended.

[2] The Burnetts assert that they did not seek to secure action from the board of directors in prosecuting this action "since any such effort would have been futile in that Defendant Yosuf Maiwandi presently serves upon the board of directors, and has immobilized the board of directors and literally held them hostage with actual litigation and threats [of] litigation against the board and members personally."

provided, among other things, for the maintenance of a private roadway to be used by adjacent property owners and the creation of easements and equitable servitudes over the properties subject to it "for the benefit of all owners of properties within the ASSOCIATION and these rights in real property run with the land to which the[y] relate." Included in the original covenant was the right of the Association "[t]o construct a gate or gates across said roadway for the purpose of regulating the use thereof and or preserving the private ownership of the same; of barring passage over the same to all traffic not lawfully entitled to use of the same; of employing agents and watchmen and/or to join with others in such employment to enforce all reasonable regulations adopted for the use of said road." Pursuant to the authority of the original covenant, in 1964 the Association erected gates on the west and east ends of what is now known as Woodlyn Lane. The east gate is adjacent to the Maiwandi and Zimmerman properties. The Association "has since the erection of the East Gate continuously maintained, repaired, modified and controlled the same so as to restrict the use by the public, members of the ASSOCIATION and their guests for ingress and egress only to the extent determined by the ASSOCIATION."

The original covenant was amended and restated in 1995 to provide, among other things, that "[s]ubject to the provisions of this Declaration, there is an easement for ingress, egress, and support through the Common Area appurtenant to each Lot. These easements shall pass with title to each Lot. . . . The Owners' easements over, and rights of use and enjoyment of, the Common Area, shall be subject to the restrictions set forth in the Governing Instruments, including . . . [t]he right of the Association to cause the construction of additional improvements in the Common Area, or to cause the alteration or removal of existing improvements in the Common Area, including, without limitation, fences, gates, ditches, culverts, signs, and landscaping."

Over the last several years, the Association proposed to modify the east gate to allow remote-controlled access by Association members. The Maiwandis and Zimmermans opposed this proposal and contended that the Association does not own and has no right to maintain and control the east gate. On about April 30, 2008, the

Maiwandis and Zimmermans "seized control of the East Gate and thereafter encroached and trespassed upon and then destroyed part of the East Gate structure resulting in opening Woodlyn Lane to pedestrian and automotive traffic. In addition, on or after the Maiwandis and Zimmermans seized control of the East Gate they have demanded a toll be paid by Association members and their guests wishing to ingress and egress through it (collectively, the Encroachments)."

The Burnetts alleged that these actions gave rise to causes of action against Gale and her codefendants, as follows:

(1) Trespass (first cause of action): "The Encroachments represent a continuing and intentional trespass by the MAIWANDIS and ZIMMERMANS on the property rights of the ASSOCIATION and in derogation of the Restated Covenant."

(2) Abatement of nuisance (second cause of action): "The Encroachments are a nuisance and have injured [the] BURNETTS and the ASSOCIATION by obstructing their respective free use and exercise of their property rights."

(3) Declaratory relief (third cause of action): Plaintiffs "seek an order of this court declaring the rights and duties of the respective parties with regard to the East Gate[,] including, without limitation: [¶] a. Declaring the location of the roadway easement based upon the legal description and the more than 45 years of use thereof; [¶] b. Declaring the validity and extent of the roadway easement including, without limitation, the provisions of the Covenant regarding the construction, use and control of gates across it at the East Gate; [¶] c. Declaring and determining an easement right in the ASSOCIATION for six feet of land adjacent to the 30' roadway easement and occupied by the East Gate and its adjacent walls for more than 45 years on the basis of (1) the express easement[,] (2) estoppel due to acquiescence or an agreed-upon boundary[,] or (3) prescription; [¶] d. Declaring the extent, use and enforceability of the roadway easement at the East Gate and the rights and responsibilities of the parties with respect thereto."

(4) Abatement of encroachments (sixth cause of action): "MAIWANDIS and ZIMMERMANS should be enjoined by the Court to remove any and all encroachments

such as vehicles or other objects occasionally placed where the East Gate structure once stood, and to restore the East Gate to its prior condition."

(5) Quiet title (seventh cause of action): "Defendants MAIWANDIS and ZIMMERMANS contend that the ASSOCIATION does not own and/or has no right to maintain and control the East Gate and that instead they, the MAIWANDIS and ZIMMERMANS do. BURNETTS are further informed and believe that this contention is in direct conflict with the provisions of the Amended and Restated Covenant. The claim of MAIWANDIS and ZIMMERMANS is without any right whatsoever, and they have no right, estate, title or interest in the above-described East Gate or any part thereof contrary to the terms of the ASSOCIATION's easement rights. [¶] . . . BURNETTS[,] individually and derivatively on behalf of the ASSOCIATION, seek to quiet title to the disputed portion of the East Gate as of the filing of this complaint."

(6) Intentional infliction of emotional distress (eighth cause of action): "MAIWANDIS and ZIMMERMANS caused discomfort and annoyance to BURNETTS and caused mental suffering occasioned by their fear for the safety of themselves and their family. [¶] . . . The conduct of MAIWANDIS and ZIMMERMANS was intentional and malicious and done for the purpose of causing BURNETTS to suffer humiliation, mental anguish, and emotional and physical distress."[3]

II. Motion for Summary Judgment

On January 31, 2011, the Maiwandis filed a motion for summary judgment or summary adjudication (summary judgment motion). Among other things, the motion asserted that Gale could not be liable for any of plaintiffs' claims because she did not own the Maiwandis' home and had not engaged in any of the conduct on which the tort causes of action were based.

The Burnetts opposed the summary judgment motion. With regard to Gale, they asserted that the tort causes of action "allege conduct—the demolition of the wall

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[3] The fourth, fifth, and ninth causes of action allege claims against Yosuf only.

appurtenant to the East Gate—that is actionable regardless of whether she owns the property where the conduct occurred. . . . Gale need not be an owner of property to commit any of these torts nor to be ordered to remediate their effects by rebuilding the wall, as prayed for in the cause of action for abatement of Encroachments." Further, "Gale's sudden disclaimer of interest in the Maiwandi property is immaterial to the quiet title claim as well. Plaintiffs do not seek to quiet title to the Maiwandi property. It is an adverse *claim* of ownership, not actual adverse ownership, that gives rise to a quiet title claim. . . . Gale contended she owned the property at 53 Woodlyn Lane both in [a prior action] and in discovery in this action."

The Maiwandis noted in reply that there was no evidence that Gale co-owned the property. To the contrary, they asserted that grant deeds attached to a request for judicial notice filed with the reply brief showed that Gale was *not* a co-owner. The Maiwandis further asserted that the Burnetts had not claimed that Gale committed any of the alleged torts. In fact, the Burnetts had requested judicial notice of Yosuf's March 9, 2009 declaration, in which he stated that he removed the wall "without assistance from any third parties." Thus, the Maiwandis said, the court "should grant the summary judgment requested by Gale Maiwandi because each cause of action alleged against her fails as a matter of law."

Concurrently with their reply brief, the Maiwandis filed a request for judicial notice, to which they attached (1) a grant deed, dated December 24, 2002, conveying property from Richard and Marilyn Dootson to "Yosuf Maiwandi, a single man[,] and Nafissa Maiwandi, a married woman," and (2) a grant deed, dated September 22, 2009, deeding the property from Yosuf and Nafissa to "Yosuf Maiwandi, a single man."

The trial court granted summary judgment for Gale on June 17, 2011. The minute order stated: "Motion for summary judgment is granted in favor of defendan[t] Gale Maiwandi. The court takes judicial notice of the grant deed recorded September 23, 2009, in Los Angeles County. It is undisputed that defendant Gale Maiwandi does not own the property located at 53 Woodlyn Lane in Bradbury, California. [Internal record reference omitted.] Plaintiffs fail to dispute that it was defendant Yosuf Maiwandi, not

Gale Maiwandi, who removed the subject wall. They have submitted no evidence that Gale [M]aiwandi committed any of the alleged torts or offending acts. [Internal record reference omitted.] . . . Evidentiary objections are overruled."

The court entered judgment for Gale on September 29, 2011, and notice of entry of judgment was served on October 17, 2011. On December 21, 2011, the court ordered the Burnetts to pay Gale attorney fees of $12,006. The Burnetts timely appealed the summary judgment and attorney fee award.

DISCUSSION

The Burnetts contend: (1) Gale's disclaimer of an interest in the disputed property requires entry of judgment *against* Gale, not in her favor; (2) the trial court erred in granting summary judgment on a ground Gale did not raise in her moving papers, namely, the purported lack of evidence of Gale's participation in the alleged torts; and (3) the trial court erred in awarding Gale attorney fees. We consider these issues below.

I. Standard of Review

"A defendant moving for summary judgment must show either (1) that one or more elements of the plaintiff's cause of action cannot be established or (2) 'that there is a complete defense to that cause of action.' (§ 437c, subd. (p)(2).) 'A court may grant summary judgment only when the evidence in support of the moving party establishes that there is no issue of fact to be tried.' (*Neighbarger v. Irwin Industries, Inc*. (1994) 8 Cal.4th 532, 547.) In other words, summary judgment should be granted only when a moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

"On an appeal from summary judgment we review the record de novo. (See *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) 'We need not defer to the trial court and are not bound by the reasons for [its] summary judgment ruling; we review the ruling of the trial court, not its rationale.' (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85.) In so doing we apply the same three-step analysis the trial court applies. 'First, we

identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue.' (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)" (*Chao Fu, Inc. v. Chen* (2012) 206 Cal.App.4th 48, 55.)

II. Quiet Title

"'A quiet title action seeks to declare the rights of the parties in realty. . . . "'The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.'"' (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 305, quoting *Yuba Invest. Co. v. Yuba Consol. Gold Fields* (1926) 199 Cal. 203, 209.) 'A description of the parties' legal interests in real property is all that can be expected of a judgment in an action to quiet title.' (*Lechuza Villas West v. California Coastal Com*. (1997) 60 Cal.App.4th 218, 243.) Title is quieted 'as to legal interests in property.' (*Id*. at p. 242.)" (*Chao Fu, Inc. v. Chen*, *supra*, 206 Cal.App.4th at pp. 58-59.)

The Burnetts contend that the trial court erred in granting summary adjudication for Gale as to the quiet title cause of action. For the following reason, we agree.

The Maiwandis' motion for summary judgment makes clear that Gale does not claim an ownership interest in the disputed property. To the contrary, the motion concedes that Yosuf is the sole owner of the family home, stating as follows: "Gale Maiwandi is Yosuf Maiwandi's common law wife. [Internal record reference omitted.] She has never owned the home located at 53 Woodlyn Lane in Bradbury, California. [Internal record reference omitted.] In fact, Plaintiff[s'] Verified Complaint correctly alleges that she does not own the home. [Internal record reference omitted.]"

Similarly, the Maiwandis' separate statement of undisputed material facts asserts that Gale does not own the Maiwandi family home:

"2. Yosuf Maiwandi is the present legal owner of the home located at 53 Woodlyn Lane in Bradbury.

"3. Prior to 2009, Yosuf Maiwandi and his mother, Nafissa Maiwandi, were both the legal owners of the home.

". . . . . .

"12. Gale Maiwandi is Yosuf Maiwandi's common law wife.

"13. She has never owned the home located at 53 Woodlyn Lane in Bradbury, California.

"14. Plaintiff[s'] Verified Complaint alleges that Yosuf Maiwandi and Nafissa Maiwandi, not Gale Maiwandi, own[] the home located at 53 Woodlyn Lane in Bradbury, California." (Internal record references omitted.)

Yosuf submitted a declaration in support of the summary judgment motion that stated, among other things, that Yosuf was the present legal owner of the home located at 53 Woodlyn Lane in Bradbury, California. Prior to 2009, he and his mother, Nafissa, jointly owned the home. Gale, his common law wife, had never owned the home.

Based on the foregoing, it is clear that Gale does not claim an ownership interest in the family home. However, her disclaimer of ownership does not entitle her to summary adjudication of the quiet title cause of action. As the court explained in *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 269-270, in a quiet title action, a defendant who disclaims an interest in property "*is not entitled to judgment in his favor*. [Citation.] Instead, the judgment should quiet title against the disclaiming defendant." (Italics added.) Similarly, in *Bradley Co. v. Ridgeway* (1936) 14 Cal.App.2d 326, 336-337, the court held that the trial court erred in entering judgment on the pleadings as to a defendant who disclaimed interest in property and did not appear at trial. As to that defendant, the judgment "should have quieted title against him since he was a defendant in the action who had disclaimed any interest in the bonds or in the real property described in the amended complaint."

In the present case, because Gale has disclaimed ownership of the property, she is not entitled to judgment in her favor on the quiet title cause of action. The trial court erred in summarily adjudicating this cause of action in her favor.[4]

III. Tort Causes of Action

The Burnetts contend that the trial court erred in granting summary adjudication for Gale on the causes of action for trespass, nuisance, abatement of encroachments, and intentional infliction of emotional distress. Specifically, they contend that Gale's lack of ownership of the property was irrelevant to these tort causes of action and that Gale failed to establish that she did not participate in any of the alleged tortious acts. Thus, they say, the burden never shifted to them to prove that Gale *did* participate in these actions. For the following reasons, we believe summary adjudication was properly granted.

A. Relevant Facts

The Maiwandis' motion for summary judgment asserted that "[w]ith respect to the trespass, nuisance and intentional infliction of emotional distress causes of action, these allegations are made with respect to the Maiwandi home, which Gale Maiwandi does not

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[4] This does not mean, of course, that the Burnetts are entitled to judgment in their favor on the quiet title cause of action. To obtain judgment, the Burnetts must prove that they own the disputed property. On the present record, they have not done so. (See *Tesseyman v. Jovick* (1955) 130 Cal.App.2d 384, 388 ["Appellants insist that, because Moore and Shaffer appeared and filed disclaimers, it was error not to enter judgment against them and in favor of appellants. Of course, if the trial court had determined that appellants owned the property it would have been error not to have quieted appellants' title against the disclaiming defendants. It would also have been error to grant a disclaiming defendant affirmative relief. (*Bradley Co. v. Ridgeway*, [*supra*,] 14 Cal.App.2d 326.) But the fact that certain defendants disclaimed any interest in Hotel La Salle did not establish that appellants were the owners of it. It would have been highly inconsistent and improper for the trial court to have determined that title should be quieted in California Pacific against appellants' claims, and against the claims of the other defendants, and then to have quieted title in appellants as against the disclaiming defendants. The appellants had no title to quiet against anyone. The trial court completely and correctly disposed of the title issue by finding that none of the parties, except respondent, had any interest in the property."].)

own, *and Yosuf Maiwandi's actions*[5]. . . . As such, the Court should grant the summary judgment requested by Gale Maiwandi because each cause of action alleged against her fails as a matter of law." (Italics added.)

In support of the motion for summary judgment, the Maiwandis submitted a separate statement of undisputed material facts, which said: "On or about April 30, 2008, *Yosuf Maiwandi* removed a two-and-a-half-foot tall barrier wall which is near the Eastern gate and then parked one of his vehicles across the roadway to prohibit unpermitted vehicular access through the Eastern gate." (Internal record reference omitted, italics added.) The Maiwandis also submitted Yosuf's declaration that stated, among other things, that "[o]n or about April 30, 2008, *I removed a two-and-a-half-foot tall barrier wall* which is near the Eastern gate and then parked one of my vehicles across the roadway to prohibit unpermitted vehicular access through the Eastern gate. I removed the wall because it was on my property." (Italics added.)

The Burnetts' opposition to the summary judgment motion contended that the tort causes of action alleged against Gale "allege conduct—the demolition of the wall appurtenant to the East Gate—that is actionable regardless of whether she owns the property where the conduct occurred." The opposition did not, however, introduce any evidence that Gale aided in the demolition of the wall. To the contrary, in support of their opposition, the Burnetts submitted Yosuf's Declaration, dated March 9, 2009, in which Yosuf declared that, "Without consultation or the agreement of any third party, *I* elected to remove the wall in question. *I* used a heavy utility equipment owned by me and tore the wall down *without assistance from any third parties*." (Italics added.) The Burnetts also submitted Gale's response to requests for admission, in which she *denied* that she "caused a portion of the EAST GATE to be torn down on or about April 30,

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5 Based on this language, we reject the Burnetts' claim that they were not advised of the grounds upon which Gale sought summary judgment. It is evident the parties understood that Gale's conduct was at issue, as both submitted additional evidence with respect to whether she was responsible for taking down the wall.

2008," and Yosuf's response to requests for admission, in which he *admitted* that he "caused a portion of the EAST GATE to be torn down on or about April 30, 2008."

B. Analysis

"A defendant moving for summary judgment has met its burden to show a cause of action lacks merit if the defendant can show the plaintiff cannot establish one or more elements of the cause of action. (Code Civ. Proc., § 437c, subd. (o)(2).) 'In such a case, the defendant bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 . . . .) If the defendant carries the burden of production, the burden shifts to the plaintiff to make his or her own prima facie showing of the existence of a triable issue of fact. (*Ibid*.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]" (*Ibid*.)' (*McGonnell v. Kaiser Gypsum Co*. (2002) 98 Cal.App.4th 1098, 1103.)" (*Robinson v. SSW, Inc*. (2012) 209 Cal.App.4th 588, 593.)

In the present case, Gale met her initial burden by offering Yosuf's declaration, in which he admitted that *he*, not Gale, engaged in the alleged tortious conduct—removing the wall and parking a vehicle across the roadway—on which the Burnetts' tort claims are based. This evidence was sufficient to make a prima facie showing that plaintiffs would not be able to establish a key element of their causes of action against Gale, i.e., her participation in the alleged tortious conduct. It thus shifted the burden to the Burnetts to show a triable issue as to Gale's participation. The Burnetts did not do so; to the contrary, they submitted additional evidence that Yosuf, not Gale, removed the wall. On the basis of this evidentiary showing, the trial court properly entered summary adjudication for Gale on the tort causes of action. (See, e.g., *Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 731 ["As to the defendant Patsaouras, the summary judgment should have been granted. There is no evidentiary showing whatever that he was involved in this matter. Nor, as plaintiffs conceded at oral

argument, is there any actual claim that he played a part in it. Thus, no triable issue of material fact exists with respect to his liability."].)

IV. Attorney Fees

The Burnetts contend that partial reversal of the judgment requires reversal of the fee award. We agree. (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 620 [reversal of summary adjudication of one cause of action required reversal of award of attorney fees and costs].)

DISPOSITION

The summary judgment for Gale is reversed. The trial court is ordered to enter a new and different order granting Gale summary adjudication of the first, second, third, sixth, and eighth causes of action, and denying Gale summary adjudication of the seventh cause of action. The award of attorney fees and costs is reversed without prejudice to Gale refiling a motion for attorney fees and costs after a final judgment is entered in this matter.

Each party shall bear his or her own costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.