Filed 3/18/11 Li v. Lawrence CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ANNA M. LI, Plaintiff and Respondent, v. WILLIAM A. LAWRENCE et al., Defendants and Appellants.	A125173 (Contra Costa County Super. Ct. No. C0601004)
ANNA M. LI, Plaintiff and Appellant, v. WILLIAM A. LAWRENCE, Defendant and Respondent.	A125356

Appellants Dr. William and Judy Lawrence (the Lawrences) and appellant Anna Li (Li)[1] own adjoining apartment complexes in Lafayette. There was a small swimming pool on the Lawrences' property, to which Li had access by way of an easement for swimming pool and recreation purposes. Although Dr. Lawrence was aware of Li's easement, he believed the easement entitled her to use the pool only for as long as it existed, and therefore he could remove the pool at any time without notice or consent. That he did, and Li sued. The trial court entered judgment ordering Dr. Lawrence to install a new pool, having rejected the balancing the hardships doctrine because it decided

[1] Li, now divorced, took title in her married name, Lei.

Dr. Lawrence's conduct was not "innocent." We conclude the trial court correctly interpreted the easement but abused its discretion in granting a mandatory injunction based on an incorrect understanding of the elements of the balancing of hardships doctrine. Accordingly we reverse and remand for the court to determine anew whether the doctrine should be applied in this case, focusing on whether Dr. Lawrence acted in good faith or in willful disregard of Li's rights.

I. FACTUAL BACKGROUND

A. *The Parties Purchase Adjacent Apartment Complexes*

In 2003, Roberto Ceriani owned adjacent apartment complexes in Lafayette: a four-unit building located at 1017 Second Street and an eight-unit complex at 3448 Orchard Hill Court. Between the two buildings, completely enclosed by a gated fence, was a small swimming pool, approximately 14 to 15 by 20 to 25 feet, with a variable depth from approximately four to seven feet. The pool was located on the Orchard Hill Court property.

Both properties went on the market for sale in 2003. The Second Street property was advertised as having access to the swimming pool.

Li,[2] a licensed real estate salesperson, was looking for an investment opportunity and became interested in the Second Street property. She was attracted by the uniqueness of the property, being four units with a "beautiful swimming pool." The preliminary title report confirmed "an easement relating to the pool." From the listing agent Li learned that she, as the owner, would be responsible for one-fifth of the pool maintenance expenses.

Li purchased the Second Street property in September 2003. The deed included "[A]N EASEMENT, NOT TO BE EXCLUSIVE, FOR SWIMMING POOL AND RECREATION PURPOSES AS AN APPURTENANCE TO PARCEL ONE ABOVE, OVER, UNDER, ALONG AND ACROSS [PARCEL TWO] . . . ."

[2] English is Li's second language; she came to the United States in 1979.

The Lawrences became interested in Ceriani's other property, and learned that its description included a reservation for a nonexclusive easement in favor of Li "for use of swimming pool facilities." They purchased the property in March 2004. The parcel two description contained in their deed includes the following: "Reserving from Parcel Two: A non-exclusive easement appurtenant to the remaining lands of the Grantor, for the use of swimming pool facilities located thereon."

B. *Dr. Lawrence Removes the Swimming Pool*

In early 2006, Dr. Lawrence had the swimming pool removed and replaced with four or five parking spaces. This entailed draining the pool, breaking up the concrete and then filling in the space. He also removed the gate that provided access to the pool from Li's property.

Dr. Lawrence recited several reasons for removing the pool: maintenance expenses; the waste of water and electricity; and safety and liability concerns about trespassing children, who sometimes rode their skateboards around the pool area. Both his property manager and realtor indicated that having a pool did not enhance the value of an apartment building and did not aid in obtaining tenants. Further, he did not believe any of his tenants used the pool on a regular basis.

Dr. Lawrence understood the easement to mean that Li "had a right to have access to the swimming pool that I owned." However, he did not believe that the easement gave Li the right to require him to maintain the pool in perpetuity. In other words, he believed that the easement entitled Li to use the swimming pool only for as long as the swimming pool existed, and therefore he had the right to remove the pool at any time. Dr. Lawrence did not believe Li had any right to object to removal of the pool, nor did he need her consent to proceed. And, he did not believe he was violating Li's easement by removing the pool.

At trial Li was questioned, and responded, as follows: "Q. Did you believe that the owner of the pool could not remove it? [¶] A. Could not remove? [¶] Q. Did you believe that the owner of the pool could not remove it? [¶] A: No, I don't believe." When asked about her understanding of the rights and responsibilities with respect to the

pool, she said: "I know that I own the easement right. My tenant can use the swimming pool." Li was also questioned at her deposition: " 'Prior to removal of the pool, did you believe that the Lawrences or [whoever] owned the pool could not remove the pool without your permission?' " Her response: " 'At least some notification. At least let me know what he's doing. . . . He's allowed to remove without my consent. At least some courtesy . . . ." Her real complaint was "the fact that he didn't notify me at all and that—just remove my easement right without any courtesy, and it's clear on the deed."

C. *Litigation*

Li learned about the pool removal from a tenant. She filed a complaint with the county's building inspection department stating, " 'Owners removed swimming pool without a permit, which I own one-fifth of ownership. I have an easement right to use and access the pool. Mr. Lawrence land-filled the pool without any ask or acknowledgement. City to investigate this violation.' " Thereafter she sued the Lawrences for damages and declaratory and injunctive relief, alleging nuisance and interference with easement. Among other relief, Li sought a declaration that the Lawrences "shall restore the servient tenement to the condition that existed" prior to removal of the pool. The Lawrences cross-complained to quiet title and for declaratory relief.

At trial a swimming pool contractor testified for Li that a replacement pool 15 feet by 30 feet meeting current code requirements would cost $94,314. The diminution in value of Li's Second Street apartment complex was either $10,000, according to Li's expert, or zero, according to the Lawrences' expert. Li stipulated that there was no substantial difference in rental value with or without a pool.

The trial court concluded that the Lawrences' interpretation of Li's easement rights—namely that although the Lawrences could not exclude her or the tenants from using an existing pool, the easement did not preclude the Lawrences from removing the pool—was "not a rational interpretation of the easement language." The court also found that this was a proper case for issuing a mandatory injunction to repair the injury by restoring original conditions. Although acknowledging that it had discretion in equity to

deny an injunction after balancing the hardships to the parties in a given case, the court determined that in order to apply the hardship doctrine, Dr. Lawrence's conduct had to be "truly innocent," and Dr. Lawrence's conduct was not. According to the court, Dr. Lawrence was well aware of Li's easement rights, but was "certainly mistaken as to whether he could legally interfere with those rights unilaterally. He took no steps to make this determination before undertaking action that would irreparably harm those rights."

The court entered judgment decreeing that Dr. Lawrence, at his expense, "shall install a swimming pool and access gate . . . ." It denied damages to Li and dismissed the Lawrences' cross-complaint. This appeal followed.

II. DISCUSSION

A. *Interpretation of the Easement*

The Lawrences push us to adopt their favored interpretation of the easement, that it does not require them to continue the existence of the swimming pool, and hence they were entitled to remove it on their own accord. As a general matter, easements, like other grants, are subject to the same rules of interpretation that govern contracts in general. (Civ. Code, § 1066.) The overriding objective of such interpretive undertaking is to determine and carry out the intent of the parties at the time of the grant. (*Id.,* § 1636.) Where, as here, an easement is acquired by grant, the extent of the servitude is determined by the terms of the grant. (*Id.,* § 806.) Only those interests expressed in the grant, and those necessarily incident thereto, pass from the servient to the dominant tenement holder. (*Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1599.)

We look first to the language of the deed, and when the intent can be derived from the plain meaning of the words used therein, the language controls and we do not resort to technical rules of statutory construction. (Civ. Code, §§ 1638, 1639; *Machado v. Southern Pacific Transportation Co*. (1991) 233 Cal.App.3d 347, 353.) When the grant creating the easement is ambiguous, we may look to the surrounding circumstances and the nature and purpose of the easement in order to divine the intent of the parties. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 522; *Edgar v. Pensinger* (1946)

73 Cal.App.2d 405, 411-414; 6 Miller & Starr, Cal. Real Estate (3d ed. 2006) § 15:16, p. 15-68.)

The Lawrences argue that the language of the grant itself simply guaranteed a right of way "for swimming pool and recreation purposes." Since that language says nothing about the right or obligations concerning the continued existence of the pool, the Lawrences leap to the conclusion that on the face of the easement they had the right to remove it.

Having said the above, the Lawrences acknowledge the true state of affairs, namely that silence on the matter of the continued existence of the pool renders the easement ambiguous on this point. Resorting to the extrinsic evidence as to the parties' understanding of the scope of the easement, the Lawrences next assert that both parties testified that they thought the Lawrences had the right to remove the pool, and this practical construction should control. Reviewing Li's testimony on the matter, it is apparent that the questioning did not encompass crucial particulars such as when the pool could be removed, and whether notice and compensation was required. Li clearly believed she was entitled to notice. And, taken as a whole, her testimony was ambiguous. Li unequivocally asserted her easement right to use the pool, both in court and to the county, notwithstanding that she said she did not believe the owners could not remove the pool. The Lawrences' practical construction argument does not hold up to closer scrutiny.

Here it is clear that the easement is an easement for the "right-of-way," specifically above, over, under, along and across the servient tenement. (Civ. Code, § 801, subd. 4.) But it is also an easement for a very specific purpose, namely "for swimming pool and recreation purposes." Private easements such as the one at stake here may embrace the right to maintain or use a permanent structure such as a garage, clubhouse or recreational facilities. (*Blackmore v. Powell*, *supra*, 150 Cal.App.4th at p. 1602.) The precise question presented is the duration of Li's right to use the pool: in perpetuity, only for as long as the Lawrences maintain it, or somewhere in between? As a general matter, where no duration is stated in the grant, most servitudes are of

indeterminate duration. (Rest.3d Property, Servitudes, § 4.3, subd. (5), p. 524.) As explained in the comments: "The duration of most servitudes is left indefinite because they are created to implement arrangements whose useful lives cannot be predicted when they are created. Instead of risking premature termination from an inaccurate prediction, parties creating servitudes generally leave the term indeterminate, relying on the law, if necessary, to terminate the servitude when it becomes obsolete. . . . When no definite term is established in the creation of the servitude, its term is indeterminate under the rule stated in this subsection. . . . Servitudes governed by the rule stated in this subsection last until terminated pursuant to the rules stated in Chapter 7." (*Id*., com. e, p. 526.)

An easement may be extinguished by destruction of the servient tenement. (Civ. Code, § 811, subd. 2.) When the easement is in a structure such as a building and the building still produces a net profit to the owner, the owner cannot destroy the building without the consent of the dominant tenement owner simply because it would be economically advantageous to do so and erect a new building. (*Rothschild v. Wolf* (1942) 20 Cal.2d 17, 20 [building owner cannot deliberately extinguish stairway easement by destroying building with remaining economic useful life, without consent of dominant tenant].) On the other hand, if a building burdened, for example, by a staircase easement is destroyed by fire without the fault of the owner of the servient tenement, the easement terminates because there is nothing left upon which it can operate. (*Id*. at p. 21.) And, when a building subject to a party wall easement has deteriorated to a point tantamount to destruction, the owner can demolish it voluntarily and the easement is extinguished. (*Walner v. City of Turlock* (1964) 230 Cal.App.2d 399, 405-408.)

Here it is apparent from the evidence that Dr. Lawrence deliberately destroyed the pool, but not with any purpose or intention to harm Li or interfere with or violate her rights. His reasons for removing the pool were not foolhardy, but rather included environmental, economic and public safety concerns. As the trial court found, it simply never occurred to Dr. Lawrence that Li had a right to object to removal of the pool. Without question the purpose of the easement was to enable Li and her tenants to use the

pool facilities. By deliberately destroying the pool without the consent of the dominant tenant, Dr. Lawrence obliterated the purpose of the easement. By analogy to *Rothschild v. Wolf*, *supra*, 20 Cal.2d 17, and the principle that the owner of a building with remaining useful economic life that is burdened by an easement cannot intentionally destroy the building without consent of the dominant tenant owner, we conclude that Dr. Lawrence similarly could not unilaterally destroy the pool, and his interpretation of the easement is not grounded in California law.

The trial court determined that the Lawrences may have had a good faith belief that they could remove the pool without notice or compensation to Li, but that belief was not well founded. We agree with this conclusion. The question then becomes, what remedy?

B. *Remedy*

The owner of an easement whose rights have been impeded may recover compensatory damages for diminution in value of the property, and for the annoyance and discomfort stemming from loss of use. (*Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 574.) Moreover, in a proper case, the trial court has discretion to issue a permanent mandatory injunction to protect and preserve an easement; enjoin a threatened interference; and compel a defendant to remove an encroachment, repair an injury or otherwise restore original conditions, thus undoing a completed wrong. (*Clough v. W. H. Healy Co.* (1921) 53 Cal.App. 397, 400; see *Furtado v. Taylor* (1948) 86 Cal.App.2d 346, 348, 354 [court compels defendants who interfered with easement for ditch to restore portions of ditch which they destroyed].)

The trial court decided that Li was entitled to a mandatory injunction and ordered Dr. Lawrence to restore the property with a swimming pool and access gate. In the process of arriving at this conclusion, the court reckoned with the balancing of hardships doctrine which presupposes a plaintiff's right to an injunction, but for the balance of hardship and expense to the defendant that far outweighs the inconvenience to the plaintiff. As explained years ago in *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 559, an encroachment case cited by the trial court, "where the encroachment does not

irreparably injure the plaintiff, was innocently made, and where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages."

The trial court never arrived at the relative hardship analysis. Instead, focusing on the "innocently made" criterion, it concluded that Dr. Lawrence's conduct was not truly innocent. It said he was "well aware" of Li's easement rights and, while he was "certainly mistaken as to whether he could legally interfere with those rights unilaterally," he "took no steps to make this determination before undertaking action that would irreparably harm those rights."

"Innocence" in this context is an easily misunderstood concept. As our Supreme Court later explained in another encroachment case, "[t]he defendant is not innocent if he wilfully encroaches on the plaintiff's land. [Citations.] *To be wilful the defendant must not only know that he is building on the plaintiff's land, but act without a good faith belief that he has a right to do so*. [Citation.] Thus, if plaintiff in the present case induced defendant . . . to believe that he had a right to act, defendant's claim of good faith is supported. On the other hand, continuation of construction after objection by plaintiff suggests a lack of good faith." (*Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 859, italics added.) Furthermore, although willful conduct forecloses resort to the doctrine, "negligence is another matter. The doctrine presumes the defendant is a wrongdoer. [Citation.] It hardly could be applied if a showing of some negligence is in every case enough to defeat its application. [¶] . . . The question whether the defendant's conduct is so egregious as to be willful or whether the quantum of the defendant's negligence is so great as to justify an injunction is a matter best left to the sound discretion of the trial court. In exercising that discretion, the court must consider the conduct and intent not only of the defendant, but also of the plaintiff. [Citation.] The trial court's consideration of the conduct of the parties must in turn be made in light of the relative harm that granting or withholding an injunction will do to the interests of the parties." (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 266-267.)

The *Brown Derby* court framed the crucial issue this way: "Defendant's action can be intentional and yet be innocent if he acted in good faith. . . . The crucial issue is: Did defendant . . . act in good faith or did he act in wilful disregard of plaintiff's rights hoping that a court would allow the structure to remain and grant only a remedy of damages? Since the trial court failed to make a finding on this crucial issue, the judgment must be reversed." (*Brown Derby Hollywood Corp. v. Hatton*, *supra*, 61 Cal.2d at pp. 859-860.)

The same can be said here. Without delving further into what "innocent" meant in the balancing of hardship arena, the trial court used the wrong filter for determining if the case were amenable to a balancing of hardships analysis. Had it focused on good faith versus willful disregard, the court might have arrived at a different conclusion. In this regard we note that when analyzing the Lawrences' interpretation of the easement, the court stated: "*They may have had a good faith belief* they could [fill in the pool without notice or compensation], but this belief was not well founded." (Italics added.) We reverse and remand with instructions to reexamine whether the case is amenable to a balancing of hardship analysis, applying the correct filter.

Li argues that the trial court found that she was irreparably harmed, and thus decided against balancing the equities for this reason. However, it is clear that the court rejected the balancing of hardship doctrine because it deemed the Lawrences were not innocent, not because it found Li was irreparably injured.[3] In any event, as a general matter, an injury is not irreparable where it could be compensated adequately in damages. (*Helms Bakeries v. St. Bd. Equalization* (1942) 53 Cal.App.2d 417, 425.) Here the evidence revealed that Li did not reside on the premises or use the pool. Thus injury to her stems from economic loss by way of attracting and keeping tenants, an injury that can be adequately compensated with damages. And, on the matter of relative hardships,

[3] The court did refer to action on Dr. Lawrence's part that would irreparably harm Li's easement rights. However, this statement was the precursor to its conclusion that the element of "innocence" was missing. The court did not undertake to analyze irreparable injury.

the evidence showed that it would cost the Lawrences roughly 10 times more to rebuild a pool than the economic benefit conferred on Li's property by virtue of having a pool available for tenants. This calculation does not even include the loss to the Lawrences of the value of the additional parking spaces, which they leased.

C. *Li's Cross-appeal*

Li filed a cross-appeal based on a motion to vacate the judgment, in which she argued Judy Lawrence should be added as a party to the injunctive order; the court should have awarded her damages for deprivation of quiet enjoyment and use; and the judgment should be amended to require a replacement pool with facilities equal to or better than the original.[4]

With new counsel, Li is not pursuing a claim for damages for deprivation of quiet enjoyment. Because we are reversing and remanding on the balance of hardship issue, there is no need to definitely decide the remaining issues. However, as to whether Judy Lawrence should be added to the judgment, we point out that the trial court entered judgment against Dr. Lawrence for interfering with and obstructing the easement, and thus ordered him to undo the damage he had done. The court also specifically found that Judy Lawrence had nothing to do with the decision to fill in the pool. Therefore, should the court arrive at the same conclusion as to Dr. Lawrence after remand, there would be no basis to add Judy Lawrence to the judgment. And finally, should the court once again impose a mandatory injunction, rules of reasonableness would compel that the pool and gate be substantially similar to the preexisting structures, as permitted under current codes; that the pool be similarly equipped and operational; and that construction be completed in a reasonable time.

[4] The Lawrences have argued that the easement is too vague to be specifically enforced because it fails to specify any details about the pool, and the injunction is too vague because it fails to specify the type of pool and gate to be installed; the time to completion; and operational matters such as supplying water, electricity, pumping and filtering equipment.

III. DISPOSITION

The judgment is reversed and the cause is remanded to the trial court to examine whether the balancing of hardship doctrine applies here. The court should determine whether Dr. Lawrence acted in good faith or in willful disregard of Li's rights, and if it concludes he acted in good faith, whether the balance of hardships favors denial of a mandatory injunction. Parties to bear their own costs on appeal.

_____
Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Rivera, J.