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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

HERBERT BALTER et al., Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	B255636 (Los Angeles County Super. Ct. No. SC120740)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Rosario Perry for Plaintiff and Appellant.

Newmeyer & Dillion and John E. Bowerbank for Defendant and Respondent.

Herbert Balter appeals from the trial court's sustaining of a demurrer without leave to amend of his complaint seeking to quiet title to a prescriptive easement. We affirm.

BACKGROUND

On May 17, 2013, Herbert Balter and Maureen Balter (Balter), residents of Santa Monica, filed a verified complaint in Los Angeles Superior Court seeking to quiet title to a prescriptive easement on land owned by the Regents of the University of California (Regents). The complaint alleged that in 1983, Balter purchased the property at 1147 16th Street in Santa Monica. In February 2013, the Regents purchased the property at 1601 Wilshire, which was adjacent to Balter's property to the south. The former owner of 1601 Wilshire was a Jaguar dealership.

Balter alleged he was entitled to a prescriptive easement on the northerly 5 by 150 feet of the 1601 Wilshire property. "The basis of [Balter's] title is [Balter's] use of the easement has been actual, open, exclusive, hostile, and adverse to [Regents] and [Regents'] predecessors for at least the past 20 years [since 1993]. Plaintiff has enclosed the easement with a fence for the last 15 years and has used the easement exclusively thereafter." Since Balter purchased his property in 1983, the "easement area was filled with grass and shrubs. The easement portion would become dirty and contaminated by garbage dumped on it by strangers and customers visiting the Jaguar dealership. Homeless individuals would camp out on the grassy easement and stay overnight at times." Balter complained and the dealership did nothing, so "[a]pproximately 15 years ago" (in 1998), Balter "finally took matters into [his] own hands" and "cleaned up all of the garbage from the easement area, removed the grass, poured cement over the entire easement, put up an iron gate to block off access to the easement by the Jaguar dealership and the rest of the outside community, and began to exclusively use the easement for [Balter's] own parking purposes."

The complaint seeks "a judgment that the plaintiff is the owner of the *above-described easement*" and that the Regents have "no interest in the easement adverse to" Balter. (Italics added.)

On December 11, 2013, Regents filed demurrers to the cause of action on the grounds that (1) for a general demurrer, Balter could not support a cause of action (Code Civ. Proc., § 430.10, subd. (e)), as Balter claimed an "exclusive prescriptive easement," a disguised claim of adverse possession, which was unavailable as Balter had not paid property taxes; or (2) for special demurrer (Code Civ. Proc., § 430.10, subd. (f)), that Balter's cause of action was impermissibly uncertain for stating a cause of action for a prescriptive easement when it is in fact a cause of action for adverse possession. Balter's opposition stated that his complaint sought only a prescriptive easement, which he had established by using the land for five years before enclosing it with the fence: "[Balter] does not seek an *exclusive* prescriptive easement, nor has [Balter] ever claimed that [Balter] is entitled to an exclusive prescriptive easement. . . . [Balter] does not want the right to use the easement area exclusively. Balter acknowledges that [Regents are] the title owner of the easement area and has the right to use the easement area as long as [Regents'] use does not interfere with [Balter's] use of the easement area for parking purposes only." (Boldface omitted.)

The trial court sustained the general demurrer without leave to amend against Balter on January 21, 2014 ("[a]s well-explained in the Regents briefs, based on the facts pled under oath as to their possession of the land, under the authorities cited above (particularly *Kapner* [*v Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182 (*Kapner*)]), Plaintiffs cannot properly state a claim for a prescriptive easement . . . . The demurrer thus must be sustained"). The court stated: "When someone encloses and exclusively possesses a part of a neighboring parcel, that person is not entitled to a prescriptive easement, as a matter of law, because his asserted possessory right in the land is 'not in the nature of an easement.' [Citation.] In other words, 'adverse possession may not masquerade as a prescriptive easement.' [Citation.] Likewise, a prescriptive easement that, as a practical matter, completely prohibits the property owner from using its land is an exclusive prescriptive easement or functional equivalent of an ownership interest. (*Silacci* [*v. Abramson* (1996) 45 Cal.App.4th 558,] 564 (*Silacci*).)" To quiet title to the easement requested by Balter "would be equivalent to giving [Balter] an estate in

the strip without having satisfied all of the requirements for adverse possession." Further, the trial court noted that Balter had not shown he could properly amend the complaint, because to do so Balter would have to "'commit perjury'" by contradicting his initial complaint to allege that he did not use the land exclusively and that he had allowed Regents (and before Regents, the Jaguar dealership) freedom to use it.

The trial court dismissed Balter's complaint without leave to amend and entered judgment on March 24, 2014. Balter filed this timely appeal.

DISCUSSION

We review the trial court's sustaining of the general demurrer independently, and "[o]ur task in reviewing a judgment of dismissal following the sustaining of a demurrer is to determine whether the complaint states a cause of action." (*Coast Plaza Doctors Hospital v Blue Cross of California* (2009) 173 Cal.App.4th 1179, 1185–1186.) We treat the demurrer as admitting all the properly pleaded material facts and consider matters which may be judicially noticed, but we do not treat as admitted contentions, deductions, or conclusions of fact or law. (*Align Technology, Inc. v Tran* (2009) 179 Cal.App.4th 949, 958.) Further, "'we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.'" (*Ibid.*) Because a demurrer tests only the legal sufficiency of the pleading, we accept as true even the most improbable alleged facts, and we do not concern ourselves with the plaintiff's ability to prove its factual allegations. (*Ibid.*) "The trial court exercises its discretion in declining to grant leave to amend. [Citation.] If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend. [Citation.] The plaintiff has the burden of proving the possibility of cure by amendment." (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 78.) "[A] pleader cannot blow hot and cold as to the *facts* positively stated." (*Manti v Gunari* (1970) 5 Cal.App.3d 442, 449.) "A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.) Although a general demurrer does not ordinarily reach

affirmative defenses, it "will lie where the complaint 'has included allegations that *clearly* disclose some defense or bar to recovery.'" (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183.)

"To establish the elements of a prescriptive easement, the claimant must prove use of the property for the statutory period of five years, which use has been (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the true owner; and (4) under claim of right." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305 (*Mehdizadeh*); *Main Street Plaza v. Cartwright & Main, LLC* (2011) 194 Cal.App.4th 1044, 1054; Civ. Code, § 1007; Code Civ. Proc., § 321.) "It is not an ownership right, but a right to specific use of another's property." (*Kapner*, *supra*, 116 Cal.App.4th at p. 1186.) An easement that would divest the owner of the property from "entering or making any use of their land" is not a prescriptive easement. (*Mehdizadeh*, at p. 1305.) Such a claim would be more properly pleaded as adverse possession, which requires the payment of taxes, while a prescriptive easement does not. (*Kapner*, at p. 1186.) "To escape the tax requirement for adverse possession, some claimants who have exercised what amounts to possessory rights over parts of neighboring parcels, have claimed a prescriptive easement. Courts uniformly have rejected the claim." (*Id.* at p. 1187.)

"'"The scope of a prescriptive easement is determined by the use through which it is acquired."'" (*Otay Water District v. Beckwith* (1991) 1 Cal.App.4th 1041, 1047.) A prescriptive easement that has been exclusive for decades may continue where the historical use was the operation of a reservoir by a public water company, and where the proposed recreational use by the owner would unreasonably interfere with contamination of the water supply and other health and safety concerns. (*Id.* at pp. 1044, 1047–1048.) But an exclusive prescriptive easement is "a very unusual interest in land." (*Silacci*, *supra*, 45 Cal.App.4th at p. 564.) "The *Otay Water Dist.* case must be limited to its difficult and peculiar facts. . . . The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, has no application to a simple backyard dispute like this one. An easement, after all, is merely the right to use the land of another for a specific purpose—most often, the right to cross

the land of another. An easement acquired by prescription is one acquired by adverse use for a certain period. An easement, however, is not an ownership interest, and certainly does not amount to a fee simple estate. To permit [the party claiming an easement] to acquire possession of the [owner's] land, and to call the acquisition an exclusive prescriptive easement, perverts the classical distinction in real property law between ownership and use." (*Ibid*.)

The weight of authority prohibits a prescriptive easement for a fence on another's property where the fence prevents the owner from making any use, occupancy, or enjoyment of the land. (*Mehdizadeh*, *supra*, 46 Cal.App.4th at p. 1308; *Silacci v. Abramson*, *supra*, 45 Cal.App.4th at pp. 561, 564 [no prescriptive easement allowed where fence enclosed a portion of owner's yard]; *Kapner*, *supra*, 116 Cal.App.4th at p. 1186 ["Kapner's use of the land was not in the nature of an easement. Instead, he enclosed and possessed the land in question."].) Even without a physical or practical barrier, a claim for a prescriptive easement may be barred as unduly exclusive when "the exclusivity of the use of the surface of the land in the encroachment area . . . has essentially co-opted the encroachment area to an exclusive use" by the claimant. (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1094.)

In this case, Balter's complaint alleges that his use of the land has been "exclusive . . . for at least the past 20 years," and that he "enclosed the easement with a fence for the last 15 years and has used the easement exclusively thereafter." When Balter cleaned up, fenced, and paved the easement area 15 years before filing the complaint, he "put up an iron gate *to block off access to the easement by the Jaguar dealership and the rest of the outside community*, and began to exclusively use the easement for [his] own parking purposes." (Italics added.) Balter seeks "a judgment that he is the owner of the above described easement." The facts he has alleged demonstrate that the "above-described easement" is an exclusive prescriptive easement, which is not available to Balter under the circumstances. Not only did Balter's complaint allege that his use was exclusive for 20 years and that 15 years ago he fenced off the area, but he also alleged that he put up an iron gate to block the owner and the community from

access to it, and thereafter exclusively used the area for his own parking purposes. The complaint's allegations show that the "above-described easement" expressly prohibited Regents from using the land, and therefore Balter did not state a claim for a prescriptive easement.

Balter also states in briefing on appeal that "[t]he fence does not have a lock on it and [Regents] can access the disputed area at any time," but those statements again contradict Balter's allegation in the verified complaint that he put up an iron gate to block off access by the property owner. His argument that Regents can use the land and has the right to share it is disingenuous, given that on reviewing the sustaining of Regents' demurrer we accept the truth of all facts properly pleaded by the plaintiff (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6), and also "must accept as true . . . facts that may be implied or inferred from those expressly alleged." (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) The complaint alleges that Balter's use of the land was exclusive since 1993. The common meaning of "exclusive" is "excluding or having power to exclude," or "limiting or limited to possession, control or use." (Websters Third New Internat. Dictionary (unabridged 1976) p. 793.)

Balter argues on appeal that he used the area "non-exclusively" for five years from 1993 to 1998, and that he therefore alleged facts sufficient to state a cause of action for a prescriptive easement acquired in 1998, at the end of the five-year statutory period. The complaint alleges otherwise, stating that Balter's use of the easement was "exclusive . . . for at least the past 20 years" (since 1993). We also note that in opposition to the demurrer Balter echoed this allegation ("[e]ven without the fence, Plaintiffs would have used the land exclusively for the past 20 years"). Again, we must confine ourselves to the face of the complaint, which alleges that Balter's use from 1993 to 1998 *was* exclusive, and does not allege that subsequent to 1998 the iron gate allowed access by Regents. Further, the complaint does not even allege what use Balter made of the strip of land from 1993 to 1998, and he did not offer to amend the complaint to that effect. As he does not allege that he used Regents' land to park his car during those first five years, he has not stated a claim for a parking easement established in 1998. "'An easement is a

restricted right to *specific, limited, definable use or activity* upon another's property, which right must be *less* than the right of ownership.'" (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1499, first italics added.)

As we do not agree that Balter's complaint alleged facts demonstrating that he acquired a nonexclusive prescriptive easement in 1998, we do not need to consider whether on its face the complaint alleges facts showing that the purported easement was extinguished when Balter fenced the land and gated it to exclude Regents under Civil Code section 811, subdivisions (3) or (4). The parties briefed this issue at the court's direction during a hearing on December 11, 2013 (there is no reporter's transcript on appeal). After reviewing the parties' briefs, the court in a minute order stated that it still believed Balter's sole claim was a mislabeled attempt to quiet title by adverse possession, and Balter was seeking an exclusive right to use the area, in spite of his "attempts to backtrack" with a claim he was seeking a nonexclusive prescriptive easement established in 1998.

The trial court was correct to sustain the demurrer.

We also conclude it was not an abuse of discretion to deny leave to amend. Balter had the burden to show how he could properly amend his complaint, and the trial court stated that Balter had not tried to carry, let alone carried, that burden. The court agreed with Regents that Balter "cannot properly amend the claim, because the only way [he] can do so 'is to commit perjury by changing [his] testimony to claim [he] did not exclusively use the strip of land' and that Regents and its predecessor in interest (the Jaguar dealership) was free to use it." The record does not show that Balter proposed any proper amendments. On appeal, Balter argues he should have been allowed to amend "to clarify that the fence has no lock, that Respondent could have used the land even during the time the fence was installed, and that Appellant used the land for five consecutive years prior to installing the fence." Even had he proposed these amendments in the trial court, the first two contradict the facts as alleged in the initial complaint, and Balter has already alleged the third point (and that the five-year use was exclusive). The court did not abuse its discretion in not allowing amendment.

DISPOSITION

The judgment is affirmed. Costs are awarded to the Regents of the University of California.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.