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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KIMBERLY KEMPTON, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B236973 (Los Angeles County Super. Ct. No. BC363837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Charles G. Kinney for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Andrew J. Nocas, City Attorney, and Peter E. Langsfeld, Deputy City Attorney, for Defendant and Respondent.

INTRODUCTION

Plaintiff Kimberly Kempton appeals from a judgment for defendant City of Los Angeles finding that plaintiffs Kempton and Charles G. Kinney had neither a public nuisance nor a private nuisance claim. Plaintiffs have not shown that fencing on neighboring properties caused them to suffer damage different in kind from that suffered by other members of the public, or caused an injury specifically referable to the use and enjoyment of plaintiffs' land. Therefore plaintiffs do not have a claim against the City of Los Angeles for public nuisance or private nuisance. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In October 2005 Kimberly Kempton and Charles G. Kinney purchased 3525 Fernwood Avenue in the Silver Lake district of Los Angeles. The property has a house and detached garage, accessed by a driveway to Fernwood Avenue and by a short driveway to Cedar Lodge Terrace from the rear of the garage across land owned by neighbors, the Harrises. In 1991 the Harrises conveyed a 15-year easement to then-owners of 3525 Fernwood Avenue for purposes of their ingress to and egress from the rear of their garage over a portion of the Harrises' lot. The easement continued after Kempton and Kinney purchased 3525 Fernwood Avenue, but terminated on June 20, 2006, at the end of its 15-year-term.

On the south side of Cedar Lodge Terrace, there is a public right of way that is 5.2 feet wide. This public right of way is unimproved and has no paved sidewalk. Homeowners on Cedar Lodge Terrace and Fernwood Avenue have placed fences and other property improvements in the public right of way on those streets. On Cedar Lodge Terrace the neighboring lot owned by the Harrises has a six-foot fence in the public right of way, and the neighboring lot owned by Cooper has a fence and vegetation that encroach on the unimproved right of way.

On December 22, 2006, Kempton and Kinney filed a complaint against the City of Los Angeles (the City) alleging that Cooper and the Harrises had built fences on City property fronting Cedar Lodge Terrace and seeking monetary damages and an injunction requiring the City to force these neighbors to remove fences from its right-of-way. Following the trial court's grant of the City's motion for judgment on the pleadings, Kempton and Kinney appealed. *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344 found that the plaintiffs had not alleged facts showing that they had suffered monetary damages because of the fencing, but held that because plaintiffs had alleged that the fences blocked the sidewalk area in a public right-of-way, they could reasonably amend their complaint to allege an action for public nuisance per se. This was based on their allegation that the fences blocked sight lines upon entering and leaving their garage, causing them to fear a collision with a vehicle or a pedestrian. Thus plaintiffs could bring an action against the City to abate a public nuisance when the individual suffered harm specially injurious to themselves. (*Id*. at p. 1349.)

On June 9, 2009, Kempton and Kinney filed a second amended complaint alleging causes of action for public nuisance regarding the 5.2-foot wide rights of way on Fernwood and Cedar Lodge Terrace; for private nuisance arising from obstruction of those rights of way; and for dangerous condition because of the City's failure to remove the fencing on Fernwood and Cedar Lodge Terrace. The trial court later sustained the City's demurrer to the dangerous condition cause of action without leave to amend.

At the trial, Kinney presented evidence of the fencing and vegetation on neighboring property owned by Cooper and by the Harrises which encroached on the 5.2-foot right of way on Cedar Lodge Terrace. From the City of Los Angeles Municipal Code, Kinney cited the definition of "concrete sidewalk" as "any sidewalk paved with Portland Cement concrete," and the definition of "sidewalk" as "any surface provided for the exclusive use of pedestrians." (L.A. Mun. Code, § 62.00.) Kinney testified that when he or Kempton backed out of their garage, the Harris and Cooper fences prevented them from seeing vehicles and pedestrians on Cedar Lodge Terrace. When they were walking on Cedar Lodge Terrace and vehicles came by, the Harris and Cooper fences prevented

them from stepping off the paved roadway. Kinney also testified about his damages because of the City's failure to remove the fencing on Cedar Lodge Terrace.

In a judgment entered in October 11, 2011, the trial court determined that since the Harrises owned the land plaintiffs formerly used to access their garage from Cedar Lodge Terrace and plaintiffs had no right to that access, plaintiffs suffered no injury arising from fences on neighboring property. No evidence showed that the Harrises' fencing blocked sunshine from plaintiffs' garage walls. Therefore plaintiffs had neither a public nuisance or a private nuisance claim. Judgment was therefore entered in favor of the City of Los Angeles and against plaintiffs Kimberly Kempton and Charles Kinney.

Plaintiff Kimberly Kempton filed a timely notice of appeal.

ISSUE

The issue is whether the trial court erroneously determined that plaintiffs had no claim for public or private nuisance.

1. *Plaintiffs Have No Public or Private Nuisance Claim*

Civil Code section 3479 defines a nuisance: "Anything which is . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) Civil Code section 3481 defines a private nuisance as every nuisance not included in the definition of a public nuisance.

"A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code, § 3493.)

A. *Plaintiffs Have Not Shown That a Public or Private Nuisance Arose From Loss of Use of Sidewalks on Neighboring Properties*

Plaintiffs claimed that fencing and vegetation on neighboring properties owned by Cooper and by the Harrises prevented plaintiffs (and all others) from using the City-

owned, public sidewalk. There is, however, no public sidewalk along Cedar Lodge Terrace either on Cooper's lot or on the Harrises' lot.

"[T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041.) Loss of use of sidewalks occurred on neighboring properties owned by Cooper and the Harrises. Loss of use of sidewalks on other property did not cause an injury to plaintiffs' use and enjoyment of their own property at 3525 Fernwood Avenue.

For a private party to maintain an action based on a public nuisance, the damage suffered must be different in kind and not merely in degree from that suffered by other members of the public. (*Koll-Irvine Center Property Owners Assn. v. County of Orange, supra,* 24 Cal.App.4th at p. 1041.) Loss of use of sidewalks affected all members of the neighborhood equally, and did not cause damage that was specific to the plaintiffs or that exceeded the damage caused to others in the community.

Therefore plaintiffs have not shown they have a claim for public or for private nuisance arising from loss of use of sidewalks on Cedar Lodge Terrace.

B. *Plaintiffs Have Not Shown That a Public or Private Nuisance Arose from Fencing and Vegetation on Neighboring Properties Which Impaired Their Driveway Access*

Impairment of a property owner's right of access to and from an abutting public street is both a private and a public nuisance. (*Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 160.) Plaintiffs claimed that the fencing and vegetation on neighboring property owned by the Harrises and by Cooper blocked their view of traffic as they backed a vehicle out of their garage onto Cedar Lodge Terrace.

Plaintiffs, however, have no easement over the Harrises' property and therefore have no right of ingress to or egress from their garage to Cedar Lodge Terrace. As plaintiff had no right to access the driveway across property owned by someone else, fences on neighboring properties owned by the Harrises and by Cooper caused no injury

specific to the use and enjoyment of plaintiffs' 3525 Fernwood Avenue property and thus did not create a private nuisance.

Fences on neighboring properties also did not cause plaintiffs to suffer damage different in kind from that suffered by other members of the public. Neither plaintiffs nor any other member of the public had a right of access to plaintiffs' garage over property plaintiffs did not own. Therefore impairment of such access because of neighbors' fencing and vegetation did not create a public nuisance. The trial court also found that no evidence showed that the Harrises' fencing blocked sunshine from plaintiffs' garage walls. Plaintiffs have no public or private nuisance claim.

C. *Plaintiffs Have No Claim for Emotional Distress Damages and Have Not Sustained Damages Because of Diminished Value of Their Property*

Plaintiffs argue that they sustained damages, in the form of emotional distress and because of the diminished value of their 3525 Fernwood Avenue property, during the period that they owned an easement over the Harrises' property giving them access to Cedar Lodge Terrace from their garage (i.e., from the date they purchased the 3525 Fernwood Avenue property in October 2005 until the easement terminated in June 2006).

Kempton v. City of Los Angeles, supra, 165 Cal.App.4th 1344 held that plaintiffs cannot recover monetary damages for their claim that fencing on public property caused negligent infliction of emotional distress. (*Id.,* at p. 1348.)

With regard to damages for diminished value of plaintiffs' property, the Harrises and Cooper, built the fences long before Kempton purchased 3525 Fernwood Avenue. "A diminution of value [of the 3525 Fernwood Avenue property], if any, necessarily would have occurred when the fences were first built, which was before [Kempton and Kinney] purchased the property. [Kempton and Kinney] cannot claim diminished property value when [Kempton and Kinney] purchased the property after the alleged diminution in value occurred." (*Kempton v. City of Los Angeles, supra,* 165 Cal.App.4th at p. 1348.)

2. *Kempton Is Not Entitled to Injunctive Relief*

As plaintiffs have no private or public nuisance claim, they are not "entitled to the relief demanded" (Code Civ. Proc., § 526, subd. (a)(1)) and thus are not entitled to injunctive relief.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant the City of Los Angeles.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.