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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KENNETH TIERSTEIN et al., Plaintiffs, Cross-Defendants, and Respondents, v. RONALD REISER et al., Defendants, Cross-Complainants, and Appellants.	2d Civil No. B223570 (Super. Ct. No. 56-2007-00307696-CU-OR-SIM) (Ventura County)

Appellants Ronald and Marleena Reiser appeal the judgment entered after the trial court concluded that respondents Kenneth and Phyllis Tierstein acquired an irrevocable license of limited duration preserving their view over the Reisers' property. They argue that there is not sufficient evidence to support the findings underlying the judgment. They also challenge certain evidentiary rulings, as well as the judgment against them on their cross-complaint and its allocation of damages between the parties, and the order awarding costs to the Tiersteins pursuant to Code of Civil Procedure section 998.[1] We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

BACKGROUND

The Tiersteins and the Reisers own homes in Thousand Oaks. This case concerns the view over a fence along the common boundary of their back yards. The Reisers have lived on property at 1456 Wilder Street since 1975 (Reiser property) below the property at 1487 Lamont that Michael Humphrey (Humphrey) sold to the Tiersteins in 2003 (Lamont property).

When Humphrey acquired the Lamont property, the seller told him that his down-slope neighbors, the Reisers, maintained their bushes at the level of the backyard fence. For years, when the bushes grew too tall, Humphrey would call Ronald Reiser (Ron) and they would trim the bushes together, to fence height.

Shortly after Humphrey listed the Lamont property for sale, Ron offered to trim his bushes lower, to about one foot below the top of the fence, to further enhance the view from the Lamont property. As Humphrey recalled, Ron said that the more money Humphrey obtained for his house, the more Ron could get for his. Humphrey also recalled Ron having authorized him to tell potential buyers that the Reisers would keep the bushes below fence height. Humphrey and Ron then trimmed the bushes to about a foot below fence height.

For several years, the Tiersteins searched for a one-story home with a view in Thousand Oaks. In late January 2003, while driving around looking at property, they noticed a "for sale" sign on the Lamont property that said "view property." They visited the property a few days later, on Monday, January 27, with their daughter-in-law, Marci Murray Tierstein, who was their agent. The Tiersteins loved the house and its view of surrounding mountains and valley. The bushes on the Reiser side of the back yard boundary were then below fence height. The Tiersteins were concerned about preserving the view, which would be blocked if the landscaping on the Reiser property grew too high.

The following day, they spoke with Humphrey. He explained that when the Reisers' bushes grew above fence height, he would call Ron, and they would trim the bushes together. Humphrey told the Tiersteins that he and Ron had

just trimmed the bushes below the fence height; and Ron said he could tell prospective buyers that he would continue to maintain the bushes at that height, but no lower. At Humphrey's suggestion, the Tiersteins decided to speak with the Reisers that day.

The Reisers were both home. Kenneth Tierstein (Ken) recognized Ron as a fellow former Los Angeles Police Department officer. Ken explained that he and Phyllis were considering buying the Lamont property, but were aware that the Reisers' bushes could affect the view. Ken asked how the Reisers had maintained the bushes and who paid for their maintenance. Ken also offered to pay for the maintenance of the bushes if they bought the property. Ken recalls Ron's responding that it would not be a problem to maintain the bushes at the "current" level (below fence height), and declined Ken's payment offer. Ron said that he had been maintaining the bushes at that level for 30 years, and would continue to do so. Ken testified that Ron said it was only a problem when people wanted the bushes trimmed lower, because that would deprive the Reisers of their privacy. Because Ron could see the legs of people around the Lamont property pool from the Reiser property, he thought people could see into his yard. Ken offered to plant a row of low bushes on the Lamont property, along the boundary fence in exchange for Ron's agreement to maintain his fence-line plants at the height that they then were (in late January). Ken recalled that Ron agreed.

Unlike the Tiersteins, the Reisers recalled that the Tiersteins spoke with them on two different dates. Their recollection of the substance of their discussions also contrasts with the Tiersteins' descriptions. Ron recalled that Ken kept saying things like, "just work with me." The Reisers recall telling the Tiersteins that there was no certainty that the bushes would not grow and block the view, although they had maintained them and tried to cooperate with their neighbors. Ron also denied making statements about the lack of privacy he recognized from seeing people around the Humphrey pool.

After discussing landscaping maintenance with the Reisers, the Tiersteins decided to make an offer to purchase the Lamont property from Humphrey. They eventually agreed upon a $670,000 sale price. Not long after escrow closed in April 2003, the Tiersteins planted a row of Texas wax-leaf privets in response to Ron's concerns about privacy.

For the first four years after the Tiersteins bought the Lamont property, Ron and Ken maintained the Reisers' bushes below the height of the common fence. Ken would let Ron know when the foliage grew above fence height, and they would set a time for trimming them. With the standing permission of another neighbor, Gail MacDonald, they also trimmed the trees on her property, to preserve their views over it.

By late July 2007, the Reisers' bushes grew approximately eight inches above fence height and impeded the Tiersteins' view. Ron and Ken agreed to trim the bushes on Saturday, July 28. That morning, Ron called Ken to say he needed to cancel. Ken said that since he had set the day aside, he would start trimming trees on the MacDonald property, and get together with Ron later to trim the Reisers' bushes. They agreed to work on the following Monday. On Saturday, as Ken started to trim the MacDonald trees, Ron said he was sorry but he wished that Ken would wait. Ken finished trimming the trees that afternoon. Because of the extreme heat and his fatigue, MacDonald agreed that Ken could wait until Monday to clean up and discard the trimming debris.

On Monday, July 30, Ken waited for Ron to come to his house at the time they usually started trimming. Ron did not show up. Ken called to ask when they would get started. Ron responded, "I'm not real happy with what you did this weekend. I'm busy. I'm on the phone and I'll talk to you later. He then slammed the phone down. About an hour later, Ken went to talk to Ron. They argued, with Ron calling Ken a "fucking asshole," and Ken responding that he was not one of Ron's "bastard children." Ken left after Ron said, "I'm not working with you anymore and we're not trimming bushes anymore," and told him to get off his

property. Ron called Ken on the telephone about 30 minutes later, and said something like, "You left a fucking mess that I had to look at all weekend. You're a fucking asshole. And we're done. And it's tough shit for you."

The shrubbery continued to grow. On August 17, 2007, attorney Richard M. Hoefflin sent a letter to the Reisers on behalf of the Tiersteins summarizing "facts" that "would lead any Court to conclude" that the Reisers and Tiersteins "have an oral agreement granting the Tiersteins a view easement" over the Reisers' property. The letter proposed that the parties "enter into a formal written and recorded agreement to avoid confusion and misunderstanding in the future." They did not enter into a written agreement.

On November 19, 2007, the Tiersteins filed this action to quiet title to view easement and for specific performance of easement agreement. On April 8, 2008, the Reisers filed a cross-complaint for declaratory relief with other causes of action. Prior to their five-week court trial, the parties had filed second amended complaints and cross-complaints seeking declaratory relief. The Tierstein pleading also stated quiet title, breach of contract, fraud, private nuisance and nuisance (spite fence) causes of action. The Reiser pleading also stated other causes of action: quiet title, slander of title, trespass, intrusion into private affairs and capturing impression of personal or familial activity.

After trial, the court issued its statement of decision and revised statement of decision. In ruling on the complaint, it declined to quiet title in a view easement but found that the Tiersteins had an irrevocable license of limited duration for maintenance of the landscaping affecting their view over the Reiser property. It ruled the license would terminate upon the earlier of: (1) the date when neither of the Tiersteins owns or occupies their property; or (2) the date when neither of the Reisers owns or occupies their property. The court also made findings regarding the scope of the license and timing of trimming, and imposed the reasonable cost of the maintenance upon the Tiersteins. In addition, it sustained the contract claim, and awarded $2,502 to the Tiersteins. It found there was a nuisance and ordered the

Reisers to allow the Tiersteins to abate the nuisance created by their foliage, but granted the Reisers the right to approve the timing of work and the selection of landscapers and maintenance workers. The court rejected the fraud and nuisance (spite fence) causes of action. It ruled against the Reisers on all cross-complaint causes of action. After trial, it ordered the Reisers to pay total costs of $30,934.19.

DISCUSSION

Evidentiary Rulings

The Reisers contend that the trial court abused its discretion by excluding the JustAnswerLegal internet response to Ken Tierstein's inquiry and the pretrial letter from counsel for the Tiersteins. We disagree.

We apply the abuse of discretion standard to trial court rulings excluding or admitting evidence pursuant to Evidence Code section 352. (*Gouskos v. Aptos Village Garage, Inc*. (2001) 94 Cal.App.4th 754, 762.) The trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid*.) We find no abuse here.

The trial court relied on Evidence Code section 352 in excluding the internet response and the prelitigation letter. That statute grants the court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time. It also relied upon the litigation privilege in Civil Code section 47, subdivision (b), to exclude the prelitigation letter.

The trial court correctly excluded the internet response. It had minimal probative value because, as the court noted, one can get conflicting legal opinions and there was no foundation shown as to the legal expertise of its author.

The Civil Code section 47, subdivision (b) litigation privilege applies to pretrial communications. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232.) That privilege furthers the policy of affording litigants unimpeded access to courts without fear of harassment from derivative tort suits, on the assumption that the external threat of liability will undermine free

communication that is essential to the effective administration of justice. *(Flatley v. Mauro* (2006) 39 Cal.4th 299.)

The trial court's exclusion of the pretrial letter served the purpose of the litigation privilege and fell within its discretion to exclude evidence that would require an unwarranted consumption of time, relative to its probative value. In addition, the ruling did not prejudice the Reisers because the contents of the letter do not undermine the court's findings.

Substantial Evidence Claims

We review the record to determine whether the trial court's findings are supported by substantial evidence. (*Yordamlis v. Zolin* (1992) 11 Cal.App.4th 655, 659.) "We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]" (*Ibid*.) "If more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court's judgment. [Citation.]" (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211; see *Medina v. Van Camp Sea Food Co*. (1946) 75 Cal.App.2d 551, 556 [existence of implied contract is question of fact for trial court, so where reasonable conflicting inferences may be drawn from undisputed evidence, the trial court's decision is conclusive].)

Complaint Issues

Irrevocable View License and Related Issues

"A license gives authority to a licensee to perform an act or acts on the property of another pursuant to the express or implied permission of the owner. The licensee has a personal privilege but does not possess either an interest in the land or any estate in the property." (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15:2, p. 8.) "The privilege conferred by a license is personal to the licensee and

cannot be inherited, conveyed, or assigned." (*Ibid*.) "A licensor generally can revoke a license at any time without excuse or without consideration to the licensee. In addition, a conveyance of the property burdened with a license revokes the license . . . ." (*Id*. at pp. 8-9.)

"An easement creates a present *incorporeal interest* in real property that is subject to the statute of frauds and is protectable, irrevocable, and compensable. [¶] By comparison, a license does not create or convey any interest or estate in the real property; it merely makes lawful an act that otherwise would constitute a trespass." (6 Miller & Starr, Cal. Real Estate, *supra*, § 15:2, p. 9.) "A license is not within the statute of frauds; it can be created either by a written conveyance or by mere oral agreement." (*Id*. at p. 10.)

"When the license is coupled with an interest in the property, it may be irrevocable as long as the licensee retains the interest." (6 Miller & Starr, Cal. Real Estate, *supra*, § 15:2, p. 11.) In addition, "[a] license may become irrevocable where, in reasonable reliance on the license, the licensee expends time and a substantial amount of money on improvements with the knowledge of the licensor under such circumstances that it would be inequitable to terminate the license . . . . [¶] In such cases, the license is made irrevocable on the grounds of estoppel and to prevent the licensor from committing fraud on the licensee." (*Ibid*.)

Here, the trial court found that "based upon the principle of promissory estoppel, an enforceable agreement was created that the Reisers would allow the foliage at issue to be maintained so as to preserve the view over the Reisers' property." It further ruled that the Tiersteins held an irrevocable license to preserve that view. Substantial evidence supports its findings. After the parties reached their oral agreement regarding the view, the Tiersteins invested $670,000 to purchase the Lamont property, then paid to landscape it with Texas privet, to improve the Reisers' privacy. Ken Tierstein invested his time and labor with Ron Reiser maintaining not only the foliage along their common boundary but also the trees on the MacDonald property to enhance the view from the Lamont and Reiser

properties. The Tiersteins' testimony regarding their preoffer conversation with the Reisers, with other evidence (including the parties' four-year pattern of maintaining the view) support the inference that the parties created a license which could be formed orally without satisfying the statute of frauds. (*Stoner v. Zucker* (1906) 148 Cal. 516, 518 ["[W]here a licensee has entered upon the premises of another, under a parol license and has expended money, *or its equivalent in labor*, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining . . . his rights under his license, and the license will continue for so long a time as the nature of it calls for"], italics added; see also *Stepp v. Williams* (1921) 52 Cal.App. 237, 256.)

We also reject the Reisers' claim that the trial court erred because it created essential elements of the agreement by specifying missing terms based "on the parties' four-year course of conduct." The essence of the agreement was to preserve the view. The court reasonably looked to the parties' conduct to fashion an equitable remedy. (See *Medina v. Van Camp Sea Food Co.*, *supra*, 75 Cal.App.2d 551, 556 [existence of implied contract is question of fact for trial court, so where reasonable conflicting inferences may be drawn from undisputed evidence, the trial court's decision is conclusive].)

Nuisance

The Reisers argue further that the trial court erred by finding that the Reisers' breach of their agreement with the Tiersteins created a condition constituting a private nuisance. We disagree.

In making this argument, the Reisers rely in large part upon an inapposite case, *Pacifica Homeowners' Association v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147.) In *Pacifica*, the court rejected a nuisance claim because "a landowner has no natural right to . . . an unobstructed view . . . ." (*Id.* at p. 1152.) In this case, the nuisance action was not based on a claim of a "natural" right to a view, but on an enforceable agreement with the Reisers.

Substantial evidence supports the findings underlying the trial court's rejection of the nuisance.

Contract Damages

We reject the Reisers' claim that the trial court erred by awarding breach of contract damages to the Tiersteins. It found that all conditions precedent to the Reisers' obligations under the agreement occurred; that the Reisers' conduct after July 2007 breached the agreement; that the Tiersteins were damaged by the related blockage of their view, for a period of nine months; and that the monetary value of that harm was $278 per month, for a total of $2,502. Substantial evidence supports those findings. For example, photographs and testimony demonstrated the duration of the blockage. An expert appraiser established the rental value of the Lamont property with and without a view.

Cross-Complaint Issues

Invasion of Privacy Torts

The Reisers contend that the trial court erred by rejecting their privacy and invasion of familial activities claims. We disagree.

Both claims rest on the premise that Phyllis Tierstein photographed Ron while he and Ken trimmed the foliage that could block the view, and that her conduct would be offensive to a reasonable person. Substantial evidence supports the trial court's contrary findings.

To recover for invasion of privacy torts, a claimant must show that the defendant in publishing private facts to a third person penetrated some zone of physical or sensory privacy surrounding the claimant. The tort is proven only if the claimant had an objectively reasonable expectation of seclusion or solitude in the place. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 232.) The photographs were taken from the Lamont property while Ron was on that property or immediately across the common fence, working with Ken Tierstein. That does not constitute the "unconsented-to physical intrusion into the home" or "other place the privacy of which is legally recognized," or "unwarranted sensory intrusions"

such as "visual or photographic spying." (*Id.* at pp. 230-231.) In addition, the record lacks any evidence of the requisite element of publication because the photographs were not disseminated, outside the context of this litigation. (*Id.* at p. 214.) It also lacks evidence that the Tiersteins had evil motives in taking the photographs, or that Ron would not be recognizable in them, unless someone knew him at least casually.

Slander of Title

The Reisers contend that the trial court erred by rejecting the slander of title action. We disagree.

Slander of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. (*Stalberg v. Western Title Ins. Co*. (1994) 27 Cal.App.4th 925, 929.) Here, in order to prove that tort, the Reisers needed to establish that the Tiersteins falsely claimed that the Reisers were not complying with their agreement to allow their foliage to be maintained in a way that would preserve the Tierstein's view over the Reiser property. They did not make the necessary showing. The Tiersteins did not make any false representations. As we have explained, substantial evidence supports the trial court's conclusion that the Tiersteins have an irrevocable license protecting that view. The same evidence supporting that conclusion defeats the slander of title claim. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631; *Campbell v. Southern Pacific Co*. (1978) 22 Cal.3d 51, 60.)

Trespass

The Reisers argue that the trial court erred by rejecting their trespass claim because it found that the Reisers suffered no harm when Ken Tierstein entered the Reiser property intentionally and without permission. They further claim error because the court failed to award them damages. We reject both contentions.

The trespass claim rested on evidence that Ken Tierstein placed rat traps on the fence separating the Reiser and MacDonald properties, and also

trimmed a tree on the Reiser property without permission. There was no evidence that either trespass caused damage. The testimony of an expert arborist testimony defeated the Reisers' claim that they suffered dames of $1,000 because Ken damaged the tree. Again, substantial evidence supports the trial court findings.

Cost Award Issues

Section 998 Offer

After trial, the court ordered the Reisers to pay total costs of $30,934.19, pursuant to section 998. The Reisers contend that it erred in ordering such costs, which included expert witness fees; deposition costs; expert consulting fees (appraiser, arborist and environmental designer) and court reporter fees, among other items. We disagree. De novo review is required where the matters before the appellate court involve the resolution of pure questions of law. *(Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779-780.) To the extent we are called upon to review the trial court's interpretation of a written instrument, we apply a de novo standard of review unless the trial court's interpretation turns upon the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) "'[A] section 998 offer must be strictly construed in favor of the party sought to be subjected to its operation.'" (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc*. (2003) 109 Cal.App.4th 537, 543; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799.) In this case, we review de novo the court's determination that the section 998 offer was unambiguous and enforceable, as we are called upon to review the court's interpretation of that written offer.

Because the section 998 offer applied to the cross complaint, we refer to the parties as cross-complainant (the Reisers) and cross-defendant (the Tiersteins) in quoting its relevant provisions: "(b) Not less than 10 days prior to commencement of trial, . . . any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall

include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer . . . shall be in writing and shall be signed by counsel for the accepting party. [¶] . . . [¶] (c)(1) If an offer made by a [cross-defendant] is not accepted and the [cross-complainant] fails to obtain a more favorable judgment or award, the [cross-complainant] . . . shall pay the [cross-defendant's] costs from the time of the offer. In addition, in any action or proceeding . . . the court . . . may require the [cross-complainant] to pay a reasonable sum to cover costs of the services of expert witnesses, . . . actually incurred and reasonably necessary in either, or both, preparation for trial . . . , or during trial of the case by the [cross-defendant]."

The Tiersteins sent the following section 998 offer to the Reisers: "Cross-Defendants, Kenneth Reiser and Phyllis Reiser, without admitting liability, pursuant to [section] 998 of the Code of Civil Procedure, hereby offer to allow judgment to be taken in the sum of Ten Thousand Dollars ($10,000[]), each side to bear its own costs. [¶] It must be understood that the offer relates solely to the cross-complaint and does not and will not operate as a retraxit as to plaintiff's complaint, or have any collateral estoppel or res judicata effect on plaintiff's complaint. [¶] You are advised that you have that time as specified by [section] 998 within which to accept the within offer and that if you do not accept the offer you will be obliged to pay cross-defendant's costs of suit from this date unless you obtain a more favorable judgment at the time of the trial. [¶] You may accept this offer by signing below and returning a copy of this document with your original signature to me at the above address. Pursuant to [s]ection 998, any acceptance of this offer, whether made on this document or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party."

The Reisers argue that they were confused and did not recognize that the offer was directed to them because it inserted the incorrect last name (cross-defendants' last name) and lacked the word "cross" in front of the caption identifying the offer as "defendant's offer to compromise." We disagree. The Reisers were represented by and served through counsel who failed to "explore those matters with the offeror[s]" or their counsel. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 730-731, and *Westamerica Bank v. MBG Industries* (2007) 158 Cal.App.4th 109, 128-129.)

We also reject the contention that the Reisers' claims for quiet title and declaratory relief rendered the section 998 offer ineffective because it did not dispose of all issues raised by the cross complaint. The offer stated in clear terms that it related solely to the cross-complaint and did not and would not operate as a "retraxit" as to plaintiff's complaint. ("In common law, a retraxit was 'a voluntary renunciation by plaintiff in open court of his suit and cause thereof, and by it plaintiff forever loses his action.' [Citations.] In California, the same effect is now accomplished by a dismissal with prejudice. [Citations]".) (*Morris v. Blank* (2001) 94 Cal.App.4th 823, 828.)) As written, the offer was to have no collateral estoppel or res judicata effect as to the underlying complaint and would not prejudice the Reisers' defense to the complaint.

Prevailing Party (Section 1032)

The Reisers argue that the trial court erred in finding that the Tiersteins were the prevailing parties and awarding costs to them. We disagree.

"[A] prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) "When any party recovers other than monetary relief . . . the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides . . . ." (*Id.* at subd. (a)(4).) The trial court did not abuse its discretion in finding that the Tiersteins are the prevailing parties and awarding them costs.

DISPOSITION

The judgment is affirmed. Costs are awarded to the Tiersteins.

NOT TO BE PUBLISHED.

COFFEE, J.*

We concur:

GILBERT, P.J.

YEGAN, J.

* Retired Associate Justice of the Court of Appeal, Second Appellate District, Division 6, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

David R. Worley, Judge

Superior Court County of Ventura

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