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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JUDITH FRIEND, as Trustee, etc., Plaintiff and Respondent, v. KENNETH TAB et al., Defendants and Appellants.	2d Civil No. B236655 (Super. Ct. No. CV 108179) (San Luis Obispo County)

Kenneth Tab and California Serengeti Corporation ("CSC"; collectively referred to in the singular as "Tab"), appeal a judgment awarding damages against him for nuisance, trespass and conversion; and the trial court's grant of summary judgment against him on his cross-complaint. We affirm.

FACTS

In the 1950s, optimistic developers created maps for residential subdivisions in an area of eastern San Luis Obispo County, known as California Valley. One of the subdivisions was known as "the Twenties," which consisted of 42 lots. Some of those lots were sold to individual purchasers. But before the developers could realize their dream of creating a desert community, they went bankrupt.

In the 1980s, CSC acquired a large amount of property in California Valley, including portions of the Twenties.

In 1984, Judith Friend ("Friend") began acquiring land in the valley. Eventually, she acquired 20,000 acres on which she operates a cattle ranch, with between 500 and 1,000 head of cattle. She calls her property the Carrizo Ranch.

Friend purchased some of her land from CSC in 2001, including some lots in the Twenties. By 2004, CSC had sold all of its lots in the Twenties to Friend. Only five lots in the Twenties remain in the hands of owners other than Friend.

A dirt road known as Dorrington Trail runs through Friend's ranch. The trail was intended by the Twenties' subdividers to provide access to the subdivision. To that end, the developers made offers to dedicate the road to the public in 1969 and 1972. But the offers were never expressly accepted by any public entity. The road dead ends in the Twenties' subdivision.

The land that CSC sold to Friend was bound by fences and a gate that crossed Dorrington Trail. The gate has been in place for at least two decades. Friend improved the gate but did not move it. The gate and fence keep cattle from escaping the ranch and prevents hunters and other trespassers from entering. Friend keeps the gate locked.

Subsequent to the sale of CSC's land to Friend, CSC leased a 40-acre parcel adjacent to Friend's ranch. The only access to the parcel is by Dorrington Trail. CSC's president and manager, Kenneth Tab, attempted to convince Friend that Dorrington Trail is a public road. He told her she could not maintain a locked gate across the road.

When Tab's efforts to convince Friend failed, he took matters into his own hands. He took down the gate and cut the support posts in half. When Friend was able to temporarily hang the gate on the remaining half of the posts, Tab returned, removed the gate, and cut the posts down to ground level.

Friend filed the instant action for trespass, nuisance and conversion against Tab. Tab cross-complained for public and private nuisance and declaratory relief.

The trial court granted Friend's motion for summary judgment on Tab's cross-complaint. The matter went to a court trial on Friend's complaint.

Tab's theory at trial was that the offer to dedicate Dorrington Trail was accepted by implication when the public used the road. Tab introduced the following evidence of public use:

In the 1960s, Elvin Carter worked for the Twenties' developer. He participated in putting in the roads. He hauled gravel from a quarry on the Twenties to use on the roads and around a fire station. Later, he worked for the community services district.

An owner of a lot in the Twenties fenced his property and placed a home on it.

In the 1970s, John Edmisten drove up Dorrington Trail two or three times to study falcons for the Department of Fish and Game.

Since 1979 until the locked gate was installed, Luke Lothrop drove on Dorrington Trail. He would take target practice in the old quarry at the end of the trail or hunt on public land past the end of the trail.

From the 1980s until the locked gate was installed, Tab, his family, friends, and guests of his motel traveled on Dorrington Trail in vehicles and on foot.

From 1986 until the gate was locked, Steve Settle would frequently use Dorrington Trail to take visitors to the Twenties to admire the view. Settle testified that most people who lived in the area would go up there.

From approximately 2004 until the locked gate was installed, Robert Boyer would travel up Dorrington Trail when he had company on the weekends. They would take pictures and admire the view.

Thomas Ortega is a board member of the Community Services District. He and his family would use Dorrington Trail about once a week to walk through the Twenties and admire the view. When Friend installed the locked gate, he protested that Dorrington Trail is a public road. Friend gave Ortega the combination to the gate lock.

Roberta Peterson is a real estate agent. Before the gate was locked, she drove on Dorrington Trail three times. The first time she was alone. The second time she was showing property to a client. The third time she went with Tab to look at some property he had for sale.

Tab also produced a survey showing Friend's fence was eight feet outside of her property line.

The trial court found: "The evidence presented at trial fails to establish that Dorrington Trail is a public road. Although formally offered for dedication in 1969, and again in 1972, the offer of dedication was never expressly accepted. Further, the evidence established that no governmental entity collects taxes to support road maintenance and no government entity has ever maintained the road. [¶] Nor does the evidence establish implied acceptance of the offer to dedicate. Use by the original owner or its contractors and employees is insufficient, as is use by the purchasers of lots who were entitled to private easement rights to their lots pending express acceptance of the offer to dedicate. [¶] Finally, the occasional nature and undefined extent of use by various individuals for primarily recreational purposes (or accessing the property in some undefined locations to view or study wildlife or natural conditions), as described at trial, is also insufficient to constitute an implied acceptance through public user."

The court also found that Friend occupied the property up to the fence line by grazing cattle there.

The court awarded Friend $994.31 for replacing the gate and $20,000 for "annoyance and discomfort" arising out of Tab's acts of trespass and

nuisance. The court also awarded Friend $115,782.50 attorney fees pursuant to Code of Civil Procedure section 1021.9, allowing an award of fees to the prevailing party in an action for trespass to lands used for raising livestock.

DISCUSSION

I.

Tab contends the trial court erred in finding Dorrington Trail is not a public road. Tab's theory is that the trail was made public by implied dedication.

Dedication is a transfer of an interest in real property to a public entity for the public's use. (*Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, 1009.) Dedication consists of an offer and acceptance. (*Ibid.*) Dedication is not binding until acceptance, proof of which must be unequivocal. (*Ibid.*) Acceptance may be implied when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication. (*Ibid.*)

The burden of proving an implied dedication is on the party seeking to establish it. (*Robas v. Allison* (1956) 146 Cal.App.2d 716, 720.) Tab claims that because the evidence here was undisputed our review is de novo. (Citing *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 535.) But our review is truly de novo only where the evidence allows one reasonable factual conclusion. Where the evidence is susceptible to more than one reasonable factual conclusion, we must give deference to the conclusion reached by the trial court. (See *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429 ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court"].) There is no question that there were two offers to dedicate Dorrington Trail as a public road, but no formal acceptance of the offers. There is also no question that there was some public use of the trail. The only question

is whether the public use was sufficient to compel the trial court to conclude the offer had been accepted by implication.

To imply an acceptance from public use, the public use must exceed the scope of private access rights. (*Baigini v. Beckham*, *supra*, 163 Cal.App.4th at pp. 1013-1014.) Thus the trial court correctly determined that use by owners, their contractors and employees is insufficient.

Of witnesses who were not owners, contractors or employees, a biologist testified he used the trail two or three times; a real estate agent testified she used the trail three times; others testified they would use the trail to take visitors to the Twenties or to take in the view or to take target practice and hunt. The trial court found such use to be of an "occasional nature and undefined extent[.]"

In discussing the intensity of public use required for a finding of implied acceptance, the court in *Biagini v. Beckham*, *supra*, 163 Cal.App.4th page 1011, stated: "One problem with the trial court's reasoning is that the court appeared to be looking for an intensity of public use of King Way beyond what could reasonably be expected of a road of that type–specifically, a dead end road in a rural area serving only a limited number of parcels. The applicable rule, however, is that '[i]n ascertaining whether or not a highway, park or public place has been accepted by user, the purpose which the way, park or place is fitted or intended to serve must be the standard by which to determine the extent and character of use which constitutes an acceptance." (Quoting *Koshland v. Cherry* (1910) 13 Cal.App.440, 443.)

Dorrington Trail may be a dead-end road in a rural area, but its purpose is intended to serve as sole access to a 42-lot subdivision. Tab cites no evidence that would compel the trial court to conclude the public use here was anywhere near what might be expected of the sole access to a 42-lot residential subdivision. Tab simply failed to carry his burden of proof.

Tab's reliance on *Hanshaw v. Long Valley Road Association* (2004) 116 Cal.App.4th 471, is misplaced. There the trial court concluded that an offer to dedicate a road was accepted by implication through public use. In so concluding, the trial court found "over 80 lots were sold under subdivision maps which contemplated county acceptance of the road, and that the road was used freely to access the parcels by all who had need to access them." (*Id.* at p. 483.) In other words, the trial court found that the public used the road as the offer to dedicate intended. Tab points to no such finding here. We, like the Court of Appeal in *Hanshaw*, affirm the trial court's findings of fact.

In any event, Civil Code section 1009[1] prevents the trial court from considering recreational use in determining whether there has been an implied dedication.

Section 1009, subdivision (a) provides: "The Legislature finds that: [¶] (1) It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax–supported publicly owned facilities. [¶] (2) Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes. [¶] (3) The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property."

Subdivision (b) of section 1009 provides in part: "[N]o use of [private] property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written

[1] All statutory references are to the Civil Code unless otherwise stated.

irrevocable offer of dedication of such property to such use, made by the owner thereof[.]"

Tab points out that there has been an irrevocable offer to dedicate. But the offer to dedicate was for public road purposes to provide access to a residential subdivision. Section 1009, subdivision (b) prohibits the creation of a recreational easement by public use in the absence of an express written offer of dedication "to such use[.]" In the context of the statute "to such use" must mean recreational use. (See *Hanshaw v. Long Valley Road Assn., supra,* 116 Cal.App.4th at p. 485 ["[G]iven that the statute speaks to recreational use of property, we interpret 'use of such property' to refer to 'lands available for *public recreational use*' (. . . § 1009, subd. (a)(1)), 'property for *recreational purposes*' (*id.*, subd. (a)(2)), and '*such public use*' (*id.*, subd. (a)(3)), as those phrases are used earlier in the statute"].)

Here there is no express written dedication for recreational use. Thus the court could not consider public use for recreational purposes in deciding whether there has been an implied acceptance of the offer to dedicate. Eliminating recreational use and use by those with private rights of access, there is very little evidence of public use: A biologist used Dorrington Trail two or three times and a real estate agent used it three times. That is clearly insufficient for an implied acceptance by public use.

II.

Tab contends the trial court erred in refusing to consider California Valley Herald newspapers dated between 1962 and 1969.

Tab offered the newspapers to establish the developer's intent that the roads in the valley, including Dorrington Trail were intended to be used for recreational horseback riding. Friend objected that the newspapers could not be authenticated and that they are hearsay. The trial court sustained the objection.

Tab argues the newspapers were authenticated by the testimony of Elvin Carter. Carter testified that the Valley Herald was sent to property owners

by developers as publicity during the 10 years the developers were active in California Valley. Tab also argues that the evidence was not offered for the truth of the matter. Instead, it was offered to show his state of mind.

Assuming the newspapers were authenticated, Tab fails to explain how his state of mind is relevant. Moreover, the state of mind exception to the hearsay rule concerns the declarant's state of mind. (Evid. Code, §§ 1250, 1251.) Tab argues on appeal that the newspapers qualify under the ancient documents exception to the hearsay rule. (*Id.*, at § 1331.) But Tab failed to raise that point at trial.

In any event, the offer to dedicate is for a public road to a subdivision, not a horse trail. As we have explained, public use is insufficient to create a recreational easement without an express written offer to dedicate for recreational purposes. (§ 1009.)

III.

Tab contends there is no substantial evidence to support the finding that he trespassed on Friend's land.

"In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. [Citation.] The trier of fact is not required to believe even uncontradicted testimony. [Citation.]" (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

Tab's contention is based on a survey showing the gate is eight feet from the boundary of Friend's land. But a cause of action for trespass affords protection of the plaintiff's possession. (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218.) The plaintiff need not show legal title. (*Lightner Mining Co. v. Lane* (1911) 161 Cal. 689, 694.)

Here the trial court found that Friend possessed up to the gate and fence line by allowing her cattle to graze in the area. The finding is supported by Friend's testimony that she allowed her cattle to graze in the area. Although there may not be direct evidence that Friend's cattle grazed up to the gate and fence line, there was nothing to stop them from doing so. The trial court could reasonably conclude Friend's cattle grazed up to the gate and fence line. In any event, evidence that Friend maintained the gate and fences is alone sufficient to support a finding of possession. (See *Williams v. Goodwin* (1974) 41 Cal.App.3d 496, 508 [possession may be evidenced by, among other things, a "substantial enclosure"].)

IV.

Tab contends the trial court erred in granting summary judgment on his cross-complaint.

Summary judgment is granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such inferences are contradicted by other inferences or evidence that raise a triable issue of fact. (*Ibid.*) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

The moving party has the initial burden of showing that one or more elements of a cause of action cannot be established. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Where the moving party has carried that burden, the burden shifts to the opposing party to show a triable issue of material

fact. (*Ibid.*) Our review of the trial court's grant of the motion is de novo. (*Id.* at p. 767.)

Of course, as to the issues decided at trial, any error in granting summary judgment is harmless. Such issues include that Dorrington Trail is not a public road.

Tab's first cause of action is for private nuisance. It alleges Friend maintains a fence that extends onto the right of way of Dos Palos Road and into the intersection of Dos Palos Road and Dorrington Trail. Tab alleges it constitutes a nuisance in that it prevents him from accessing his leased property. He alleges he plans to use the leased property to install a water system to support development on 115 acres north of Friend's property.

But it is undisputed Tab has no existing plans to develop his 115 acres and no permits to install a water system on his leased land. The trial court granted summary judgment on the grounds that there is no substantial and unreasonable interference with the use of his land. (See *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 937-938.)

Tab claims the continuing harm is that Dorrington Trail is the only access to his leased parcel. But that is not the gravamen of his first cause of action. Moreover, it has been established that Dorrington Trail is not a public road. Tab does not explain why Friend would owe him a right of access across her land.

Tab's second cause of action is for public nuisance. He alleges Dos Palos Road, Dorrington Trail and Gaviota Trail are public roads that are blocked by Friend's fences. Tab alleges that Friend created a public nuisance by blocking the roads and by letting her cattle run loose in the area of Dorrington Trail.

The trial court granted summary judgment because the undisputed evidence was that Friend's fences did not interfere with the use of Dos Palos Road and Gaviota Trail. In addition, the trial court determined that Tab had no standing to maintain an action for public nuisance because his damages were not

different in kind from those shared by the general public. (See *Brown v. Petrolane* (1980) 102 Cal.App.3d 720, 725 [action for public nuisance requires showing of special injury different in kind from that suffered by general public].) Tab fails to explain how his damages are different in kind than those shared by the general public.

Tab's third cause of action is for declaratory relief. It seeks to establish that Dorrington Trail, Gaviota Trail and Dos Palos Road are public roads. But Tab's opposition to the motion did not dispute Friend's claim that the declaratory relief cause of action is moot if the nuisance causes of action are defeated.

Morever, it is undisputed that the written offer to dedicate the subdivision roads was never formally accepted. If Tab contends acceptance of Gaviota Trail and Dos Palos Road was by public use, he points to no such evidence.

The judgment is affirmed. Costs are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Martin J. Tangeman, Judge

Superior Court County of San Luis Obispo

Duggan Smith & Heath LLP, and Jane E. Heath for Defendants and Appellants.

Glick & Haupt LLP and Michael D. Haupt for Plaintiff and Respondent.