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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TESORO REFINING &
MARKETING COMPANY, LLC,
et al.,

Plaintiffs and Respondents,

v.

REBECCA RICKLEY et al.,

Defendants and Appellants.

B290903

(Los Angeles County
Super. Ct. No. BC656002)

APPEAL from an order of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed.

Law Offices of Natasha Roit and Natasha Roit for Defendants and Appellants.

Buchalter and Efrat M. Cogan for Plaintiffs and Respondents.

Rebecca Rickley and Natasha Roit (collectively, Appellants) appeal from an order granting a preliminary injunction against them and in favor of respondents Tesoro Refining & Marketing Company, LLC, and Thrifty Oil Co. (Thrifty Oil). Tesoro leases property from Thrifty Oil on which Tesoro operates a gas station. The gas station property is adjacent to property that Appellants own and on which they live. Tesoro claims the right to an express easement over Appellants' property for the purposes of a sewer pipe.¹

Tesoro sued to quiet title in the easement after a dispute arose over the condition of the pipe and Tesoro's access to it. As part of a landscape stabilization project, Appellants began constructing concrete stairs over a portion of the easement. The trial court granted Tesoro's motion for a preliminary injunction precluding Appellants from completing the construction and from damaging Tesoro's sewer pipe pending trial.

Appellants argue that the trial court abused its discretion in issuing the injunction because: (1) it relied on inadmissible evidence concerning the possibility of using a directional drilling machine to install new pipe if the concrete stairs were completed; (2) it erred in concluding that construction of the stairs would cause irreparable harm; (3) it imposed an unlawful condition for dissolving the injunction; and (4) it exceeded its authority in ordering preservation of the pipe because the pipe was not actually located within the express easement.

¹ Because Tesoro and Thrifty Oil assert the same rights under the easement that is the subject of this lawsuit, unless required by the context we do not distinguish between them, referring to them collectively as Tesoro.

We reject the arguments and affirm. There was ample evidence to support the trial court’s finding that the construction Appellants planned would make access to the pipe “extremely difficult” and would deprive Tesoro of the ability to preserve evidence.

BACKGROUND

1. The Easement Dispute

Appellants own residential property on Malibu Vista Drive in Malibu (the Malibu Vista Property). The Malibu Vista Property is built on a slope, with an upper lot and a lower lot. Appellants’ house is on the upper lot.

In 1967, the then owner of the Malibu Vista Property conveyed the right to an easement on the property to Gulf Oil Corporation (Gulf Oil) and its “successors and assigns” (the Easement).² At the time, Gulf Oil owned the property that Tesoro currently leases for its gas station (the Gas Station Property). The Gas Station Property is contiguous to, and downhill from, the Malibu Vista Property.

The Easement is on a one-foot strip of land on the edge of the Malibu Vista Property and provides the right to “construct, maintain, operate and use sanitary sewers and appurtenant structures in, over and across” the designated segment of land. A sewage pipe was in fact installed in the area of the Easement before Tesoro acquired its interest in the Gas Station Property.

² Appellants dispute the validity of the Easement but do not argue that point on appeal. We therefore use the term “Easement” to refer to the recorded easement without intending to express any view on whether it is valid or enforceable.

In October 2016, Appellants notified Tesoro that there was a sewage leak in the lower lot of the Malibu Vista Property. Tesoro claims that, while investigating the source of the leak, it discovered that a portion of the sewage pipe had been removed from the ground in the lower lot.³ The Tesoro representatives who performed the investigation did not observe any obstruction of the Easement at that time.

Tesoro claims that, following the leak, Appellants did not provide it with adequate access to the Malibu Vista Property to investigate the causes of the sewage leak; to determine the extent of damage to the sewer pipe; and to repair the pipe and restore sewer service to the gas station.

2. Appellants' Permit Application

Also in 2016, Appellants sought a coastal development permit for a project to stabilize the slope on which the Malibu Vista Property is located. The Los Angeles County Department of Regional Planning (the Department) held a hearing on Appellants' permit application on December 20, 2016.

Representatives of Tesoro and Thrifty Oil attended the hearing and advised the Department that they had no objection "in concept" to Appellants' project, but that they did not intend to abandon or waive any rights under the Easement. Roit, speaking for Appellants, advised the Department that there was a dispute with Tesoro about the validity of the Easement, but stated that

³ The parties dispute the source of the leak and the circumstances of the missing pipe in the lower lot. Tesoro claims that the missing pipe was "broken or disconnected and removed from the ground." Appellants claim that they were forced to cap the pipe to stop the leak and removed only a small portion of the pipe to do so. The dispute is not material to the appeal.

“none of the piles” involved in their project would impact the Easement and that Tesoro’s concern about the Easement “doesn’t impact the project in any way.”

3. Tesoro’s Lawsuit

Disagreements over the Easement continued, and Tesoro filed this action against Appellants in April 2017. Tesoro filed a First Amended Complaint (FAC) in September 2017, and Appellants filed cross claims.

Tesoro’s FAC asserts causes of action to quiet title on the recorded Easement as well as on alleged prescriptive and equitable easements concerning the sewer pipe. The FAC also asserts claims for declaratory relief and negligence.

4. Tesoro’s Application for a Temporary Restraining Order and Motion for a Preliminary Injunction

On February 20, 2018, the trial court ordered an inspection of the Malibu Vista Property. During the inspection on February 28, 2018, Tesoro’s counsel observed that about 10 feet of the sewer pipe was covered with concrete steps and another portion of the Easement had concrete forms over it in preparation for a concrete pour. In addition, about two feet of the sewer pipe had been cut out and removed. Roit, who was present, gave one of Tesoro’s lawyers the piece of pipe that had been removed.⁴

Tesoro applied for a temporary restraining order (TRO) that same day. After a telephonic hearing in which counsel for

⁴ Appellants acknowledge the damage to the pipe and explain that it was “inadvertently cut by the workers performing the slope stabilization.”

both Tesoro and Appellants participated, the trial court issued a TRO.

Tesoro filed its motion for a preliminary injunction seven days later on March 7, 2018. After several continuances while the TRO remained in place, the trial court held an evidentiary hearing on May 10, 2018, concerning the injunction motion. The court issued its written ruling granting the motion on June 11, 2018.

5. The Trial Court's Ruling

The trial court found that Tesoro had established a likelihood of prevailing on its cause of action to quiet title on the recorded Easement (the only claim that Tesoro addressed in its motion). With respect to the balancing of harms, the court concluded that there was a threat of irreparable harm to Tesoro if the motion were not granted because “[i]t will be extremely difficult for [Tesoro] to inspect, repair, access, use, operate, or maintain the sewer pipe if the concrete steps are poured,” as Appellants planned to do. The court also found that Tesoro “will lose the ability to preserve the status quo of evidence if concrete is poured over the pipe.” The court noted that “[t]here appears to be a deliberate cut on the pipe near the steps.”

In contrast, the trial court found that Appellants had not provided evidence that they would suffer irreparable harm if the concrete steps were not immediately poured. The court explained that, “[f]rom the drawings and photographs reviewed by the Court, it appears that all other work with respect to the hillside stabilization has been concluded, including the soldier piles and cap system that [Appellants] claim is necessary for slope stability.”

The trial court granted a preliminary injunction, prohibiting Appellants from “further cutting, damaging, altering or removing any portion of the sewer pipe which runs across [Tesoro’s] easement on [Appellants’] property, and also from covering over the sewer pipe and [Tesoro’s] easement with concrete or other non-temporary material.” The court stated that the injunction would be dissolved if Appellants were to: (1) allow Tesoro to preserve both ends of the pipes from the upper lot by the stairs and the wooden form; (2) stipulate that they would not rely on the concrete pour as “weight in the scale of equity” at trial; and (3) permit Tesoro to install a plastic sleeve below the area where the concrete stairs were to be formed. The purpose of the sleeve was to permit the installation of new pipes through the sleeve in the event that Tesoro prevailed on its claims. The court set a bond of \$50,000.

DISCUSSION

1. Standard of Review

An appellate court reviews the decision to grant a preliminary injunction for abuse of discretion. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 (*Cohen*)). Where the trial court’s decision involves the resolution of factual disputes, we review the court’s factual findings for substantial evidence. (*Smith v. Adventist Health System / West* (2010) 182 Cal.App.4th 729, 739.)

In deciding whether to issue a preliminary injunction, a trial court must consider two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits; and (2) the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were

issued. (*Cohen, supra*, 40 Cal.3d at p. 286.) Here, for purposes of appeal Appellants do not dispute the trial court's finding that Tesoro adequately demonstrated a likelihood of success on the merits. Our review is therefore limited to the trial court's balancing of the harms in ruling on the second factor.

2. The Trial Court Acted Within Its Discretion in Admitting Testimony Concerning the Effect of Constructing the Concrete Steps

At a scheduled hearing on Tesoro's preliminary injunction motion on April 19, 2018, Appellants submitted a supplemental declaration from Roit attaching an e-mail from a Los Angeles County building inspector, James Gustin. The e-mail stated that "[t]here is a method where a machine is used to drill for and install the [sewer] line. If they use this method it should have little or no effect on your steps/flatwork."

Upon receiving this declaration, the court continued the hearing to May 10, 2018, "[i]n order to give [Tesoro] an opportunity to respond to the Roit Declaration and Gustin email." Tesoro's notice of ruling of the April 19, 2018 hearing stated that "the court intends to hold an evidentiary hearing on the issues raised by the Roit Declaration and Gustin email and that Mr. Gustin and Mr. Tran [Appellants' project engineer] may be subpoenaed to appear."

At the evidentiary hearing on May 10, 2018, Tesoro did call Gustin to testify. Gustin explained that he was "not an expert on directional drills" and that his e-mail was a "very brief general answer to a general question." However, he testified that he believed it was "probably doable" to use a directional drilling machine to install a new pipe under completed concrete steps on the Malibu Vista Property. In response to the court's question

whether this belief was “an opinion or a speculation,” Gustin admitted that it was speculation.

Tesoro called Scott Willett to respond to this testimony. Willett was a project manager with DiMaggio Maintenance, a general contracting company. He was present at the inspection of the Malibu Vista Property on February 28 and March 1, 2018.

Willett explained the problems with using a directional drilling machine to drill under the concrete steps on the Malibu Vista Property if Appellants were to complete them. He identified several photographs of directional drilling machines. He explained that such machines are heavy and would need to be centered on the Easement, which would require part of the machine to be placed on the neighbor’s property. He described why it is difficult for a directional drilling machine to drill in a straight line over a long distance. He also explained that operating such a machine can damage patios and landscaping features, and that a contractor would therefore typically require a waiver from persons whose property might be affected. Finally, he offered his opinion that, if Appellants completed constructing the concrete steps, it was unlikely that Tesoro would be able to “bring in a machine and core drill a hole” under the poured concrete.

Appellants objected to Willett’s testimony at the hearing and argue on appeal that his testimony was inadmissible because Willett was not qualified to provide expert testimony on directional drilling machines. We find no error in the trial court’s consideration of Willett’s testimony.

A trial court’s decision to admit or exclude evidence is reviewed under the abuse of discretion standard and “will not be disturbed except on a showing the trial court exercised its

discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) The trial court acted within its discretion here.

Willett had seen directional drilling machines in operation in his previous jobs working for a civil engineer and for a public works contractor. Willett was able to explain the operation of such machines in detail. He had also personally seen the Malibu Vista Property during several inspections and therefore could testify from his personal knowledge about the location on the property where a directional drilling machine would need to operate.

The trial court therefore reasonably concluded that Willett was competent to testify about the operation of directional drilling machines based upon his own percipient knowledge. The court overruled Appellants’ objection that Willett was not qualified to testify as an expert. The court explained that it had not deemed Willett to be an expert and that Willett could “testify as to what he knows with respect to what he’s seen.”

The trial court also did not abuse its discretion in permitting Willett to testify to his opinion that a directional drilling machine was not a viable option for installing a pipe under the concrete steps. Lay opinion testimony is admissible in the discretion of the trial court if it is “[r]ationally based on the perception of the witness” and is “[h]elpful to a clear understanding of his testimony.” (Evid. Code, § 800; *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 112–113.) As discussed, Willett had sufficient personal knowledge about the size and operation of directional drilling machines and the characteristics of the Malibu Vista Property to offer a rational

opinion. In overruling Appellants' motion to strike Willett's opinion testimony, the trial court concluded that Appellants' argument concerning Willett's qualifications to offer such testimony "[g]oes to weight." Having heard an extensive explanation of the factual basis for Willett's opinion, the trial court could decide how much, if any, weight to give it.

Finally, the trial court did not abuse its discretion in considering the photographs of directional drilling machines that Willett identified. Willett had seen directional drilling machines, and therefore had sufficient personal knowledge to testify that the photographs actually depicted what "the proponent of the evidence claims it is." (Evid. Code, § 1400.)⁵

⁵ Appellants argue that they had insufficient notice of Willett's testimony. Appellants claim that the evidentiary hearing on May 10, 2018, was set for the limited purpose of permitting the testimony of Gustin and Tran only. The trial court rejected that assertion below, and this court has no basis to question the trial court's understanding of the scope of the hearing. Further, Appellants cite no rule or court order requiring that Tesoro provide notice of the witnesses it intended to call at the hearing. Appellants rely on the pre-hearing notice procedure in California Rules of Court, Rule 3.1306, but that rule applies to law and motion matters that would otherwise be heard on declarations alone. (Cal. Rules of Court, rule 3.1306(a).) Here, the trial court had already exercised its discretion to hold an evidentiary hearing. (See *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 524–525, fn. 7 (*Continental*) [trial court had discretion to hear live testimony on a motion for a preliminary injunction].)

3. The Trial Court Acted Within Its Discretion in Balancing the Harms

Appellants argue that the trial court abused its discretion in issuing a preliminary injunction because the evidence did not show that the harm to Tesoro in the absence of an injunction would be *irreparable*. Appellants argue that, if they were to lose at trial after completing the concrete stairs, Tesoro could still access the Easement by drilling under the stairs or by demolishing them.

Appellants' argument misinterprets the applicable legal standard. While the degree of irreparable injury in the absence of an order is a relevant factor in determining whether a preliminary injunction is warranted, it must be considered in the context of weighing the relative harms to the parties. (See *Cohen, supra*, 40 Cal.3d at p. 286 & fn. 5.) For example, in *Butt v. State of California* (1992) 4 Cal.4th 668, our Supreme Court affirmed a preliminary injunction requiring the State of California to ensure that a bankrupt local school district would remain open through the end of the school year or to provide the students with an equivalent educational opportunity. (*Id.* at pp. 675–676.) The court rejected the State's argument that the plaintiffs' proof of interim harm was inadequate because the plaintiffs failed to show "why any adverse effects on student progress could not be ameliorated." (*Id.* at p. 693.) The court concluded that the trial court was "not obligated to deny a preliminary injunction simply because plaintiffs failed to demonstrate that 'irreparable' harm to students was unavoidable by other means." (*Ibid.*) It was sufficient for the trial court to conclude that plaintiffs had a "reasonable probability of success on the merits" and "that they would suffer more harm in the

meantime if an injunction were denied than the State would suffer if it were granted.” (*Id.* at pp. 693–694.)

Similarly, here, the theoretical possibility that Tesoro could avoid permanent injury by obtaining access to the Easement after trial through directional drilling or by demolishing Appellant’s concrete steps did not preclude the trial court from balancing the relative harms. The trial court reasonably decided that the extreme difficulty of enabling Tesoro to “inspect, repair, access, use, operate, or maintain the sewer pipe if the concrete steps are poured” outweighed the harm to Appellants from maintaining the status quo.

Moreover, even if the construction of concrete steps blocking access to the Easement were theoretically remediable after trial, damages alone could not provide such a remedy. (See *People ex rel. Gow v. Mitchell Brothers’ Santa Ana Theater* (1981) 118 Cal.App.3d 863, 871 [“ ‘the word ‘irreparable’ is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by any accurate standard” ’ ”], quoting *Wind v. Herbert* (1960) 186 Cal.App.2d 276, 285.) Absent the cooperation of all affected parties, restoring access to the Easement following trial would require some kind of further injunction to undo the effects of Appellants’ construction. As the trial court noted, the evidence showed that directional drilling would require access to property beyond the Easement, including onto the neighbor’s land, and there was “no evidence before the Court that shows [Appellants’] neighbors would consent to allowing the drilling machines on their land.” And an order requiring destruction of the newly constructed steps to permit

access to the Easement would likely (perhaps inevitably) lead to further disputes and litigation concerning the scope and costs of such remedial work.

Appellants' argument also ignores the substantial evidence supporting the trial court's findings. The court reasonably concluded that covering the Easement with a concrete structure would make access to the Easement "extremely difficult." And, as discussed above, Willett testified about the problems with directional drilling, supporting the conclusion that it was not a viable option.⁶

Moreover, Tesoro's *use* of the Easement was not the only issue. The trial court also found that permitting Appellants to complete their concrete steps would cause an irreparable loss of evidence. The construction project had already damaged a portion of the pipe. The court reasonably concluded that Tesoro would "lose the ability to conduct further discovery or inspection concerning any portion of the pipe once the concrete is poured."

Appellants argue that they offered to provide the pipe itself to Tesoro to preserve it for evidence, but that offer did not address the evidentiary value of the location of the pipe and its condition at the site. For example, Appellants argue that the sewer pipe is not actually located within the express Easement.

⁶ Appellants argue that smaller directional drilling machines than those that Willett identified are available. Appellants did not provide evidence of any such machines, much less evidence that any particular smaller machine would avoid the problems that Willett explained. Willett's admission on cross-examination that there might be smaller machines cannot substitute for evidence.

The actual location of the pipe in the ground is relevant to that argument.⁷

Finally, Appellants claim that one of the conditions the trial court ordered for dissolving the injunction is inconsistent with its finding that drilling under the concrete steps was an unrealistic option. As mentioned, the trial court ordered that the injunction would be dissolved if, among other things, Appellants permitted Tesoro to install a plastic sleeve “below the area under the concrete stairs/where the [concrete] stairs are to be formed” to permit placement of pipes in the sleeve in the event Tesoro prevails.

Appellants argue that the trial court’s conclusion that a plastic sleeve could be installed under the existing concrete is inconsistent with its finding that a new pipe could not be installed under the completed concrete steps. However, the record shows that the trial court understood that installation of the plastic sleeve *prior* to Appellants’ completion of the concrete steps was less difficult—and more realistic—than later drilling under the completed steps. We see no inconsistency in the trial court’s findings.

⁷ Appellants also argue that the trial court’s written decision on this point is inconsistent with the court’s statements during oral argument. The court was not bound by any comments that it made during argument; its written decision supersedes any inconsistent observations it might have made earlier. (See *Whitlow v. Board of Medical Examiners* (1967) 248 Cal.App.2d 478, 487 [“[f]ortunately for the stability of judgments the findings of the court are those expressed in writing. What the judge said may be useful to explain the findings but it cannot overcome them, and if contradictory, must be disregarded”].)

4. The Trial Court Did Not Impose An Impermissible Condition

Appellants argue that requiring them to permit installation of a plastic sleeve as a condition for dissolving the injunction was unlawful because the court could not force them to accept new construction on a disputed easement. Appellants' argument ignores that the trial court's order imposing conditions on the *dissolution* of the injunction did not force them to do anything. Appellants could simply choose to comply with the preliminary injunction if they did not wish to accept the trial court's condition to dissolve it. Appellants cite no authority supporting their claim that a condition for dissolving an injunction affecting one's land amounts to a "restrictive negative covenant."⁸

5. Appellants Waived Their Argument that the Trial Court Exceeded Its Authority in Prohibiting Appellants from Damaging the Sewer Pipe

In their reply brief, Appellants argue that the trial court did not have the authority to issue an injunction "outside the easement." While Appellants cited evidence in their opening brief that a portion of the sewer pipe is not within the area of the Easement, they did not argue that the preliminary injunction was impermissible for that reason. They have therefore waived the argument. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894–895, fn. 10)

⁸ *Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137 includes no such holding. That case simply held that the trial court erred in issuing a posttrial order permitting conduct that exceeded the scope of an easement. (*Id.* at pp. 142–143.)

[absent good reason, points raised in the reply brief for the first time will not be considered].)

Moreover, whether the scope of the Easement extends to the sewer pipe is an issue that goes to the merits of Tesoro's claims. Appellants do not challenge the likelihood of success on Tesoro's claims for purposes of this appeal.⁹

6. Appellants' Challenge to the TRO is Moot

Appellants argue that the trial court issued the TRO without notice and continued it in force beyond the time period permitted by statute. In light of the trial court's order granting a preliminary injunction the issue is now moot. (See *Continental, supra*, 68 Cal.2d at p. 517, fn. 2.) We therefore decline to consider it.¹⁰

⁹ Although we need not reach the merits of Appellants' argument, its premise—that the trial court had no authority to order the preservation of evidence located on Appellants' property—is suspect. The trial court had the power to issue an injunction to preserve evidence. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1418–1420.) That power extends to evidence that is in the opposing party's possession. (*Ibid.*) There is no apparent reason why that principle should be different simply because the evidence in question is located on an opposing party's real property. (Cf. *Northpoint Homeowners Assn. v. Superior Court* (1979) 95 Cal.App.3d 241, 242–246 [trial court could issue an injunction ordering the plaintiff to preserve trees on its property as evidence upon requiring the defendant to post an undertaking].)

¹⁰ Tesoro seeks sanctions against Appellants for filing a frivolous appeal. We do not find that the appeal was prosecuted for an improper motive or that it is “totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) We therefore deny the sanctions request.

DISPOSITION

The trial court's order granting a preliminary injunction is affirmed. Tesoro is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.