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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GLEN NELSON, TRUSTEE OF THE TOOMEY FAMILY CHILDREN'S TRUST-JET INVESTMENT CO., Plaintiff, Cross-defendant, and Respondent, v. ERIC BJORKLUND, Defendant, Cross-complainant, and Appellant, ARTHUR OBER et al., Defendants, Cross-defendants, and Respondents.	2d Civil No. B266500 (Super. Ct. No. 1319393) (Santa Barbara County)

This is the companion appeal to *O'Reilly v. Nelson*, 2d Civil No. B266392. Both cases were tried together. The opinions in both cases are being filed concurrently.[1]

[1] On January 5, 2016, we ordered that the appeals in both cases be consolidated for all purposes. On May 5, 2017, after

Eric Bjorklund, appeals from a judgment entered in favor of Glen Nelson, Trustee of the Toomey Family Children's Trust-Jet Investment Company ("the Trust"). The judgment requires appellant to pay the Trust $250,000 in damages on Nelson's causes of action for trespass and negligence. The causes of action were primarily based on appellant's unauthorized construction of an illegal road and the removal of trees on property owned by the Trust. Appellant also appeals from a judgment entered against him on his cross-complaint for fraud and breach of contract against Nelson, Olaf Lange, and Arthur Ober.

The matter was tried by a jury. Before the jury trial began, a court trial was conducted on the validity of a joint venture agreement purportedly entered into by three parties: (1) Olaf Lange, (2) Arthur Ober, and (3) Joseph Toomey individually and on behalf of the Trust. The court ruled that the agreement did not create a joint venture. Even if a joint venture had been created, the court ruled that it would have been extinguished by the parties' conduct. Appellant contends that these rulings are erroneous. We affirm.

Evidence Presented at Court Trial

The Trust owns parcels 76, 78, and 80-83 ("the Trust property"). The locations of the parcels are shown on the map attached to this opinion as Appendix A.* In June 2005 Ober,

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briefing had been completed, we ordered that the appeals be deconsolidated because Bjorklund had filed for bankruptcy. The bankruptcy proceeding automatically stayed the appeal in the instant case, but did not stay the appeal in case no. B266392. The bankruptcy proceeding was dismissed on June 21, 2017, so the stay in the instant case is no longer in effect.

*See appendix A, *post*, p. 11, for a diagram of the parcels.

Lange, and Toomey signed a document entitled, "Joint Venture Agreement." At that time Toomey was the trustee of the Trust. Ober and Lange agreed to retain a law firm "to prosecute title claims in an attempt to place [the Trust property] in marketable condition." All of the parties agreed that, "[u]pon obtaining marketable title, the [Trust property] will be marketed and sold by mutual agreement." Upon the sale of the Trust property, the Trust will receive $600,000 from the proceeds. Ober and Lange "shall then be reimbursed for money advanced in legal fees, costs and lien payments." The remainder of the sale proceeds shall be split as follows: 50 percent to the Trust and 50 percent to Ober and Lange.

Each of the parties to the Joint Venture Agreement signed it on a separate page. Toomey's signature is undated. Ober's signature is dated June 6, 2005. Lange's signature is dated June 23, 2005. Toomey testified, "I was totally ignorant of their [Ober's and Lange's] signature[s] being anywhere near the document." Toomey believed "[t]hat anything that was done was irrelevant because it was not signed simultaneously as an agreement of the minds."

Ober testified: He invested no money in the joint venture. It "never came to pass. It was just an idea." Toomey "kept wanting to make changes to it and he was mercurial in his dealings with Olaf [Lange] and myself." "There was [*sic*] so many changes, that we abandoned the joint venture." In January 2006 Toomey agreed to sell to Ober and Lange the Trust Property except parcel 81. In May 2006 Ober and Lange filed an action against Toomey seeking specific performance of the sale agreement. They did not seek to enforce the Joint Venture Agreement.

Lange testified: The joint venture "never materialized. We went from the 2005 agreement that was a joint venture to buying the property in 2006."

In March 2007 Ober's and Lange's lawsuit against Toomey was settled. The parties agreed that Ober and Lange would purchase the Trust Property, except parcel 82, for $722,000. However, in May 2009 Ober, Lange, and Nelson, who had succeeded Toomey as trustee of the Trust, agreed that the 2007 lawsuit would be dismissed in consideration of Toomey's payment of $50,000 to Ober.

Ober and Lange owned parcel 79, which adjoins parcel 80 of the Trust Property. (See Appendix A.) In May 2007 they conveyed parcel 79 to appellant and Kelsey O'Reilly as joint tenants.

On March 12, 2009, Lange and appellant signed a document entitled "Land Sales Agreement" in which Ober and Lange purportedly agreed to sell parcel 80 to appellant for $365,000. Ober did not sign the agreement and was unaware of it. At the time of the agreement, Lange knew that the Trust owned parcel 80, and he so informed appellant. He handwrote the agreement as appellant "dictated" it to him.

Lange mistakenly believed that he had the authority to sell parcel 80 because of the March 2007 settlement of the lawsuit. He considered the March 2009 Land Sales Agreement to be "a future sale [to appellant] because we didn't take any down payment, and didn't go through title insurance, didn't go through escrow."

The Land Sales Agreement provided, "Prior to sales [appellant] has all the rights of ownership prior to close of escrow on [parcel 80]." Lange intended this to mean "[t]hat if we go into

escrow and it doesn't have to be closed, that [appellant] can take possession of the land and do whatever [he] wanted to do." The agreement also provided, "Downpayment shall be $110,000 minus road construction cost."

Appellant's Cross-Complaint

Appellant filed a cross-complaint against Ober, Lange, and Nelson alleging a cause of action for breach of the March 2009 agreement to sell parcel 80. Appellant claimed that the agreement was valid because Ober and Lange "had authority under the 2005 Joint Venture Agreement to negotiate land deals on behalf of [the Trust]." Appellant asserted: "When . . . Nelson[] became a member of the 2005 Joint Venture Agreement (via his appointment as [successor trustee] of [the Trust]), he assumed the obligations of it." "The Joint Venture Agreement binds the named [cross-]defendants as partners with respect to [the Trust] Properties." Appellant sought "damages . . . for failure to convey Lot 80."

Trial Court's Ruling

The trial court found "that there was no genuine meeting of the minds on the Joint Venture Agreement." It continued: "I don't think that there was ever a period of time in which it could be said that the joint venture either existed, or if it could be found to have existed, that it was capable of being revived after it was extinguished by the entirely different proposal that there be a sale of the property from Mr. Toomey to Mr. Ober and Lange."

After ruling that a joint venture did not exist, the trial court declared as to appellant's cross-complaint, "[T]he . . . consequence [of this ruling] is that we can no longer entertain the possibility that [appellant] has a contractual right to purchase [parcel] 80 as a result of the March 12, 2009[] written [sale]

agreement with Mr. Lange because Mr. Lange wasn't the owner of the property."

Evidence Presented at Jury Trial

After the March 2009 agreement to sell parcel 80 to appellant, he constructed a one-mile road on Trust-owned parcels 80-83. He believed that the March 2009 agreement gave him the right to construct the road. Appellant testified that Lange had said that he and Ober owned parcels 80-83. Lange told him "that it was no problem . . . to put that road in over lots 81, 82, and 83, even though [appellant was not] buying those lots."

Appellant cut down between 100 and 140 trees. "For the most part," the trees were California Live Oaks. He planted marijuana on parcel 80. The purpose of the road was to afford access to the marijuana. Appellant told Lange that he "would need to get a fire truck and 40[-]foot containers up the road into the grow site." Appellant opined that the road had improved and increased the value of the Trust property.

Santa Barbara County sent a notice of violation to Nelson (trustee of the Trust) informing him that the road had been illegally constructed and requiring him to take remedial action. Appellant testified that, before he began work on the road, Lange had said that "it would take too long to get a permit."

Lange testified that, in building the road, appellant "just ran over" trees. Lange told him it was "illegal" to remove the trees. Appellant replied, "'All of the trees are my business.'" Lange also told appellant not to build the road because a county permit was required and the March 2009 agreement was "a future contract."

Discussion

"The essential element of a joint venture is an undertaking by two or more persons to carry out a single business enterprise jointly for profit. [Citation.] . . . Whether a joint venture relationship exists is a question of fact, depending on the intention of the parties. [Citations.]" (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 525.)

Appellant claims that the trial court erroneously determined that a joint venture never existed. He argues: "At the time [March 2009] Olaf Lange . . . signed the [parcel] 80 Land Sales Agreement, the 2005 Joint Venture Agreement remained in effect. . . . [It] gave Olaf Lange legal authority to enter into contractual obligations with third parties on behalf of [the Trust]." "[T]he 2005 Joint Venture Agreement ostensibly authorizes Mr. Lange's signature upon the 2009 Land Sales Agreement." Appellant states that he is appealing "the lower court[']s refusal to accept, as a matter of law, the establishment of the 2005 Joint Venture Agreement and therefore the enforceability of the [parcel] 80 Land Sales Agreement." He acknowledges that, when he signed the agreement to purchase parcel 80, he was unaware of the Joint Venture Agreement.

We need not decide whether a joint venture was created in 2005. If it had existed, it would have been extinguished when Toomey agreed to sell the Trust property to Ober and Lange. Because the pertinent facts relating to extinguishment are undisputed, we decide this issue de novo. "Generally, a conclusion reached by the trier of fact will be affirmed on appeal if it is supported by substantial evidence. [Citation.] But where the relevant facts are undisputed, the proper characterization of a transaction presents a question of law that this court reviews

de novo on appeal. [Citation.]" (*Junkin v. Golden West Foreclosure Serv., Inc.* (2010) 180 Cal.App.4th 1150, 1156.)

"[A]n abandonment or dissolution of a partnership or joint adventure may take place by conduct inconsistent with its continuance . . . ." (*Middleton v. Newport* (1936) 6 Cal.2d 57, 62; accord, *Richards v. Plumbe* (1953) 116 Cal.App.2d 132, 138-139; *Beck v. Cagle* (1941) 46 Cal.App.2d 152, 162.) The purpose of the joint venture was to obtain marketable title to the Trust property, sell it to third parties, and divide the proceeds among the Trust, Ober, and Lange. The following actions dissolved the joint venture because they were wholly inconsistent with its continuance: (1) Toomey's 2006 agreement to sell the Trust property (except parcel 81) to Ober and Lange irrespective of marketable title, (2) Ober and Lange's lawsuit against Toomey seeking specific performance of the sale agreement, and (3) the lawsuit's 2007 settlement providing that Ober and Lange would purchase the Trust Property (except parcel 82) for $722,000.

Thus, the joint venture was extinguished long before Lange's March 2009 agreement to sell parcel 80 to appellant. There is no evidence that the joint venture was revived. Accordingly, the March 2009 Land Sales Agreement is not enforceable based on the 2005 Joint Venture Agreement. Because the Trust, not Ober and Lange, owned parcels 80-83, appellant had no lawful right to remove trees from and construct a road on the property.

For the first time in his reply brief, appellant argues that he "should be relieved of the trespass damages in that [he] was '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.' California Code of Civil

Procedure § 871.1." Such a good faith improver may seek damages or other relief from the actual owner of the land upon which the improvement was made. (Code Civ. Proc. §§ 871.1-871.7 (hereafter the "good faith improver law").)

The argument is forfeited because appellant did not raise it in his opening brief. (*City of Costa Mesa v. Connell* (1999) 74 Cal.App.4th 188, 197 ["'We do not entertain issues raised for the first time in a reply brief, in the absence of a showing of good cause why such issues were not raised in the opening brief'"].)

Furthermore, appellant was not entitled to relief under the good faith improver law because in his cross-complaint he had failed to assert a good faith improver claim. (See *Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 632, fn. 2 ["The first cause of action was based on the 'good faith' improver-of-property provisions set forth in Code of Civil Procedure section 871.1 et seq."].)

In any event, appellant does not qualify as a good faith improver. To qualify, a person must have a good faith belief "that he is the owner of the land" upon which the improvement is being made. (Code Civ. Proc., § 871.1.) When appellant constructed the road on Trust-owned parcels 80-83, he knew that he was not the owner of these parcels. The March 2009 Land Sales Agreement concerned only parcel 80, and the agreement was not consummated by a conveyance of that parcel to appellant. Escrow was never opened and no money passed between appellant and Lange. Appellant did not receive a deed for parcel 80. Appellant testified that he did not get a permit for the road "[b]ecause that was Olaf Lange's responsibility and the property would be in [Lange's] name."

It does not matter that appellant may have believed in good faith that the Land Sales Agreement gave him the right to construct the road on parcels 80-83. (See 3 Miller & Starr, Cal. Real Estate (4th ed. 2017) § 9:46, pp. 9-196-197 [good faith improver law "does not apply where the improver merely believes there is a right to make improvements to the property of another"].) Thus, appellant does not qualify as a good faith improver based on the following provision in the Land Sales Agreement: "Prior to sales [appellant] has all the rights of ownership prior to close of escrow on [parcel 80]."

Long v. Keller (1980) 104 Cal.App.3d 312, is instructive. There, a tenant made improvements to land pursuant to a lease that gave her an option to purchase the property. The tenant exercised the option. Before escrow closed, a fire destroyed the improvements. The sellers' fire insurance carrier reimbursed the sellers for the destruction of the improvements. The tenant did not have fire insurance. Based on the good faith improver law, the tenant contended that she was entitled to recover the cost of the improvements because she had made them "'in contemplation of purchasing the property.'" (*Id.* at p. 321.) The appellate court rejected her contention: "[Tenant], in making these improvements in contemplation of purchasing the property, in no way became a person who in good faith and under an erroneous belief thought she was the owner of the land. Her contention that she contemplated purchasing the property clearly takes her out of the protection of these provisions [i.e., the good faith improver law]." (*Id.* at p. 322.) Appellant is in no better position than the tenant.

Finally, we question whether the road qualifies as "an improvement to land" within the meaning of Code of Civil

Procedure section 871.1. The road was illegally constructed without a permit, Nelson was cited for the illegality and required to take remedial action, and appellant removed between 100 and 140 trees.[2]

Disposition

The judgments are affirmed. Ober shall recover his costs on appeal. Lange, appellant, and Nelson shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

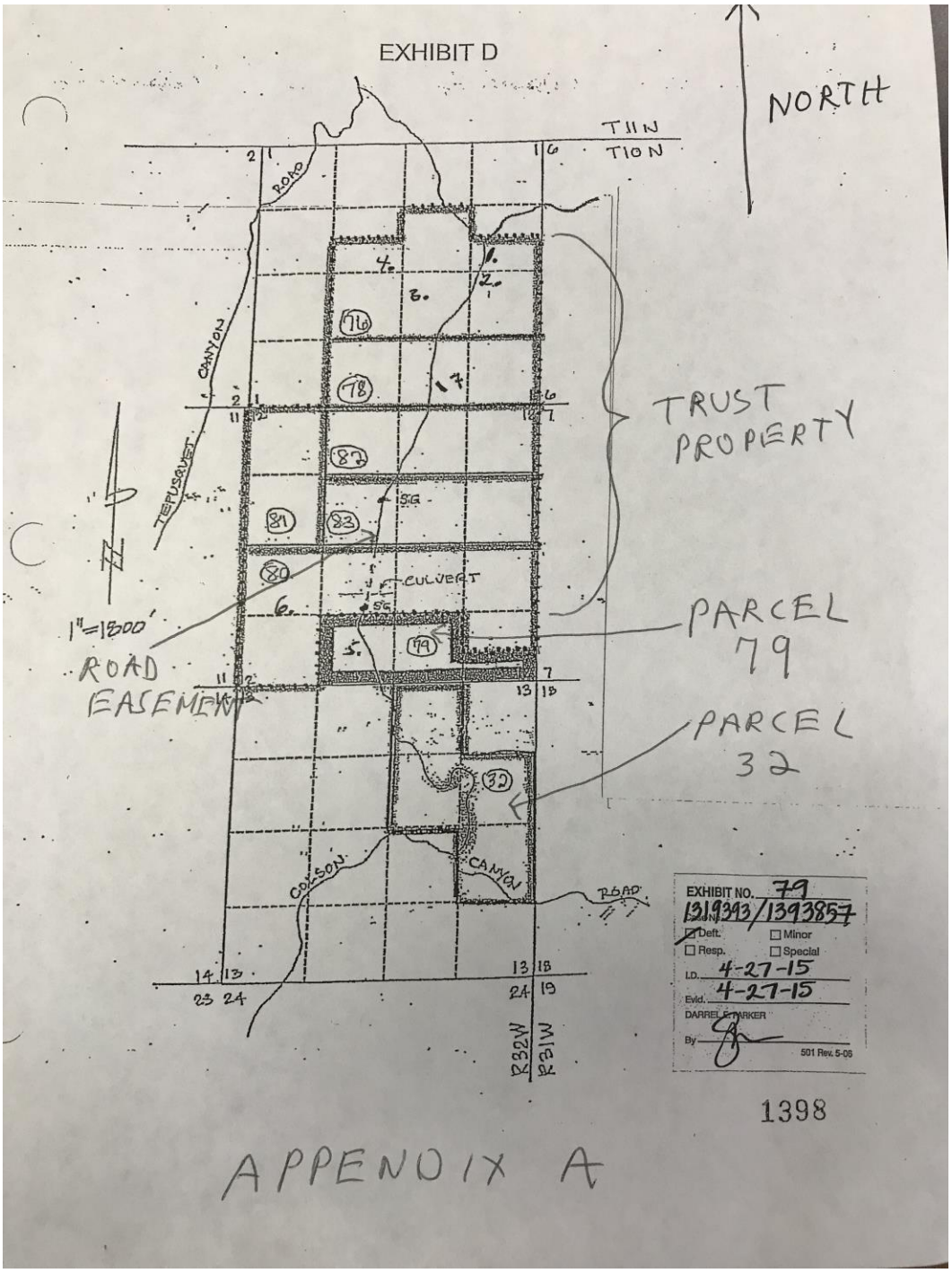
YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

[2] At oral argument appellant claimed that the damages award of $250,000 is excessive because some of the removed trees were mere saplings or scrubs of little, if any, value. The claim is forfeited because appellant failed to raise it in his briefs. (*People v. Thompson* (2010) 49 Cal.4th 79, 110, fn. 13 ["Because counsel failed to raise this . . . argument in her briefs, to raise it at oral argument was improper"]; *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1326, fn. 10.)



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APPENDIX A

Jed Beebe, Judge

Superior Court County of Santa Barbara

Eric Bjorklund, in propria persona, for Appellant.

Ogden & Fricks, Roy E. Ogden and Sue N. Carrasco, for Respondent, Glen Nelson, Trustee of the Toomey Family Children's Trust-Jet Investment Co.

Law Offices of Woosley & Porter, Eric A. Woosley and Jordan T. Porter, for Respondent Arthur Ober.