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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PATRICK JOHN SCOTT,

Plaintiff, Cross-  
defendant and Appellant,

v.

YEHORAM TOM EFRATI et  
al.,

Defendants and  
Respondents,

TOMAX, LLC,

Defendant, Cross-  
complainant and Respondent.

B281122

(Los Angeles County  
Super. Ct. No. BC542579)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Barton, Klugman & Oetting and Ronald R. St. John for Plaintiff, Cross-defendant and Appellant.

Robert F. Smith for Defendants and Respondents and  
Defendant, Cross-complainant and Respondent.

\* \* \* \* \*

Plaintiff Patrick John Scott appeals a judgment imposing a prescriptive and equitable easement in favor of defendant Yehoram Tom Efrati<sup>1</sup> over a piece of his property “for the purposes of maintaining a pool deck, a fence, and set back compliance with the Los Angeles Municipal Code.” On appeal, Scott does *not* challenge Efrati’s right to have this legally required setback for his pool on Scott’s property. Instead, he assumes the trial court imposed an easement beyond the legally required setback and argues the easement was improper. Because his assumption is contrary to the trial court’s statement of decision, and he has not provided an adequate record to demonstrate otherwise, we have no basis to overturn the judgment. We also reject Scott’s challenge to the attorney fee award. We affirm.

### **BACKGROUND**

The trial court held a two-day bench trial that was not reported. It then issued a detailed, 23-page statement of decision with an attachment. Without a reporter’s transcript or agreed statement, Scott may not challenge the sufficiency of the evidence supporting the court’s findings. (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; *Foust v. San Jose Construction Co., Inc.*

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<sup>1</sup> Tomax, LLC, was another defendant, but the trial court noted that entity was solely owned by Efrati and the parties treated the two as a single entity. We will do the same and refer to both as Efrati.

(2011) 198 Cal.App.4th 181, 186 (*Foust*).) We therefore recite the following facts as found by the trial court in the statement of decision. (*Foust, supra*, at p. 184.)

Scott and Efrati are neighbors in Los Angeles. Scott lives at 7217 Woodrow Wilson Drive and Efrati lives at 7241 Woodrow Wilson Drive. The two properties were originally part of one large parcel owned by the same person. That owner divided it into four sections, which he sold to different buyers. One of those sections was eventually owned by Scott and another by Efrati.

In 1959, before subdividing the property, the prior owner built a pool onto the parcel that would eventually become Efrati's property. In the 1960's, the owner constructed a fence dividing Scott's and Efrati's properties, which has been the de facto boundary of the properties for 50 years. The parties in this case (and their predecessors) treated it as the property boundary through their words, actions and inactions for 30 years.

Scott bought his property in 1983. The property west of the fence is legally described as "the East 14 feet of Lot 9 in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 131, pages 22 and 23 of Maps, in the office of the County Recorder of said County." A portion of this 14-foot section of Scott's property was used exclusively by Efrati and his predecessors as it was necessary "to accommodate the pool and its deck built in 1959 (along with the fence) and the Los Angeles Municipal Code 'setback' requirements for the pool and deck."<sup>2</sup>

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<sup>2</sup> The trial court cited Los Angeles Municipal Code section 12.21 C.10.(a) for the setback requirement and attached to the statement of decision the "Baseline Hillside Ordinance" guide from the Los Angeles Department of City Planning.

Based on this overview of the facts, the trial court found: “Therefore, [Efrati] and [his] predecessors openly and continuously exercised possession, ownership and control of this 14 feet of [Scott’s] property ever since the pool was built in 1959. Since 1959, neither [Scott] nor his predecessors ever filed suit to claim to the 14 feet of property west of the fence, or objected to [Efrati’s] use of the 14 feet, until this lawsuit was filed. [Efrati], therefore, gained a prescriptive easement over [Scott’s] property due to the passage of time for the purposes of use of the pool, the pool’s deck, the fence, and the Los Angeles Municipal Code’s ‘setback’ requirements. [Scott] did not dispute the applicability of the Los Angeles Municipal Code’s ‘setback’ requirements.”

Both Scott and Efrati testified at the bench trial. The court expressly found Efrati credible and found Scott not credible. Efrati testified the prior owners of his property exclusively used the 14-foot property west of the fence because it was necessary to accommodate the pool and fence and to comply with the setback requirement. This use continued after Scott purchased the adjoining property in 1983.

Efrati explained that two years ago he and Scott agreed to create a new fence where the old one had been. A contractor was hired to do the work. Scott watched the first part of the demolition without any complaint and left to run errands. When he returned, he was hostile and objected to the construction. Then, to Efrati’s surprise, when Efrati went on vacation, Scott erected a wood fence (hereinafter referred to as the “unauthorized fence”) and a wood deck that extended west onto—and encroached upon—the 14 feet of property Efrati had been using for his pool, the pool deck, the fence, and the legally required setback. Three witnesses corroborated Efrati’s testimony.

Scott's testimony conflicted with this version of events, and the court rejected it. The court noted Scott initially denied having received a notice to comply from the Los Angeles County Building and Safety Department for Scott's unauthorized fence and his new deck, but then admitted he had received it. The court concluded Scott constructed the deck and unauthorized fence while Efrati was on vacation in order to avoid detection and to prevent Efrati from stopping the illegal construction and encroachment. The court found these actions indicated Scott was conscious of his own wrongdoing.

Efrati objected to Scott's construction and asked him to remove the deck, the unauthorized fence, and a tree, but Scott refused. Instead, he filed this lawsuit and a *lis pendens* on Efrati's property. Due to the *lis pendens*, Efrati was unable to obtain loans or refinancing of his property for years.

Scott filed a lawsuit alleging two claims for injunctive relief and trespass. Efrati filed a cross-complaint alleging 13 causes of action: (1) trespass, (2) trespass by encroachment, (3) trespass by destruction of boundary fence, (4) quiet title, (5) implied easement, (6) prescriptive easement, (7) declaratory relief, (8) permanent injunction, (9) ejectment, (10) slander of title, (11) intentional interference with contractual relationship, (12) negligent interference with contractual relationship, and (13) breach of verbal contract.

The court found against Scott on his claims in the complaint and in favor of Efrati on his cross-claims for trespass, prescriptive easement, declaratory relief, ejectment, slander of title, and breach of contract. The court concluded a prescriptive easement existed because Efrati's use of the property was open, continuous and adverse for more than five years, and Efrati

objected to Scott's encroachment. The court also weighed the equities in favor of Efrati and found an equitable easement existed.

For the prescriptive easement, injunction, and declaratory relief claims, the court described Efrati's protected interest as " 'the East 14 feet of Lot 9 in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 131, pages 22 and 23 of Maps, in the office of the County Recorder of said County' for the purposes of maintaining a pool deck, a fence, and set back compliance with the Los Angeles Municipal Code." Likewise, for the ejectment claim, the court found Efrati "has a right of possession (although not ownership) of the disputed property to the extent that the 14 feet must accommodate [Efrati's] pool deck, the fence, and all relevant building codes. Because [Scott] moved the original fence line and constructed a new fence so as to accommodate his new, larger deck, [Scott] ejected [Efrati] from the property which [Efrati] had a right to possess for purposes of maintaining his pool deck, a fence, and 'set back' compliance with the Los Angeles Municipal Code." The trial court specifically noted Scott's expanded deck likely placed Efrati in violation of the setback requirements of the Los Angeles Municipal Code and that was likely why Scott was cited by the Los Angeles Building and Safety Department.

The court awarded damages to Efrati for \$40,000, which included the cost of destroying the old fence, removing Scott's unauthorized fence and deck, conducting a survey, and constructing a new fence. Scott was enjoined from preventing Efrati from removing the structures on the easement, and Efrati was required to bear the cost of erecting or removing any future fence in the same location as the old fence.

The court awarded attorney fees to Efrati on the claims in the complaint and the cross-claims on which he prevailed. It awarded Scott attorney fees on the four claims in the cross-complaint on which he prevailed. The court did not cite authority for the awards but awarded them “as provided by law.”

The court entered judgment consistent with its statement of decision, including the description of Efrati’s interest in the disputed property.

## **DISCUSSION**

### **1. Scott’s Challenge to the Judgment**

Scott argues the trial court erred as a matter of law because an encroaching party like Efrati cannot obtain an easement for *exclusive* use of another’s property based upon “misplaced fences.” Scott relies heavily on *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296 and other cases rejecting prescriptive easements that would grant the encroaching party exclusive use of another’s property. (See, e.g., *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1187; *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564.)<sup>3</sup>

Scott includes an important limitation to his legal argument, however: “Note that [Scott] is not trying to interfere with the area used by permission within a five-foot radius of the

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<sup>3</sup> Scott also cites cases involving the “agreed-boundary” doctrine, which hold that a court should not rely on adjoining property owners’ agreement to a boundary unless uncertainty in the true boundary prompted the agreement. (See *Bryant v. Blevins* (1994) 9 Cal.4th 47, 49-50; *Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 89.) The trial court did not rely on this concept, and in light of our resolution of this case, we need not address it.

swimming pool. But [the trial judge] has *conflated* this use with ‘the fence’ which extends far beyond the five-foot radius of the pool and down the hill between the two parcels, and encumbered the entirety of the 14-foot wide parcel with an easement that is tantamount to occupation. *The disputed area of historic fencing and nearly the whole of the 14-foot wide parcel have nothing to do with the pool set-back.*” (Italics added.) The language we have italicized reflects a factual assumption that the court granted Efrati an interest *beyond* what he needed to maintain a fence to accommodate the preexisting pool, pool deck, and setback requirements. However, Scott has not provided an adequate record to support that assumption, and a fair reading of the court’s statement of decision belies his position.

We are guided by several basic principles of appellate review. “On appeal, a judgment of the trial court is presumed to be correct. [Citation.] Accordingly, if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court’s reasoning. [Citation.] All intendments and presumptions are made to support the judgment on matters as to which the record is silent.” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

We must view the evidence in favor of the party who prevailed in the trial court. (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) “This precept is equally applicable here, where [the trial court] issued a statement of decision: ‘Where a statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.’” (*Ibid.*)



The entire dispute here involved Scott's surreptitious building of a fence that contained an L-shaped jog extending what appeared to be *two and a half feet* west of the original fence line in order to accommodate his expanded deck and Jacuzzi. The court noted Scott was probably cited by the Los Angeles Building and Safety Department for this construction because this expansion "is likely placing [Efrati] in violation of the setback requirements of the Los Ang[e]les Municipal Code." If moving the original fence line less than three feet to the west encroached on Efrati's needed five-foot setback, we may readily infer the original fence line reasonably demarcated the property Efrati legally needed for his historic uses.

Further, at every opportunity, the trial court took care to limit Efrati's easement to the portion of Scott's 14-foot strip of property "for the purposes of maintaining a pool deck, a fence, and set back compliance with the Los Angeles Municipal Code." It found Scott's property was used "exclusively by [Efrati] as it was necessary to accommodate [Efrati's] pool, which was built in 1959 along with the fence, and to comply with the Los Angeles County Municipal Code 'setback' requirements for the pool and deck." Nothing in this language suggests the court intended to grant Efrati an interest beyond that necessary to preserve the original fence line and Efrati's ability to maintain his pool, pool deck, and setback compliance.

We acknowledge the maps introduced at trial seem to show the old fence line extending as Scott claims—northwest beyond Scott's unauthorized deck to Scott's western property line. This suggests perhaps the original fence extended somewhat beyond the area technically needed for Efrati's pool, pool deck, and setback requirement. Scott has not provided a reporter's

transcript, a settled statement, or an agreed statement of the testimony presented at trial, so we have no way to know *exactly* where the original fence was placed. It was his burden to provide a sufficient record to demonstrate error, and without an adequate factual record, we must accept the court's findings that the original fence placement was necessary to accommodate Efrati's historic uses. (See *Foust, supra*, 198 Cal.App.4th at p. 187 [noting appellant " 'has the burden of providing an adequate record' " and " '[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [appellant]' "].)<sup>4</sup>

Having failed to demonstrate the prescriptive and equitable easement found by the trial court exceeded the uses Scott admittedly has not challenged on appeal, we have no basis to reverse the trial court's judgment.

## **2. Attorney Fees**

In the statement of decision and judgment, the court awarded each party attorney fees "as provided by law" for the claims on which they prevailed. In a single short paragraph with no citations to the record, Scott urges us to "correct" the judgment to delete any reference to attorney fees because, in his words, the statement of decision "cites no basis for any attorney's fees award, and there is no legal basis." For legal authority, he mentions only the "American Rule" that each party bears their own fees, and cites Code of Civil Procedure section 1021, which provides that "the measure and mode of compensation of

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<sup>4</sup> Prior to issuing the final statement of decision, the trial court requested and received additional briefing on the Los Angeles County Building and Safety Code regarding "setbacks." This suggests the court was focused on the setback issue when it crafted the statement of decision.

attorneys and counselors at law is left to the agreement, express or implied, of the parties,” absent fees specifically provided by statute.

Scott has presented us no way of deciding whether the attorney fee award was correct. As appellant, Scott bears the burden to affirmatively demonstrate error with an adequate record, argument, and citations to authority. (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) We may thus treat this contention as waived. (*Ibid.*) Even if not waived, Scott’s contention fails. The court awarded fees “as provided by law.” If Efrati is not legally entitled to recover fees, then they would not be “provided by law” and the judgment would be correct. We see no basis to strike the reference to attorney fees.

#### **DISPOSITION**

The judgment is affirmed. Respondents are awarded costs on appeal.

ROGAN, J.\*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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\* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.