Filed 8/5/04

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| JERRY FELGENHAUER et al.,<br><br>Plaintiffs, Cross-defendants and Appellants,<br><br>v.<br><br>JENNIFER SONI et al.,<br><br>Defendants, Cross-complainants and Appellants. | 2d Civil No. B157490<br>(Super. Ct. No. CV990500)<br>(San Luis Obispo County) |

Here we hold that to establish a claim of right to a prescriptive easement, the claimant need not believe he or she is legally entitled to use of the easement.

Jerry and Kim Felgenhauer brought this action to quiet title to prescriptive easements over neighboring property owned by Ken and Jennifer Soni. [[The Felgenhauers claimed easements for deliveries to their property; maintenance of a trash dumpster on the Sonis' property, including access to the dumpster; and for public utility lines. The Sonis cross-complained against the Felgenhauers for maintaining a nuisance.]]

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

A jury made special findings that established a prescriptive easement for deliveries. [[The jury rejected the Felgenhauers' other claims. In a separate court trial, the court found the Felgenhauers did not have an easement by implication for utility lines. The court also found the Felgenhauers liable for $3,550 on the Sonis' nuisance cause of action.

Both parties appeal.]] We affirm.

FACTS

In November of 1971, the Felgenhauers purchased a parcel of property consisting of the front portion of two contiguous lots on Spring Street in Paso Robles. The parcel is improved with a restaurant that faces Spring Street. The back portion of the lots is a parking lot that was owned by a bank. The parking lot is between a public alley and the back of the Felgenhauers' restaurant.

[[*Delivery Easement*]]

From the time the Felgenhauers opened their restaurant in 1974, deliveries were made through the alley by crossing over the parking lot to the restaurant's back door. The Felgenhauers never asked permission of the bank to have deliveries made over its parking lot. The Felgenhauers operated the restaurant until the Spring of 1978. Thereafter, until 1982, the Felgenhauers leased their property to various businesses.

The Felgenhauers reopened their restaurant in June of 1982. Deliveries resumed over the bank's parking lot to the restaurant's back door. In November of 1984, the Felgenhauers sold their restaurant business, but not the real property, to James and Ann Enloe. The Enloes leased the property from the Felgenhauers. Deliveries continued over the bank's parking lot.

James Enloe testified he did not believe he had the right to use the bank's property and never claimed the right. Enloe said that during his tenancy, he saw the bank manager in the parking lot. The manager told him the bank planned to construct a fence to define the boundary between the bank's property and the

Felgenhauers' property. Enloe asked the manager to put in a gate so that he could continue to receive deliveries and have access to a trash dumpster. The manager agreed. Enloe "guess[ed]" the fence and gate were constructed about three years into his term. He said, "[Three years] could be right, but it's a guess." In argument to the jury, the Sonis' counsel said the fence and gate were constructed in January of 1988.

The Enloes sold the restaurant to Brett Butterfield in 1993. Butterfield sold it to William DaCossee in March of 1998. DaCossee was still operating the restaurant at the time of trial. During all this time, deliveries continued across the bank's parking lot.

The Sonis purchased the bank property, including the parking lot in dispute in 1998. In 1999, the Sonis told the Felgenhauers' tenant, DaCossee, that they were planning to cut off access to the restaurant from their parking lot.

The jury found the prescriptive period was from June of 1982 to January of 1988.

[[*Dumpster*

Jerry Felgenhauer testified that when they reopened their restaurant in 1982, they placed a dumpster that straddled the border between their property and the bank's parking lot. The trash collection truck crossed the bank's parking lot to empty the dumpster. The dumpster was visible to the bank and there was no discussion with the bank about the dumpster.

James Enloe testified that when they first opened their restaurant in November of 1984, they maintained a dumpster on neighboring property. After one or two years, the Enloes moved the dumpster onto the bank's parking lot. They did not ask the bank's permission. The dumpster was there continuously. The dumpster remained on the bank's parking lot during Butterfield's and DaCosse's tenancies.

*Utility Easement*

The Felgenhauers' parcel and the Sonis' parcel had a common ownership when the restaurant was constructed in 1937. The common owner conveyed the Felgenhauers' parcel to their predecessor in July of 1946. A year later, the former common owner granted an easement for utility purposes over the northern three feet of the parcel that the Sonis eventually purchased. The water, sewer and gas lines serving the Felgenhauers' parcel are approximately 26 feet south of the northern boundary of the Sonis' parcel.

*Nuisance*

The Sonis tested a pool of stagnant water near the gate on the Felgenhauers' property for fecal matter. The test showed the presence of such matter. Jennifer Soni complained to Jerry Felgenhauer about trash on the Felgenhauers' property. Felgenhauer said he would take care of it but never did. Felgenhauer said he remembered Jennifer Soni telling him about waste water from the restaurant coming onto her property, but he could not remember when. Felgenhauer also said Soni told him the trash area was messy and that melted tallow had been spilled on the ground. Felgenhauer admitted the trash area was messy and said he spoke to his tenant about the tallow.]]

DISCUSSION

I

[[*The Sonis' Appeal*]]

The Sonis contend there is no substantial evidence to support a prescriptive easement for deliveries across their property. They claim the uncontroverted evidence is that the use of their property was not under "a claim of right."

Whether the elements of a prescriptive easement have been established is a question of fact, which we review under the substantial evidence rule. (See *O'Banion v. Borba* (1948) 32 Cal.2d 145, 149-150.) "In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.]

We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. [Citation.] The trier of fact is not required to believe even uncontradicted testimony. [Citation.]" (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

At common law, a prescriptive easement was based on the fiction that a person who openly and continuously used the land of another without the owner's consent, had a lost grant. (See *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 575.) California courts have rejected the fiction of the lost grant. Instead, the courts have adopted language from adverse possession in stating the elements of a prescriptive easement. The two are like twins, but not identical. (*Taormino v. Denny* (1970) 1 Cal.3d 679, 686 [elements necessary to establish prescriptive easement are the same as those required to establish adverse possession, with exception of the payment of taxes].) Those elements are open and notorious use that is hostile and adverse, continuous and uninterrupted for the five-year statutory period under a claim of right. (*Ibid.*) Unfortunately, the language used to state the elements of a prescriptive easement or adverse possession invites misinterpretation. This is a case in point.

The Sonis argue the uncontroverted evidence is that the use of their property was not under a claim of right. They rely on the testimony of James Enloe that he never claimed he had a right to use the bank property for any purpose.

Claim of right does not require a belief or claim that the use is legally justified. (*Lord v. Sanchez* (1955) 136 Cal.App.2d 704, 707.) It simply means that the property was used without permission of the owner of the land. (*Ibid.*) As the American Law of Property states in the context of adverse possession: "In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in

it by the denial of adverse claim on the part of the possessor." (3 Casner, American Law of Property (1952) Title by Adverse Possession, § 5.4, p. 776.) One text proposes that because the phrase "'claim of right'" has caused so much trouble by suggesting the need for an intent or state of mind, it would be better if the phrase and the notions it has spawned were forgotten. (Cunningham et al., The Law of Property (Law. ed. 1984) Adverse Possession, § 11.7, p. 762.) Enloe testified that he had no discussion with the bank about deliveries being made over its property. The jury could reasonably conclude the Enloes used the bank's property without its permission. Thus they used it under a claim of right.

The Sonis attempt to make much of the fence the bank constructed between the properties and Enloe's request to put in a gate. But Enloe was uncertain when the fence and gate were constructed. The Sonis' attorney argued it was constructed in January of 1988. The jury could reasonably conclude that by then the prescriptive easement had been established.

The Sonis argue the gate shows the use of their property was not hostile. They cite *Myran v. Smith* (1931) 117 Cal.App. 355, 362, for the proposition that to effect a prescriptive easement the adverse user """. . . must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.""'

But *Myran* made the statement in the context of what is necessary to create a prescriptive easement. Here, as we have said, the jury could reasonably conclude the prescriptive easement was established prior to the erection of the fence and gate. The Sonis cite no authority for the proposition that even after the easement is created, the user must keep the flag of hostility flying. To the contrary, once the easement is created, the use continues as a matter of legal right, and it is irrelevant whether the owner of the servient estate purports to grant permission for its continuance.

[[II

*The Felgenhauers' Appeal*

*(a)*

The Felgenhauers contend the portion of the judgment denying them an easement to maintain a trash dumpster must be reversed. They contend there is no substantial evidence to support the judgment and that the trial court erred in instructing the jury.

The Felgenhauers, as plaintiffs in this action, have the burden of proof. (See Evid. Code, § 500; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 145.) Where, as here, the judgment is against the parties who have the burden of proof, it is almost impossible for them to prevail on appeal by arguing the evidence compels a judgment in their favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. (See *Rodney F. v. Karen M.*, *supra*, 61 Cal.App.4th at p. 241; *Kunzler v. Karde* (1980) 109 Cal.App.3d 683, 688 [judgment appealed from is presumed correct].) We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence. (*Kimble v. Board of Education* (1987) 192 Cal.App.3d 1423, 1427.)

The Felgenhauers argue the instructions failed to inform the jury that continuous use over a long period of time, without the land owner's interference, raises a presumption that the user acted under a claim of right. (Citing *Warsaw v. Chicago Metallic Ceilings, Inc.*, *supra*, 35 Cal.3d 564.) They also argue the court should not have instructed the jury that any period during which the bank's property was leased or held by the Resolution Trust Corporation (RTC) cannot be included in the prescriptive period. They claim there was no substantial evidence the bank's property was leased or held by the RTC.

Assuming the instructions were in error, the error was not prejudicial. The jury found a prescriptive easement for deliveries to the restaurant under the

same instructions. The evidence relating to the continuous use of the dumpster was simply not as strong as the evidence relating to the continuous use of the bank's lot for deliveries. James Enloe testified that for a year or two at the beginning of their lease, they used a dumpster on a different parcel. The jury found that the prescriptive period ended in January of 1988, less than five years after the Enloes placed the dumpster on the bank's property. There is no reasonable probability the Felgenhauers would have obtained a more favorable result in the absence of the claimed error. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 438, p. 484.)

*(b)*

The Felgenhauers contend the court's finding that there was no implied reservation of an easement for utilities is against the evidence.

But the Felgenhauers point to no evidence that the trial court as the finder of fact was legally compelled to accept. Among other factors, an easement by implication requires the trial court to find a prior use that was so obvious as to show it was intended to be permanent. (*Piazza v. Schaefer* (1967) 255 Cal.App.2d 328, 332-333.) The trial court was not required to conclude that underground utilities were obvious.

The Felgenhauers cite *Kosich v. Braz* (1967) 247 Cal.App.2d 737, for the proposition that relocation of an easement to comply with the intent of the parties is proper. They claim that location of the express easement for utilities on the northern end of their property was most likely the result of a drafting error. But they cite no evidence that compels the trial court to so find.

*(c)*

The Felgenhauers contend the trial court should have imposed an easement for utilities in their present location under the doctrine of relative hardship. They concede, however, the issue was not raised in the pleadings or at trial. We cannot consider matters raised for the first time on appeal. (*Degnan v. Morrow* (1969) 2 Cal.App.3d 358, 366.)

*(d)*

The Felgenhauers contend the trial court erred in placing the delivery easement on the northerly five feet of the Sonis' property.

The Felgenhauers cite *Dooling v. Dabel* (1947) 82 Cal.App.2d 417, 424, for the proposition that use during the prescriptive period establishes the location of a prescriptive easement. They point to the testimony of Ann Enloe that the bank placed the gate where the deliveries were made. The gate was 16 feet south of the northern boundary. But the trial court did not have to find Enloe's testimony credible. In fact, the trial court found that no definite pattern of use was established by the testimony.

In response to the Felgenhauers' argument about the placement of the easement, the Sonis cite *Dooling v. Dabel*, *supra*, 82 Cal.App.2d at p. 424, for the proposition that a prescriptive easement requires a definite line of travel. They argue the lack of a definite line of travel is another reason why the trial court should not have found an easement.

But immaterial deviations in the line of travel will not prevent the acquisition of a prescriptive easement. (*Dooling v. Dabel*, *supra*, 82 Cal.App.2d at p. 424.) Here the trial court could conclude that, although the lines of travel across the bank's lot varied, the bank's lot was small enough that any deviation was immaterial. In contrast to the urban lot involved here, *Dooling* involved various lines of travel over a 1,320-acre farm.

Under the circumstances, here the trial court did not err in locating the easement on the northerly five feet of the Sonis' property. The obvious purpose of the placement is to allow the Felgenhauers the benefit of their easement with a minimum of interference with the Sonis' use of their land. The Felgenhauers present no reason in law or logic for overturning the trial court's decision.

*(e)*

Finally, the Felgenhauers contend there is no substantial evidence to support the judgment holding them liable for nuisance.

The Felgenhauers cite *Resolution Trust Corp. v. Rossmoor Corp.* (1995) 34 Cal.App.4th 93, 100, for the proposition that a landlord is not liable for nuisance in the absence of his own negligence. But a landlord may be liable if he has knowledge of the condition and has such a degree of control over the premises that he can obviate it. (*Id*. at p. 101.)

Here Jennifer Soni testified she told Jerry Felgenhauer about trash on her property. Felgenhauer admitted Soni spoke to him about the trash, melted tallow and waste water coming onto her property. He said he spoke to his tenant about the trash and tallow. That is sufficient to support the finding that the Felgenhauers had knowledge of the nuisance and sufficient control over the premises to obviate it.]]

The judgment is affirmed. The parties are to bear their own costs.

CERTIFIED FOR PARTIAL PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Kenneth Andreen, Judge[*]

Superior Court County of San Luis Obispo

---

Christian E. Iversen for Plaintiffs, Cross-defendants and Appellants.

James L. Hudgens, Cappello & Noel, A. Barry Cappello, Pine & Pine and Norm Pine for Defendants, Cross-complainants and Appellants.

[*] Retired Associate Justice, Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.