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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PAUL ANSTEY, Plaintiff and Appellant, v. DION BEEBE et al., Defendants and Respondents.	B228741 (Los Angeles County Super. Ct. No. BC39352)

APPEAL from judgment of the Superior Court of Los Angeles County, Conrad Aragon, Judge. Affirmed.

Horvitz & Levy, David M. Axelrad and Dean A. Bochner; Leader Gorham and Jon M. Leader; Soltman, Levitt, Flaherty & Wattles and Philip E. Black, for Plaintiff and Appellant.

Michelman & Robinson, Sanford Michelman, Marc R. Jacobs, and Robin James, for Defendants and Respondents.

In this boundary dispute case, Paul Anstey appeals from the summary judgment in favor of respondents Dion Beebe and Unjoo Moon. He asks that we reverse the judgment because: his wife, Denise Anstey, is an indispensable party to the boundary dispute; he is entitled to relief under Code of Civil Procedure section 473[1]; respondents' unopposed motion for summary judgment did not satisfy their initial burden of production; and the trial court failed to adequately balance the equities.

We conclude the judgment is not infirm for lack of a necessary or indispensable party, that appellant has not shown entitlement to relief under either the mandatory or discretionary provisions of section 473, and that, on the merits, respondents were entitled to summary judgment. We therefore shall affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In 2002, appellant bought a home located at 2908 Roscomare Road in the Bel Air section of Los Angeles. He purchased it as his separate property, then immediately deeded it to himself and his wife as joint tenants. The property consists of lot 9, which includes parcels 16 and 17. In 2006, respondents bought property located at 3001 Antelo View Drive. Their property consists of parcels 18, 19, and 20 on lot 8. Parcels 19 and 20 are adjacent to lot 9. Parcel 20 includes a 20-foot-wide strip of land (the pole), which connects it to Roscomare Road. The pole runs along the southern border of parcel 16.

A concrete wall and part of the Ansteys' fenced-in backyard jut out into the pole. The wall starts at the border with lot 20 and veers into the pole, encroaching at about 11 feet at the wall's end. The fenced-in portion of the backyard, where playground equipment is located, begins at the end of the wall and encroaches on the entire width of the pole in an area next to the Ansteys' home. The encroachments are along more than half of the length of the pole.

In 2008, appellant filed a lawsuit against respondents, seeking to (1) quiet title to a prescriptive easement in the pole and (2) establish a boundary pursuant to an existing

[1] Unless otherwise specified, all statutory references are to the Code of Civil Procedure.

boundary agreement. Respondents cross-complained against him to (1) quiet title, and for (2) declaratory relief, (3) trespass, (4) ejectment, and (5) injunctive relief. After the cross-complaint was filed, the Ansteys deeded their property to themselves as co-trustees of their revocable trust. Respondents, similarly, transferred their own property to their living trust.

In his first amended answer to the cross-complaint, appellant asserted failure to join an indispensable party as an affirmative defense. The parties then sought to amend their respective complaints. Respondents filed an ex parte application to add Denise Anstey as a party and to include all parties' representative capacities as trustees of their respective trusts. Appellant filed an ex parte application seeking to amend his complaint along the same lines. He also sought to replace his second cause of action with a declaratory relief claim based on his affirmative defense of balancing the equities. Both ex parte applications were denied for lack of good cause.

The ex parte applications were followed by noticed motions for leave to amend the complaint and cross-complaint. Appellant's motion was the same as his ex parte application, except that he no longer proposed to add Denise Anstey as a party. Respondents' motion expanded on the earlier proposed amendments by seeking to add as parties the Russells, who own property on the other side of the pole from the Ansteys. Appellant objected to the proposed addition of Denise Anstey and the Russells on due process grounds.

The court denied the motions in June 2009. It found respondents' motion defective because it was not accompanied by a proposed amended cross-complaint. The court found appellant's motion unnecessary, ruling that both sides would be allowed to amend their pleadings to conform to proof and proceed against each other in all capacities made evident at trial. Specifically, the court stated that respondents "shall be permitted to amend their pleadings, at trial, to conform to proof that Anstey and Denis [*sic*] Anstey, and the Anstey 2008 Revocable Trust (of which both are trustees) are properly named as parties cross-defendant."

In December 2009, respondents moved for summary judgment on all causes of action in the complaint and cross-complaint. One week after opposition to the motion was due, the law firm representing appellant filed an ex parte application for a continuance to prepare an opposition because it had no record of the motion. The court denied the application, finding this explanation not credible.

On February 18, 2010, the day of the hearing on the summary judgment motion, appellant's counsel made another ex parte application to continue, explaining that the failure to file an opposition was due to a breakdown in the law firm's policies and procedures. The court denied the application on the ground that a noticed motion for a continuance was required. The court allowed appellant's counsel to submit written objections to respondents' evidence but granted the summary judgment motion without ruling on the objections.

Appellant moved for reconsideration. The court overruled appellant's evidentiary objections and denied the motion for reconsideration. It noted that, despite making repeated requests for relief, appellant had not presented a proposed opposition to the summary judgment motion. The court acknowledged granting summary judgment only against appellant but stated that "[w]hether entry of judgment upon summary judgment precludes action by and on behalf of the respective trusts raises questions not now before the court. The question as to which parties are burdened or benefitted by the judgment does not require reconsideration of the court's February 18 ruling."

In response to appellant's opposition to the proposed judgment, the court noted there was "a technical legal issue regarding what parties and what capacities the parties are involved." The court was "sure we're going to be talking about that at great length at a future date." In July 2010, the court entered judgment on all causes of action and quieted title in respondents' name solely against appellant. The court ordered appellant to remove the encroachments, "including a treehouse and a swing set," and enjoined him from entering on the property, but stayed enforcement of the injunctive relief.

Two law firms representing appellant filed separate motions to vacate the judgment under section 473. The court denied both, noting among other things that

neither was accompanied by a proposed opposition to the summary judgment motion. The court awarded costs to respondents.

This timely appeal from the judgment and denial of the motions to vacate followed.

DISCUSSION

I

Appellant argues Denise Anstey is an indispensable party, in whose absence the court could not render an effective judgment as to the parties before it. The joinder issue was not adequately presented to the trial court or on appeal, and we are not persuaded that the judgment should be reversed on this ground.

Compulsory joinder is governed by section 389. Subdivision (a) of that section provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." The person is deemed "necessary" to the action. (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 83 (*City of San Diego*).)

When a necessary party *cannot* be joined, subdivision (b) of section 389 requires the court to determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable." (§ 389, subd. (b); *City of San Diego, supra,* 186 Cal.App.4th at pp. 83–84.) Appellant claims that "Denise Anstey was an indispensable party . . . ." His nomenclature is misleading since there is no evidence that

Denise Anstey could not be joined so as to trigger section 389, subdivision (b). Instead, the question is whether, under section 389, subdivision (a), Denise Anstey is a necessary party to the boundary dispute, who should have been ordered joined under that subdivision.

The court's determination of whether an absent party is necessary or indispensable under section 389 is reviewed for abuse of discretion. (*Hayes v. State Dept. of Developmental Services* (2006) 138 Cal.App.4th 1523, 1529.) But a claim of error in failing to join an absent party may be deemed forfeited on appeal unless it was appropriately raised in the trial court or some compelling reason of equity or policy warrants its belated consideration. (*Jermstad v. McNelis* (1989) 210 Cal.App.3d 528, 538; see also *Krause v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 363–371 (*Krause*).)

The record does not indicate that the issue of Denise Anstey's compulsory joinder was appropriately presented to the trial court. Appellant's complaint did not disclose that he owned the property with his wife as joint tenants. It was not until he filed an amended answer to the cross-complaint that he alleged he and Denise Anstey owned the property, as co-trustees of their revocable trust. The amended answer raised lack of joinder of unnamed "indispensable parties" as an affirmative defense. In his ex parte application seeking to amend his complaint, appellant proposed to "conform the pleadings to the evidence" by adding Denise Anstey in her capacity as a co-trustee of the Anstey trust. He omitted this proposed addition from his subsequent noticed motion to amend.

Respondents' motion for leave to amend the cross-complaint sought to add another set of neighbors, the Russells, as "indispensable parties." But it sought to add Denise Anstey as an individual and co-trustee only so as to properly identify the titleholders or proper "parties . . . with legitimate interests." Appellant opposed the proposed addition of Denise Anstey and the Russells. His attorney stated that the affirmative defense of failure to join indispensable parties referred to the Russells. At no time before the ruling on summary judgment did appellant or respondents argue that Denise Anstey was a necessary or indispensable party to the action, and in denying the

motions to amend, the court stated that respondents would be permitted to amend their pleadings to "conform to proof" at trial that the Ansteys and their trust were proper cross-defendants.

The joinder issue resurfaced after the court granted the unopposed motion for summary judgment. In his motion for reconsideration, appellant argued that the judgment was in favor of and against the wrong parties since respondents had not amended the cross-complaint to reflect that the properties were now owned through the parties' respective trusts. Although he then identified Denise Anstey as a "necessary party," the issue was described as one of "standing," rather than joinder, and no argument was presented as to why she was necessary to the action. The court noted that the briefing was inadequate. Appellant's opposition to the proposed judgment argued that the judgment was not against "necessary parties," incorrectly claiming that respondents' motion to amend the cross-complaint had identified Denise Anstey as "one of several necessary parties." Again, the issue why Denise Anstey was a necessary party was not briefed.

We see no place in the record where appellant argued that Denise Anstey was a necessary party, subject to compulsory joinder under section 389, subdivision (a). His affirmative defense does not appear to have been intended to cover her, nor did appellant file any motion to compel her joinder or to dismiss the action for failure to join her, even though such a motion "may be made as late as the trial on the merits." (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 22.) Neither did respondents' motion to amend alert the court that Denise Anstey was subject to compulsory joinder.

When, during the course of an action, an interest is transferred to another, the transferee may be substituted, or the action may continue in the name of the original party. (§ 368.) The transfer of the properties to the two trusts during the pendency of this action made substitution an issue since the parties appeared unsure whether they could proceed with the action in their individual capacities. Denise Anstey was brought to the court's attention in this context as a co-trustee of the Ansteys' trust, rather than as co-owner of the property since 2002.

By the time the trial court heard appellant's opposition to the proposed judgment, it had become clear that the trusts did not need to be named as parties since they were not legal entities separate from the trustees. (See *Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473.) Additionally, respondents argued that they did not need to be named in their representative capacities since they were both trustees and beneficiaries of their trust. (See *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 170–171 [where same persons are trustees and beneficiaries of express trust, pleadings need not mention their representative capacities].) It is unclear whether the Ansteys similarly are the sole beneficiaries of the Anstey 2008 Revocable Trust, but appellant does not argue that Denise Anstey's capacity as a co-trustee of that trust is an issue.

Respondents contend that Denise Anstey is not a necessary party because her interest in the action is the same as appellant's. (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1102 [absent party's "ability to protect its interest is not impaired or impeded as a practical matter where a joined party has the same interest in the litigation"].) Relying on *Pacific Coast Refrigeration, Inc. v. Badger* (1975) 52 Cal.App.3d 233, 252–253 and *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 23, appellant presumes that Denise Anstey is a necessary party as a matter of law. Both cases involved actions to foreclose a mechanic's lien on property held by a husband and wife as co-tenants, where only the husband was named as a defendant, and there was no evidence that the property was community property. Appellant does not address the issue whether a wife is a necessary party to a quiet title action against her husband involving community property. (See e.g. *Cutting v. Bryan* (1929) 206 Cal. 254, 258 [in quiet title action, husband and wife in privity as to community interest in property].)

Nor does he attempt to characterize the status of the Ansteys' property before or during the pendency of this litigation, and the record before us is inconclusive. The description of title in a deed creates a rebuttable presumption about the actual ownership interests in the property. (*In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th

176, 184–185.) The presumption may be overcome "only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended." (*Id*. at p. 189.) Here, the property was originally deeded to appellant in 2002 as his separate property. He then deeded it to himself and his wife as joint tenants. Under the second deed, each spouse's interest in the joint tenancy was presumptively his or her own separate property. (See *Estate of Mitchell* (1999) 76 Cal.App.4th 1378, 1385.) Yet, in 2008, during the pendency of this case, the Ansteys, "Husband and Wife, as Community Property" quitclaimed the property to themselves as "Co-Trustees of the Anstey 2008 Revocable Trust." The record thus suggests that the Ansteys' property may be community property.

We do not determine the status of the property and the character of the spouses' interest in it. We only conclude that the issue of Denise Anstey's compulsory joinder was not adequately presented to the trial court, and the court did not abuse its discretion in not ordering her joined. (See *Jermstad v. McNelis, supra*, 210 Cal.App.3d at p. 538 [in action to establish paternity, mother waived issue of court's failure to join prospective adoptive parents by failing to mention compulsory joinder in demurrer, at hearing, or any time before trial]; *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 865 [when court recognized declarant was necessary party, it erred in setting aside his voluntary declaration of paternity without ordering him joined on its own motion].)

Nor are we persuaded that, even if Denise Anstey were a necessary or indispensable party, the judgment in this case does not bind appellant. In *Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, on which appellant relies, a debtor managed to set aside a foreclosure sale by obtaining a default judgment against the purchaser of the property. (*Id*. at p. 666.) He had dismissed the lender and trustee from the case in response to their demurrer. (*Ibid*.) They later obtained a declaratory judgment that the sale was valid, and the court quieted title in favor of the purchaser. (*Ibid*.) The court of appeal cited the well-established principle that an indispensable party is not bound by a judgment rendered in its absence and may collaterally attack it. (*Id*. at p. 667.) It also held that, after the foreclosure sale was declared valid in the second

action, the purchaser should not be bound by the original default judgment that invalidated the sale. (*Id*. at p. 669.)

Washington Mutual Bank v. Blechman arose from a successful collateral attack on a prior judgment. It does not stand for the broad proposition that a party to a judgment is not bound by it just because the judgment may be subject to a later collateral attack, particularly when it is unclear whether such an attack would result in an inconsistent judgment. Even in the absence of an indispensable party, the court has the power to render a legally binding decision between the parties before it. (*Krause*, *supra*, 73 Cal.App.3d at p. 364.)

Appellant also cites *Welch v. Bodeman* (1986) 176 Cal.App.3d 833. The plaintiff in that case sued the Director of Finance of the City of San Bruno, but the judgment purported to compel the city to give him certain process for obtaining a business license even though the city was not a party. (*Id*. at p. 837.) The appellate court reversed because the trial court had no jurisdiction over the city and should not have drafted the judgment so as to grant relief against it. (*Id*. at p. 840.) *Welch v. Bodeman* is distinguishable because the judgment in this case expressly granted respondents relief only against appellant and not against Denise Anstey.

In a quiet title action, a plaintiff must name as defendants "the persons having adverse claims to the title of the plaintiff against which a determination is sought." (§ 762.010.) The judgment in such an action is binding on "[a]ll persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided." (§ 764.030, subd. (a).) This statutory scheme indicates that a judgment in a quiet title action is binding on an adverse claimant who, like appellant, was a party to the action.

We, therefore, decline to reverse the judgment for non-joinder.

II

A

Appellant seeks relief from the judgment under the mandatory relief provision of section 473, subdivision (b). He acknowledges a split of authority on the application of

this provision to summary judgments and asks that we follow the expansive reading adopted in *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868. We believe that case was wrongly decided and is contrary to what is, by now, the strong weight of authority on what is considered a "default" under the statute.

The mandatory relief provision of section 473, subdivision (b) reads: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

A series of recent cases has recognized that, by its express terms, the mandatory relief provision applies only to defaults, default judgments, and dismissals. An unopposed summary judgment is none of those. (See *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 226–229; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1415; *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 294–297; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 137–138.) We followed this non-expansive reading of the mandatory relief provision in *Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 457–459, where we applied it to an attorney's failure to file a timely opposition to a motion to enforce a settlement. Here, too, we find no reason to depart from the statutory language.

B

Appellant also invokes the discretionary relief provision of section 473, subdivision (b), which reads: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the

answer or other pleading proposed to be filed therein, otherwise the application shall not be granted . . . ." (*Ibid.*)

Appellant argues that an opposition to a motion for summary judgment is not a pleading. The proposed pleading requirement compels the party seeking relief under section 473 to demonstrate his or her good faith and readiness to proceed on the merits. (*Job v. Farrington* (1989) 209 Cal.App.3d 338, 341.) The requirement has been broadly applied not only to pleadings, but to other proposed filings as well. (See *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1731 [relief denied for failure to attach copy of proposed motion for attorney fees].) It has been excused when the substance of the proposed filings is reflected in other papers filed with the court. (See *Estate of Parks* (1962) 206 Cal.App.2d 623, 632 [requirement excused where substance of proposed objection to report of inheritance tax appraiser was contained in the verified application and declaration]; *Freeman v. Goldberg* (1961) 55 Cal.2d 622, 625 [failure to make timely motion to tax costs; requirement excused where untimely motion already on file].)

Appellant's two motions for relief from judgment were not accompanied by a proposed opposition to the summary judgment, nor did they reflect the substance of his proposed opposition. In denying the motions, the trial court noted specifically that appellant failed to submit a proposed opposition even though the order denying his motion for reconsideration had advised him of this requirement. The court was within its discretion to decline to set aside the judgment because it had no indication that appellant was ready to proceed on the merits.

III

We next reach the merits of the summary judgment. Summary judgment is proper when no triable issue exists as to any material fact, and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A moving defendant meets its burden by showing that one or more essential elements of the cause of action cannot be established. (*Id.*, § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).) The burden then shifts to the plaintiff to show that a

triable issue of fact exists as to the cause of action. (*Ibid*.; Code Civ. Proc., § 437c, subd. (p)(2).)

Generally, on summary judgment, the pleadings define the issues, and the moving party need not consider theories that could have been but were not pled. (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421.) The trial court is empowered to read the pleadings liberally if they give fair notice to the opposing party of the theories on which relief is generally being sought. (*Id*. at p. 422.)

We review the trial court's decision on a summary judgment motion de novo, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

A

We first consider the issue of prescriptive easement. Appellant's complaint sought to quiet title to a prescriptive easement in the property enclosed by the wall, alleging "actual, open, notorious, exclusive, hostile, and adverse use of the [e]asement." A prescriptive easement arises from open and notorious, hostile, and continuous use of land. (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1186.) But when someone like appellant encloses and exclusively possesses a part of a neighboring parcel, he is not entitled to a prescriptive easement as a matter of law because his asserted possessory right in the land is "not in the nature of an easement." (*Ibid*.) In other words, "adverse possession may not masquerade as a prescriptive easement." (*Id*. at p. 1185.)

A claim of adverse possession has the same elements as a prescriptive easement claim, except that it also requires the payment of taxes. (*Kapner v. Meadowlark Ranch Assn., supra*, 116 Cal.App.4th at p. 1187, *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321–322.) In their motion for summary judgment, respondents argued that appellant was not entitled to a prescriptive easement as a matter of law, and he could not claim adverse possession because they paid taxes on parcel 20. The trial court treated appellant's claim of prescriptive easement as one of adverse possession, and granted respondents' motion on this claim on two grounds: that appellant's possession of the enclosed portion of the pole was not hostile, and that respondents paid taxes on parcel 20.

In finding that appellant's use of the land was not hostile, the trial court relied on a 1964 recorded agreement, signed by one Andrew Chitiea. The agreement says that Andrew and Joan Chitiea were in the process of buying what would later become the Ansteys' property. The agreement states that "a wall is extending from our land onto an easement which is owned by Christopher Wojciechowski." Andrew Chitiea agreed that "the portion of wall footings and foundation south of Lot 9 . . . erected on an easement leading from Lot 8 . . . will be removed from Lot 8 . . . at the undersigned's sole expense, within 15 days after the receipt of written notice to remove the same."

The parties disagree about the admissibility, authenticity, and relevance of this agreement. Even were the agreement admissible, authentic, and enforceable, it does not establish that appellant's use of the portion of the pole enclosed within his backyard was not hostile. The element of hostility is missing when land is possessed or used with the owner's permission. (See *Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 362.) The 1964 agreement is to tear down the encroaching portion of a wall after written notice. It is unclear whether the referenced wall is the same as the wall at issue in this action or some other wall. It also is unclear how far into lot 8 the wall extended in 1964 and whether it completely enclosed a portion of the pole. The agreement to remove wall footings and foundation suggests that the encroaching portion of the wall may have been unfinished. The agreement cannot be read as permitting Andrew Chitiea or anyone else to continue construction on the wall or to expand an enclosure of the pole beyond the wall. Viewed in the light most favorable to appellant, the agreement does not give notice that appellant's possessory use of the portion of the pole enclosed by the currently existing wall and fence is permissive.

Respondents presented evidence that they and their predecessors paid taxes on parcel 20, which includes the pole. The trial court relied on this evidence in granting summary judgment even though appellant's complaint did not allege a claim of adverse possession. In his reply brief, appellant argues the court should have inferred that he paid taxes on the enclosed portion of the pole, which he visibly possessed. His argument is based on *Gilardi v. Hallam, supra,* 30 Cal.3d 317, in which the court stated that "where

the claimant by construction of buildings or other valuable improvements or by the building of fences has visibly shown occupation of a disputed strip of land adjoining the boundary, several cases have reasoned that the 'natural inference' is that the assessor did not base the assessment on the record boundary but valued the land and improvements visibly possessed by the parties." (*Id*. at p. 327.)

The "natural inference" rule does not apply to this case. First, there was no need to consider whether appellant was entitled to adverse possession since appellant did not plead such a claim. (See *Howard v. Omni Hotels Management Corp*., *supra*, 203 Cal.App.4th at pp. 421–422). Second, although summary judgment was expressly granted because of appellant's non-payment of taxes, in his opening brief on appeal appellant does not argue that he was entitled to a "natural inference" that he paid taxes. Arguments not raised until the reply brief are forfeited absent a showing of good cause for failing to raise them earlier. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

The "natural inference" rule arose in the context of the agreed-upon boundary doctrine. (See *Caballero v. Balamotis* (1956) 144 Cal.App.2d 58, 61 ["'Once it is found that the parties agreed upon a boundary, the payment of taxes according to deed descriptions amounts to payment of taxes on the area up to the agreed-upon boundary'"].) The inference originated in *Price v. De Reyes* (1911) 161 Cal. 484, 489, where the court explained: "It is conceded that both parties paid taxes each year assessed according to the descriptions in the respective deeds. As we have seen, [an agreed-upon boundary] 'attaches itself to the deeds of the respective parties,' and defines the lands described in each deed, so that the one in the possession of the overlap holds the title thereto by the same tenure as he holds the lands technically embraced in the description. [Citations.] The consequence is that under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Furthermore, the natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line

by a careful survey and assessed to one a part of the possession of the other." (*Id*. at pp. 489–490.)

As we explain below, appellant is not entitled to an inference that there was an uncertainty about the true boundary line. Moreover, the tax assessor's map in the record does not show that appellant's wall and fence were considered in drawing the lot lines. Rather, the lot lines on the map are similar to those on respondents' survey of the area. On this evidence, appellant is not entitled to an inference that lot lines for tax purposes were ascertained by visual inspection rather than a survey.

B

Appellant sought to establish a boundary at the site of the wall under the agreed-upon boundary doctrine. That doctrine applies when coterminous owners uncertain about the true boundary line fix it by marking its location or building up to it and acquiesce during the statute of limitations period. (*Bryant v. Blevins* (1994) 9 Cal.4th 47, 55.) The trial court concluded that the doctrine had no application in this case because it was undisputed that appellant's wall was not erected to resolve uncertainty as to the boundary line between the properties. The court added that the 1964 agreement demonstrated the lack of such uncertainty.

Appellant argues the court improperly based its ruling on the 1964 agreement, which, admissible or not, does not establish when, by whom, or why the wall that Andrew Chitiea agreed to remove was built. He argues further that respondents have not negated the element of uncertainty about the true boundary line since they presented no evidence showing what the coterminous owners of the properties believed when the wall was built. Appellant is incorrect.

Respondents could meet their initial burden by presenting evidence "which, if uncontradicted, would constitute a preponderance of evidence that an essential element of [appellant's] case cannot be established." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878–879.) Even if the 1964 agreement is irrelevant, respondents also presented legal records in the form of surveys, tax assessor records, and legal descriptions in deeds showing the true boundaries of the two properties. In *Bryant v.*

Blevins, *supra*, 9 Cal.4th 47, the court held that "when existing legal records provide a basis for fixing the boundary, there is no justification for inferring, without additional evidence, that the prior owners were uncertain as to the location of the true boundary or that they agreed to fix their common boundary at the location of a fence." (*Id.* at p. 58.) The legal records respondents presented would have been sufficient to entitle them to a judgment in their favor after a trial on the merits. (See *ibid*.) They are, thus, sufficient to negate uncertainty as to the location of the true boundary for purposes of summary judgment.

Without additional evidence, appellant is not entitled to a speculative inference that prior coterminous owners agreed to establish a boundary at the site of the wall. The trial court correctly concluded that the agreed-upon boundary doctrine does not apply in this case.

C

In his answer to the cross-complaint, appellant raised the doctrine of balancing conveniences (also known as the doctrine of balancing the equities or relative hardships) as an affirmative defense to respondents' cross complaint. Through this doctrine, the trial court may create an equitable easement "by refusing to enjoin an encroachment." (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 265.) Here, the trial court granted respondents' summary judgment motion on the defense and enjoined the encroachment.

In exercising its discretion to *deny* an injunction, the trial court must consider the following factors: "1. Defendant must be innocent—the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant." (*Linthicum v.*

Butterfield, supra, 175 Cal.App.4th at p. 265, quoting *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 562–563.)

Appellant argues that it is improper to engage in equitable balancing on a summary judgment motion. In the case he cites, *Scheble v. Nell* (1962) 200 Cal.App.2d 435, 438, the court expressed doubt that the equities could be balanced "by affidavits submitted by the opposing parties at motion for summary judgment." Here, the balancing was not done by opposing affidavits.

The trial court balanced the equities as follows: "It is undisputed that cross-complainants will suffer irreparable injury if the encroachments are not removed because they obstruct cross-complainants' ingress and egress. There is no corresponding evidence to support a claim that undue hardship to Anstey will result by reason of the removal; the encroaching structures include a treehouse and a swing set, objects that are easily removed."

Appellant contends that these findings are inadequate. Specifically, he argues that a reversal is warranted because the court did not make a finding on the first factor—whether appellant was innocent and whether respondents were responsible for the situation. He relies on cases in which the trial court denied injunctive relief without making such a finding. (See *D'Andrea v. Pringle* (1966) 243 Cal.App.2d 689, 695 [judgment denying injunction was reversed for failure to make proper findings on innocence or good faith]; *Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 860 [same].)

A finding about defendant's good faith or innocence is crucial in cases denying injunctive relief because all three factors must be present in such cases. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 759; see also *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 559 ["where the encroachment does not irreparably injure the plaintiff, was innocently made, *and* where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages" (Italics added.)].) The requirement that the encroachment be made innocently or in good

faith "implements the rule that '"'relief by way of a mandatory injunction will not be denied on the ground that the loss caused by it will be disproportionate to the good accomplished, where it appears that the defendant acted with full knowledge of the complainant's rights and with an understanding of the consequences which might ensue . . . .'"'" (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 573.)

Appellant cites no cases holding that the failure to make express findings on all three factors amounts to reversible error when the court grants rather than denies an injunction. Nor would the first factor in *Christensen v. Tucker*, *supra*, 114 Cal.App.2d 554, 563, regarding the parties' relative negligence, be dispositive in this case. The wall existed when appellant and respondents bought their respective properties. Appellant testified he did not obtain a survey because he was "[v]ery satisified" with what he purchased, "didn't necessarily want to start looking to claim land or anything more," and is "not the type of person to look for trouble." Yet, he and his wife admitted they enclosed a portion of the pole for their exclusive use even though they knew the wall and their backyard sat on an easement that "belonged to someone else" and was to be used by all. On the other hand, there was evidence that respondents bought their property in 2006 with the understanding that it had two access points—on Roscomare Road and Antelo View Drive. They promptly surveyed their property in 2007 and asserted their rights in the pole in 2008, which prompted this action. This evidence hardly shows that appellant was innocent or that respondents were negligent.

Under the second factor, the court could enjoin an encroachment that causes irreparable harm to respondents regardless of the injury to appellant. (See *Christiansen v. Tucker*, *supra*, at p. 563.) The court made an express finding of irreparable injury based on the obstruction of respondents' ingress and egress, presumably with regard to parcel 20. Respondents showed that parcel 20 has a legal ingress and egress driveway access to Roscomare Road over the pole and a separate address on that street. There also was evidence that the currently undeveloped parcel can be improved with a guest house, office, studio, or a separate single family residence, but that development is contingent on

building a driveway over the pole that connects it to Roscomare Road. The driveway would require removal of the enroachments on the pole.

The court found no undue hardship to appellant in having to remove the treehouse and swing set. The only additional encroachments that respondents' motion revealed were the wall, fence, and some pre-existing trees. Respondents did not estimate what it would cost appellant to remove these encroachments, and the court did not expressly mention them in balancing the equities or in the judgment, which ordered appellant to remove "the encroachments upon the property, including a treehouse and a swing set." But there is no reason to infer that the cost of removal would be prohibitive.

Appellant argues that the court failed to fully balance the equities since it ignored the allegations in appellant's answer to the cross-complaint and his counsel's offer of proof at the hearing on the motion for summary judgment. He cites no authority that allegations in a pleading and an offer of proof may raise triable issues of fact. The law is to the contrary. (See e.g. *Cornelius v. Los Angeles County Etc. Authority* (1996) 49 Cal.App.4th 1761, 1768 ["a party cannot rely on the allegations of his own pleadings, even if verified, to make or supplement the evidentiary showing required in the summary judgment context"]; *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014 [counsel's "assertions and allegations . . . , unsupported by declarations or affidavits, do not serve to create a factual issue"].)

The evidence before the court did not indicate that there were material issues of fact on appellant's affirmative defense. Summary judgment was therefore proper.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.