SMITH v. CARTWRIGHT

21CV45132

PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendant is the record owner of 5348 Messing Road in Valley Springs, and leased the property to plaintiff with an option to purchase at a fixed sum within two years. According to plaintiff, defendant reneged on the agreement, and secretly recouped rent from tenants in the "front" house on the property despite plaintiff's rental agreement purportedly covering both residences. The history between the parties is complex, as reflected in the various legal proceedings between them. (See 20CH45068, 21UD13373, 21UD13416, and 21CH45278.) In this seemingly straightforward civil action, plaintiff alleges thirteen (13) causes of action, ranging from breach of contract to invasion of privacy and assault.

Before the Court is plaintiff's motion for reconsideration of this Court's ruling denying plaintiff's motion for judgment on defendant's unverified answer, pursuant to CCP §438(c)(1)(A). As set forth in the Minute Order, the Clerk's Notice of Ruling, and the formal Written Order, plaintiff's motion was denied not because plaintiff's counsel forgot to request argument pursuant to Local Rule 3.3.7 but, rather, because the absence of a verification is an issue which must be addressed via a motion to strike (CCP §436(b)), and not a Motion for Judgment on the Pleadings. Furthermore, this Court found that plaintiff sat far too long on his rights to complain almost a year later about a missing verification, i.e. laches which blocks a request for equitable relief. In keeping with the overarching axiom that legal disputes are to be decided on the merits whenever possible, and the fact that the defect here was entirely (and easily) curable, this Court denied the MJOP and gave defendant leave to file a *verified* First Amended Answer – which he has since done.

Plaintiff's MJOP – which was directed to the original answer – is now moot as that pleading – whether defective or not – has been superseded and is no longer of any import. (See *State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130-1131.) Even if this Court were to reconsider the MJOP, given that the defect in the answer was entirely curable, plaintiff's best day would be "grant with leave to amend" and that has already occurred, and the alleged defect has been cured. (See, *e.g., Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360; *Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768-769; *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.) There is absolutely nothing substantive to be gained from this motion for reconsideration, and yet plaintiff zealously pushes forward.

[Before explaining why plaintiff's motion for reconsideration is utterly without merit, and arguably sanctionable (*infra*), this Court would like to remind Attorney Loving of his

professional obligations set forth at CRPC Rule 3.1(a), 3.3(a), 4.1, and 8.2(a). The motion for reconsideration takes what this Court considers to be remarkable liberties with truth, integrity, and respect for the Court. (See, *e.g.*, 2:12-17; 4:13-23; 5:13-19; 6:11-16; 7:6-8; 9:16-20; 10:1-9; 12:10-21.)]

As to the merits of the motion for reconsideration…

First, in this County, oral argument must be affirmatively requested for any law and motion matter. The local rule is rather explicit: "the tentative ruling shall become the ruling of the court, unless a party desiring to be heard so advises the Court no later than 4:00 p.m. on the court day preceding the hearing including advising that all other sides have been notified of the intention to appear." (Calaveras County Superior Court Local Rule 3.3.7.) This rule tracks, and is authorized by, CRC 3.1308(1). Plaintiff's counsel included this very warning in the Notice accompanying his own MJOP, and the same warning appears on this Court's website where tentative rulings are posted. Although plaintiff's counsel is correct that the courtesy notice served by the Court on 07/22/22 did state that the parties were "directed to appear" on a different day for the motion, pursuant to plaintiff's Notice, this Court's website, CRC 3.1308(a)(1), and CCSC Local Rule 3.3.7, everyone understood that no hearing would occur absent a request for oral argument. (See also *Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1060.) Counsel's impression that a hearing would occur either way, based solely on the language of that courtesy notice, reflects a mistake of law, and legal errors are not curable on a motion for reconsideration.

Second, in this County, oral argument – when permitted – may not exceed ten (10) minutes and cannot go beyond the written papers already on file. (Calaveras County Superior Court Local Rule 3.3.) Despite counsel's protestations, there is no "constitutional right" to oral argument in civil litigation. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1247; *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 742.) Given this, and the inherent limits with oral argument, many appellate courts have concluded that oral argument is fundamentally "collateral" to the substantive issues of the motion, and does not constitute "a new circumstance" warranting reconsideration. (See, *e.g., Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690-691; *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; in accord, *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670.)

Third, plaintiff tacitly approved the ruling submitted by defendant and entered by this Court on 08/18/22. Pursuant to CRC 3.1312(a), plaintiff had five days to either approve the proposed ruling or "state any reasons for disapproval." Failing to set forth those reasons, plaintiff would be automatically deemed to have "approved" the proposed ruling. Here, Attorney Loving advised defense counsel via email on 08/06/22 that his client was considering options to challenge the substance of the ruling, but never once articulated any issue (procedural or substantive) with the proposed ruling itself. Attorney Loving simply stated that, because he disagreed with this Court's order, "hell

will freeze over before the (sic) I sign it." This is a tacit admission that the proposed ruling was correct, to wit: "neither party requested oral argument."

Fourth, plaintiff's motion for reconsideration was technically late. A motion for reconsideration must be made "within 10 days after service upon the party of written notice of entry of the order" subject to reconsideration. (CCP §1008(a); see *Novak v. Fray* (2015) 236 Cal.App.4th 329, 335; *Wilson v. Science Applications Internat. Corp.* (1997) 52 Cal.App.4th 1025, 1032.) Pursuant to CRC 3.1308(a)(1), the tentative ruling became "the ruling of the court" at 4:01pm on 08/04/22. (See *M&R Properties v. Thomson* (1992) 11 Cal.App.4th 899, 901.) Both sides were notified by the court clerk on 08/05/22 that the Court's tentative ruling had become the order of the Court. This notice informed the parties that the Minute Order and Ruling had been entered into the Register of Action. (See *Phipps v. Copeland Corporation LLC* (2021) 64 Cal.App.5th 319, 339; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1192.) Based on the 08/05/22 trigger, plaintiff had until 08/22/22 to file his motion for reconsideration. He was two days late. Although defendant looks to the 08/18/22 "formal" 3.1312 order as the 10-day trigger, this Court did not order service "by the party" (see CCP §1019.5(a)), and instead ordered service by the clerk. This was accomplished on 08/05/22. Plaintiff is taking issue with the 08/05/22 Minute Order and Ruling, not the subsequent 3.1312 order mirroring the Minute Order and Ruling.

For each, and all, of the above reasons, the motion for reconsideration was meritless *ab initio*. There was no bona fide basis for making, let alone maintaining, the motion. Pursuant to CCP §1008(d), "a violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7." Pursuant thereto, every attorney who signs a filing certifies to the Court (and all opposing parties) that the filing has merit and is not being presented for an improper purpose. (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) The filing party has an affirmative duty to conduct a reasonable investigation regarding the facts, circumstances and legal support for the papers filed, a duty which continues even after the papers have been filed. If the filing – viewed objectively – fails to meet <u>any</u> of the three requirements (proper purpose, legal merit and evidentiary support), sanctions may be imposed. (*Bockrath v. Aldrich Chem. Co. Inc.* (1999) 21 Cal.4th 71, 82; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 575.) Frivolity is measured objectively; purpose is measured subjectively but can be inferred from the presence or absence of arguable merit. In the end, filing frivolous motions "is an abuse of the legal system that is not fair to the opposing litigant who is victimized by such tactics. Furthermore, whether the abuse involves the trial courts or the courts of appeal, other litigants are prejudiced by the useless diversion of the courts' attention. And the judicial system and the taxpayers are damaged by what amounts to a waste of the court's time and resources." (*In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830.)

This Court finds with little difficulty that the motion for reconsideration was presented primarily for an improper purpose (needlessly increasing litigation costs), and that the contentions made lacked legal or evidentiary support – both in terms of reconsideration

and as to the MJOP merits itself. Plaintiff worked with the unverified answer for almost a year, then claimed that leave to amend to include a verification would be an abuse of discretion because plaintiff "relied" on the unverified answer for a year (meaning plaintiff purposefully sat on his rights). No reasonable attorney would think this circular reasoning had merit. The absence of a verification was always curable, and since it was actually cured the same day the motion for reconsideration was filed, Attorney Loving clearly failed in his duty to reevaluate the propriety of the motion for reconsideration after it was filed. Defense Counsel has requested a very reasonable sanction of $1,530, representing 5.1 hours at $300/hr. Defense counsel has exercised due diligence in trying to get cooperation, to no avail, and is entitled to be reimbursed this amount. (CCP §128.7(d).) The Motion for Reconsideration is DENIED and Attorney Loving is personally assessed and ordered to pay $1,530 to defense counsel within 5 calendar days.

The Clerk shall provide notice of this Ruling to the parties forthwith. No CCP §1019.5 or CRC 3.1312 order shall be required.

WILLIAMS v. MININ

21CV45674

PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

This is a neighbor dispute over ingress and egress via a dirt road cutting through many private parcels, which plaintiff describes as an easement. Surveying is no easy task when the parties are relying on unnatural monuments like iron pipes and wagon wheels. Nevertheless, defendant secured a survey and decided it was time to formalize those boundaries with wiring, fencing, "no trespassing" signs and a myriad of other barriers. The stated goal was to keep plaintiff and her guests/workers off defendant's property. Boundary line disputes are all-too-common in Calaveras County, often dating back to the railroads' abandonment of rights-of-way, outdated mining claims, and even Spanish land grants. Before the Court is plaintiff's application for a preliminary injunction barring defendant from – among other things – interfering with her historical use of defendant's property via a purported easement, and harassing her invitees.

Background Facts

On or about 01/10/14, defendant Andrew Minin acquired APN 014-013-070, which is more commonly referred to as 1263 Rayjen Lane, Rail Road Flat, CA 95248. His property consists of a 1,680 sq ft residence and 14.5 acres of wooded terrain. His grant deed includes:

(1) a 50-foot easement running parallel to the western edge of the parcel "to a point on the county road leading from Mokelumne Hill to Railroad Flat (est. 11/27/43)," which seemingly traverses APN 014-013-027 and APN 014-013-069; and

(2) a non-exclusive easement for road and utility purposes "the same as" the easement described in Chester Raymond's deed. Chester's deed (APN 014-013-063) reflects an easement cutting across the northwest corner of the parcel, and which is made expressly "appurtenant to and for the benefit of" a parcel to the west, which appears to now be two parcels: APN 014-013-070 *and* 014-013-069.

On or about 10/31/14, plaintiff Margaret Williams acquired APN 014-012-034, which is more commonly referred to as 1330 Rayjen Lane, Rail Road Flat, CA 95248. Her property consists of a 2,644 sq ft residence and 16 acres of wooded terrain. Her grant deed includes:

(1) a 60-foot easement running straight north along the eastern edge of the parcel up to Ridge Road, which apparently dissects APN 014-012-033, APN 014-012-041, and APN 014-012-042;

and

(2) a 30-foot easement starting at the northwest corner of the parcel, traversing APN 014-012-033, to reach Cedar Hill Road. Plaintiff's 60-foot easement does touch Rayjen Road near the southeast corner of the parcel, but there is nothing in the deed reflecting any easement carve-out for that roadway.

On 04/02/21, plaintiff filed a Request for Civil Harassment Restraining Order against defendant based on an incident occurring 10 weeks earlier in which defendant allegedly poked plaintiff and her guests with a measuring stick. There is reference to another incident involving Andrew's wife (co-defendant) watching plaintiff burn debris in the yard. Although the initial TRO was granted, this Court ultimately denied the request after considering defendant's response and evidence presented at the hearing. (See 21CH45253.)

On 08/26/21 – less than three months after plaintiff's request was denied – defendant sued plaintiff for $3,100.00 over trees cut down and her refusal to remove her vehicle from his property. (See 21SC7717.) That action was consolidated with the present quiet title action.

Legal Analysis

A preliminary injunction is an equitable remedy designed to preserve the existing status quo until the dispute between the parties can be finally resolved on the merits. Preliminary injunctions are generally available to avoid waste (CCP §526(a)(2)), to keep a party from violating the rights of another (CCP §526(a)(3)), and whenever sufficient grounds exist pursuant to caselaw (CCP §527(a)), such as when the applicant has demonstrated a likelihood of prevailing on the merits and yet is likely to suffer in the interim irreparable harm which cannot be adequately addressed with money. Courts refer to this as a sliding scale of considerations – how likely the party is to win versus how much harm it will suffer awaiting its day in court. (See *White v. Davis* (2003) 30 Cal.4th 528, 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678; *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 551; *Amgen Inc. v. Health Care Services* (2020) 47 Cal.App.5th 716, 731; *Jamison v. Department of Transp.* (2016) 4 Cal.App.5th 356, 361; *Aspen Grove Condominium Ass'n v. CNL Income Northstar LLC* (2014) 231 Cal.App.4th 53, 62-64.)

Since a preliminary injunction can only issue to preserve the status quo, it is necessary to first clarify what the "status quo" actually is in this case. Neither party has addressed this critical aspect of the motion. From the time this lawsuit was filed, and continuing thereafter, plaintiff was allegedly unable to gain access to her property due to the presence of various barriers erected by defendant. Plaintiff is asking this Court to order defendant to *remove* those barriers. An injunction which requires a party to take affirmative action is classified as a mandatory (as opposed to prohibitory) injunction. Mandatory injunctions are rarely granted and done so only in the most extreme of cases where the right to relief is clearly established. (See *Brown v. Pacifica Found., Inc.* (2019) 34 Cal.App.5th 915, 925; *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.*

(2016) 6 Cal.App.5th 1178, 1184; *Teachers Ins. & Annuity Ass'n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.) If plaintiff truly is seeking a mandatory injunction, this is a serious hill to climb.

One year ago, our California Supreme Court in *Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, reaffirmed the rule of thumb that injunctions asking parties to remove barriers are mandatory:

> "Perhaps the prototypical mandatory injunction is an order requiring the defendant to remove an improvement it has made to challenged property. For example, in an action to establish an easement, a preliminary injunction ordering a party to remove an existing fence that blocks the easement is a mandatory injunction, while restraining the party from parking or storing vehicles along the easement is a prohibitory injunction. But mandatory injunctions in property disputes are not limited to tear-down orders." *Id*. at 1042.

The test for determining what the true status quo is – and thus whether the injunction sought is prohibitory or mandatory – is not always black and white. (See *Daly* at 1052: "It is not always easy to distinguish a restraint from a command, or vice versa. There are no magic words that will distinguish the one from the other.") Most courts now look *not* to the existing landscape when the complaint was filed, but rather to the last actual peaceable, uncontested status which preceded the pending controversy. (*Id*; *People v. iMERGENT, Inc.* (2009) 170 Cal.App.4th 333, 343.) The test is not as usable, however, for "tear down" or "remove" cases since "an injunction preventing the defendant from committing additional violations of the law may not be recharacterized as mandatory merely because it requires the defendant to abandon a course of repeated conduct as to which the defendant asserts a right of some sort. In such cases, the essentially prohibitory character of the order can be seen more clearly by measuring the status quo from the time before the contested conduct began." (*Daly* at 1046.) In the end, the question turns on whether defendant had an existing property right to create the barriers in the first instance, without regard to plaintiff's desired access. If defendant was entitled to block access, ordering him to remove the barrier is undoubtedly a mandatory injunction subject to the much higher evidentiary threshold. (See, *e.g., Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 649; *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1094-1098.)

There is no disagreement that defendant owns APN 014-013-070, and as such he is entitled as record owner to erect any barrier he wants (subject to any regulatory (city/county) land use restrictions) on that property, including the identified gate which plaintiff takes issue with. Plaintiff contends that defendant does not have *exclusive* right to barricade all access, despite being the record owner, claiming plaintiff owns either an express or a prescriptive easement over portions of defendant's property relating to Rayjen Lane.

This Court first notes that plaintiff failed to include the required site map. Pursuant to CRC 3.1151, an application for a preliminary injunction involving real property

easements or encroachments "must depict by drawings, plot plans, photographs, or other appropriate means, or must describe in detail the premises involved, including, if applicable, the length and width of the frontage on a street or alley, the width of sidewalks, and the number, size, and location of entrances." Although the papers filed for and against the injunction include photographs, parcel maps, recorded instruments, and the like, the information provided does not provide this Court enough detail to visualize both the barriers and the actual access needed by plaintiff to reach her property. According to defendant, there are no barriers blocking Rayjen Lane itself, and plaintiff has not provided a schematic showing where it is along Rayjen Lane that she is required to go "off roading" onto defendant's property to get to her front door. This Court will do its best to analyze the pleadings on their merits without the requisite diagram(s).

Based on a first read of the various recordings and accessor parcel maps, it would appear to this Court that plaintiff has no established "right" to use Rayjen Lane, and that she is "supposed to" access her property using Cedar Hill Road or a long easement cutting through her neighbors to reach Ridge Road. However, there is certainly something curious about Rayjen Lane given that it cuts through numerous private parcels, and yet is seemingly used openly by anyone as if it were a public roadway. This begs the question how did Rayjen Lane come into existence, and is there anything in the deeds associated with APNs 014-013-026, 014-013-069, and 014-013-003 securing for plaintiff <u>*or*</u> defendant allowing its use northerly to Ridge Road.

An easement is a nonpossessory and restricted right to a specific use or activity upon another's property. It is not a type of ownership, but rather an incorporeal interest in land which confers a right upon the owner thereof to some benefit or lawful use out of or over the estate of another. The key distinction between an ownership interest in land and an easement interest in land is that the former involves possession of land whereas the latter involves a limited *use* of land. In general, and unless the easement expressly provides otherwise, the landowner may freely use his or her property so long as he or she does not "unreasonably interfere" with the easement, but the easement holder is only allowed to use the easement in such a way which imposes as slight a burden as possible on the landowner. (See Civil Code §806; *Romero v. Shih* (2022) 78 Cal.App.5th 326 (review granted); *Zissler v. Saville* (2018) 29 Cal.App.5th 630, 638; *McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174; *Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1422-1423; *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 562-564.) Best this Court can tell, there is no express easement giving plaintiff any right to use any portions of defendant's property. For this reason, plaintiff has not established probable success for either the first or second causes of action in the First Amended Complaint. In addition, without an express easement, the request to remove lawful barriers becomes a mandatory injunction involving a concomitant higher burden of proof.

Plaintiff also claims to have a nonexclusive easement acquired by prescription, which is an easement acquired by use and occupancy. (Civil Code §1007.) To establish the

elements of a prescriptive easement, plaintiff must establish by clear and convincing evidence that she has made specific and definable use of some portion of defendant's property (see CRC 3.1151) for at least five years which was (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the landowner; and (4) under claim of right. (*Husain v. California Pacific Bank* (2021) 61 Cal.App.5th 717, 725-726; *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032.) The concept of hostility is synonymous with adversity, and is loosely defined as use without any express or implied recognition of the owner's property rights, or in defiance of the owner's property rights. Stated another way, whether the use is hostile or is merely a matter of neighborly accommodation is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties. (*Husain* at 726; *McBride* at 1181; *Aaron v. Dunham* (2006) 137 Cal.App.4th 1244, 1252 [adverse use means that the claimant's use was made without the explicit or implicit permission of the landowner.]) The evidence presented both by sides demonstrates that defendant voluntarily allowed plaintiff to use his property for the better part of a year, and then rescinded that offer less than five years later. As a result, the evidence does not permit any finding by clear and convincing evidence that plaintiff's use was adverse for at least 5 years.

Since defendant is presumed to possess every right to barricade his own property vis-à-vis the world at large, an order that he remove all of the barricade is *mandatory* – and not supported under the circumstances since most of the barriers have not been shown to actually impede plaintiff's access to her front door. Application for preliminary injunction is DENIED.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal order is required.