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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ZETA GRAFF, Plaintiff and Appellant, v. ALEX BLYUMKIN et al., Defendants and Respondents.	B267165 (Los Angeles County Super. Ct. No. SC115019)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Richard A. Stone and Mitchell L. Beckloff, Judges. Affirmed in part, reversed in part, and remanded.

Arminak Law, Tamar G. Arminak, Baker, Olsen, LeCroy & Danielian and Arbella Azizian for Plaintiff and Appellant.

Murchison & Cumming and Edmund G. Farrell III for Defendants and Respondents Alex Blyumkin and Polina

Blyumkin, Individually and as Trustees of The Alex and Polina Blyumkin Family Trust UDT 02/03/03.

P.K. Schrieffer, Paul K. Schrieffer, Wayne H. Hammack, and David T. Hayek for Defendants and Respondents Newform Construction Company and Oleg Fur.

In this appeal from the judgment following a bifurcated jury and court trial, plaintiff and appellant Zeta Graff challenges the denial of her request for a mistrial following the jury trial, the denial of her motion to continue the court trial, and the award of costs to defendants as the prevailing parties. We conclude her contentions lack merit, and affirm except as to the amount of costs awarded to the prevailing parties Newform Construction Company and Oleg Fur.

FACTS AND PROCEDURAL BACKGROUND

This litigation involves a dispute between homeowners in a hillside neighborhood in the City of Los Angeles. The plaintiff, Ms. Graff, owns an award-winning home that is constructed primarily of glass. In 2009 her neighbors, defendants Alex Blyumkin and Polina Blyumkin,[1] began construction of what Ms. Graff describes as a "massive new home of approximately 15,000 square feet, with a guest house of approximately 5,500 square

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[1] Title to the adjoining property is held by the Blyumkins as trustees of the Alex and Polina Blyumkin Family Trust UDT 02/03/03. The Blyumkins were sued individually and as trustees of their trust.

feet, with substantial hardscape, including a large motor court, a six car garage, pool house, and patios."

The two homes share a driveway from Stone Canyon Road. The driveway entrance is at the base of the Blyumkins' property, and Ms. Graff has an easement for ingress and egress over the driveway.

Both homes are located "at the foot of a massive canyon and at the point of collection of a substantial natural water-course." Ms. Graff was concerned that the Blyumkins' construction project—particularly "the massive footprint of the structures being constructed"—would cut into the hillside and alter the natural drainage, causing water that previously flowed elsewhere to be diverted onto her property or the easement.

The First Lawsuit

In June 2010, Ms. Graff filed her first lawsuit against the Blyumkins; their general contractor, Newform Construction Company; and Alex Fur, the president of Newform. (*Graff v. Blyumkin et al.*, Super. Ct. L.A. County, 2011, No. BC439185 (*Graff I*).)[2] Among other issues, the dispute involved the

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[2] On July 10, 2017, defendants filed a joint motion to take judicial notice of the *Graff I* complaint, the transcript of the June 8, 2011 settlement hearing in *Graff I*, the Los Angeles County Superior Court policy regarding normal availability of official court reporters and privately arranged court reporters effective May 15, 2012, and pages from the transcript of Ms. Graff's deposition on April 7, 2017, in *Graff v. First American Title Insurance Co.* (Super. Ct. L.A. County, 2017, No. BC602599).

Ms. Graff filed opposition to this motion on August 31, 2017. On September 27, 2017, this court deferred its ruling until the case was assigned to a panel. We now rule as follows: The motion is granted only as to the *Graff I* complaint and transcript

unauthorized removal of some trees and shrubbery from a portion of Ms. Graff's property that abuts the driveway. The complaint alleged claims for trespass, negligence, injury to trees and shrubbery, loss of privacy, diminished property value, fraud, nuisance, and interference with prospective business advantage.

The parties settled the *Graff I* action, and announced the settlement terms at a court hearing on June 8, 2011. As part of the agreement, defendants agreed to pay Ms. Graff $200,000 ($150,000 from New Form and $50,000 from the Blyumkins), and the parties agreed to comply with the following terms:

- *Entry Gate*. Mr. Blyumkin would construct and maintain an entry gate at the entrance to the driveway on Stone Canyon Road. Ms. Graff would be provided with access to the gate and entry code, and the right to approve the design of the gate, its support systems, and its related structures.
- *Water Drainage*. Mr. Blyumkin and Mr. Fur would use their best efforts to complete the water drainage vault adjacent to the easement, the remainder of the drainage system along the easement, and the storm drain system at the street.
- *Pavement of Easement*. Mr. Blyumkin and Mr. Fur would use their best efforts to finish paving the easement by August 30, 2011, consistent with applicable building codes and ordinances. Inconvenience to Ms. Graff would be minimized, and she would have vehicular access to her property at all times.

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of the June 8, 2011 settlement hearing. (Evid. Code, § 452, subd. (d).) The balance of the motion is denied.

- *Retaining Wall.* The retaining wall along the easement would be constructed and modified to comply with all building codes and ordinances, including ordinances imposing a 10-foot height restriction. Defendants acknowledged that compliance with this requirement may require a substantial reduction in the height of the wall. The work would be performed in a manner that minimized inconvenience to Ms. Graff and afforded her vehicular access to her property at all times.
- *Cleanup and Behavior.* Ms. Graff's property and the easement area would be kept free of trash, garbage, construction debris, and other unsightly materials. No offensive or threatening comments or gestures would be made to Ms. Graff, her son, or her guests and invitees.
- *Arbitration.* Should a further dispute arise concerning the final construction of the wall, drainage system, gate, or compliance with ordinance or code, each party would engage a qualified expert. If the experts reached an agreement, it would be binding on the parties. If the experts did not agree, the parties would jointly select a third qualified expert who would act as arbitrator and render a final and enforceable decision.
- *Reservation of rights*. Ms. Graff reserved the right to insist that future work on the Blyumkin property be performed in conformance with law, ordinance, and code. She retained the right to pursue any claims for damage or loss occurring in the future.

- *Driveway radius*. Ms. Graff would not "object to the encroachment of a driveway radius that preserves the existing tree trunk" and will so inform future purchasers of her agreement.
- *Planting trees*. In order to improve Ms. Graff's privacy, Mr. Blyumkin would plant small trees and foliage immediately adjacent to the curved driveway structure.

The Present Action

Ms. Graff filed the present action in November 2011 based on alleged breaches of the *Graff I* settlement agreement by defendants. The settlement agreement (as stated in the reporter's transcript of the June 8, 2011 settlement hearing in *Graff I*) was incorporated by reference.

The incidents that precipitated the present action included:

- *Paving of easement.* Ms. Graff was told she could not use the driveway for at least a week during the paving process.
- *Drainage.* Ms. Graff believed the plan for paving the easement did not provide for proper drainage along the curbs, swales, driveway aprons, and existing pavement.
- *Retaining wall.* Defendants planned to maintain the wall at its present height, which in some places exceeded 12 feet.
- *Gate*. Mr. Blyumkin planned to place the electronic gate at a location not authorized by the settlement agreement.
- *Vandalism*. Ms. Graff claimed that her trees had been vandalized with pink spray paint.

- *Trash and debris.* Trash, metal plates, grading stakes, and other structures were left in the easement area.

The trial was conducted in two phases. In phase I, the jury considered Ms. Graff's claims for breach of contract, false promise, negligence, intentional infliction of emotional distress, trespass, and nuisance. During closing argument to the jury, Ms. Graff requested almost $9 million in damages. She sought $500,000 for diminution in rental value; $5 million to $6 million for diminution in fair market value; $1.5 million for past emotional distress; $1 million for future emotional distress; $29,600 for past medical expenses; an unspecified amount for future medical expenses; $283,569 for security expenses; $19,000 to repaint her house; and $4,000 for vehicle repairs.

Ms. Graff did not prevail on any of these claims presented to the jury. Based on findings in the jury's special verdict, defendants moved to dismiss Ms. Graff's remaining claim for declaratory relief. In its July 16, 2014 order, the trial court (Judge Richard A. Stone) denied that dismissal motion, and identified two remaining issues for trial in phase II. The first, proposed by Ms. Graff, was whether defendants must place the drainage swale entirely on the Blyumkins' property in order to prevent water from being diverted onto her property. The second, proposed by the court, was whether it was possible to improve the water drainage system.

Ms. Graff sought to continue the phase II trial in order to retain new counsel. The court granted a continuance, but warned that no further requests for extension would be granted. The court rescheduled the phase II trial for January 5, 2015, and later continued the trial date to July 13, 2015.

Ms. Graff retained new counsel, Mr. Lindemann, and filed a phase II trial brief in which she suggested the remaining issues could be decided based on the evidence from the phase I jury trial. She stated that if necessary, she would call her expert witnesses, Mr. Murphy and Mr. Akers, who testified in the phase I trial. In her phase II trial brief, Ms. Graff asked that defendants be required to: (1) enlarge the catch basin behind the retaining wall; (2) redirect the discharge pipe so that the water would flow to Stone Canyon Road; (3) construct a desilting system; (4) construct a drainage vault with a pipe that sends the discharge to Stone Canyon Road rather than to the trench drain; (5) remove the trench drain; (6) pave the entire easement, including the portion between the curb and Ms. Graff's property; and (7) remove the encroaching drainage swale at the rear of the Blyumkin property.

Ms. Graff also cited two grounds for mistrial or sanctions. One was the alleged misconduct of her former counsel (Stephen E. Foster of Mitchell Silberberg & Knupp LLP), based on his allegedly improper meeting with Mr. Blyumkin following the phase I trial. The other was an allegedly defamatory press release issued by the Blyumkins' counsel (Murchison & Cumming, LLP) after the phase I jury verdict. The press release allegedly said that Ms. Graff was "'just plain nuts.'"

Shortly before the phase II trial date, on June 29, 2015, Ms. Graff e-mailed the trial court to seek a four-month continuance in order to retain new counsel. She referred to Mr. Lindemann's alleged "unethical conduct" and agreement with opposing counsel to do nothing in this case. She indicated that, according to what Mr. Lindemann told her, the court was a party to this agreement.

At the direction of the trial court, a copy of Ms. Graff's e-mail was forwarded to all counsel along with the court's response. In its response, the court advised Ms. Graff that because she was represented by counsel, she could not communicate directly with the court, and that ex parte communications with the court are not allowed.

After receiving Ms. Graff's e-mail to the court, Mr. Lindemann requested a continuance and moved to be relieved as Ms. Graff's trial counsel due to a breakdown in the attorney-client relationship. The court granted the motion to relieve Mr. Lindemann as counsel, but denied the request for continuance.

Ms. Graf, now in propria persona, did not appear at the phase II trial on July 13, 2015. The court continued the matter to the afternoon calendar and notified Ms. Graf that her attendance was required should she desire another continuance. When Ms. Graff did not appear for the afternoon calendar, defendants requested dismissal of the declaratory relief cause of action on the grounds of abandonment and failure to prosecute. This motion was denied. The court explained that because it had heard substantial evidence during the phase I trial regarding the two remaining issues—one involving the upper swale, and the other involving drainage along the easement—it was prepared to provide its independent analysis of that evidence in conjunction with the jury's phase I findings.

The court next considered and denied the requests for mistrial and sanctions contained in Ms. Graff's phase II trial brief. As to the allegedly defamatory press release, the court stated it was unaware of its existence until it was discussed in Ms. Graff's trial brief. Without determining the propriety of the alleged press release, the court found it was irrelevant to the

determination and evaluation of the facts of this case, and denied the motion for mistrial on that basis.

As to the request for a mistrial or sanctions based on the allegedly improper meeting between Mr. Foster and Mr. Blyumkin following the phase I jury verdict, the court stated there was no evidence the meeting took place. Based on its observations at trial, the court found both Mr. Foster and his colleague, Mr. Kaiser, had done an "extraordinary job" in "aggressively and zealously" representing Ms. Graff throughout the proceedings. The trial judge stated that his view of the case evolved during the phase I trial: At first, he believed that Ms. Graff would prevail. But later, through no fault of her counsel, Ms. Graff's "embellished and exaggerated" testimony seriously undermined her own case. The court concluded that Ms. Graff's allegations of impropriety by her former counsel were not credible, and, in any event, even assuming the alleged post-jury verdict conversations occurred, there was no indication they undermined the jury verdict or would impact the court's evaluation of the declaratory relief phase of the trial.

Turning to the two issues identified in the court's July 16, 2014 order, the court granted defendants' motion for nonsuit as to the first issue: "whether the [upper] drainage swale should be removed and, if so, to what extent." The court agreed with defendants' assertion that the evidence failed to support a finding that the upper swale should be altered or removed. The court accepted Mr. Murphy's expert testimony that it would be better to leave the swale in place. Because Mr. Murphy was Ms. Graff's expert, the court found no reason to remove or modify the upper swale, which "will remain intact as is, with no changes or modifications."

As to the second issue, the court inquired whether there were improvements that could be made to the drainage system along the driveway. Defendants presented three major proposals based on the recent deposition testimony of Mr. Akers and the live testimony of Mr. Fur at the phase II trial. The court adopted all three proposals.

The first, which already had taken place, was removal of the filter on the weir (the slotted drain at the bottom of the driveway). The second involved two options: (1) reposition the weir to a more horizontal position, or (2) installation of a second weir that is more horizontal. The court adopted the first option, and according to Mr. Fur, this could be accomplished within ten working days at a cost of $10,000. The third proposal was to build a second catch basin with a pipe that sends the water directly to the street.

The court also ordered that a cover be placed over the swale leading to the first catch basin; that the swales be cleared by the property owners every six months; and that Ms. Graff not obstruct or interfere with the work to be performed in accordance with its order. The court scheduled a status hearing on August 28, 2015, to receive an update on defendants' compliance with its rulings.

In the judgment dated July 22, 2015, the court issued the rulings made at the phase II trial, and adopted the jury's findings in the phase I trial.

At the August 28, 2015 status hearing, defendants provided a progress report. Ms. Graff, then in propria persona, did not appear. The court found defendants had complied with its previous rulings, and issued an order finding defendants to be the prevailing parties in this action. The court amended the July 22,

2015 judgment to award defendants their costs as stated in their respective costs bills. The Blyumkins, individually and as trustees of their family trust, were awarded costs in the amount of $102,087.62. Newform and Mr. Fur were awarded costs in the amount of $98,667.59. The court found that Ms. Graff was not a prevailing party, and struck her costs bill.

Ms. Graff filed two notices of appeal; they have been consolidated for appeal under case No. B267165. The first, filed on September 28, 2015, was taken from the July 22, 2015 judgment and the August 28, 2015 post judgment order. The second, filed on May 13, 2016, was taken from the March 3, 2016 denial of her motion to strike or tax costs awarded to Newform and Mr. Fur.

DISCUSSION

I

Ms. Graff challenges the denial of her request for a mistrial. The request, made in her phase II trial brief, cited an allegedly improper meeting between her former counsel, Mr. Foster, and an opposing party, Mr. Blyumkin, which occurred after the phase I trial had ended. Due to the timing of the alleged meeting, the court reasoned the jury could not have been influenced by it, and therefore Ms. Graff had suffered no prejudice. We agree, and find no abuse of discretion.

"Because the core idea of a mistrial is the presence of error that cannot be corrected, it is natural that, generally speaking, the standard of review will be abuse of discretion. That is, the trial judge, present on the scene, is obviously the best judge of whether any error was so *prejudicial to one of the parties* as to warrant scrapping proceedings up to that point. 'Whether a

particular incident is incurably prejudicial is by nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citations.]" (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 678.)

The trial court was not persuaded by Ms. Graff's assertion that an ethical violation had occurred. There is nothing in the record that supports her claim. The only purported evidence of the allegedly improper communication between Mr. Foster and Mr. Blyumkin is an unfiled declaration by Ms. Graff that the trial court never saw.

Credibility determinations are to be made by the trial court in the first instance. (*Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 666.) On appeal, we review the record in the light most favorable to the trial court's ruling, and defer to its express or implied factual findings if they are supported by substantial evidence. (*Ibid.*) The trial court was able to observe Ms. Graff testify at the phase I trial, and, based on her demeanor and statements, concluded that she was not a credible witness, and that her testimony was exaggerated. These observations influenced the court's rejection of Ms. Graff's assertion that her counsel—whose performance at trial was found to be exemplary—had engaged in misconduct, and the court was entitled to make that credibility determination.

II

Ms. Graff contends the trial court abused its discretion by refusing to continue the phase II trial so that she could retain new counsel. (See *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527 [trial courts have broad discretion whether to grant continuance] (*Freeman*).) The contention lacks merit.

Notwithstanding the denial of her earlier request for continuance, the court indicated on the date of trial that it was willing to consider a renewal of her request. The court continued the matter to the afternoon calendar and notified Ms. Graff that her appearance was required should she desire another continuance. When the court received no communication from Ms. Graff and after she failed to appear at the afternoon calendar or seek a further continuance, it proceeded with the phase II trial.

Ms. Graff argues that if her earlier motion for continuance had been granted, she would have appeared with her new counsel at the phase II trial, and her new counsel would have objected to the court's determination and award of costs to defendants. The contention lacks merit. It ignores the fact that the court delayed the commencement of the phase II trial in order to allow Ms. Graff the opportunity to seek a further continuance. Her failure to avail herself of that opportunity is fatal to her effort to establish that the earlier denial of her request for continuance was prejudicial. (*Freeman*, *supra*, 192 Cal.App.4th at p. 528 [denial of continuance reversible only if shown to be prejudicial; prejudice not presumed].)

III

Where, as here, "the prevailing party is one not specified, Code of Civil Procedure section 1032, subdivision (a)(4) permits the trial court to determine the prevailing party and then allow costs or not, or to apportion costs, in its discretion. The statute requires the trial court to determine which party is prevailing and then exercise its discretion in awarding costs. [Citation.] This portion of the statute does not require the trial court to

award costs to the prevailing party 'as a matter of right.' (Code Civ. Proc., § 1032, subd. (b).)" (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248–1249, fn. omitted.)

In this case, there is no party who fits the specified definition of a prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4).[3] Accordingly, there is no prevailing party who is entitled to costs as a matter of right. (Code Civ. Proc., § 1032, subd. (b).)

The court in its discretion found defendants were prevailing parties but Ms. Graff was not. Ms. Graff argues this was error, citing several cases that are distinguishable. In *Tonini v. Ericcsen* (1933) 218 Cal. 39, 41–42, the appellant was entitled to costs as a matter of right under a statute that applies to cases involving title or possession of real estate. The appellants in *Texas Commerce Bank v. Garamendi*, *supra*, 28 Cal.App.4th at p. 1249 recovered fees and costs based on a contract provision. Fees were awarded in *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 839, based on a statute that applies where an important right affecting the public interest has been enforced.

The assertion in this case that Ms. Graff achieved her main litigation objective by restraining defendants' encroachment on her property is debatable. As defendants point out, Ms. Graff failed to recover any damages in the phase I trial (she argued for

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[3] A prevailing party is "the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Code Civ. Proc., § 1032, subd. (a)(4).)

an award of almost $9 million) and prevailed on only one of several issues in the declaratory relief trial. Defendants contend that because this issue was raised by the trial court on its own motion, it was not central to Ms. Graff's case. We agree. On this record, it was within the trial court's discretion to weigh the greater objectives of the litigation against the limited relief awarded to Ms. Graff, and its conclusion that she was not a prevailing party is a rational determination that will not be disturbed on appeal.

IV

Ms. Graff seeks reversal of the order denying her motion to strike or tax the costs bills submitted by Newform and Mr. Fur. We briefly summarize the relevant facts:

On August 27, 2015, one day before the August 28 status hearing, Ms. Graff filed the instant motion to strike or tax costs. The motion was scheduled to be heard on March 3, 2016. At the March 3, 2016 hearing, the trial court (Judge Mitchell L. Beckloff) denied the motion without prejudice, finding it lacked jurisdiction based on the pending appeal from the judgment.

Because the motion to strike or tax costs was never heard, the matter must be remanded for the trial court to consider the matter and issue its ruling.

DISPOSITION

The July 22, 2015 judgment and the August 28, 2015 post judgment order are affirmed, except as to the amount of costs awarded to the prevailing parties Newform and Mr. Fur. The matter is remanded for the trial court to consider and rule on Ms. Graff's motion to strike or tax the costs bills submitted by Newform and Mr. Fur. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.