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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

SYLVESTER WINERY, INC., et al., Plaintiffs, Cross-defendants and Respondents, v. SYLVESTER FEICHTINGER, as Trustee, etc., Defendant, Cross-complainant and Appellant.	2d Civil No. B235939 (Super. Ct. No. CV 100157) (San Luis Obispo County)

This appeal arises from a contentious family dispute over water rights to a well owned by appellant Sylvester Feichtinger. The trial court granted summary judgment in favor of respondents Sylvester Winery, Inc. (Winery) and Sylvester Winery, L.P. (SWLP). The court concluded that an agreement prepared and recorded by Feichtinger as a condition of a bank loan created an appurtenant easement entitling respondents to 100 percent of the well water for the "occupancy and development" of the Winery's property, including use on a neighboring vineyard. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Feichtinger's daughter, Sylvia Filippini, is the current owner of the Winery and SWLP (collectively respondents). The Winery conducts its operations from approximately 60 acres of real property located in Paso Robles (Winery Property).

SWLP owns the Winery Property, which it leases to the Winery. The Winery Property does not have its own water source.

Feichtinger owns approximately 340 acres of real property surrounding the Winery Property. In 1997, while he also owned the Winery Property, the Winery and SWLP, Feichtinger obtained a $3 million loan from Central Coast Farm Credit (Farm Credit), secured by the Winery Property, to refinance costs incurred in constructing the winery building and tasting room. Farm Credit required that a water and drainage agreement (Water Agreement or Agreement) between Feichtinger and SWLP "be recorded as a condition of funding." According to Feichtinger, "[a]t the time of the bank loan [which remains in effect], the Winery Property did not have a well located on it and the bank wanted assurance that the property would have access to water. Rather than drill a well, [Feichtinger], who controlled both properties, executed a Water Agreement in October 1997, and recorded it on December 5, 1997, allowing the Winery Property use of the water from a designated well (commonly referred to as Well #2) on Rancho Robles for a period of a renewing one-year term."

The Water Agreement contains the legal description of both properties and provides, in relevant part:

"AGREEMENT TO FURNISH WATER

NOW, THEREFORE, [Feichtinger] agrees to furnish to [SWLP] from said well such water as may be necessary for the use by [SWLP] in the occupancy and development of [SWLP's] Land on the following terms and conditions.

LIMIT ON WATER AMOUNT

1. [SWLP] is entitled up to 100% of the water that may be made available from said well or any replacement well drilled in place of said well.

NO GUARANTY AS TO QUANTITY

2. [Feichtinger] cannot and does not make any guaranty concerning the quantity of water agreed to be furnished under this Agreement or concerning the continuing availability of water except as herein expressly provided. [SWLP] understands and hereby acknowledges that [Feichtinger] is not a public utility, is not

guaranteeing any specific quantity of water, is the sole owner of said well and all waters underlying or in any way connected with the retained land, and has agreed to furnish water to [SWLP] only in accordance with the terms of this Agreement. [SWLP] stipulates that it has no right, title, or interest in or to any water from said well or water underlying said retained land except as herein specifically set forth.

. . . . . .

TERM OF AGREEMENT

7. This Agreement is made for the period of one year commencing October 1, 1997, and will be automatically renewed thereafter from year to year.

SALE OF RETAINED LAND AND WELL

8. [Feichtinger] expressly reserves the right to sell, lease, trade, mortgage, encumber, or otherwise deal with the retained land as it may see fit. This agreement is binding on [Feichtinger] and its successors in interest."

For approximately 12 years, the Winery received all the water it needed from Well #2 with no interference or charge. During that period, and even before the Water Agreement was created, Filippini received water from Well #2 to irrigate a separate vineyard she owns south of the Winery Property (Filippini Vineyard). That vineyard supplies grapes to the Winery.

In 2001, Feichtinger sold the Winery to an entity owned by Filippini. In 2009, Feichtinger and Filippini disagreed on a variety of issues, including possession and control of the Winery Property and surrounding land. In August 2009, Feichtinger attempted to terminate the Water Agreement. Filippini contended it could not be terminated. The parties engaged in litigation, which they settled in December 2009. As a result of the settlement, Filippini became the sole owner of SWLP. The settlement excluded issues concerning the Water Agreement.

In 2010, Feichtinger started billing respondents for the use of water from Well #2. Respondents refused to pay the bills and brought this action for breach of the Water Agreement, breach of the implied covenant of good faith and fair dealing, declaratory relief and injunctive relief. Although it seeks declaratory relief, the complaint

does not explicitly allege the creation of an easement. Feichtinger cross-complained for breach of contract (oral and written), breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, declaratory relief and injunctive relief. On July 7, 2010, the trial court granted a preliminary injunction allowing water from Well #2 to be used by respondents for any purpose without interference.

Respondents moved for summary judgment on the complaint or, alternatively, for summary adjudication as to the conversion cause of action and the request for punitive damages in the cross-complaint. The motion did not seek summary judgment on the cross-complaint. Specifically, respondents requested a determination that Feichtinger breached the Water Agreement by threatening to terminate the Agreement and by demanding payment for the water from Well #2. They filed a memorandum of points and authorities, separate statement of undisputed material facts and evidentiary declarations in support of the motion.

In a five-page "response" to the motion, Feichtinger stated: "Recent tragic events in the family have caused [Feichtinger] to rethink matters, and he wishes to end this dispute. Thus, [Feichtinger] rescinds his termination of the [Water Agreement] and is willing to relinquish any right to terminate the Water Agreement in the future." He further stated he "does not contest any of the facts set out in Plaintiffs' Separate Statement of Undisputed Material Facts," but noted, without further explanation, that "[there] are factual questions which have not been presented and cannot be determined on this Motion." Feichtinger asserted that if the trial court concludes there are no triable issues of material fact, the court should "find as a matter of law that the Water Agreement creates an appurtenant easement and that water from the well that is the subject of such agreement may be used only on the Winery Property, and no other property." Feichtinger did not present any evidence in support of his response. Nor did he file a separate statement of undisputed and disputed material facts.

In its tentative ruling, the trial court stated its intent to grant summary judgment on the complaint. The court determined, based on the undisputed material facts, that the Water Agreement allows use of the water "in the occupancy and

development o[f] SWLP's Land" and that respondents are entitled to "up to 100% of the water that may be made available from [Well #2]." The court rejected Feichtinger's contention that the use must be limited to the Winery Property, stating: "The fact that at no time prior to the fairly recent development of the business disagreements did [Feichtinger] attempt to limit Plaintiffs' use of the water, and the fact that Plaintiffs used the water in the same manner at the time of the Agreement, and the Agreement itself grants Plaintiffs[] use of 100% of the water from Well #2, convinces the Court that Plaintiffs' interpretation of the Agreement is correct."

Feichtinger formally objected to the proposed order granting summary judgment and dismissing his cross-complaint with prejudice. He claimed that respondents did not move for summary judgment on his cross-complaint and that the trial court did not grant their request for summary adjudication of his claim for conversion. In reply, respondents acknowledged the motion only sought summary judgment on the complaint, but asserted it was unnecessary to separately seek summary judgment on the cross-complaint "as the two [pleadings] are simply each party's argument of the contract in question."

On June 1, 2011, the trial court heard Feichtinger's objections to the proposed order. The hearing was not reported, but the minutes reflect the court signed the order, which adopted the court's tentative ruling, dismissed the cross-complaint "as to Well #2 only"[1] and provided that "[j]udgment shall be entered in favor of Plaintiffs, with a Permanent Injunction to be issued as set forth in the tentative ruling."

The trial court subsequently entered judgment in favor of respondents on "their Complaint that the Water Agreement is an appurtenant easement in favor of [the Winery Property]," and dismissed the cross-complaint with prejudice as to Well #2. The judgment contains a permanent injunction prohibiting Feichtinger from interfering with

[1] Respondents assert that, at the unreported hearing, Feichtinger asked the trial court to limit any dismissal of the cross-complaint to Well #2 and that, as a result, the court handwrote this language on the order. Respondents also contend that Feichtinger's counsel voluntarily dismissed the remainder of the cross-complaint without prejudice. These assertions are not evident from the record.

respondents' right to receive 100 percent of the water from Well #2 and their "right to use the water from Well #2 for the occupancy and development of Plaintiffs' property, including but not limited to providing water to the adjoining [Filippini Vineyard] . . . . " Feichtinger appeals.

DISCUSSION

Standard of Review

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review the record de novo to determine whether triable issues of material fact exist and whether defendant was entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

Resolution of this appeal requires us to interpret the Water Agreement. Where, as here, the material facts are undisputed, "the interpretation of a writing involves a question of law for de novo review by the appellate court." (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.)

Procedural Issues

Feichtinger contends the judgment must be reversed because it exceeds the relief requested in the complaint and in the motion, exceeds the relief permissible under Code of Civil Procedure section 437c, subdivision (f)(1), exceeds the scope of the trial court's tentative ruling, is not supported by the undisputed material facts and erroneously interprets the Water Agreement as a matter of law. Respondents assert Feichtinger has waived most, if not all, of these arguments by failing to raise them in the trial court. Unquestionably, Feichtinger's failure to raise most of these arguments in the trial court complicates our examination. His five-page "response" to the summary judgment motion did not contest the facts in respondents' separate statement and all but invited the trial court to enter judgment for respondents. Feichtinger now submits more than 100 pages telling us why he believes the judgment is wrong.

At first blush, the procedural irregularities seemed to overshadow the substantive issues. We particularly were concerned that the judgment appears to dismiss only a portion of Feichtinger's cross-complaint, leaving other issues unresolved. (See *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 698 ["[T]he presence of an unresolved cross-complaint defeats appealability"].) At oral argument, however, counsel for both sides assured the court that the judgment disposes of all claims, including those in the cross-complaint, and thus is appealable. Counsel also requested that we look beyond the procedural issues and reach the merits of the summary judgment ruling. The parties agree the Water Agreement may be interpreted as a matter of law based on the undisputed material facts. They disagree on whether it created a license or easement. We turn to that issue.

The Water Agreement Created an Appurtenant Easement

Feichtinger contends the Water Agreement merely created a license for SWLP to use water from Well #2, rather than an easement. A license is a personal, revocable and non-assignable interest in land. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 36; *Eastman v. Piper* (1924) 68 Cal.App. 554, 560.) An easement is a permanent interest in real property that is either appurtenant to land or in gross. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 521; see *Alameda County v. Ross* (1939) 32 Cal.App.2d 135, 143 ["Ordinarily, an easement is a permanent interest in the realty, while a license, at least so long as it is executory, may be revoked at pleasure"].) An appurtenant easement attaches to the land of the easement holder and benefits the holder as the owner of that land. (*Buehler v. Oregon–Washington Plywood Corp.* (1976) 17 Cal.3d 520, 527 (*Buehler*); see Civ. Code, § 801.)[2] The land to which an appurtenant easement is attached is known as the dominant tenement, and the land that

[2] All further statutory references are to the Civil Code unless otherwise stated.

is burdened by the easement is called the servient tenement. (§ 803.) An appurtenant easement may grant the right to take water from the servient tenement.[3] (§ 801, subd. 5.)

Unlike a license, appurtenant easements are descendible and run with the land. (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 420, p. 493; *Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568; see § 1104 ["A transfer of real property passes all easements attached thereto"].) Although the grant of an express easement must be in writing, the precise form or nature of the writing is immaterial. (*Pacific Gas & Elec. Co. v. Minnette* (1953) 115 Cal.App.2d 698, 708.) Any document, whether a deed or a contract, evidencing a party's intent to create a right to use his or her property by another party may establish an easement. (See *Rice v. Capitol Trailer Sales of Redding* (1966) 244 Cal.App.2d 690, 692-693.) "As with all contracts, the paramount goal of interpreting a writing creating an easement is to determine the intent of the parties." (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 777; see *Fisher v. General Petroleum Corp.* (1954) 123 Cal.App.2d 770, 776.) This intent is ascertained from the language of the contract alone, if the language is clear and explicit. (§ 1638.)

The Water Agreement does not state whether it is a license or easement. Respondents contend it effectively granted a perpetual appurtenant easement in favor of the Winery Property as the dominant tenement. Feichtinger claims it is a license because it may be terminated at any time. The Agreement does not have an express termination clause. It states the term of the Agreement is "for the period of one year commencing October 1, 1997, and will be automatically renewed thereafter from year to year." This language suggests the parties intended to make the Agreement perpetual or permanent. At a minimum, it is ambiguous on that point. "When the document creating the easement is ambiguous, the court looks to the surrounding circumstances, the relationship between

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[3] An easement in gross is a personal interest in the land of another and is independent of a dominant tenement. (*City of Anaheim v. Metropolitan Water Dist. of Southern Cal.* (1978) 82 Cal.App.3d 763, 767-768.) The parties agree that if an easement does exist, it is appurtenant to land and not in gross. We therefore limit our discussion to appurtenant easements.

the parties, the properties, and the nature and purpose of the easement in order to establish the intention of the parties." (6 Miller & Starr, Cal. Real Estate (3d ed. 2006) § 15:16, p. 15-68, fn. omitted.) In other words, even if we assume "the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions . . . that to them the contract mean[s] something quite different, the meaning and intent of the parties should be enforced." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.)

It is undisputed that Feichtinger created the Water Agreement as a condition of the $3 million loan from Farm Credit. He acknowledges that because the Winery Property did not have its own well, "the bank wanted assurance that the property would have access to water." Obviously, a winery with a water source is more valuable than one without water, and Farm Credit wished to ensure that in the event of a default, the pledged security would retain its value. Feichtinger admits he considered drilling a well on the Winery Property, but instead of incurring that expense, he granted SWLP the right to 100 percent of the water from Well #2. If Feichtinger had drilled a well, the Winery Property would have had its own permanent water source. It stands to reason, therefore, that Feichtinger intended to accomplish this same goal through the Water Agreement. Not only did he record the document, but he also made it binding on his "successors in interest."

Feichtinger claims the only evidence of his intent was "his desire to do the minimum necessary to satisfy his lender." Even if that were true, the logical inference is that Farm Credit would not accept an agreement with a termination clause because that would not ensure the Winery Property's ongoing access to water. Otherwise, Feichtinger would have included a termination clause instead of an automatic renewal. Feichtinger cannot take advantage of an ambiguity he created in the Water Agreement. It is well established that ambiguities in the language of a contract are construed against the drafter of the instrument. (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 525.) It also is well established that an instrument granting an easement is interpreted liberally in favor of the grantee. (*Ibid.*) Applying these principles, we

agree with the trial court that the Water Agreement created an appurtenant easement for the benefit of the Winery Property.

Feichtinger contends this conclusion is contrary to *Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873 (*Ginsberg*). We disagree. *Ginsberg* involved a lease granting the tenant an option to extend the five-year term "for additional five year periods upon the same terms and conditions contained in the lease." (*Id.* at p. 880.) The Court of Appeal rejected the trial court's determination that the lease authorized unlimited extensions. (*Id.* at p. 879.) In reaching that conclusion, the appellate court applied the "special rule of construction" relating to perpetual or unlimited renewals in leases. (*Id.* at pp. 884-893.) Because perpetual lease provisions potentially implicate the rule against perpetuities, such provisions are disfavored unless the parties' intent to create the right is explicit and clear in the lease. (*Id.* at pp. 884-885, 893.)

Ginsberg did not consider whether the special rule of construction relating to perpetual leases also applies to easements, which typically are “present interests” outside the scope of the rule against perpetuities. (70 Corpus Juris Secundum (2005), Perpetuities, § 21, p. 397; see *Strong v. Shatto* (1919) 45 Cal.App. 29, 32-36.) In *Carlson v. Bold Petroleum, Inc.* (Colo. Ct.App. 2000) 996 P.2d 751, 752, a Colorado court concluded that a pipeline easement that was renewable for three-year periods was perpetual. The court stated: "We are aware of no prohibition against parties providing for such multiple renewals of easement rights. Indeed, there is nothing either improper or unusual about an easement's being of a perpetual duration. We find the cases cited by plaintiff regarding perpetual leases to be simply inapplicable to this case, which involves the grant of an *easement* rather than a lease agreement." (*Id.* at p. 753.) Feichtinger cites no authority suggesting we should conclude otherwise.

Feichtinger contends paragraph 2 of the Water Agreement confirms he did not intend to grant respondents any right, title or interest in the water. That paragraph, which is under the heading "NO GUARANTY AS TO QUANTITY," states Feichtinger is not a public utility, is not guaranteeing any specific quantity of water and "has agreed to furnish water to [SWLP] only in accordance with the terms of th[e] Agreement." By

stipulating it has "no right, title, or interest in or to any water from said well or water underlying said retained land except as herein specifically set forth," SWLP acknowledged that there is no guaranty as to the quantity of water and that its rights are limited to the available water in Well #2. SWLP did not stipulate that it has absolutely no right, title or interest in the water. It agreed that any such right is limited by the terms of the Agreement.

Scope of Appurtenant Easement

Feichtinger asserts that even if the Water Agreement created an appurtenant easement, it only allows respondents to take water for use on the Winery Property and not on the Filippini Vineyard. He is correct that as a general rule an appurtenant easement benefiting one parcel of land may not be expanded for the benefit of other parcels. (*Buehler, supra,* 17 Cal.3d at p. 527; 6 Miller & Starr, *supra,* at § 15:6, p. 15-25.) This rule does not apply if the easement provides otherwise. "[T]he scope of the easement is measured by the extent the property was obviously and permanently *used* at the time when the transfer was completed." (*Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 771.) In some instances, therefore, easements for use can grant benefit to properties beyond that of the dominant tenement. (See *Kerr Land & Timber Co. v. Emmerson* (1965) 233 Cal.App.2d 200, 213.)

Here, the Water Agreement expressly states that the water from Well #2 may be taken for the "occupancy and development" of the Winery Property. The Agreement did not limit such use to the Winery Property itself. Indeed, it suggests the water may be used as necessary for Winery operations. At the time of the Agreement, the water already was being diverted to the Filippini Vineyard for the benefit of the Winery Property. Feichtinger had full knowledge the Filippini Vineyard was receiving the water because he personally directed that the piping from Well #2 be extended to that property. If Feichtinger did not wish for that practice to continue, he could have excluded it from the Agreement. Instead, he allowed respondents to take 100 percent of the water from Well #2 for the "occupancy and development" of the Winery Property. As noted above, any ambiguity in this grant must be construed against Feichtinger as the drafter of the

document and liberally construed in favor of the easement. (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park, supra,* 45 Cal.App.3d at p. 525.)

The reason an easement typically is limited to the dominant tenement is to prevent an increase in the burden upon the servient estate. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 350 ["The owner of an easement cannot materially increase the burden of the easement on the servient estate or impose a new burden"].) There is no danger of that occurring here. Feichtinger granted SWLP 100 percent of the available water from Well #2, retaining no interest in the water for use on the servient tenement. This strongly suggests that SWLP and the Winery, as lessee of the Winery Property, have the right to the available water in that well as long as it is for the "occupancy and development" of the Winery Property. Because they are entitled to 100 percent of the available water under the Water Agreement, respondents are not overburdening the easement by diverting a portion to a vineyard that provides grapes to the Winery.

It bears emphasis that the judgment does not make the Filippini Vineyard part of the dominant tenement under the Water Agreement. To the extent that the vineyard receives water from Well #2, it is through the appurtenant easement granted to SWLP for the "occupancy and development" of the Winery Property as the dominant tenement. If, for example, respondents decide they need all of the available water for use on the Winery Property only, they may divert the water from the Filippini Vineyard for that purpose. Under the terms of the Water Agreement, it is for respondents, not Feichtinger, to direct how the available water is used for the "occupancy and development" of the dominant tenement.

Finally, Feichtinger maintains that even if the trial court properly interpreted the Water Agreement, the judgment is improper because respondents did not seek creation of an appurtenant easement in the complaint or request it in their motion. He is incorrect. Respondents pled a cause of action for declaratory relief, asking the trial court to determine the parties' "respective rights and duties under the Water Agreement." In their motion, respondents asserted that "the Water Agreement that Feichtinger created

himself and signed both as Grantor and Grantee is an easement." In his "response" to the motion, Feichtinger stated "[e]ven if the Water Agreement is characterized as an easement, as a matter of law, it is an appurtenant easement." Feichtinger had notice of respondents' claims and ample opportunity to oppose those claims. He has not demonstrated error in the summary judgment ruling.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Dodie A. Harman, Judge

Superior Court County of San Luis Obispo

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