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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SOUTHEAST CORNER, LLC, Plaintiff and Appellant, v. LF-120 SPALDING, LLC, Defendant and Respondent.	B237240 (Los Angeles County Super. Ct. No. BC445398)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Affirmed.

Hillel Chodos for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, James P. Fogelman, Julian W. Poon, Joseph V. Marra III, and Michael R. Menssen for Defendant and Respondent.

Plaintiff and appellant Southeast Corner, LLC, appeals from a summary judgment entered in favor of defendant and respondent LF-120 Spalding, LLC. We conclude that the trial court rightly determined that plaintiff's claims against defendant are barred by the five-year statute of limitations set forth in Code of Civil Procedure section 336, subdivision (b).[1] Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties and the properties

Plaintiff and defendant are the current owners of two adjacent commercial properties in the City of Beverly Hills (the City)—plaintiff owns the Wilshire property, and defendant owns the Spalding property.

The covenant for parking and conditional use permit

In 1981, the then-owners of the two properties entered into a written covenant revising the relationship between the Wilshire property and the Spalding property. As pertains to this litigation, the covenant specifies that the parties "shall at all times provide and maintain 98 automobile parking spaces (as prescribed by the Municipal Code of City) on the Spalding Property for the benefit of the Wilshire Property."

In 1995, the then-owners of the Spalding property applied to the City for, and were granted, a conditional use permit (CUP), enabling them to meet their obligations under the Municipal Code with respect to parking through the use of tandem and compact parking spaces and valet service. The CUP was granted after several public hearings and notice to the surrounding property owners, including the then-owners of the Wilshire property.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Plaintiff acquires the Wilshire property and discovers violation of the covenant and attempts to enforce it

In 2002, plaintiff acquired the Wilshire property. Robert Goldman (Goldman), plaintiff's sole member and owner, was aware of the covenant and had received it prior to plaintiff's purchase of the Wilshire property.

Shortly after plaintiff acquired the Wilshire property, Goldman asked the then-owner of the Spalding property, Arden Realty Finance V, LLC (Arden), to show him the 98 dedicated parking spaces; but, Arden had no parking spaces designated for the Wilshire property. In other words, by April 2003, Goldman believed that the owner of the Spalding property was in violation of the covenant.

On October 7, 2004, plaintiff's attorney sent a letter to the City demanding that it enforce the covenant, citing Arden's alleged violation of the covenant. Specifically, the letter provided: "The owner of the Spalding Building, [Arden], is not currently providing and maintaining the required parking at the Spalding Building for the Wilshire Property. Arden has indicated that it may provide the required parking once our client is able to lease the Wilshire Property. However, our client's leasing efforts will be stymied unless Arden designates and maintains the required parking now."

The City did not act on plaintiff's request for enforcement.

Before plaintiff resolved its dispute with Arden, Arden sold the Spalding property to LaCambra Realty. Goldman continued to maintain that the Spalding property was in violation of the covenant, and so informed the new owners. Once more, however, the Spalding property changed owners before this issue was resolved. Defendant purchased the Spalding property in 2008, after which time plaintiff asserted that it was entitled to full-size dedicated parking spaces, as opposed to valet parking.

The lawsuit

On September 13, 2010, plaintiff filed a complaint against defendant seeking declaratory relief. According to the first amended complaint, "since 1995, the owners of the Spalding Property have been utilizing all of their parking spaces, including those needed to fulfill the obligation to the Wilshire Property, for valet parking, and all the

spaces have been occupied by Spalding tenants and others on a reserve basis." Plaintiff allegedly needs the 98 parking spaces in order to lease space in the Wilshire property. Although plaintiff avers that it "first requested" the 98 parking spaces "less than two years prior to the filing of this action," defendant has refused to provide them, offering only compact parking spaces or tandem parking spaces through valet parking.

Plaintiff seeks a declaration that it is entitled to "98 full-size dedicated parking spaces, whether or not plaintiff rents or provides such spaces to tenants in plaintiff's buildings or to others." Plaintiff also seeks compensation "for an amount each month equal to the amount which plaintiff could earn each month from renting out 98 full-size dedicated parking spaces, which amount plaintiff alleges is not less than $150 per space per month." If "plaintiff is unable to develop and utilize the existing buildings on the Wilshire Property for office and retail uses because defendant . . . is either unable or is not required to provide and make available to plaintiff . . . 98 full-size dedicated parking spaces for tenants and their employees, plus unlimited, free validated on-site parking for their clientele," plaintiff seeks monetary damages of at least $10 million.

Defendant's successful motion for summary judgment

Following the completion of discovery, including Goldman's deposition, defendant filed a motion for summary judgment on the grounds, inter alia, that plaintiff's lawsuit was time-barred pursuant to section 336, subdivision (b). Plaintiff opposed defendant's motion.

After entertaining oral argument, the trial court granted defendant's motion. Specifically, it found that section 336, subdivision (b)'s five-year statute of limitations applied; that plaintiff knew or should have known at the earliest by April 2003 or at the latest by October 2004 that the covenant was being violated; and that plaintiff did not initiate the instant lawsuit until September 2010, more than five years later.

Judgment was entered, and plaintiff's timely appeal ensued.

DISCUSSION

I. *Standard of review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. *The trial court did not err*

Section 336, subdivision (b), provides for a five-year limitations period on any "action for violation of a restriction, as defined in Section 784 of the Civil Code. The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered, or, through the exercise of reasonable diligence, should have discovered the violation." (§ 336, subd. (b).) Civil Code section 784 defines "restriction" as a "limitation on, or provision affecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction." (Civ. Code, § 784.)

Here, the covenant limits and affects the use of the Spalding property by directing that the property's owner (now defendant) provide parking for up to 98 cars in favor of the Wilshire property. This constitutes a restriction within the meaning of Civil Code section 784. As the trial court correctly concluded, "[t]he Covenant clearly affects the use of real property and [thus] falls within the definition of 'restriction' set forth in Civil Code [section] 784."

Because the covenant constitutes a restriction within the meaning of Civil Code section 784, it follows that the five-year statute of limitations set forth in section 336, subdivision (b), applies. We thus turn our attention to whether plaintiff timely initiated this action. Plaintiff filed its complaint on September 13, 2010. However, plaintiff knew or should have known by April 2003 that the covenant was being violated. After all, that is what Goldman stated in his deposition—when asked if he "believed that in April of 2003 [that] the owners of the Spalding property were not fulfilling their contractual

obligations to you and your colleagues," he replied "Yes." Even if there were some question as to whether plaintiff knew in April 2003 that the covenant was being violated, plaintiff certainly knew of the alleged violation by October 7, 2004, when its attorney sent a letter to the City asking for the covenant to be enforced. Because the complaint was not filed until more than five years later, plaintiff's action is time-barred.

In urging us to reverse, plaintiff asserts that "[t]his is not an action to enforce a 'restriction,' as that term is defined in Civil Code [section] 784." According to plaintiff, a "restriction" limits the way in which a property owner can use his or her own property. The legal authority cited by plaintiff (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 352 & *Pacific Hills Homeowners Assn. v. Prun* (2008) 160 Cal.App.4th 1557, 1564) holds no such thing. They do not support such a narrow definition of the term "restriction" as that word in used in these statutes.

Plaintiff further argues that even if section 336, subdivision (b), were applicable,[2] "[t]he obligation to provide the 98 spaces is a continuing obligation, and the failure to provide the 98 spaces described in the Covenant is a continuing failure, and each day that [plaintiff] requests the spaces and is refused by defendant, a new violation occurs." Thus, according to plaintiff, the statute of limitations could not commence running until after plaintiff demanded the parking spaces and defendant improperly refused to provide them. Because plaintiff did not demand the parking spaces until November 2008, plaintiff claims that this action was timely filed.[3] In support, plaintiff relies upon *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379 (*Cutujian*). *Cutujian* is distinguishable.

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[2] Curiously, both in the trial court and on appeal, plaintiff proposes no alternate statute of limitations.

[3] We note that this argument was difficult to discern, primarily because of the poor quality of the opening brief. Sentences repeat, words are missing, and pages do not flow from one to the other.

In *Cutujian*, a case decided two years before the enactment of section 336, the court considered when the statute of limitations commenced on a claim for enforcement of a covenant to perform an affirmative obligation (namely the obligation to repair slope areas in a development) in recorded covenants, conditions, and restrictions (CC&R's). (*Cutujian*, *supra*, at p. 1384.) The CC&R's provided that the defendant was required to repair the landscaping "'*when necessary or appropriate.*'" (*Id*. at p. 1387; see also *Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1227 (*Crestmar*) [noting that the "'necessary or appropriate' language made the obligation open-ended"].) According to the *Cutujian* court, the repairs at issue were not "'necessary or appropriate'" until the plaintiff purchased the vacant lot with the intent to build, and made a demand for the repairs in accordance with the CC&R's. (*Cutujian*, *supra*, at p. 1387.) Thus, the "statute of limitations to enforce the disputed provision of the CC&R's began to run . . . when [the plaintiff] demanded that the [defendant] fulfill its obligation." (*Id*. at p. 1384.)

Here, in contrast, the obligation to provide parking is not open-ended; rather, the covenant provides for parking "at all times." Thus, defendant's obligation to perform that affirmative duty (*Cutujian*, *supra*, 41 Cal.App.4th at p. 1385) arose when the parties agreed to the terms of the covenant, not when plaintiff allegedly demanded performance.[4] It follows that a demand for performance did not trigger the statute of limitations.[5]

In a similar vein, plaintiff contends that the statute of limitations could not begin to run until plaintiff needed the parking spaces, i.e., when the property was no longer vacant. The problem for plaintiff is its inconsistency in this position. In the first

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[4] Even if the necessity for a demand could be implied here, a party may not "indefinitely suspend the running of the statute by delaying to make a demand." (*Stafford v. Oil Tool Corp.* (1955) 133 Cal.App.2d 763, 765.) Plaintiff cannot benefit by learning in 2003 that the covenant was being violated, but then delay seven years before demanding that the violation be cured.

[5] Notably, plaintiff offers no legal authority to support its contention that a demand triggers section 336. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

amended complaint, for example, plaintiff alleges that defendant "is obligated . . . to provide and make available . . . 98 full-size dedicated parking spaces, whether or not plaintiff rents or provides such spaces to tenants in plaintiff's buildings or to others." Yet, in opposition to the motion for summary judgment, plaintiff claimed that defendant was not obligated to provide the parking spaces until plaintiff needed them. And, significantly, plaintiff has not shown how it needs those spaces now. In fact, plaintiff represents in its opening brief on appeal that the Wilshire property "has been and remains unoccupied."

In another attempt to save its claim, plaintiff cites *Crestmar*, *supra*, 157 Cal.App.4th at page 1228 and argues: "*If* this action is viewed as one to quiet title to the 98 spaces, it is likewise timely." (Italics added.) Plaintiff's reliance upon *Crestmar* is misplaced for at least two reasons. The plaintiff in *Crestmar* sought to quiet title to two parking spaces, of which it had undisputed exclusive possession, in a condominium complex garage. (*Id*. at p. 1230.) Here, unlike the plaintiff in *Crestmar*, plaintiff has (1) never had undisputed exclusive possession of the 98 parking spaces on the Spalding property, and (2) not pursued a claim to quiet title.

Finally, without citing any legal authority, plaintiff argues that "[t]he dismissal of the action on the ground of limitations was simply an inappropriate way for the trial court to determine [plaintiff's] action for declaratory relief." After all, because the covenant runs with the land, the rights of a successor in interest are at stake. Absent a reasoned argument with citations to authority, we treat this point as waived. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852.)

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD