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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHEVIOT HILLS SPORTS CENTER, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B249719 (Los Angeles County Super. Ct. No. SC118259)

APPEAL from judgment of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Affirmed in part and reversed in part and remanded with directions.

Fenigstein & Kaufman, Ron S. Kaufman and Sara M. McDuffie for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Timothy McWilliams and Peter E. Langsfeld, Deputy City Attorneys, for Defendant and Respondent.

INTRODUCTION

Plaintiff Cheviot Hills Sports Center, Inc. appeals the trial court's judgment in favor of Defendant City of Los Angeles finding that the City was not liable for forcible entry, forcible detainer, or violation of the Bane Act (Civil Code section 52.1). The suit arises out of Cheviot Hills' eviction from a tennis pro shop by the City. Cheviot Hills operated the pro shop at Cheviot Hills Park from 2000 until August 2011, when the city removed Cheviot Hills after the pro shop contract was awarded to another concessionaire. Plaintiff argues that it satisfied all elements of the three causes of action during the bench trial and requests reversal and restitution of the property.

We reverse the trial court as to its findings regarding forcible entry and detainer because the City improperly engaged in self-help to remove Cheviot Hills, which was in peaceable possession of the tennis pro shop. We affirm the trial court's findings regarding Plaintiff's cause of action for violation of Civil Code section 52.1 because plaintiff cannot prove that the City utilized violence or threats of violence to take possession of the property. As restitution of the property to Cheviot Hills is impractical on appeal, we remand to the trial court solely for findings regarding nominal damages to be awarded to Cheviot Hills for the City's forcible entry and detainer.

FACTS AND PROCEDURAL BACKGROUND

In 2000, an entity called Merchant of Tennis (Merchant) signed a contract with the City of Los Angeles to operate the Cheviot Hills Tennis Professional Concession (the pro shop) at Cheviot Hills Park. Merchant was required to pay rent and percentages of retail sales and payments received for tennis instruction. During contract negotiations, Merchant of Tennis sought permission from the City to assign the contract to Plaintiff Cheviot Hills Sports Center, Inc. Notably, the same individuals own and run Merchant and Cheviot Hills. The City never approved of the assignment. Cheviot Hills nonetheless operated the pro shop, communicated to the City that it was operating the pro shop, and paid rent to the City with checks indicating that the payments were from Cheviot Hills' account for "Merchant of Tennis."

In 2006, the contract expired, but Merchant continued to be the concessionaire on month-to-month terms and Cheviot Hills continued to operate the pro shop. In January 2011, the city advised the owner of Merchant and Cheviot Hills that the concessionaire contract had been awarded to another operator pursuant to a bidding process. In April 2011, the City informed the owner of Merchant and Cheviot Hills by letter that the month-to-month contract was terminated and Merchant was to remove all equipment and vacate the premises by the end of May 2011. Cheviot Hills did not vacate the pro shop and its owner asserted that Cheviot Hills had a right to be on the property until October 2011.

The City brought an unlawful detainer action against Merchant and Cheviot Hills, identifying them both as parties in possession of the pro shop. Although Merchant was served, Cheviot Hills was never served and was dismissed from the case on that basis. At the unlawful detainer trial, both the City and Merchant stipulated that Merchant was not in possession of the premises. The trial court entered judgment in favor of the City, which was later reversed by the superior court appellate division because Merchant lacked possession of the property. Notably, the City never obtained a writ of possession against Cheviot Hills.

On August 19, 2011, the City locked Cheviot Hills out of the tennis pro shop. A Recreation and Parks representative and three police officers entered the pro shop and requested the employee working there to leave the premises. After that employee exited the shop, the representative removed the tennis nets from the courts and requested that the pro shop employees teaching lessons leave the tennis courts. The City then placed padlocks on the tennis pro shop and the gates to the tennis courts. The entire event was recorded on video tape. Several days later, the City allowed Cheviot Hills to collect its merchandise and belongings from the pro shop. The City's new concessionaire subsequently took over operation of the pro shop.

On August 29, 2011, Cheviot Hills brought the present action against the City for forcible entry, forcible detainer, and violation of Civil Code 52.1. Cheviot Hills asserted that it had a right to be in the pro shop until the end of October 2011, and was planning to transition its business to another location by that time. Cheviot Hills sought restitution of the property and damages associated with loss of business and devaluation of its inventory. At the bench trial, the court heard testimony from the owner of Cheviot Hills and Merchant, the Cheviot Hills employee working in the pro shop at the time of the lock-out, two City of Los Angeles employees, and an accounting expert. The court also reviewed documentary evidence of the City's unlawful detainer action, contractual relations, and correspondence between the parties, and watched the video of the lock-out.

The trial court found that Cheviot Hills failed to prove each cause of action. The court explained that "after reviewing the video during trial of the lock out of the concession and tennis courts [the] City, who had three police officers, a Recreation and Parks representative and a videographer present, did not engage in conduct that included willful threats or menacing conduct 'that would create an apprehension of harm in a reasonable person' as is defined in Civil Code [section] 1940.2" The court also found that Cheviot Hills did not sustain "its burden of proof for any general damages including damages related to the loss of business, being dispossessed or losing the value of its inventory from the Cheviot Hills Park concession facility because Plaintiff was unable to transition to a new location."

DISCUSSION

Cheviot Hills asserts that it satisfied the requirements of forcible entry, forcible detainer, and the Bane Act, and that it should be awarded restitution of the property. When reviewing a judgment based on a statement of decision following a bench trial, we resolve any conflict in the evidence or logical factual inferences in support of the trial court's decision, giving the court's findings the benefit of every reasonable inference. (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) We are bound by the trial court's credibility determinations and may not reweigh the evidence. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.) " 'Mixed questions of law and

fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied.' [Citation.]" (*General Mills, Inc. v. Franchise Tax Bd.* (2012) 208 Cal.App.4th 1290, 1302.) "The findings of historical fact are reviewed for substantial evidence, and the selection of the applicable law (the legal issues) is reviewed de novo." (*Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1009.) Where the mixed question involves primarily a factual determination, we review under a deferential substantial evidence standard. (*Ibid*.) If the issue raised is largely legal in nature, we review de novo. (*Ibid*.)

1. The City Committed Unlawful Entry and Detainer

Under Code of Civil Procedure[1] section 1159, a defendant commits forcible entry when, "after entering peaceably upon real property, [it] turns out by force, threats, or menacing conduct, the party in possession." Similarly, section 1160 states that forcible detainer occurs when "[b]y force, or by menaces and threats of violence, [a person or entity] unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise." Section 1172 explains that "[o]n the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer." Thus, to succeed on these causes of action, Cheviot Hills had the burden of establishing its peaceable actual possession of the property and that the City used force or threats to exclude Plaintiff from the property (for forcible entry) and to maintain possession of the property (for forcible detainer).

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

a. Uncontroverted Evidence Establishes Peaceable Actual Possession

The trial court's statement of decision appears to analyze the contractual relationships between the parties and the legal right to possess the property rather than Cheviot Hills' actual possession. The trial court erred in this application of the law because "[t]he right of possession cannot be put in issue, or tried" in forcible entry and detainer cases. (*Sanchez v. Loureyro* (1873) 46 Cal. 641, 642; *see Jordan v. Talbot* (1961) 55 Cal.2d 597, 603 (*Jordan*) ["[O]wnership or right of possession to the property was not a defense to an action for forcible entry."].) The sole issue with regard to possession is whether the plaintiff was in actual possession of the premises. (*See* § 1172.)

Actual possession is satisfied where one can prove that they were "exercising exclusive dominion and control over it." (*McCormick v. Sheridan* (1888) 77 Cal. 253, 256; *accord Bailey v. Weymouth* (1872) 1 Cal.Unrep. 745, 746 [stating that the plaintiff proved possession where "the plaintiff had for four years cultivated in wheat nearly all of the larger tract and all of the smaller parcel in controversy."]; *Goldstein v. Webster* (1908) 7 Cal.App. 705, 708 [finding no possession by the plaintiff where the "[p]laintiff never in fact occupied the stores, either by himself or by any employee or agent[,] never put any of his goods or possessions therein[, and] simply had possession of keys to the stores"].) The plaintiff "must show a possession, *actual, peaceable,* and exclusive; a mere scrambling or interrupted possession, or the exercise of casual acts of ownership over the premises, is not sufficient." (*House v. Keiser* (1857) 8 Cal. 499, 501.)

In *Moore et al. v. Goslin* (1855) 5 Cal. 266, the Supreme Court held that "[t]here could not be legally any more conclusive evidence of actual possession," where the land "had been for more than two years in possession of the plaintiffs, had been improved by them, and at the time of the entry, in their absence, was in express charge of their agents." In another case, the Supreme Court concluded that a plaintiff satisfied the actual possession element of forcible entry where the plaintiff resided on ranch with permission of his son who owned ranch, and acted as the custodian of the ranch in his son's absence. (*Daluiso v. Boone* (1969) 71 Cal.2d 484, 486 (*Daluiso*).)

Here, uncontroverted evidence shows that Cheviot Hills was in peaceable possession of the pro shop. Correspondence and accountings all indicate that Cheviot Hills was occupying and operating the pro shop for more than decade, selling goods and tennis lessons. In its unlawful detainer complaint, the City expressly named Merchant and Cheviot Hills as the entities in possession of the pro shop. At the unlawful detainer trial, both the City and Merchant stipulated that Merchant was not in possession of the premises. Furthermore, at the request of the City, the trial court in the present case held that Merchant was not in possession of the premises. Based on the City's own allegations and assertions at trial, the only possible factual conclusion is that Cheviot Hills was the entity physically possessing and conducting business at the pro shop.

Furthermore, the City does not attempt to dispute the facts showing that Cheviot Hills physically occupied and operated the pro shop. Rather, the City argues that Cheviot Hills was a licensee, focusing on Cheviot Hills' lack of a legal right to occupy the property. Legal status is wholly irrelevant to an unlawful entry and detainer action. "Regardless of who has the right to possession, orderly procedure and preservation of the peace require that the actual possession shall not be disturbed except by legal process." (*Jordan, supra,* 55 Cal.2d at p. 605; *Daluiso, supra,* 71 Cal.2d 484, 498. ["The legislative intent in enacting the forcible entry statute was to establish a summary procedure for the restitution of real property and thereby to promote the settlement of disputes over possession by legal means rather than by self-help."].) " 'A tenant holding over without permission is technically a trespasser. But by statute the owner must use the unlawful detainer procedure, and, if the owner ousts the tenant forcibly, the tenant may regain possession by an action for forcible entry.' " (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1038 (*Spinks*).)

Actual possession is the only possession at issue in this case and it is defined, as described above, by the plaintiff's exercise of exclusive dominion and control over the property, regardless of its status as tenant, licensee, or squatter. Cheviot Hills has satisfied this prong of the unlawful entry and detainer analysis because the

uncontroverted evidence and admissions of fact from the City establish Cheviot Hills' exclusive control over the pro shop.

b. The City's Lock-out Satisfies the Force Element

Although the City did not make willful threats or exhibit menacing conduct in its eviction of Cheviot Hills, its use of padlocks barring Cheviot Hills' entry was sufficient to establish the use of force. Forcible entry and detainer are "not confined to cases where a fight takes place, or physical force or restraint is used, or there are threats of physical harm. . . . No flat breach of the peace is necessary [citation], the statute being enacted to obviate such incidents of self help as occurred here." (*Karp v. Margolis* (1958) 159 Cal.App.2d 69, 73 (*Karp*).) "Landlords thus may enforce their rights '*only* by judicial process, not by self-help.' " (*Spinks, supra,* 171 Cal.App.4th at p. 1038 citing *Jordan, supra,* 55 Cal.2d at p. 604, emphasis added.)

"There is a statutory violation if 'entry was made by breaking locks, without any other show of force, threat or intimidation.' [Citation.] *The same is true where a locksmith is employed to peaceably change the lock.*" (*Spinks, supra,* 171 Cal.App.4th at p. 1039, emphasis added; *Lamey v. Masciotra* (1969) 273 Cal.App.2d 709, 713-715 [holding that changing the locks was sufficient to establish forcible entry and detainer].) "It has long been settled that there is a forcible entry . . . if a show of force is made that causes the occupant to refrain from reentering." (*Jordan, supra,* 55 Cal.2d at p. 607.)

Undisputed evidence shows that the City padlocked the Tennis shop and posted uniform guards outside of the shop. The trial court itself described the City's conduct as a "lock out." The lock-out was used by the City to exclude the Cheviot Hills employees from the premises (satisfying a showing for forcible entry) and hold and keep possession of the property (satisfying a showing of forcible detainer). (*See Jordan, supra,* 55 Cal.2d at pp. 607-608 [stating that forcible entry is completed when the plaintiff is excluded from the property by force]; section 1160 [stating that the plaintiff must show the defendant used force to unlawfully hold and keep possession of the real property to prove forcible detainer].)

We reiterate that "[u]nless a tenant voluntarily vacates, a landlord must have a valid writ of execution or possession to re-acquire possession of the premises in the eviction context." (*People v. Thompson* (1996) 43 Cal.App.4th 1265, 1270.) Self help remedies are impermissible. Even if the City had a valid writ of possession against Merchant, it needed to acquire a writ of possession against Cheviot Hills in order to satisfy due process. "Those who are evicted from their homes pursuant to a writ issued against another receive no notice or hearing whatever . . . their eviction is manifestly contrary to the strictures of the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution." (*Arrieta v. Mahon* (1982) 31 Cal.3d 381, 389.) Without a writ of possession, the City was not entitled to use force and lock Cheviot Hills out of the tennis pro shop.

Based on the foregoing, we conclude that the trial court misapplied the law for forcible entry and detainer. The uncontroverted evidence establishes Plaintiff's peaceable actual possession of the pro shop as well as City's use of force in changing the locks to exclude Plaintiff and its employees from the property. We thus reverse the trial court's judgment in favor of the City with regard to forcible entry and detainer.

2. The City Did Not Violate the Bane Act

Plaintiff also asserts that it should have succeeded on its Bane Act claim. Civil Code section 52.1, also known as the Bane Act, "provides remedies for 'certain misconduct that interferes with' federal or state laws, if accompanied by threats, intimidation, or coercion." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 882 quoting CACI No. 3025 [stating that one of the elements of a cause of action under Civil Code 52.1 is the defendant's interference with the plaintiff's constitutional or statutory rights by threatening or committing violent acts].) "For the purposes of the Bane Act, the term 'threat' means 'an "expression of an intent to inflict evil, injury, or damage to another." ' " (*McCue v. S. Fork Union Elem. Sch.* (E.D. Cal. 2011) 766 F.Supp.2d 1003, 1011.) "The test is whether a reasonable person, standing in the shoes of the plaintiff, [would] have been intimidated by the actions of the defendants and have perceived a

threat of violence." (*Richardson v. City of Antioch* (N.D. Cal. 2010) 722 F.Supp.2d 1133, 1147.) "[T]he multiple references to violence or threats of violence in the statute serve to establish the unmistakable tenor of the conduct that section 52.1 is meant to address. The apparent purpose of the statute is not to provide relief for [an interference with one's rights] brought about by human error rather than intentional conduct." (*Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959.) Importantly, the showing of force or threat of force required by Civil Code 52.1 is much greater than the mere force sufficient to establish forcible entry and detainer.

Here, the trial court found that "after reviewing the video during trial of the lock-out of the concession and tennis courts [the] City, who had three police officers, a Recreation and Parks representative and a videographer present, did not engage in conduct that included willful threats or menacing conduct 'that would create an apprehension of harm in a reasonable person.' " We conclude that this finding is supported by substantial evidence. The video of the lock-out shows that the City's representatives and the police officers never made any threats of violence to Cheviot Hills employees. The City representative repetitively requested the Cheviot Hills employees to leave, and locked the premises after they complied. Their conduct did not constitute violence, did not show an intent to inflict injury, and would not cause a reasonable person to apprehend infliction of evil, injury, or damage to Cheviot Hills property or personnel. The lock-out that occurred here, without more, is insufficient to show force under Civil Code section 52.1.

We thus conclude that substantial evidence supports the trial court's finding that Plaintiff failed to satisfy an essential element of its Bane Act cause of action. We affirm the court's judgment for the City in this regard.

3. Plaintiff's Only Remedy is Nominal Damages

Cheviot Hills argues that it must be awarded restitution of the premises because the City is liable for forcible entry and detainer. In forcible entry and detainer cases, Plaintiff's primary remedy is restitution of the property. (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 219 ["The plaintiff's interest in peaceable even if wrongful

possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry."].) Case law requires the plaintiff to seek restitution of the property in order to even bring a cause of action for forcible entry or detainer. (*Shusett, Inc. v. Home Sav. & Loan Assn.* (1964) 231 Cal.App.2d 146, 154 [stating that the complaint must pray for "immediate return of possession"].) In addition to restitution, a plaintiff may recover all damages which were the natural and proximate consequence of the forcible entry and detainer. (*Karp, supra,* 159 Cal.App.2d at p. 75; *Daluiso, supra,* 71 Cal.2d at p. 495.)

On appeal, the power to order restitution of property upon reversal rests in our sound discretion under section 908 and is governed by equitable principles. (*Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 657 (*Munoz*); *see* § 908 [stating that "the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order"].) It is well established that " '[a] person whose property has been taken under a judgment "is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable." ' " (*Gunderson v. Wall* (2011) 196 Cal.App.4th 1060.)

In cases like this one, " 'appellate courts are not apt to invoke [Code of Civil Procedure section] 908 to reinstate a tenant's right to possession after years have gone by . . . especially if the landlord has already leased (or perhaps *sold*) the property to a third party.' " (*Munoz, supra,* 195 Cal.App.4th at p. 658.) In such cases where the property has already been leased to another party, " 'the only appropriate [and practical] remedy for vacating tenants who prevail on appeal . . . may be a *monetary award* "sufficient to compensate [the tenant] for the property rights not restored." ' " (*Ibid.*)

In this case, another concessionaire has been occupying and operating the pro shop for more than two years since Cheviot Hills' removal. Cheviot Hills was aware that the City awarded the pro shop contract to another concessionaire well before Cheviot Hills was forced out of possession. Outside of this unlawful entry and detainer action, Cheviot Hills lacks any right to possession because Merchant's concessionaire contract expired in

May 2011. In contrast, the new concessionaire (an innocent party) has a contractual right to possession and is presently in possession. (*See San Francisco etc. Soc. v. Leonard* (1911) 17 Cal.App. 254, 262 [stating that although the right of possession is irrelevant to evaluating the elements of forcible entry and detainer, "the question of the right of possession must necessarily arise in such cases, since the power to award restitution of the premises involved rests with the jury or the court"].) To reinstate Cheviot Hills back in the pro shop at this late juncture would be impractical, as well as unfair and inequitable to the new concessionaire. Therefore we will not order restitution on appeal.

Under these circumstances, Cheviot Hills' sole remedy is damages. Yet, the trial court found that Cheviot Hills did not sustain "its burden of proof for any general damages including any damages related to the loss of business, being dispossessed or losing the value of its inventory from the Cheviot Hills Park concession facility because [Cheviot Hills] was unable to transition to a new location." Cheviot Hills does not appeal the trial court's findings regarding damages, as it exclusively argues that "[r]egardless of whether [Cheviot Hills] proved its monetary damages to the trial court's satisfaction, the court would have been required to enter a judgment for possession of the premises if the City was found liable for its forcible entry and detainer." Plaintiff has thus waived any argument as to the trial court's finding of insufficient evidence to establish damages.

"In the absence of such evidence [of damages incurred by forcible entry and detainer] the most that could be done was to award nominal damages. [Citations.] The power to fix the damages, compensatory or nominal, rests with the trier of the facts." (*Pacific States Aux. Corp. v. Farris* (1931) 118 Cal.App. 522, 524; *Karp, supra,* 159 Cal.App.2d at p. 76 ["Lacking proof of actual damages, the most the court could do was to award nominal damages."]; Civ. Code, § 3360 ["When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."].) We therefore remand to the trial court solely for a determination and award of nominal damages to Cheviot Hills.

DISPOSITION

The judgment is reversed as to the trial court's findings regarding forcible entry and detainer. The judgment is affirmed with regard to Cheviot Hills' cause of action for breach of Civil Code section 52.1. The case is remanded for entry of judgment against Defendant City of Los Angeles for forcible entry and detainer, and for the trial court's determination and award of nominal damages to Plaintiff Cheviot Hills. In the interests of justice, the parties shall bear their own costs.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.