Filed 4/30/18 Kay Link Corp. v. DPS Ventures, Inc. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KAY LINK CORP., et al., Plaintiffs and Appellants, v. DPS VENTURES, INC., et al., Defendants and Respondents.	B275666 (Los Angeles County Super. Ct. No. VC064119)

APPEAL from the judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Law Offices of Willie W. Williams and Willie W. Williams for Plaintiffs and Appellants.

Wallace, Brown & Schwartz, George M. Wallace for Defendants and Respondents.

INTRODUCTION

Kay Link Corporation, doing business as Wireless Vision, and Zehra Ali (together plaintiffs) appeal from the judgment entered on an order of nonsuit that the trial court granted after plaintiffs gave their opening statement. Plaintiffs contend they stated viable claims for public and private nuisance against defendants, Jerome Raphael Inc. and DPS Ventures, Inc., both doing business as Animal Care Clinic of Bellflower, and otherwise the procedure by which the trial court granted nonsuit denied them due process. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background*

Plaintiffs owned and operated a wireless telephone store located in a shopping center next to defendants' veterinary clinic. Plaintiffs claimed that defendants allowed their clients' pets to congregate in front of plaintiffs' premises, blocking access, urinating, defecating, fighting, growling, whining, and barking around the walkway adjacent to plaintiffs' store. Plaintiffs' customers, who complained about the unpleasant noise, dirt, and odors, refused to return to the store, forcing plaintiffs out of business less than half way through the term of their lease.

Plaintiffs brought this action for damages and an injunction against defendants and the shopping center's landlord, alleging five causes of action. The landlord was dismissed from the action apparently based on a forum selection clause in plaintiffs' lease. The case went to trial against defendants on the causes of action for public and private nuisance.

2. *Facts according to plaintiffs' opening statement*

We assume, as we must on review from a nonsuit on the opening statement, that plaintiffs can prove all favorable facts presented in their opening statement. (*Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1421 (*Galanek*).) Plaintiffs stated the following facts to the jury at the beginning of trial: Amin Ali and his sister-in-law, Zehra Ali, entered into an oral agreement to own and operate a cell phone business. Under the agreement, Mr. Ali would provide the start-up capital, fund some expenses, and provide know-how. Ms. Ali would help out with the finances and serve as store manager. She ran the store's operations. On May 14, 2012, plaintiffs entered into a three-year lease of a store in the Kmart Plaza in Bellflower, California. In September 2012, they opened their store, Wireless Vision.

Almost immediately after the opening, plaintiffs began having issues with the neighboring veterinary clinic, run by Dr. Raphael Salvador, which had been in business for quite a while. "[O]n a routine basis," defendants "allowed" the pets visiting the veterinarian to congregate in front of the clinic and plaintiffs' store, where the animals obstructed access by plaintiffs' customers. Defendants "allowed" dogs to urinate and defecate in front of both the clinic and plaintiffs' store without cleaning it up. They "allowed" the animals to whine and bark excessively, and to fight. Defendants "also allowed" foul smelling liquid to come out from their side of the wall. All of this created a disgusting, noisy, and smelly atmosphere at the entrance to plaintiffs' store.

The animals' behavior had an impact on plaintiffs' bottom line. Some of plaintiffs' potential customers were scared away. Other repeat customers complained and did not feel comfortable returning because of the nuisance.

Despite plaintiffs' multiple oral and written requests to defendants and to the landlord to eliminate the nuisance, defendants did nothing. In fact, they ignored plaintiffs' requests to "solve the problem." Defendants "turned a blind eye to this situation. They just chose to ignore it." Plaintiffs asserted that defendants could have: (1) asked their clients to wait in their cars, (2) built a bigger waiting room, or (3) scheduled appointments differently. Instead, defendants allowed the problem to persist over an extended period of time. Plaintiffs eventually closed their store after only 15 months into a three-year lease.

3. *Proceedings in chambers after opening statements*

Once both sides had given opening statements, the trial court brought counsel into chambers and asked the defense whether it "ha[d] a motion at this time." Defense counsel replied, "A motion for nonsuit after opening argument, your honor, opening statement?" The court responded that it had listened to the opening statements, read the briefs, and did not think that plaintiffs could "prove that they [defendants] created this situation." Plaintiffs responded by listing numerous things that defendants "could have done to control the situation." Defendants stated for the record that their ground for nonsuit was that the evidence described in the opening statement was not "sufficient to establish that [the] animal care clinic had any duty to be exercising control over these dog owners outside its door." The court granted the nonsuit motion. After plaintiffs' new trial motion was denied, plaintiffs brought their timely appeal. (Cal. Rules of Court, rule 8.108(b)(1)(A).)

CONTENTIONS

Plaintiffs contend that the trial court erred in granting nonsuit because they stated viable causes of action. They also contend that the court denied them due process by raising the nonsuit motion *sua sponte* and by granting it on a different legal ground than that given by defendants.

DISCUSSION

1. *Nonsuit and the standard of review*

"Because a successful nonsuit motion precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances. [Citation.]" (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1505 (*DiPalma*).)

"It is . . . a fundamental rule that the motion [for nonsuit] should state the precise grounds on which it is made, with the defects in the plaintiff's case clearly and particularly indicated. This gives the plaintiff an opportunity to cure the defect by introducing additional evidence. [Citation.]" (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161; Wegner et al., Cal. Prac. Guide: Civil Trials and Evidence (The Rutter Group 2017) ¶ 12:229, p. 12-52.) This rule obtains because "[o]nly the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit. [Citation.]" (*DiPalma*, *supra*, 27 Cal.App.4th at p. 1510, citing *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.)

" 'The standard of review for a nonsuit after [the] conclusion of the opening statement is well settled. Both the trial court in its initial decision and the appellate court on review of that decision must accept all facts asserted in the opening statement as true and must indulge every legitimate inference which may be drawn from those facts. [Citations.]' " (*Galanek*, *supra*, 68 Cal.App.4th at p. 1424.) Nonsuit " 'can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action or has inadvertently established uncontrovertible proof of an affirmative defense. [Citation.]' [Citation.]" (*Ibid*.)

2. *Nuisance*

Civil Code section 3479 defines nuisance as "Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." " 'A nuisance may be a public nuisance, a private nuisance, or both. [Citation.]' " (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163.) "A public nuisance is an unreasonable interference with a right common to the general public," whereas "[a] private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." (Rest.2d Torts, §§ 821B & 821D.)[1]

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[1] California courts have considered the Restatement of Torts in cases involving nuisance. (See *Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 360, fn. 1 (*Citizens*).)

Focusing on the conduct of defendants, to hold them liable for public or private nuisance, plaintiffs must show that defendants, who own and operate a lawful veterinary business, by acting or failing to act, created a condition that was indecent or offensive to the senses or that obstructed the free use of plaintiffs' property so as to interfere with plaintiffs' enjoyment of their property. (See CACI Nos. 2020 & 2021.)[2] That is, to be held liable, defendants' conduct must be *either* "(a) an act; *or* (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the private interest." (Rest.2d Torts, *supra*, § 824; accord *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988.) This rule is written in the disjunctive. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 517 [" 'or' is disjunctive"].)

The first basis for liability, "an act," is a question of causation (Rest.2d Torts, *supra*, com. b, p. 116 [liability arises because the defendant's "acts set in motion a force or chain of events resulting in the invasion."].) The plaintiff "must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens*, *supra*, 8 Cal.App.5th at p. 359.) The pertinent question is whether defendant's *act* created or assisted in the creation of a nuisance. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542.)

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[2] There are six additional elements in a cause of action for public nuisance and seven additional elements in a cause of action for private nuisance. (CACI Nos. 2020 & 2021.) As defendants' nonsuit motion was premised only on the first element, we do not address the remainder of the elements, regardless of whether plaintiffs can prevail at trial on them.

The second ground for liability in private and public nuisance – inaction – is a question of duty. (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 (*Birke*); see *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1237; see also *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1389 ["It is settled that where conduct which violates a duty owed to another also interferes with that party's free use and enjoyment of his property, nuisance liability arises"]; accord, *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1373 (*Chee*) ["Nuisance liability arises from violation of a duty to another that interferes with the free use and enjoyment of his or her property"].)

This second source of liability formed the basis for plaintiffs' theory of their case. As plaintiffs acknowledge, the conduct that created the alleged nuisance was defendants' *inaction*. Plaintiffs' opening statement asserted repeatedly that defendants "*allowed*" the pets to congregate outside, eliminate, fight, and growl on the sidewalk in front of plaintiffs' store. In other words, the allegation was that defendants did not prevent or abate the animals' conduct. The precise ground on which defendants relied for nonsuit was the absence of a duty to plaintiffs. We consider that ground in deciding whether nonsuit was properly granted. (*DiPalma*, *supra*, 27 Cal.App.4th at p. 1510.)[3]

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[3] In arguing that the court denied them due process, plaintiffs assert that the trial court granted the nonsuit motion on a ground different from that specified by defendants' oral motion. They argue that the court focused on whether defendants *affirmatively created* the nuisance and omitted to consider whether defendants can be liable for *failing to act*. The trial court said: "I don't think you can prove that they

In *Birke*, *supra*, 169 Cal.App.4th 1540, a case relied on by plaintiffs, a resident sued the owners and managers of her apartment complex alleging nuisance arising from the failure to limit secondhand smoke in the complex's outdoor common areas. In reversing the sustaining of a demurrer to the nuisance cause of action, the appellate court held that the plaintiff had sufficiently alleged that the defendants "encouraged and facilitated the creation of a secondhand tobacco smoke hazard . . . by providing ashtrays for use by tenants and guests who smoke cigarettes and cigars, by permitting its own employees and agents to smoke" in the common areas of the defendants' property, and "by refusing the request of [plaintiff] that smoking in the outdoor common areas be limited or restricted." (*Id.* at p. 1552.) The court then explained, "even if the first amended complaint were construed to allege only a failure to act, *which in turn may require a finding that* [*the defendant*] *has a duty to take positive action to prevent or abate the interference before an actionable nuisance can be established*," such a duty existed as a landlord has a duty to maintain its premises in a reasonably safe condition. (*Ibid.*, italics added.)

[defendants] created this situation." The ground given by defendants and that given by the court are the same, namely that the defendants' conduct as described by plaintiffs – inaction – did not create a nuisance. Furthermore, plaintiffs had the opportunity to respond to the nonsuit motion in chambers, their contention to the contrary notwithstanding. There, plaintiffs' response was to list acts defendants "could have done" but omitted to do, to control their clients' pets. Nonetheless, as we demonstrate here plaintiffs could not establish defendants' liability for either the failure to act *or* for affirmatively acting.

Accepting as true all facts asserted in plaintiffs' opening statement, and drawing every legitimate inference which may be drawn from those facts (*Galanek*, *supra*, 68 Cal.App.4th at p. 1424), we conclude that plaintiffs did not name a duty on the part of defendants to take positive action to control the conduct of their clients' pets off of defendants' property and on the sidewalks outside of the clinic.[4] (*Birke*, *supra*, 169 Cal.App.4th at p. 1552.)

"In general, courts have imposed a duty to prevent the harm caused by a third party's animal when a defendant possesses the means to control the animal or the relevant property and can take steps to prevent the harm." (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1236; cf. *Chee*, *supra*, 143 Cal.App.4th at p. 1373 [no liability of landlord for nuisance caused by tenant allowing dog to run off-leash and urinate and defecate in the landlord's common areas absent knowledge and ability to prevent harm].) Here, defendants had no duty to prevent their clients' pets from gathering outside the clinic and engaging in canine-esque activity – even assuming that conduct constituted a nuisance – because defendants had no means to control the pets, who were in the possession of the animal owners and on the sidewalk in front of plaintiffs' property over which defendants had no control.

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[4] In their opening statement, plaintiffs made a fleeting reference to an incident in which a liquid came through the wall between plaintiffs' and defendants' businesses. However, plaintiffs never claimed at trial that the intrusion, standing alone, constituted a nuisance.

Plaintiffs contend that they adequately established their nuisance claim because, as they argued to the trial court in chambers, they had evidence that defendants knew of the nuisance and failed to take steps to abate it. But knowledge alone is not sufficient absent a duty owed to take positive action to control the pets. (*Birke*, *supra*, 169 Cal.App.4th at p. 1552; *Chee*, *supra*, 143 Cal.App.4th at p. 1373).

Even if, indulging in all reasonable inferences, we could construe plaintiffs' opening statement to allege an *affirmative act* by defendants creating the nuisance (Rest.2d Torts, *supra*, § 824), they could not establish an essential element of their cause of action. Plaintiffs overlook that nuisance liability arises from wrongful or negligent conduct that occurs *on the defendants' own property*. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com*. (1984) 153 Cal.App.3d 605, 622 [liability arises from the defendant's possession and control of the land in question].) "The basic concept underlying the law of nuisance is that one should use one's own property so as not to injure the property of another. [Citation.]" (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) Businesses which are not per se a nuisance may become one by the *improper or negligent* manner in which the businesses are conducted on their own property. (*Dauberman v. Grant* (1926) 198 Cal. 586, 590; *Benetatos v. City of Los Angeles* (2015) 235 Cal.App.4th 1270, 1284–1285 [defendant created nuisance per se by the manner in which it ran its fast food restaurant that encouraged loitering, pimping, and prostitution on and around the premises]; *Lew v. Superior Court* (1993) 20 Cal.App.4th 866, 872-873 [defendants' landlord created a nuisance by manner in which it maintained apartment building that facilitated drug sales on defendants' property]; see generally

Rest.2d Torts, *supra*, §§ 838–840.) Here, plaintiffs did not claim that defendants were negligently or improperly conducting or maintaining their own property. Unlike in *Benetatos* and *Lew*, plaintiffs have not claimed that the provision of veterinary care or its associated activity on defendants' premises was illegal, negligent, or improper.

In sum, plaintiffs cannot establish an essential element of their nuisance causes of action and so nonsuit was properly granted. (*Galanek*, *supra*, 68 Cal.App.4th at p. 1424.)

3. *Plaintiffs' due process contentions are unavailing.*

Plaintiffs contend that the trial court denied them due process by raising the nonsuit *sua sponte*. " 'In the absence of express statutory authority, a trial court may, under certain circumstances, invoke its limited, inherent discretionary power to dismiss claims with prejudice. [Citations.]' [Citations.] . . . . [¶] [W]e will not reverse for this irregular procedure unless we find that [the plaintiff] was prejudiced. (*Ford v. Evans* (1938) 29 Cal.App.2d 623, 625 . . . ; Cal. Const. art. VI, § 13 ['No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice'].)" (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 748–749.) Plaintiffs countered the nonsuit motion in chambers by listing the facts they planned to adduce showing how they believed that defendants breached a duty to prevent the nuisance. Still, as we have concluded upon all of the evidence plaintiffs cited, they did not show that defendants created a nuisance on their own premises or had control over the pet owners or the pets' conduct off defendants' property, and so plaintiffs have not been

prejudiced because the result would have been the same even if it was defendants, not the court, who first raised the nonsuit issue.[5]

DISPOSITION

The judgment is affirmed. Each party to bear its costs of appeal.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

EGERTON, J.

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[5] Accordingly, we reject plaintiffs' contention that the trial court erred in denying plaintiffs' motion for new trial based on irregularities in the proceeding. (Code Civ. Proc., § 657(1).)

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