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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CONNIE GORDEN-CAVE, Plaintiff and Appellant, v. RONALD JOHN BARTRAM et al., Defendants and Respondents.	B276360 (Los Angeles County Super. Ct. No. BC511648)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura A. Matz, Judge. Affirmed.

Law Office of Paul S. Levine and Paul S. Levine for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Connie Gorden-Cave appeals from the judgment entered after a bench trial. Appellant sued her neighbors, respondents John Bartram and Beverly Bartram, for intentional and negligent infliction of emotional distress. After trial, the court concluded appellant's complaint was barred by the applicable two-year statute of limitations. On appeal, appellant argues both that the judgment conflicts with the trial court's earlier ruling denying respondents' motion for summary judgment and that the trial court "misapplied the law regarding continuing wrongs." We disagree and affirm.

BACKGROUND

1. Events Preceding Appellant's Lawsuit

Respondents John and Beverly Bartram are brother and sister. They have lived in their home in Montrose most of their lives. Before they owned the house, their parents owned it. Appellant moved into her home next door to respondents in 2002.

This case concerns a wall that sits one inch inside respondents' property line and runs between the parties' properties. The wall belongs to respondents and holds special meaning to them because their parents built the wall on their property just after World War II. Although appellant's driveway did not exist at the time the wall was built, her driveway now runs alongside the wall. One end of the wall is about 15 feet from appellant's porch and is visible from appellant's front door, porch, bedroom, and living room. The wall is also visible from the street.

Sometime prior to May 15, 2006, when she was in the midst of doing home improvements, appellant said she asked a City of Glendale planner or engineer if she needed either a permit or her neighbors' permission to paint the wall. According to appellant,

the person she spoke to told her she did not need a permit or permission to paint the wall. Thus, on either May 15 or 16, 2006, and without asking respondents for permission, appellant painted the wall.

A few days later, after returning home from an annual fishing trip and discovering appellant had painted the wall without permission, John painted a threatening message on the wall, which included the following language in large, graffiti-like "blood-red" print: "This wall was built by John & Dorothy Bartram about 1950. This wall is built 1 inch inside our property line . . . . [¶] Screw you and up yours for delibtly [*sic*] painting our wall without our permission. Connie you did this knowing that the Bartrams would not allow the painting."

About one week later, appellant wrote a letter to respondents asking if she could paint over the graffiti. Beverly responded with a letter stating in part, "No! Connie Gorden-Cave you may not repaint our wall." Eventually, however, almost a year after John had painted the threatening message and without respondents' permission, appellant painted over the graffiti on the wall.

On May 12, 2007, John wrote another threatening message on the wall. The second message included the following language, again in large, graffiti-like "blood-red" print: "A God is going to put a Gonnie [*sic*] into hell for a Christmas present!" and, "Screw you." After seeing John's new message on the wall, appellant became very scared. She unsuccessfully sought a restraining order, installed or updated her home security system, and slept with a two-by-four blocking her bedroom door so no one could get inside.

Finally, on August 19, 2011, the City of Glendale had the graffiti removed from the wall.

Over the same five-year time period, appellant also believed John not only harassed people who visited her house but also purposely parked his truck and cars on the street in such a way so as to make it difficult for her to drive in and out of her driveway.

2. First Amended Complaint and Cross-Complaint

On June 13, 2013, appellant filed a complaint against respondents, and on August 15, 2013, she filed a first amended complaint, alleging one cause of action for intentional infliction of emotional distress and a second cause of action for negligent infliction of emotional distress. Both causes of action alleged the same facts: "On two occasions during the period May 15, 2006 through August 19, 2011, Defendants painted, or caused to be painted, vile graffiti on the wall which runs on the border between Plaintiff's and Defendants' property; the graffiti was finally abated by the City of Glendale on August 19, 2011. Plaintiff's emotional distress from this and from the other actions of Defendants described herein reached its maximum severity on August 18, 2011, the day before the graffiti was finally abated. [¶] During this period, Defendants routinely and repeatedly harassed almost anyone who came to visit Plaintiff in her own home, or perform work on her . . . home, or make deliveries to her, as the visitors were arriving or leaving. [¶] During this period, Defendants routinely and repeatedly parked their cars, and arranged their exterior potted plants and bushes, in such a way as to continually block Plaintiff's ability to drive her car in and out of the driveway in front of her own home."

Respondents filed a cross-complaint against appellant, alleging causes of action for trespass and damage to real property.

3. Respondents' Motion for Summary Judgment

After filing an unsuccessful demurrer to the first amended complaint, respondents filed a motion for summary judgment. Respondents argued in part summary judgment was proper because the statute of limitations barred appellant's claims. Relying on Code of Civil Procedure section 335.1, respondents argued the applicable statute of limitations was two years and had expired long before she filed her complaint. Respondents claimed appellant's causes of action had accrued, at the latest, in May 2007, when she feared for her personal safety. Appellant opposed the motion for summary judgment and, relevant here, argued the statute of limitations did not bar her claims.

The trial court denied respondents' motion for summary judgment. The court concluded material facts were in dispute with respect to the statute of limitations issue. The trial court considered all the papers submitted in the case, including appellant's responses to interrogatories, in which appellant reported her "emotional distress reached its peak" on August 18, 2011. In light of the parties' conflicting positions with respect to when appellant's claims accrued, the trial court determined summary judgment was not proper on statute of limitations grounds. The court stated appellant's "response to the interrogatory . . . states, in effect, that [appellant's] emotional distress reached its maximum severity on August 18, 2011. This evidence is sufficient, if credited by the trier of fact, to support a finding that [appellant] suffered continuing severe emotional distress until the writing on the wall was removed, at which

point, on August 18, 2011, the statute could reasonably be found to have accrued. This action was filed on June 13, 2013, within the two year statute of limitations."

4. Bench Trial

A bench trial was held on May 2 and 3, 2016. Appellant testified she felt terrorized, humiliated, intimidated, and bullied because of the graffiti on the wall. She also testified she was extremely stressed by the wall and, as a result, gained weight. Appellant said she could not sell her home because of the graffiti and neighbors complained to her that it decreased their property values. Appellant explained that, in May 2007 after John wrote graffiti on the wall for a second time, she feared for her safety and, indeed, her life. As a result, she had a security system installed in her house and unsuccessfully sought a restraining order. She also slept with a "two-by-four jammed under my door handle of my bedroom door, wedged up against the post of my bed so that no one could get in."

Appellant also testified John "hassled" people who were visiting or working at appellant's home and purposely parked his cars and trucks on the street in such a way that made it difficult and unsafe for appellant to get in and out of her driveway.

Representing themselves, John and Beverly also testified at trial. They both said that, before appellant painted the wall, they had told her repeatedly the wall was not a common wall, but was on respondents' property, and they did not want her to touch it. The wall had special meaning to respondents because their parents built it when respondents were children.

After both sides had rested, the trial court asked appellant's counsel to address the statute of limitations during his closing argument. The court noted the statute of limitations

began to run when appellant's damages could be considered extreme and that damages could have been extreme before reaching their peak. In addressing the issue, counsel explained that, although appellant's suffering "certainly was extreme" before August 2011, her suffering "reached its peak" in August 2011 just before the City of Glendale had the graffiti removed from the wall. Thus, counsel argued appellant's complaint, which was filed in June 2013, was filed within the two-year limitations period. Counsel also argued that, in denying summary judgment, the trial court already had decided appellant's complaint was timely and not barred by the statute of limitations. The trial court disagreed with counsel's position.

5. Memorandum Decision

Following the bench trial, the trial court issued its tentative decision. Although the court found John's conduct was "outrageous," appellant suffered distress, and appellant trespassed upon respondents' wall, the court nonetheless concluded both the complaint and cross-complaint were barred by the applicable statutes of limitations. With respect to appellant's claims, the trial court found by a preponderance of the evidence appellant "suffered emotional distress that was sufficiently 'severe' to support a claim from the day she saw the first graffiti on or about May 15, 2006 and that she felt that distress for the five years the vile words remained on the wall. While it may have increased at various times, it was never just momentary and fleeting."

In response to the court's tentative decision, appellant filed a document entitled, "proposals not included in this court's tentative decision." Appellant asked the trial court to explain how it was possible, on the one hand in denying summary

judgment, for the court to find the statute of limitations did not bar appellant's lawsuit and then, on the other hand after trial, for the court to conclude appellant's claims were barred by the statute of limitations. Appellant requested the trial court to reconcile its summary judgment ruling with its ruling after trial.

On June 2, 2016, the trial court entered its memorandum decision. As with its tentative decision, the court concluded both the complaint and the cross-complaint were barred by the applicable statutes of limitations. In response to appellant's concerns, the trial court explained its summary judgment ruling was not inconsistent with its decision after trial. The court stated in part: "The answer is found in the procedural differences between the two proceedings. The court's sole function in ruling on a summary judgment motion is issue-finding, *not* issue determination. The court determines from the evidence presented whether there is a 'triable issue as to any material fact.' CCP §437c(c). It does not weigh conflicting evidence. Contrary to plaintiff's contention that the court purportedly made a 'finding' 'as a matter of law' that the statute accrued on August 18, 2011 . . . , the court actually stated that the evidence offered in opposition to the summary judgment motion was '*sufficient, if credited by the trier of fact*' to support a finding that the cause of action for infliction of emotional distress accrued on August 18, 2011. When plaintiff's distress became sufficient to support a cause of action for emotional distress is an issue of fact and although she testified her distress hit a peak on August 18, 2011, the pertinent issue was not when it hit its peak, but when it became 'severe.' "

The trial court concluded: "John's conduct was 'outrageous' for purposes of a cause of action for infliction of emotional

distress and plaintiff understandably suffered the distress John intended to create. Plaintiff did trespass upon defendant's wall. However, the court is compelled to find the parties simply waited too long to sue each other."

6. Judgment and Appeal

On June 2, 2016, the trial court entered judgment in favor of respondents on the complaint and in favor of appellant on the cross-complaint. Appellant filed her notice of appeal on July 5, 2016.

DISCUSSION

1. Standard of Review

We review the judgment after trial for substantial evidence. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874 (*Bowers*).)

We review purely legal issues de novo. (*Snow v. Woodford* (2005) 128 Cal.App.4th 383, 393.) "The meaning of a court order or judgment is a question of law within the ambit of the appellate court." (*In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429.)

2. The judgment does not conflict with the trial court's order denying summary judgment.

"The purpose of summary judgment is not to resolve issues of fact, but simply to determine whether there are issues of fact that must be resolved through a trial." (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 451, fn. 3.) "Accordingly, the function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Thus, when the trial court denies a motion for summary judgment, the court has concluded there are issues of material fact that must be heard and determined by the trier of fact following a trial. In other words, on denial of summary judgment, the trial court has not determined which claims to believe, but rather has determined judgment before trial is not proper because the pertinent facts are disputed. By successfully opposing summary judgment, a party is not guaranteed success at trial.

Here, appellant argues the judgment must be reversed because it conflicts with the trial court's order denying summary judgment. Specifically, appellant claims that, at the summary judgment stage, the trial court determined respondents were "not . . . entitled to judgment as a matter of law," and also as a matter of law appellant's causes of action were timely filed and not barred by the statute of limitations. As the trial court indicated, however, appellant misconstrues the court's summary judgment ruling. In denying summary judgment, the trial court did not decide judgment should be or would be entered in appellant's favor as a matter of law. Rather, the court decided a *summary* judgment could not be entered as a matter of law because

material facts remained disputed. Thus, the case proceeded to trial, at which point the trial court was able to hear the evidence and make factual determinations, including a determination of when appellant's injuries were sufficiently severe so as to trigger the limitations period.

In addition to misconstruing the import of the trial court's summary judgment ruling, appellant also miscites that ruling. In her brief on appeal, appellant incorrectly states the court "found that there was [¶] 'no triable issue of material fact as to Plaintiff's [causes of action] [regarding whether or not] Defendants have a complete defense pursuant to the statue of limitations.' [¶] That is, the trial court already found on summary judgment that there was no dispute as to the facts." The trial court did not make that finding. Rather, the quote appellant attributes to the trial court is simply the court's recitation of the arguments *respondents* made in their motion for summary judgment. In fact, as noted above, the trial court expressly found triable issues of fact existed with respect to respondents' statute of limitations defense and, therefore, summary judgment was not proper on that point.

Thus, we conclude appellant has misconstrued the trial court's ruling denying summary judgment and, contrary to her position on appeal, there is no inconsistency between that ruling and the judgment.

3. Appellant cannot raise a new argument for the first time on appeal.

The parties agreed appellant's infliction of emotional distress causes of action are governed by the two-year limitations period prescribed by Code of Civil Procedure section 335.1. The applicable statute of limitations begins to run when the cause of

action accrues. (Code Civ. Proc., § 312.) The tort of intentional infliction of emotional distress "is not complete until the effect of a defendant's conduct results in plaintiff's *severe* emotional distress. That is the time the cause of action accrues and starts the statute of limitations running." (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 232.) " 'Both the intensity and duration of the emotional distress suffered must be considered in determining its severity. Severe emotional distress means "emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." ' " (*Id.* at p. 231.)

Here, the trial court held appellant's causes of action accrued and the statute of limitations began to run when John painted threatening graffiti on the wall on May 15, 2006, and again on May 12, 2007. The court rejected appellant's claim that "her distress was not 'severe' enough to state a claim until it 'reached its maximum severity on August 18, 2011, the day before the graffiti was finally abated.' " Instead, the trial court explained appellant's trial testimony established she suffered severe emotional distress in May 2006 when she first saw the graffiti on the wall. Specifically, the court found "by a preponderance of the evidence that [appellant] suffered emotional distress that was sufficiently 'severe' to support a claim from the day she saw the first graffiti on or about May 15, 2006 and that she felt that distress for the five years the vile words remained on the wall. While it may have increased at various times, it was never just momentary and fleeting." Thus, because appellant filed her complaint on June 13, 2013, more than two years after her causes of action accrued, her causes of action were barred.

Importantly, appellant does not dispute that her distress was "extreme" in 2006 when she first saw the graffiti on the wall. And we agree substantial evidence supports that finding. (See *Bowers*, *supra*, 150 Cal.App.3d at pp. 873–874.) However, for the first time on appeal, appellant argues the doctrine of "continuing violations" applies because the graffiti remained on the wall until August 19, 2011. Appellant analogizes John's two separate acts of painting graffiti on the wall (first in 2006, and again in 2007) to a "continuing nuisance," claiming "the wrong was 'repeated' every day that the wall contained the vile graffiti."

Because appellant raises her continuing violations argument for the first time on appeal, we decline to address it. "It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action." (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340.) First, appellant's two causes of action were based on respondents' infliction of emotional distress, which clearly was the focus of her case. Appellant did not plead a nuisance cause of action. Thus, the nuisance cases she cites are not persuasive. In addition, for the duration of her case, appellant argued the statute of limitations did not bar her claims because the severity of her distress "reached its peak" on August 18, 2011, the day before the graffiti was removed. She did not argue, as she does now, that each day the graffiti was on the wall triggered a new limitations period.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.