Filed 1/25/18 Grace Chinese Alliance Church etc. v. Lin Ma DDS Inc. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GRACE CHINESE ALLIANCE CHURCH OF THE CHRISTIAN AND MISSIONARY ALLIANCE OF WEST COVINA, CALIFORNIA,

Plaintiff, Cross-defendant and Respondent,

v.

LIN MA DDS INC.,

Defendant, Cross-complainant and Appellant;

MICHAEL J. HAYDEN, dba HAYDEN MICHAEL CO TRUST, et al.

Cross-defendants and Respondents.

B272415

(Los Angeles County Super. Ct. No. KC065263)

APPEAL from a judgment of the Superior Court for Los Angeles County, Robert A. Dukes, Judge. Affirmed.

Law Offices of Seth W. Wiener and Seth W. Wiener for Defendant, Cross-complainant and Appellant Lin Ma DDS Inc.

Law Offices of Hung Ban Tran and Vivian Junmin Zou for Plaintiff, Cross-defendant and Respondent Grace Chinese Alliance Church of the Christian and Missionary Alliance of West Covina, California.

Freedman + Taitelman, Michael A. Taitelman and Bradley H. Kreshek for Cross-defendants and Respondents Lee & Associates Commercial Real Estate Services, Inc.—City of Industry and Christopher Larimore.

Clements & Knock and Rick H. Knock for Cross-defendants and Respondents Michael J. Hayden dba Hayden Michael Co Trust and Michelle H. Hayden aka Michelle H. Wilson.

This appeal involves a commercial property that was sold by cross-defendants Michael J. Hayden and Michele[1] H. Wilson (the Haydens), as trustees of a trust, to defendant and cross-complainant Lin Ma DDS Inc. (DDS). The Haydens were represented in the transaction by their real estate agent, cross-defendant Christopher Larimore, and his

---

[1] Although all parties used the spelling "Michelle" when referring to Ms. Wilson in the documents filed both in the trial court and this court, when testifying, Ms. Wilson spelled her first name "Michele." We will use that spelling in this opinion.

brokerage, cross-defendant Lee & Associates Commercial Real Estate Services, Inc.—City of Industry (L&A; we will refer to Larimore and L&A collectively as the Brokers). DDS did not have an agent or broker; its principal, Dr. Lin Ma, handled the transaction on behalf of DDS.

The property in question (the Hayden property) is adjacent to another property (the Church property) that currently is owned by plaintiff and cross-defendant Grace Chinese Alliance Church of the Christian and Missionary Alliance of West Covina, California (the Church). The dispute in this case arises from a fence that runs parallel to the property line separating the two properties but sits several feet onto the Church's property. The Church brought an action against DDS to quiet title to the portion of the property from the fence to the property line, and DDS responded with a cross-complaint against the Church for quiet title, adverse possession, easement by prescription, and unjust enrichment. DDS also filed a cross-complaint against the Haydens and the Brokers for various claims, including breach of contract and intentional and negligent misrepresentation.

Following bench trials on the complaint and the cross-complaints, judgment was entered against DDS and in favor of the Church, the Haydens, and the Brokers, from which DDS now appeals. We affirm the judgment.

BACKGROUND

A. *DDS Purchases the Hayden Property*

In 2010, Dr. Ma was looking for a commercial property for DDS to purchase so he could relocate his dental practice, because the building

where his practice was then located was being sold and redeveloped. One of his employees, Rosa Noriega, brought the Hayden property to his attention. The Hayden property had been used as a dental office at one time, but it had been vacant for a while and was in a state of disrepair.

Dr. Ma met with Larimore, the Hayden's real estate agent, to look at the property to see if it would meet his needs. One of his concerns was having a place for the equipment he needed for his dental practice, particularly the air compressor used to power his tools. He discovered that the property had a compressor room, which was accessible only from the outside, from a yard along the side of the building adjacent to the Church property. The side yard was completely fenced in; it was approximately six feet wide from the building to the fence.

In June 2010, DDS entered into an agreement to purchase the Hayden property. The standard form agreement included provisions (1) allowing DDS 30 days to obtain a survey of the property;
(2) acknowledging that DDS was purchasing the property in its existing condition, and that no representations, inducements, promises, agreements, or assurances concerning the property had been made by either party or their broker, or relied upon by either party; and
(3) advising DDS to retain appropriate consultants to investigate the property. In addition to these standard provisions, the parties added several other provisions, two of which are relevant to this case:
(1) "Seller is selling this property in its 'As-Is' 'Where-Is' condition. Both Seller and Buyer have agreed that there will be no credits given to Buyer with regards to the condition and the size of the property"; and
(2) "Seller and Buyer acknowledge that Broker has made no

representations or warranties regarding the physical condition of the property. Seller and Buyer are relying on their own independent investigation in making or accepting this Agreement."

B. *Dispute Over Location of Property Line Arises*

The purchase closed, and Dr. Ma moved his dental practice into the Hayden property. On June 20, 2011, DDS received a letter from Richard K. Quan, an attorney for Cathay Bank, then-owner of the Church property. Quan stated that the Church property was the subject of a sale escrow, and that a boundary survey conducted in connection with the sale indicated that a fence and shed along the east property line of the Hayden property was encroaching into the Church property by approximately 3.76 feet along nearly the entire length of the boundary between the two properties. He enclosed a copy of the boundary survey that had been conducted, and asked DDS to acknowledge the encroachment and agree that it could be removed immediately. He warned that the encroachment was delaying the closing of the pending sale, and that further delay would result in financial harm to the buyer and seller. He asked DDS to respond within 10 days.

Dr. Ma responded on behalf of DDS the following day in a two-sentence letter. He stated: "We are in receipt of your letter and we have no problem with whatever you want to do with the fence as long as it is on your property. Please let us know your future plans if the fence is removed, so that we can prepare for any security issues to our office related to this."

Shortly thereafter, and in reliance upon Dr. Ma's response, the Church completed the purchase of the Church property and began renovations. In February 2012, the Church's pastor, Rev. To-Kay Chan, wrote to Dr. Ma. Rev. Chan explained that in order to complete its renovations, the Church needed to meet City codes for parking lots, which required the Church to repave the entire parking area. To do that, the fence needed to be moved to the correct property line, and a portion of a shed that also was encroaching on the Church property needed to be cut back. Recognizing that Dr. Ma might incur labor costs to cut back the shed, Rev. Chan offered to contribute $500 to help offset those costs. He asked that Dr. Ma tell him when he could begin that work, so the Church could make its plans to move the fence at no cost to Dr. Ma. Finally, Rev. Chan noted that the property line was marked by metal pins on the ground by a licensed surveying company, and offered to provide Dr. Ma a copy of the survey.

Dr. Ma wrote back to Rev. Chan the next day. He told Rev. Chan that he had done research to verify "your undated boundary ex[h]ibit presented to us, and have discovered that the survey was never filed with the Los Angeles County surveyors office as required by state law." Therefore, he stated, he "cannot proceed with any changes or requests until a valid boundary survey is filed and verified."

After receiving Dr. Ma's letter, the Church submitted the surveyor's report to the Los Angeles County Recorder, which accepted it for recording on October 15, 2012. Rev. Chan wrote to Dr. Ma on October 24, 2012, provided him with a copy of the recorded surveyor's

report, and gave notice that the Church would begin to move the fence after November 9, 2012.

Dr. Ma responded through his attorney, who stated that Dr. Ma disagreed with the Church's survey. He informed Rev. Chan that the fence was in its current location when Dr. Ma purchased the Hayden property, and he had spent more than $50,000 improving the property in dispute. He noted that his possession and improvement of the property had been open and continuous, and that the disputed property therefore was Dr. Ma's property, or he has an easement by prescription. He warned Rev. Chan that if anyone attempted to move the fence without a court order, Dr. Ma would call the police and have them arrested.

C. *Lawsuit is Commenced*

Two months later, the Church filed a complaint against DDS to quiet title and for injunctive relief. DDS answered the complaint and filed a cross-complaint against the Church (the Church cross-complaint) alleging claims for quiet title, adverse possession, easement by prescription, and unjust enrichment. A few months later, DDS filed a second cross-complaint (the Sellers cross-complaint) against the Haydens and the Brokers, which subsequently was amended. The amended Sellers cross-complaint alleged that the Haydens, through their agents L&A and Larimore, showed the property twice to Dr. Ma and his employee, Rosa Noriega, and during both visits Larimore represented to Dr. Ma that the fence between the Hayden property and the Church property was the true property line. DDS alleged that after

purchasing the property, it spent approximately $50,000 in improvements, including removing tree stumps, trash, and rocks, leveling the land, paving, constructing a shed, and fixing doors. The cross-complaint alleged claims against the Haydens and the Brokers for intentional and negligent misrepresentation (based upon Larimore's alleged representations regarding the fence/boundary), and equitable indemnity and contribution (based upon the Church's quiet title action). In addition, the cross-complaint alleged claims against only the Haydens for breach of contract (for failing to disclose a defect, i.e., the encroachment) and for breach of warranties (for failing to convey good and marketable title).

The case went to trial in two phases, without a jury. The first phase addressed the Church's complaint and the Church cross-complaint; the second phase addressed the Sellers cross-complaint.

D. *Phase One Trial*

In the first phase of the trial, the Church presented testimony from Yoon Lai (the surveyor who analyzed the boundaries of the Church property), Rev. Chan, and Dr. Ma.

Lai testified that he performed the survey of the Church property in May 2014 and determined that the fence was approximately three feet inside the Church property.

Rev. Chan testified that the Church was aware of the boundary issue before it purchased the Church property, but it went ahead with the purchase in reliance on Dr. Ma's statement to the seller that the fence could be moved to the correct position. He testified that the fence

was six feet tall, with locked gates on both ends, and that the Church did not have access to its property on the other side of the fence.[2] He explained that the Church needed to move the fence in order to use that property to comply with certain parking lot requirements for the Church's conditional use permit. Finally, Rev. Chan testified that the Church would not benefit from any improvement DDS made to the disputed area because DDS paved it with concrete; the Church will have to remove the concrete, level it with the rest of the parking lot, and repave it with asphalt. Therefore, the Church will have to pay extra to undo the alleged improvement.

During his testimony, Dr. Ma conceded that all surveys done of the Church and Hayden properties—including one that he commissioned in 2015—show that the true boundary is not the fence, and that the fence is on the Church property. Nevertheless, he said that he was seeking title to the "entire back alley"—i.e., the property enclosed by the fence—and/or an easement giving him exclusive possession of the entire back alley. He testified that the sales agent told him when he bought the property that the fence was on the property line and that the entire area was part of his property. He explained that if the fence were moved to the true boundary, he would not be able to fully open the door to the compressor room, which would make it difficult (although, he conceded, not impossible) to service it.

---

[2] He testified that the property in dispute is approximately 485 square feet—i.e., the amount of encroachment (3.75 feet) times the length of the boundary (158 feet).

He also testified that he spent $50,000 making improvements to the property, although he admitted that that figure was an estimate, because he did not have a record of everything.[3] Finally, when asked about his response to the letter from the attorney for Cathay Bank, in which he stated that he had no problem with the removal of the fence if it was on the Church property, Dr. Ma testified that he believed the Bank was mistaken, and that it eventually would see that it was mistaken and let it go quietly.

DDS presented a single witness, George Gibson, a general contractor who had been asked to determine the cost to relocate the fence to the property line.

Following closing arguments, the trial court made its ruling. It found that the fence was encroaching the Church property and that title of that property is in the Church, and it quieted title in favor of the Church and against DDS. The court found that DDS was not entitled to adverse possession of the disputed property because there was no evidence that DDS (or the previous owners) paid taxes on that property. It rejected DDS's claim for a prescriptive easement because DDS sought exclusive use and control over the Church's property, which would deny the Church its entire right to use the property. It also found, with regard to both adverse possession and the prescriptive easement, that DDS failed to show that the possession or use was hostile because there

---

[3] Dr. Ma introduced into evidence a series of checks or other documents to show the amounts he paid for improvements. On examination, however, some of the improvements they purportedly documented had nothing to do with improvements to the disputed property.

was no showing that the fence was not placed where it was by license, permission, or agreement with prior owners. With regard to DDS's request for an equitable easement, the court found the equities did not weigh in favor of DDS. It noted that, on the one hand, the Church was unable to function as it wanted to function because it could not complete its parking lot as required for its conditional use permit without access to the disputed property; on the other hand, DDS failed to show that it would suffer any comparable hardship, even if it had to move the compressor or any other equipment as a result of moving the fence to the correct property line. Finally, the court rejected DDS's claim for unjust enrichment. The court gave no weight to the documentation Dr. Ma submitted, finding there was nothing to support what the alleged payments were for, and questioning Dr. Ma's credibility. In any event, the court found that the disputed property was not improved from the standpoint of the Church.

E. *Attempted Disqualification of Trial Judge*

The first phase of the trial took place on January 13, 2016. The second phase was set to begin on March 1, 2016. On February 26, 2016, DDS filed an ex parte application for an order allowing a new attorney, Oscar E. Toscano, to substitute into the case, and to continue the second phase of the trial. The Brokers and the Haydens did not oppose the request to substitute counsel, but opposed the request to continue the trial. The court granted the application as to the substitution of attorney, but denied it as to the request to continue the trial on the ground that no good cause was shown.

On the scheduled day of trial of the second phase, DDS filed a request and challenge for disqualification for cause of the trial judge. The ground for the challenge was that the court's denial of DDS's request for a continuance of the trial "showed extreme prejudice toward either Mr. Toscano or [his] client." The trial court addressed the request for disqualification at a hearing held that same day, and announced that it was filing an order striking the request as improper. The written order stated that the court found the request for disqualification, on its face and as a matter of law, did not present lawful grounds for disqualification and ordered it stricken under Code of Civil Procedure section 170.4.[4] In its order, the court "reminded [the parties] that this determination of the question of the disqualification is not an appealable order and may be reviewed only by a writ of mandate from the Court of Appeal sought within 10 days of notice to the parties of the decision." The court ordered that the written order be filed and "copies are to be given to all counsel." DDS did not seek a writ of mandate from this court to challenge the trial court's order.

F. *Phase Two Trial*

In the second phase of the trial, DDS presented testimony from the Haydens, Larimore, Dr. Ma, and his employee, Rosa Noriega, as well as two witnesses whose testimony related to damages.

---

[4] Further undesignated statutory references are to the Code of Civil Procedure.

Michael Hayden testified about his purchase and subsequent ownership of the Hayden property.[5] He stated that the fence was in the same location when he purchased the property, and he was never aware of any dispute regarding the fence. He did not ask if the property went all the way to the fence when he bought it, and he did not obtain a survey or do anything else to determine where the property line was. When he decided to sell the property, he met with Larimore in the parking lot. They did not go to the area by the side of the building and the fence because it was not easy to access. He did not tell Larimore that he did not know where the boundary line was, and did not recall Larimore ever asking where the boundary line was. He also testified that he spoke to Dr. Ma one time, when Dr. Ma called him to see if he could buy the property directly from him (without Larimore); Dr. Ma did not ask about the boundary or the fence during that conversation.

Michele Wilson testified that she was one of the trustees that owned the Hayden property, that she went to the property only once or twice, and had no idea if there was a fence there.

Larimore testified that when he was asked to market the Hayden property, the only concerns about the property that Michael Hayden expressed to him related to a shared parking agreement with the property next door, and his desire to avoid having the buyer come back and try to renegotiate the price due to the poor condition of the

---

[5] The Haydens, along with two other people, bought the Hayden property in 1986; the Haydens subsequently bought out the two other people and transferred the property to a trust, with the Haydens as trustees.

property. When he went to visit the property, he looked at the building. He never really thought about the side yard adjoining the Church property. He did not ask Michael Hayden about the boundary line and did not do anything to determine where it was. He testified that if a prospective buyer asked him about the boundary line, he would have told him to hire a surveyor because he was not qualified to answer.

Larimore also testified about his meetings and discussions with Dr. Ma during the sale process. He stated that Dr. Ma called him and asked to look at the property, so they set up a meeting. At that first meeting, which lasted a half-hour to an hour, they went inside the building and walked around outside, although they did not go to the side yard adjacent to the Church property.[6] The only things Dr. Ma discussed during the meeting were the condition of the building, the fact that it had been used as a dental office previously, and the asking price. Dr. Ma did not ask him where the boundary was, or whether the fence was the boundary. At the end of the meeting, Dr. Ma asked Larimore to write up an offer for him.[7]

---

[6] Larimore testified that although they did not go over to the side yard, they opened a door from inside the building and looked out at it; they could see the fence when they did that.

[7] The Sellers cross-complaint included allegations regarding Larimore representing (or making representations about representing) both the Haydens and DDS during the sales transaction. It appears that DDS has abandoned any claims regarding those allegations, having failed to raise any issue regarding them on appeal. Therefore, we do not include testimony related to those allegations.

Larimore testified that he only had one more meeting with Dr. Ma at the property. He testified that this second meeting took place when they already were in escrow. He recalled that Dr. Ma brought some contractors with him, and that Dr. Ma did not ask any questions regarding the boundary of the property. Larimore testified that the only investigation by Dr. Ma of which he was aware related to the business license for the property: Dr. Ma wanted to make sure that the property remained zoned for use as a dental office, so Dr. Ma went to the city to confirm that is was so zoned. In fact, because of Dr. Ma's concern that the zoning for the building might expire because the building had been vacant for so long, he negotiated a lease with DDS as a tenant of the building so it could immediately obtain a business license.

Rose Noriega testified that she went to see the Hayden property once before DDS purchased it. She stated that she met Dr. Ma and Larimore at the property and did a complete tour, including going to the side of the building adjacent to the Church property. She testified that Dr. Ma asked if the entire area was part of the property, and that Larimore "signaled to the fence and indicated that everything from the fence over to the building was part of the property."

Dr. Ma testified that he saw the property with Larimore twice before he agreed to buy it. The first time, only he and Larimore were there. They did a walkthrough of the entire property, including the side yard adjacent to the Church property, which they accessed by a gate in the back alley. He testified that he was concerned about where to put the compressor and how he was going to install it, so he asked Larimore

about the boundary of the property; Larimore told him that the fence was the boundary. During the second meeting, where he was joined by Noriega, they did another walkthrough, including the side yard. He again asked Larimore if the entire yard was part of the property, and Larimore said that from the fence to the building was all part of the property.

Dr. Ma also testified that he paid $32,280 for work related to the disputed property, and introduced checks to support his claim (although he conceded on cross-examination that some of the checks included payment for work done on other parts of the property.

DDS's remaining witnesses testified regarding DDS's alleged damages. General contractor George Gibson testified that three of the four doors on the exterior of the building on the side adjacent to the Church property could not open fully once the fence was located on the property line, which would make it difficult to access the compressor and other equipment in the compressor room for maintenance and service. He noted that the equipment could be relocated to a storage room in the building, and that the estimated cost to relocate the equipment was $8,455. Appraiser Noble Tucker testified that he appraised the Hayden property at two points in time (September 24, 2010 and December 29, 2015), at two different values (the "unimpaired" value, which was with the fence in its original position, and the "impaired" value, which was with the fence on the property line), to determine the diminution in value. He concluded that the diminution in value was $20,000 in 2010 and $25,000 in 2015. He admitted on cross-examination, however, that if he were told that the property DDS

purchased did not include the portion within the fenced-in area from the fence to the property line (i.e., the Church's property), he would conclude there was no diminution in value.

After DDS rested its case, the Brokers moved for judgment under section 631.8, and the Haydens joined in the motion. The trial court granted it.

The court began by noting that it did not give much weight to Dr. Ma's testimony that he relied upon Larimore's representations that the property ran all the way to the fence; instead, the court found it clear that Dr. Ma "was going to purchase the building regardless." The court acknowledged that the seller of a property and his agent do have a duty to disclose known defects and errors, but found there was no evidence that the Haydens or the Brokers knew of the improper placement of the fence. Instead, the court found that, to the extent Larimore indicated that the property ran all the way to the fence, that was merely an opinion based upon a reasonable assumption. The court also noted that several provisions in the purchase agreement made clear that the seller was not making any promises about the property, and that it was Dr. Ma's responsibility to determine the boundaries of the property.

The court also found that Dr. Ma suffered no damages. It noted that after the first phase of the trial, Dr. Ma elected to build a fence on the property line, but he built it "in a way that created some difficulty for him as to his own voluntary placement of that compressor." Observing that there were other options he could have chosen that would not have caused those difficulties, the court concluded that none

of Dr. Ma's alleged damages "[were] caused by the original fence being on the Church's property line."

Addressing the breach of warranty and equitable indemnity claims, the court found there was no evidence to support any breach of warranty, and that it would not be equitable to require the seller and agent to absorb the cost of moving a fence that Dr. Ma was not required to move or to pay for any of the alleged damage he suffered as a result of moving the fence.

The court also addressed the Broker's assertion that DDS's claims against them were time-barred under a provision in the purchase agreement, which required any lawsuit against the Brokers involving a breach of duty, error, or omission relating to the transaction to be brought within one year of the date of the agreement. The court found that Dr. Ma was on notice of the issue regarding the property line in June 2011, and waited two years before bringing the action against the Brokers. Therefore, it found the action against the Brokers was time-barred under the purchase agreement.

Finally, the court found that the Haydens and the Brokers were the prevailing parties for purposes of fees and expenses, and ordered counsel for the Brokers to prepare the judgment.

G. *Judgment, Appeal, and Motion for Attorney Fees*

Counsel for the Brokers submitted a proposed judgment setting forth the trial court's rulings as follows: (1) title to the Church property is quieted in favor of the Church; (2) Church is granted an equitable injunction barring DDS from interfering with the Church's right to use,

improve, and/or develop the Church property; (3) DDS has no right, title, or any interest in any portion of the Church property; (4) DDS shall take nothing against the Church on the Church cross-complaint; (5) DDS shall taking nothing against the Haydens and/or the Brokers on the Seller cross-complaint; (6) the Church is the prevailing party on the complaint and the Church cross-complaint; (7) the Haydens and the Brokers are the prevailing parties on the Sellers cross-complaint; (8) the Church is awarded attorney fees and costs against DDS (with the amount left blank); (9) the Brokers are awarded attorney fees and costs against DDS (with the amount left blank); and (10) the Haydens are awarded attorney fees and costs against DDS (with the amount left blank).

DDS objected to the proposed judgment on several grounds, including that no motion for attorney fees had been filed and the trial court had not made any ruling on attorney fees. In response to those objections, the Brokers argued that the trial court had determined that the Church, the Haydens, and the Brokers were the prevailing parties with respect to fees and costs, and therefore the proposed judgment accurately reflected the court's determination. The trial court signed the proposed judgment without any changes on March 24, 2016.

The Haydens filed a motion for attorney fees on April 11, 2016, and the Brokers filed their motion on April 15, 2016.[8] Both motions based their request on a provision in the purchase agreement entitling the prevailing party to recover reasonable attorney fees in any "action

---

[8] All of the parties also submitted memoranda of costs, and all of their requested costs were awarded and added to the judgment by the court clerk.

or proceeding (including arbitration) involving the Property whether founded in tort, contract or equity, or to declare rights hereunder."

DDS filed a notice of appeal on May 18, 2016. The notice indicated that DDS was appealing from a judgment after court trial, as well as "orders related to costs and attorney fees resulting from the judgment" and other specified orders. The trial court subsequently granted the attorney fee motions, and on August 4, 2016, the court entered a second amended judgment adding the following attorney fee and cost awards: $3,793.05 in costs to the Church; $71,880 in attorney fees and $3,127.58 in costs to the Brokers; and $44,460 in attorney fees and $2,902.94 in costs to the Haydens.

DISCUSSION

DDS's contentions on appeal are as follows:

1. The trial court erred in finding that DDS had not established a prescriptive easement based upon its finding that DDS did not show that DDS's use of the disputed property was hostile.

2. The trial court erred in denying DDS an equitable easement, because the evidence showed that the encroachment was not willful, an easement was necessary to prevent irreparable injury to DDS, and the Church did not show any hardship if the easement were granted.

3. The trial court erred by denying DDS's claim for unjust enrichment because there was no finding that DDS acted negligently in making the improvements to the property, DDS presented unrefuted testimony that DDS spent $50,000 in making the improvements, and the disputed property was improved.

4. The trial court erred by striking DDS's challenge to the judge.

5. The trial court erred by finding that the Haydens and the Brokers had not misrepresented the boundary, in that the court erred in finding that Larimore had only provided an opinion and that the Haydens and the Brokers had no duty to accurately disclose the boundary, and in faulting DDS for not conducting due diligence.

6. The trial court erred by finding that DDS had not sustained any damages.

7. The trial court erred in finding that DDS's claims against the Brokers and the Haydens were time-barred.

8. The trial court erred by awarding attorney fees to the Brokers and the Haydens because there was no contractual basis for such an award.

Many of these contentions are based upon faulty interpretations of the trial court's rulings and/or ignore the standards governing motions for judgment and/or the standard of review on appeal. None has merit.

A. *Review of Rulings on Motions for Judgment*

Section 631.8 provides in relevant part: "After a party has completed his presentation of evidence in a trial by the court, the other party . . . may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision . . . , or may decline to render any judgment until the close of all the evidence." (§ 631.8, subd. (a).) "'"Under the statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that

the plaintiff failed to sustain its burden of proof. [Citation.] In making the ruling, the trial court assesses witness credibility and resolves conflicts in the evidence.'" [Citation.] "'Because the trial court evaluates the evidence as a trier of fact, it may refuse to believe some witnesses while crediting the testimony of others.'" [Citations.]" (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229, 239 (*Orange County Water Dist.*).)

"The trial court's ability to weigh the evidence and consider witness credibility distinguishes a motion for judgment from a motion for nonsuit during a jury trial, which also challenges a plaintiff's evidence at the close of the plaintiff's case-in-chief. When considering a motion for nonsuit, a trial court must deny the motion 'if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor.' [Citation.] In other words, to avoid a nonsuit, a plaintiff must introduce evidence sufficient to establish a prima facie case. [Citations.] If a plaintiff makes out a prima facie case, a motion for nonsuit must be denied. When considering a motion for judgment during a bench trial, a trial court is not so limited. Even if a plaintiff introduces evidence sufficient to establish a prima facie case, the trial court may still conclude the plaintiff has not carried his or her burden of proof and grant judgment in favor of the moving defendant. For example, on a motion for judgment, the trial court may disbelieve the plaintiff's evidence, draw adverse (rather than favorable) inferences therefrom, and credit contrary evidence introduced through cross-examination or otherwise." (*Orange County Water Dist.*, *supra*, 12 Cal.App.5th at p. 239.)

"'The standard of review after a trial court issues judgment pursuant to Code of Civil Procedure section 631.8 is the same as if the court had rendered judgment after a completed trial—that is, in reviewing the questions of fact decided by the trial court, the substantial evidence rule applies. An appellate court must view the evidence most favorably to the respondents and uphold the judgment if there is any substantial evidence to support it. [Citations.] However where . . . we are called upon to review a conclusion of law based on undisputed facts, we are not bound by the trial court's decision and are free to draw our own conclusions of law. [Citation.]' [Citation.]" (*Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 10.)

B. *Prescriptive Easement*

DDS contends the trial court's denial of its claim for a prescriptive easement was based upon its finding that DDS failed to establish that its (and its predecessors') use of the disputed property was hostile, which finding DDS asserts was error. We need not determine whether that finding was erroneous, however, because the trial court denied the prescriptive easement for another reason, namely, because it would deny the Church all use of its property.

As DDS correctly observes, "[t]o establish the elements of a prescriptive easement, the claimant must prove use of the property, for the statutory period of five years, which use has been (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the true owner; and (4) under claim of right." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.) What DDS fails to acknowledge, however, is

that even where all of these elements are met, "when a claimant cannot satisfy the requirements for adverse possession, the claimant may not receive a prescriptive easement which extends so far that it becomes the equivalent of a fee interest and dispossesses the record title owners of part of their property." (*Id.* at p. 1300.)

In this case, the trial court found that DDS could not establish adverse possession because there was no evidence that DDS or its predecessors paid taxes on the disputed property. More importantly for purposes of DDS's argument on appeal, the court found that DDS could not be granted a prescriptive easement because to do so would deny the Church of all of its rights to use the property. Thus, even if the court erred in finding that DDS failed to establish that its use of the disputed property was hostile, the court's denial of the prescriptive easement was proper.

DDS's argument that exclusive prescriptive easements are not always precluded, based upon *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, is unpersuasive. There is no question that in some circumstances, such as in that case, a court could find an exclusive prescriptive easement to be justified. But those circumstances are very limited, and involve instances where the easement was necessary to allow a utility to provide an essential service, such as water or electricity, or to protect the health and safety of the public. (See, e.g., *ibid.* [water district granted easement after mistakenly building reservoir on property that included portions of neighboring parcels].) There are no such circumstances in this case.

C. *Equitable Easement*

In challenging the trial court's denial of an equitable easement, DDS begins by quoting a passage from *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749 describing the three factors that must be present for a court to grant an equitable easement: "First, the defendant must be innocent. That is, his or her encroachment must not be willful or negligent. The court should consider the parties' conduct to determine who is responsible for the dispute. Second, unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff 'will suffer irreparable injury . . . regardless of the injury to defendant.' Third the hardship to the defendant from granting the injunction 'must be *greatly disproportionate* to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant." (Quoting *Hirshfield v. Schwartz*, *supra*, 91 Cal.App.4th at p. 759.) DDS argues that the trial court erred by denying the equitable easement because the encroachment was not willful, DDS would suffer irreparable injury if it were not granted, and there would be no hardship to the Church if it were granted.

Leaving aside DDS's misinterpretation of the second factor—which, when understood in the context of the case, provides that an equitable easement should *not* be granted if it would cause irreparable injury *to the non-encroacher* (in this case, the Church) regardless of any injury to the encroacher—DDS's argument ignores the findings of the trial court and standard of review on appeal. The trial court expressly found that the Church would be irreparably injured if an easement

were granted because it would be unable to function as it wanted to function. It also found that DDS failed to show it would suffer any hardship if the easement were denied that would come close to the hardship suffered by the Church if the easement were granted. DDS does not even attempt to show that no substantial evidence supports those findings.

D. *Unjust Enrichment*

DDS argues that under California law it is a good faith improver—i.e., "A person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land" (§ 871.1, subd. (a))—and therefore it is entitled to recover the value of the improvements under an unjust enrichment claim. It contends the trial court erred by denying its claim because there was no finding that DDS acted negligently in making the improvements to the property, DDS presented unrefuted testimony that DDS spent $50,000 in making the improvements, and the disputed property was improved.

Once again, DDS ignores the factual findings of the trial court. Regardless whether DDS is a good faith improver, the trial court rejected DDS's evidence of the cost of the work done on the disputed property, and found that, from the Church's standpoint, the property was not improved and the Church received no benefit from the work DDS did. Substantial evidence supports the trial court's finding with respect to the benefit to the Church. Accordingly, the court properly rejected DDS's unjust enrichment claim.

E. *Challenge to the Trial Judge*

DDS purports to challenge the trial court's order striking its request for disqualification of the trial judge. As the trial court warned in its order striking the request, however, section 170.3 provides that "[t]he determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." (§ 170.3, subd. (d).)

In its reply brief, DDS contends its "request for review of this ruling is timely as there was no 'service of written notice of entry of the court's order determining the question of disqualification,'" as required by section 170.3, subdivision (d). DDS is mistaken. First, the issue is not the timeliness of DDS's challenge, it is the fact that the order is not appealable and may be reviewed only by a writ of mandate. Second, the record shows that the written order was served in court on all counsel at the time it was entered. In short, DDS's challenge is not properly before us in this appeal.

F. *Misrepresentation Claims*

DDS contends the trial court erred by finding the Haydens and the Brokers did not misrepresent the boundary, citing three purportedly erroneous findings by the court: (1) that Larimore had only provided an opinion; (2) that the Haydens and Brokers had no duty to accurately disclose the boundary; and (3) that DDS was at fault for not conducting due diligence. DDS's contention, even if correct (a determination we do

not make), is ineffective because it addresses only some elements of its misrepresentation claims and ignores the primary basis for the trial court's denial of those claims.

"The elements of fraud [or intentional misrepresentation] are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. [Citation.] The elements of negligent misrepresentation are the same except for the second element, which for negligent misrepresentation is the defendant made the representation without reasonable ground for believing it to be true. [Citations.]" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

Even if DDS were correct in its assertion of the errors it cited, it fails to address the trial court's finding that Dr. Ma did not rely upon any alleged representation concerning boundaries in making his decision to purchase the Hayden property. In light of that finding, which is supported by substantial evidence, DDS's misrepresentation claims necessarily fail. Therefore, we need not address DDS's assertion of errors, because resolution of those issues would not affect the outcome on appeal. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259 [appellate court may decline to resolve issues raised that are not necessary to appellate decision].)

G. *Finding of No Damages*

DDS contends the trial court erred by finding that DDS had not sustained any damages because the court disregarded the testimony of its appraisal expert regarding the diminution in value of DDS's property. The record shows, however, that the expert's opinion was based upon incomplete information, and he conceded that there would be no diminution in value if—as was the case here—the property DDS purchased did not include the portion of the area within the fenced-in area that was part of the Church property. Thus, the trial court did not err by disregarding the expert's original opinion.

H. *Finding That Claims Were Time-Barred*

DDS contends the trial court erred in finding that DDS's claims against the Brokers and the Haydens were time-barred because (1) the one-year limitations provision in the purchase agreement did not apply to claims for intentional and negligent misrepresentation; (2) the provision did not apply to claims against the Haydens; and (3) the court incorrectly found that DDS was put on notice in June 2011, because the Church did not tell DDS it was going to move the fence until February 2012.

DDS's second argument is based upon a misreading of the record. In finding DDS's claims were time-barred, the court limited its ruling to the claims against the Brokers. With regard to DDS's other two arguments, we need not determine whether the trial court erred because, as discussed in section F., *ante*, DDS's misrepresentation claims necessarily fail in light of the trial court's finding that Dr. Ma

did not rely upon the alleged representations, so even if the court erred in finding those claims time-barred, that error would not affect the outcome on appeal. (*Shaw v. County of Santa Cruz*, *supra*, 170 Cal.App.4th at p. 259.)

I. *Award of Attorney Fees*

DDS contends the trial court erred by awarding attorney fees to the Brokers and the Haydens because there was no contractual basis for such an award. Quoting the attorney fee provision in the purchase agreement—"If any Party or Broker brings an action or proceeding (including arbitration) involving the Property whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereinafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorney fees"—DDS argues that the provision does not apply in this case because the "Property" described in the purchase agreement is the Hayden property, but the property that was the subject of the action was the Church property.

DDS's argument is meritless. All of its claims in the Sellers cross-complaint are based upon what the Haydens and the Brokers allegedly represented the "Property" to be, or what they failed to disclose (i.e., the correct boundaries) regarding the "Property." Therefore, the trial court correctly concluded that the attorney fee provision applied, and that the Haydens and the Brokers were entitled to their attorney fees.

DISPOSITION

The judgment is affirmed. All respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.