

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ANTONIO FIGUEROA et al.,

Plaintiffs and Respondents,

v.

AZUSA LAND PARTNERS, LLC, et al.,

Defendants and Appellants.

B238725

(Los Angeles County
Super. Ct. No. KC054645)

APPEAL from a judgment of the Superior Court of Los Angeles County.
R. Bruce Minto, Judge. Reversed and remanded for a limited new trial on the issue of damages on the breach of contract cause of action.

Best Best & Krieger, Jeffrey V. Dunn and Christopher M. Pisano for Defendants and Appellants.

Driskell & Gordon, Robert L. Driskell and Jason A. Fetchik for Plaintiffs and Respondents.

This matter concerns an infill development project within the City of Azusa (the City), known as the Rosedale Project. Plaintiffs Antonio and Lupe Figueroa, who own two parcels adjacent to the Rosedale Project area, contend that the developers of the Rosedale Project, defendants Azusa Land Partners, LLC (ALP), Rosedale Land Partners, LLC, and Rosedale Land Partners II, LLC, breached certain legal and contractual obligations to them, causing them damage. After the presentation of evidence, the trial court agreed with plaintiffs and awarded them judgment.

Defendants appeal, claiming: (1) The trial court erred in finding that plaintiffs were intended third party beneficiaries of the purchase and sale agreement (the agreement) between Monrovia Nursery Company (the nursery) and ALP; (2) Even if plaintiffs were intended third party beneficiaries, defendants did not breach the agreement; (3) Defendants are not liable for negligence because they had no duty to build a street in front of plaintiffs' properties; (4) Defendants are not liable for nuisance because the failure to build a street in front of plaintiffs' properties did not interfere with their enjoyment of their private property; (5) Damages were too speculative to have been awarded; and (6) The trial court erred in awarding damages based upon a valuation approach.

We agree in part. On plaintiffs' breach of contract claim, we conclude that plaintiffs were third party beneficiaries of the agreement and the appellate record supports plaintiffs' claim to the extent defendants breached the agreement by failing to provide an adequate sewer line and an adequate water main line to plaintiffs' properties. However, defendants complied with their responsibilities under the Vesting Tentative Tract Map (the Map); defendants were not required to construct an additional street in front of plaintiffs' properties. Because plaintiffs are only entitled to damages for these breaches, and the appellate record does not support the \$202,000 award for these breaches, the matter is remanded for a limited new trial on the issue of damages.

We reverse the judgment in favor of plaintiffs on the negligence and nuisance causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Plaintiffs own two parcels within the City—one parcel is improved with a single family residence where plaintiffs live; the other parcel, which is immediately to the west of the house parcel, is vacant. Both properties are located on the north side of Sierra Madre Avenue.

Prior to the Rosedale Project, there was a nursery in the City. In around 2000, the nursery sought to entitle the property on which it was located for a residential development project (the Rosedale Project). The nursery hired various consultants to begin the entitlement process; one firm prepared the design for the Rosedale Project, and that design eventually became the Map.

Notably, the design realigns Sierra Madre Avenue. In order to give plaintiffs access to Sierra Madre Avenue, the consulting firm designed a cul-de-sac with a private driveway. That was the design the City wanted.

In 2003, the City Council voted to approve the Map. The matter was then put to a direct vote of the people, and, in early 2004, a special election was called. In the 2004 special election, the Rosedale Project passed, with about 75 percent of the people voting to affirm the City's approval of the Specific Plan, which contained the same project design as was in the Map that had been approved by the City Council. The voters also approved the City entering into a development agreement with the nursery.

On May 27, 2004, the nursery and the City entered into a development agreement, which gave the nursery the vested rights to develop the Rosedale Project. Because the nursery was not a developer, its plan was to entitle the project and then sell it to a development company. Ultimately, the nursery sold the project to ALP.¹

On May 28, 2004, the nursery and ALP executed the agreement, which set forth the terms of sale for the Rosedale Project. As part of the agreement, the nursery assigned

¹ In 2010, Rosedale Land Partners, LLC acquired part of the property and then transferred it to Rosedale Land Partners II, LLC, who now intends to develop the Rosedale Project.

to ALP, and ALP assumed the nursery's obligations under, the "commitments [the nursery] . . . made to those certain six (6) residents along Sierra Madre Avenue as set forth in Exhibit F of the Exhibit Binder." Paragraph 3 of Exhibit F lists as one of the commitments "New permanent access in the form of a cul-de-sac street, as shown on Vesting Tentative Tract Map 54057." Paragraph 5 of Exhibit F provides: "A sewer main line shall be located in the new cul-de-sac street along the frontage of these properties and made available to those residences for connection into the sewer system."

The agreement also provides, in relevant part: "The provisions of this Agreement and of the documents to be executed and delivered at Closing are and will be for the benefit of [the nursery] and [ALP] only and are not for the benefit of any third party, and accordingly, no third party shall have the right to enforce the provisions of this Agreement or of the documents to be executed and delivered at Closing."

Procedural Background

Plaintiffs initiated this action on January 8, 2009. Their third amended complaint, which is the operative pleading, alleges causes of action for nuisance, negligence, and breach of contract against defendants. Their nuisance claim is based upon the theory that defendants replaced plaintiffs' access to Sierra Madre Avenue with a "dead end lane that cannot be safely used." In their negligence cause of action, plaintiffs aver that defendants breached the duty to conform to the standard of conduct established by law. And, in the breach of contract cause of action, plaintiffs allege that defendants breached the agreement "by failing to construct a cul-de-sac street in a good and professional manner" and "by failing to construct a sewer line that is available to Plaintiffs' undeveloped lot, and by failing to maintain water service to Plaintiffs' lot."

The matter proceeded to a court trial, and on September 12, 2011, the trial court issued its memorandum of decision. On plaintiffs' breach of contract claim, the trial court found that plaintiffs were the intended third party beneficiaries of the agreement and could enforce that contract. Defendants breached the agreement "by not designing and building a dedicated public road in front of Plaintiffs' properties." In so doing, the trial court rejected defendants' interpretation of the documents that Exhibit F of the

purchase and sale agreement only required “that some portion of Plaintiffs’ access be over a public road.” And, “[g]iven the court’s finding that Plaintiffs were contractually entitled to a dedicated public road in front of their properties, they were also necessarily entitled to those other attributes of public streets dictated by the applicable codes.”

The trial court further determined that the agreement was “breached as to the failure of [defendants] to have the water and sewer utilities brought to the front of the lot, (or to otherwise provide Plaintiffs with reasonable, enforceable, access to the utilities through appropriate easements or other legal instruments), and by planning and constructing the sewer line at an elevation that prevents normal hook up of Plaintiffs’ lot without incurring extraordinary expense.”

For the same reasons, the trial court found for plaintiffs on their negligence and nuisance causes of action.

Judgment was entered, and defendants’ timely appeal ensued.

DISCUSSION

I. Breach of Contract

A. Were Plaintiffs Third Party Beneficiaries of the Agreement?

Plaintiffs assert a claim for breach of contract against defendants based upon their theory that they are third party beneficiaries of the agreement.

“California law permits third party beneficiaries to enforce the terms of a contract made for their benefit.” (*Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1485; see also Civ. Code, § 1559.)

“The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.” (*Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 297; accord, *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1232; *Souza v. Westlands Water Dist.* (2006) 135

Cal.App.4th 879, 891 (*Souza*); *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022 (*Spinks*).) In other words, “the doctrine presupposes that the defendant made a promise which, if performed, would have benefited the third party.” (*Souza, supra*, at p. 891.)

“Under the intent test, ‘it is not enough that the third party would incidentally have benefited from performance.’ [Citation.]” (*Spinks, supra*, 171 Cal.App.4th at p. 1022.) “‘The contracting parties must have intended to confer a benefit on the third party.’ [Citation.] ‘The effect of [this rule] is to exclude enforcement by persons who are only incidentally or remotely benefited.’ [Citation.]” (*Ibid.*) “While intent is pivotal, there is no requirement that ‘both of the contracting parties must intend to benefit the third party. . .’ [Citation.] Rather, ‘it is sufficient that the promisor must have understood that the promisee had such intent.’ [Citations.]” (*Id.* at p. 1023.) “Ultimately, the determination turns on the manifestation of intent to confer a benefit on the third party. [Citation.] ‘Ascertaining this intent is a question of ordinary contract interpretation.’ [Citation.]” (*Ibid.*)

We agree with the trial court’s conclusion that plaintiffs are intended third party beneficiaries of the agreement. The nursery assigned all of its obligations to defendants, including those specified in Exhibit F. Exhibit F specifically identifies which commitments were assigned and even names plaintiffs.

In urging us to reverse, defendants rely heavily upon paragraph 16.18 of the contract, which seems to preclude any third party claims. We are not convinced. In reviewing the agreement de novo (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1708), it is, at best, inconsistent and thus requires parol evidence to aid in deducing the parties’ intent. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 376–377; see also *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 72–73.) The only parol evidence offered here was from Peter Carlson (Carlson), a consultant on the Rosedale Project. Carlson testified that the nursery and ALP did not intend to confer contract beneficiary status upon the neighbors on Sierra Madre Avenue. But, the trial

court found Carlson’s testimony not credible in light of Exhibit F and public policy. After all, “[b]arring plaintiffs from enforcing [compliance with Exhibit F] despite its clear intent to benefit them would contravene the statutory policy of granting a remedy to those expressly benefited as third party beneficiaries and would render [Exhibit F] a nullity.” (*Prouty v. Gores Technology Group, supra*, 121 Cal.App.4th at p. 1235.) We agree.

B. Did Defendants Breach the Agreement?

Having decided that plaintiffs were intended third party beneficiaries of the agreement, the next issue presented is whether defendants breached the agreement.

1. *Rules regarding contract interpretation*

In resolving this issue, we are called upon to interpret the agreement. As set forth above, we do so de novo. (*Postal Instant Press, Inc. v. Sealy, supra*, 43 Cal.App.4th at p. 1708.)

“‘The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the “mutual intention” of the parties. “Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The ‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage’ (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)” [Citations.]’” (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647–648.)

“When parties dispute the meaning of contractual language, the trial court must provisionally receive extrinsic evidence offered by the parties and determine whether it reveals an ambiguity, i.e., the language is reasonably susceptible to more than one possible meaning. If there is an ambiguity, the extrinsic evidence is admitted to aid the interpretative process. ‘When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the [factfinder].

[Citations.]’ [Citation.]” (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP*, *supra*, 201 Cal.App.4th at pp. 376–377; see also *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, *supra*, 175 Cal.App.4th at pp. 72–73.)

2. *Defendants did not breach the agreement by constructing a driveway*

The agreement provides that defendants are obligated to comply with the “commitments [the nursery] has made to those certain six (6) residents along Sierra Madre Avenue as set forth in Exhibit F of the Exhibit Binder.” Paragraph 3 of Exhibit F describes the commitment to plaintiffs as “New permanent access in the form of a cul-de-sac street, as shown on Vesting Tentative Tract Map 54057.” Paragraph 5 provides that a “sewer main line shall be located in the new cul-de-sac street along the frontage of these properties and made available to those residences for connection into the sewer system.”

According to plaintiffs, defendants committed at least two breaches of the agreement. First, they contend that defendants breached the agreement by building what they characterize as a “private driveway”; according to defendants, they complied with their contractual obligations by building what they did. We agree with defendants. Exhibit F required defendants to build “a cul-de-sac street, as shown on Vesting Tentative Tract Map 54057.” That is what they did. Thus, there was no breach.

To the extent required, parol evidence supports defendants as well. The only parol evidence identified in the parties’ appellate briefs is the trial testimony from Carlson. He testified that the Map showed a private driveway design all along. The nursery’s engineer prepared the private driveway design, and it was approved by the City Council as part of the Map. The Map was then copied into the Specific Plan in multiple places. It follows that defendants’ duty under the agreement was to build a cul-de-sac street with driveway access to plaintiffs’ properties. Again, because defendants did just that, there was no breach.

In urging us to affirm the trial court’s judgment, plaintiffs direct us to the Specific Plan, which requires the construction of a “public street” to connect the residences to Sierra Madre Avenue, and which does not mention a driveway. Plaintiffs seem to contend that this language means that their properties would sit on a street without a

driveway. But, plaintiffs do not explain how a cul-de-sac is not a public street. Moreover, the agreement does not reference the Specific Plan. And, even if it did, nothing in the Specific Plan requires defendants to build a public street in front of plaintiffs' properties. All the Specific Plan provides is that a public street connect the residences to Sierra Madre Avenue.

Moreover, the Map is incorporated into the Specific Plan. Plaintiffs attempt to get around this point by claiming that it is not the *real* vesting tentative tract map. The problem for plaintiffs is that they did not challenge the foundation of the maps at trial and did not object to their admission into evidence. Having failed to raise this argument below, they cannot do so on appeal. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.) And, in any event, all iterations of the Map design from 2002 through 2004 show the exact same design of a cul-de-sac street ending to the east of plaintiffs' property and then a private driveway for plaintiffs.

3. Defendants breached the agreement by failing to provide sewer access and a water main line

Second, plaintiffs defend the judgment by arguing that, based upon the evidence presented, the trial court rightly determined that they had not been given the water and sewer access that they had been promised. Specifically, they argue that defendants "did not maintain sewer and water lines in front of" plaintiffs' properties. Notwithstanding counsel's representation at oral argument, it does not appear that defendants adequately challenged this finding in their appellate briefs, thereby forfeiting this position on appeal. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

Setting this procedural issue aside, we note that substantial evidence supports the trial court's determination that defendants breached the agreement in this regard. Samuel Giron (Giron), a civil engineer and plaintiffs' expert, testified that the sewer and water collection systems established by defendants were not extended far enough to service plaintiffs' parcels properties. He also testified that the water main line needed to be extended. This testimony supports the trial court's finding that defendants breached their

obligation to provide proper sewer and water line access to plaintiffs, which would support at least a partial judgment in favor of plaintiffs.

C. Damages

We are presented with a judgment, which awards plaintiffs damages for breach of contract. As noted above, we agree with the trial court's finding that defendants committed these two breaches of contract. But, plaintiffs' evidence of damages related to these breaches is not sufficiently definite for us to remand the matter with directions to enter judgment with a different amount of damages. Thus, we must remand the matter for a new trial limited to the issue of damages stemming from defendants' breach of the agreement delineated herein.

II. *Negligence*

Plaintiffs' negligence claim is based upon the theory that defendants harmed them "by having a 16-foot driveway in front of their property, when the other houses on their street were given a new public roadway." A legal duty is one that is "'imposed by statute, contract or otherwise, owed by the defendant to the person injured.'" (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8.) Here, plaintiffs have not identified any legal duty to provide a different public roadway in front of their properties. Thus, they are not entitled to judgment on the negligence cause of action.

III. *Nuisance*

To prevail on a nuisance claim, a plaintiff must show interference with the use and enjoyment of property that is objectively substantial and unreasonable. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938–939.) As with their negligence claim, plaintiffs' nuisance cause of action is based upon defendants' assertion that "construction of the driveway in front of their property [has] obstructed the reasonable use and enjoyment of their property." The construction of the driveway here, which is consistent with the Map that was approved by both the City Council and the voters, was not interference with use that was objectively substantial and unreasonable. It follows that judgment on this cause of action is reversed as well.

DISPOSITION

The judgment of the trial court is reversed. The matter is remanded for a limited new trial on the issue of damages on the breach of contract cause of action only. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ