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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MEIR J. WESTREICH et al.,

Plaintiffs and Appellants,

v.

RANDALL R. HIGA et al.,

Defendants and
Respondents.

B270413

(Los Angeles County
Super. Ct. Nos. BC488506,
BC578660)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Holly E. Kendig and William F. Fahey, Judges. Affirmed in part and dismissed in part.

Meir J. Westreich for Plaintiffs and Appellants.

Fidelity National Law Group, Kevin R. Broersma; Hanger Steinberg Shapiro & Ash, Nilofar Nouri, for Defendants and Respondents.

INTRODUCTION

Spouses Meir Westreich and Maria Ruiz (plaintiffs) brought two actions against their next-door neighbors, Randall and Janice Higa (defendants). The first action concerned a boundary line dispute and ownership of the fence that separated their properties. Defendants prevailed.

While the first action was pending, plaintiffs filed a new action for breach of privacy, retaliation for the exercise of their rights to free speech and to petition, intentional and negligent infliction of emotion distress, and trespass. The trial court struck this complaint on defendants' anti-SLAPP motion and awarded defendants \$41,207.76 in attorney fees and costs.

Plaintiffs filed separate appeals from the judgment in the first action and the anti-SLAPP order in the second. We consolidated the appeals and now affirm the judgment in the first action and dismiss the appeal in the second.

FACTUAL AND PROCEDURAL BACKGROUND

I. First Action—Case No. BC488506

Plaintiffs' operative pleading, the first amended complaint, alleged causes of action for quiet title, breach of express and/or implied contract, agreed boundary, prescriptive easement, injunctive and declaratory relief, and trespass.¹ Plaintiffs alleged the following:

Westreich bought the property at 6003 Eucalyptus Lane in Los Angeles (6003 Eucalyptus) with another individual, Rosa Martinez, on March 20, 1989. At the time of the Westreich

¹ Defendants cross-complained, alleging many of the same theories. They voluntarily dismissed their cross-complaint without prejudice.

purchase, the neighboring property, 6007 Eucalyptus Lane (6007 Eucalyptus) was owned by Roy and Jane Semones. A 180-foot long, five-foot-high wire fence, partially mounted on a retaining wall, separated the properties. In 1989, Westreich and the Semones agreed the fence was on Westreich's property and owned by him. Defendants purchased 6007 Eucalyptus from the Semones in 1992. In 1997, questions concerning the property line arose; but the parties agreed to abide by the boundary decision reached earlier between Westreich and the Semones. In June 2012, however, defendants recorded a Record of Survey that indicated the property line was approximately four and a half inches in defendants' favor along the 180-foot boundary. On information and belief, plaintiffs alleged defendants sought to take possession of the disputed area in order to remove the retaining wall and wire fence.

The trial court granted defendants' motion for summary adjudication of issues as to the causes of action for agreed boundary, breach of contract, prescriptive easement, and injunctive and declaratory relief. It denied summary adjudication on the quiet title and trespass causes of action. Plaintiffs voluntarily dismissed without prejudice the trespass cause of action. The parties tried the quiet title cause of action to the court. Defendants prevailed. The trial court found the 2012 recorded survey established the legal property line and, consequently, defendants' ownership of most of the fence.

The trial court's statement of decision noted the original property survey was conducted in 1907. Westreich moved into 6003 Eucalyptus in 1989. Defendants purchased 6007 Eucalyptus in 1992. In 2012, in connection with landscaping work on their property, the property lines were surveyed. On

June 5, 2012, the County of Los Angeles recorded the survey map (the Record of Survey) prepared by defendants' surveyor, Raymundo Lombera.

The statement of decision detailed the testimony of the parties' various experts. Plaintiffs' expert, Steve Opdahl, was not retained to survey the disputed property line. Opdahl suggested there were three options in terms of the property line's location, but offered no opinion on which one was correct. He also offered no opinion as to the accuracy of Lombera's survey. Opdahl testified any opinion by him would be speculation.

Defense expert Michael Tortomasi reviewed tract maps, city field book notes, deeds, and other documents. Tortomasi visited the property site, found monuments, and took measurements of the property. As required by prevailing acceptable survey methods, he retraced the steps of the original survey of the tract. Tortomasi's survey map identified 29 monuments and detailed monument notes, a requirement of the California Professional Land Surveyor's Act. The trial court found his survey to be independent and thorough.

Tortomasi's survey differed from Lombera's by only one and a quarter inches in the east-west direction and about two inches in the north-south direction. As his determination of the property line was not materially different from Lombera's, Tortomasi was not required to record his survey. He testified the correct property line was reflected in Lombera's Record of Survey. According to Tortomasi, Opdahl's work was not consistent with the California Professional Land Surveyor's Act. The trial court found Tortomasi to be a highly competent and credible witness.

Defendants called Peter Martin as a percipient witness. Westreich retained Martin, a surveyor, to check Lombera's work.

Martin, too, found no material discrepancies between his and Lombrera's work. Martin orally reported his findings in a conversation with Westreich and Janice Higa. In a separate conversation, Martin told Lombrera he thought Lombrera's Record of Survey was accurate. The trial court found Martin's testimony to be straightforward and highly credible.

The trial court discounted the testimony of Bradley Kuric, a general contractor retained by Westreich as a construction expert. The trial court found Kuric's opinions concerning the retaining wall weak, not credible, and lacking foundation.

Citing *Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 736, the trial court held the location of a disputed boundary line is proven by retracing the footsteps of the original surveyor whose survey set the boundaries. It found Lombrera and Tortomasi followed the required procedures and Opdahl did not. The trial court concluded Lombrera's Record of Survey correctly established the property line.

Based on Tortomasi's testimony, the trial court found the retaining wall, which ran in a north-south direction, sat entirely on 6007 Eucalyptus. It further found the north-south wire fence sat on the 6007 property line, except for the last most northerly 20 feet. The trial court also dissolved the preliminary injunction issued at plaintiffs' behest.

II. Second Action—Case No. BC578660

While their first action was ongoing, plaintiffs filed the second lawsuit. They complained defendants were harassing them with a protracted campaign of surveillance and trespass in retaliation for plaintiffs' property line lawsuit.

Defendant filed an anti-SLAPP motion to strike all the causes of action in plaintiffs' complaint (breach of privacy, retaliation for the exercise of their rights to free speech and to petition, intentional and negligent infliction of emotion distress, and trespass). The trial court granted the motion, dismissed plaintiffs' action with prejudice, and awarded defendants \$36,000 in attorney fees. Plaintiffs filed a motion to reconsider the order granting defendants' anti-SLAPP motion and awarding attorney fees; it was denied.

DISCUSSION

I. The Trial Court Properly Granted Summary Adjudication for Defendants in the First Action

Plaintiffs contend the trial court erred in granting summary adjudication of their agreed boundary, breach of contract, and prescriptive easement causes of action.² They do

² In setting forth the standard of review for an order granting summary adjudication, plaintiffs argue the trial court erred in issuing a blanket ruling sustaining nearly all of defendants' objections to Westreich's and Opdahl's declarations. Plaintiffs' argument fails. Even if the trial court erred, plaintiffs neither argue nor demonstrate prejudice from any error. (*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1449 [reversal for an erroneous blanket evidentiary ruling is required only on a showing of prejudice]; *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119 [a party challenging a trial court's evidentiary rulings on summary judgment has two burdens on appeal—to show affirmatively the rulings were error and to establish prejudice]; see *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038 (*Winfred D.*) [prejudice from an evidentiary ruling is not

not challenge the trial court’s summary adjudication of the cause of action for injunctive and declaratory relief.

We review de novo an order granting summary adjudication. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 950-951.) We view the evidence and all reasonable inferences therefrom in the light most favorable to plaintiffs, as the parties opposing the motion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A. Agreed Boundary Agreement Cause of Action

Our Supreme Court has long recognized the agreed-boundary doctrine. (*Ernie v. Trinity Lutheran Church* (1959) 51 Cal.2d 702.) The doctrine “properly may be invoked only under carefully specified circumstances. . . . [It] requires that there be [1] an uncertainty as to the true boundary line, [2] an agreement between the coterminous owners fixing the line, and [3] acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position.” (*Bryant v. Blevins* (1994) 9 Cal.4th 47, 55.) “Generally, an agreed boundary agreement must be made and carried out by the actual owners of the coterminous properties.” (6 Miller & Starr, Cal. Real Estate (4th ed. 2017) § 17:45; *Sneed v. Osborn* (1864) 25 Cal. 619, 624 (*Sneed*) [“To be effectual for any purpose, [an agreed boundary] must be done while the parties own the lands on both sides of the line they thus locate”].)

Defendants offered into evidence the March 20, 1989 grant deed for 6003 Eucalyptus. It established that Martinez, an

presumed; the burden is on the party challenging the ruling to demonstrate affirmatively the error was prejudicial].)

unmarried woman, purchased the property in her sole name on that date. Westreich did not become title owner of 6003 Eucalyptus until June 27, 2007, when Martinez transferred ownership to him by grant deed. Westreich was not the record owner of 6003 Eucalyptus in 1989 or 1997 when the agreed boundary agreements were allegedly made.

Despite allegations in the first amended complaint that Westreich purchased 6003 Eucalyptus in 1989, plaintiffs concede Westreich did not hold title to the property before 2007. They nonetheless maintain the definition of property ownership under *Sneed* is much broader than title ownership. They argue Westreich had an equitable interest in the property because he financed Martinez's purchase in 1989 and acted as her agent, he had an option from Martinez to pay off her bank loan and acquire title, he always occupied the property, and he made substantial improvements to it. Plaintiffs cite no authority for this proposition, and nothing in *Sneed* supports this analysis and conclusion.

The *Sneed* holding aside, plaintiffs are judicially estopped from claiming Westreich had an ownership interest in 6003 Eucalyptus at the time of the alleged agreed boundary agreements. He filed a Chapter 13 bankruptcy petition in April 1995. Under penalty of perjury, Westreich reported in the Schedule A document that he owned no real property. Elsewhere, he described his interest in 6003 Eucalyptus as a right of first refusal to purchase the property if he was current with his obligations associated with the agreement. Westreich's disavowal of real property ownership statements in the bankruptcy matter preclude plaintiffs from taking a contrary

position in this action. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 117-118.)

B. Breach of Contract Cause of Action

Plaintiffs contend the trial court failed to rule on their contract claims other than their agreed boundary claim. We disagree.

This cause of action was based on alleged breaches of the 1989 and 1997 agreed boundary agreements. When the trial court determined no such agreements existed because Westreich was not the owner of 6003 Eucalyptus, this cause of action failed as a matter of law.

C. Prescriptive Easement Cause of Action

Alternatively, plaintiffs claimed ownership of the disputed property by prescriptive easement. The elements of a cause of action for prescriptive easement are a plaintiff's open and notorious, continuous and uninterrupted use of real property for at least five years. The use must be both hostile to the interests of the true owner and under a claim of right. (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.) A claim of right "means that the property [is] used without permission of the owner." (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450.) Use of real property with the owner's permission is not hostile to the owner's interests. (*Kerr Land & Timber Co. v. Emmerson* (1965) 233 Cal.App.2d 200, 231.)

Until the 2012 Record of Survey, defendants—and the Semones before them—permitted plaintiffs to use the disputed property. It matters not that the agreed boundary agreements were subsequently declared ineffective based on Westreich's lack

of an ownership interest. Defendants' permission defeats plaintiffs' prescriptive easement claim.

Plaintiffs seek to avoid this result with evidence they made improvements to the real property and performed work on the wire fence and boundary wall without first obtaining permission, suggesting this satisfies the claim of right and hostile possession requirements. Not so. Plaintiffs were on the property with defendants' permission; their activities did not transform their permissive use into a hostile one.

II. Plaintiffs Failed to Prove the Recorded Boundary Line was Inaccurate

The Record of Survey established the boundary line between the two properties. In order to prevail on the cause of action for quiet title, plaintiffs had the burden to prove the Record of Survey was inaccurate. The trial court concluded plaintiffs did not meet their burden. Plaintiffs argue erroneous evidentiary rulings and undisputed evidence in their favor require reversal of the trial court's decision on the quiet title cause of action. We disagree.

A. Evidentiary Rulings

Plaintiffs challenge three evidentiary rulings. They first argue the trial court did not permit them to examine Randall Higa about a letter Westreich sent defendants concerning ownership of the retaining wall. But the record clearly demonstrates plaintiffs examined Mr. Higa about the letter. There was no evidentiary error on this score.

Next, plaintiffs fault the trial court for overruling their hearsay objections to testimony concerning Martin's statement to

Lombera concerning the accuracy of the Lombera Record of Survey. The argument is incomplete, however, as plaintiffs did not attempt to explain how the admission of that testimony, even if erroneous, was prejudicial.³ (Cal. Const., art. VI, § 13 [no reversal of judgment for erroneous admission of evidence without a showing of a miscarriage of justice]; Evid. Code, § 353 [same]; *Winfred D.*, *supra*, 165 Cal.App.4th at p. 1038 [the party challenging an evidentiary ruling must affirmatively demonstrate prejudice].)

The third claimed evidentiary error concerns defendants' cross-examination of Ruiz. Plaintiffs argue it was designed to improperly impeach her with character evidence in violation of Evidence Code section 1101, subdivision (a). Plaintiffs' failure to object in the trial court forfeits the issue on appeal. (*People v. Medina* (1995) 11 Cal.4th 694, 729; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1336.)

B. Merits

On the merits of the quiet title cause of action, plaintiffs contend they satisfied their burden with "undisputed evidence impeach[ing] defense surveys and validat[ing] plaintiffs' boundary survey alternatives." The trial court, however, determined plaintiffs failed to meet their burden of proof to establish a boundary line that materially differed from the

³ Defendants did not have the burden of proof in this case. The boundary line was as depicted on the recorded Lombera survey unless plaintiffs could prove otherwise. Martin's testimony at best was cumulative of that of Tortomasi, which the trial court credited.

Lombera Record of Survey. We agree. The trial court reached the right result.

When a trial court determines there is a failure of proof, we examine “whether the evidence compels a finding in favor of the appellant as a matter of law.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*)). Specifically, we must determine “whether the [plaintiff’s] evidence is (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’” (*Ibid.*) We are also guided by the general principle that “in reviewing a judgment based upon a statement of decision following a bench trial, “any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.”” (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.) We do not reexamine and reevaluate the evidence to determine whether substantial evidence supported plaintiffs’ allegations. (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466; *I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

This bench trial was essentially a battle of experts. Plaintiffs bore the burden to prove Lombera’s Record of Survey was inaccurate. In concluding plaintiffs failed to carry their burden of proof, the trial court discounted Opdahl’s expert testimony, finding Opdahl had no opinion on the correct property line between 6003 and 6007 Eucalyptus and had not opined that the Lombera Record of Survey was inaccurate. It also rejected Kuric’s expert testimony, finding “Mr. Kuric did not present credible testimony. His testimony was exceedingly weak and without foundation. An expert opinion has no value if its basis is unsound.” In short, plaintiffs’ evidence was not uncontradicted,

unimpeached, or of such great weight as to have precluded the findings in defendants' favor. (*I.W., supra*, 180 Cal.App.4th at p. 1528.)

III. Plaintiffs Failed to Timely Appeal from the Anti-SLAPP Ruling

Defendants assert plaintiffs' separate appeal from the orders granting the anti-SLAPP motion and awarding attorney fees and denying the motion for reconsideration was untimely and must be dismissed. Defendants are correct.

The trial court granted defendants' anti-SLAPP motion and awarded attorney fees on October 8, 2015. Plaintiffs' motion for reconsideration was filed October 29, 2015. The trial court denied the reconsideration motion on January 26, 2016, and defendants served notice of that order the same day. Plaintiffs filed a notice of appeal challenging both orders on February 25, 2016.

The granting of defendant's anti-SLAPP motion was an appealable order. California Rules of Court, rule 8.108(e) is the controlling authority in cases involving a motion for reconsideration of an appealable order. It provides, "If any party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of:

- "(1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;
- "(2) 90 days after the first motion to reconsider is filed; or
- "(3) 180 days after entry of the appealable order."

In this case, rule 8.108(e)(2) provides the earliest date. Plaintiffs filed their motion for reconsideration October 29, 2015. The time to appeal accordingly expired 90 days later, on January 27, 2016. Plaintiffs' notice of appeal was not filed until February 25, 2016, 30 days after defendants served notice of entry of the order denying the motion for reconsideration.

The notice of appeal was untimely, and the appeal must be dismissed. (Cal. Rules of Court, rule 8.104(b).) Because plaintiffs' appeal from the order granting defendants' anti-SLAPP motion was untimely, the order denying plaintiffs' motion for reconsideration is not reviewable. (See Code Civ. Proc. § 1008, subd. (g).)⁴

⁴ Code of Civil Procedure section 1008, subdivision (g) states: "An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order."

DISPOSITION

The judgment in case number BC488560 is affirmed. The appeal from the order in case number BC578660 is dismissed. Defendants are awarded their costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.