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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MICHAEL STRIDER,

Plaintiff and Appellant,

v.

RICHARD BURKE et al.,

Defendants and Respondents.

A134561

(Sonoma County  
Super. Ct. No. SCV247953)

**INTRODUCTION**

Plaintiff Michael Strider and defendants Burkes are adjoining landowners. When Strider bought his undeveloped lot in 1999, his deed referenced a parcel map that depicted a drainage easement running through his lot for the benefit of the neighboring lot. The Burkes bought their property, the neighboring lot, in 2004, and their deed also referenced the same parcel map.

The placement of the drainage easement caused Strider to become concerned about its impact on his future ability to build on the lot. He understood prior to the close of escrow he would have to take affirmative steps to extinguish the easement, but he waited until 2010 to file an action against the Burkes to cancel an instrument (i.e., the parcel map) under Civil Code section 3412. The trial court granted the Burkes' motion for summary judgment on the ground that the four-year statute of limitations in Code of Civil Procedure section 343 barred the action. On appeal, Strider argues no statute of limitations applies because his action is akin to a quiet title action with his continuous, undisputed possession of the property, citing the rationale of *Muktarian v. Barmby* (1965)

63 Cal.2d 558 (*Muktarian*), an appeal from a quiet title action. For the reasons discussed below, we find that *Muktarian* does not apply to this action for cancellation of an instrument. Accordingly, we will affirm the judgment because Strider's belated action is barred by the applicable statute of limitations.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***The Parties***

Plaintiff Michael Strider is the owner of the property located at 1049 Sunset Drive, Healdsburg, in Sonoma County, California. His property is described as "Lot 3" in the parcel map referenced in the grant deed recorded on September 15, 1999. Defendants and respondents Richard and Mary Burke (the Burkes) are the owners of the property located at 1039 Sunset Drive in Healdsburg, Sonoma County. Their property is described as "Lot 2" in the parcel map referenced in a grant deed recorded on August 5, 2004.

### ***The Easement***

Strider's property is described as "Lot 3 as said lot is numbered and designated upon the Parcel Map No. 119" in an "Exhibit One" attached to and expressly made a part of the grant deed recorded on September 15, 1999. Exhibit One does not verbally reflect any drainage easement over and across lot 3 for the benefit of Lot 2. It does reflect the reservation of an access and utility easement over and across Lot 3 for the benefit of Lot 4, and a 15-foot private drainage easement over Lot 4, as shown on Parcel Map No. 119.

The Burkes' property is described in their deed as "Lot 2 as said lot is numbered and designated upon the Parcel Map No. 119." Their deed does not indicate the property is benefitted by a drainage easement over Lot 3.

Parcel Map 119 consists of four pages. Page one describes Parcel Map 119 as "being the land of Francis & Clyda Ritz per deed recorded under Doc. No. 82-042042 located in the City of Healdsburg, Rancho Sotoyome," dated June 1986. Page one also contains, *inter alia*, a notarized owner's statement signed by Francis R. and Clyda E. Ritz on October 16, 1989, averring that they are the owners of the real property included within the subdivision shown on the map and are the only parties whose consent is necessary to pass a clear title to the subdivision.

Page two contains, *inter alia*, a City Planning Commission's Certificate certifying that the City of Healdsburg approved the map on September 26, 1989, as well as statements from the City Engineer and Surveyor attesting to the map's conformity with the requirements of the Subdivision Map Act, local ordinances, and "the approved or conditionally approved tentative map."

Page three shows Lots 1, 2, 3, and 4 on Sunset Drive in the Valley View Subdivision. Lot 3 contains a "10 [foot] private drainage easement" running through the middle of the lot. Lot 4 contains a "15 [foot] private drainage easement" running from the boundary line between Lots 3 and 4, through Lot 4 and exiting it at the upper right hand corner of the lot.

Page four contains a map of the four lots on Sunset Drive, without easements, showing the "building envelope" on Lot 2 and a setback line on Lot 4. It contains the following note: "For Planning Commission 'Conditions of Approval,' see Planning Commission Resolution Number 1-88 on file at the City of Healdsburg Offices."

The City of Healdsburg Planning Commission passed Resolution 1-88 on January 12, 1988, setting forth the conditions of approval for a tentative map which later became Parcel Map 119. Pursuant to Resolution No. 1-88, the Public Works Department's condition of approval B-3 requires "[t]hat a 10 [foot] wide private drainage easement be established across Lot 3, to the benefit of Lot 2, which easement shall encompass the existing drainage swale." Further, the Public Works Department's condition of approval B-4 requires "[t]hat no lot-to-lot drainage be permitted outside of drainage easements."

### ***Strider's Knowledge of the Easement's Existence***

Prior to the close of escrow, plaintiff read Resolution No. 1-88 and saw that it required a 10-foot easement across his Lot 3 for the benefit of Lot 2. He was "concerned because it possibly precluded [him] from building a structure on it." He asked the seller "to look into getting rid of it." In a letter dated August 31, 1999 to the Chief Title Officer of Fidelity National Title Company, an associate engineer from Healdsburg's Community Development Center expressed the opinion that " 'the Private Drainage Easement' does

not in fact exist.” However, at the time Strider closed escrow on September 15, 1999, he knew the issue was “not completely” resolved. To resolve the issue completely, he would have to “eradicate the easement on the map.” But he did not make it a condition of the close of escrow that the easement be eradicated prior to completion of the purchase.

Strider consulted an attorney about eradication of the easement in 2005 or 2006. That did not resolve the problem. The next action he took was to call Richard Burke on October 1, 2007 and ask him if he would “sign off” on eradication of the easement. However, Burke “didn’t want to give it up.”

### ***The Lawsuit***

On August 10, 2010, plaintiff Strider filed a verified complaint for “Cancellation of Inactive Drainage Easement” pursuant to Civil Code section 3412. The complaint alleged that in the 10 plus years he had owned the property, “there has been no use of the Drainage Easement for drainage or any other purpose.” However, in the complaint Strider admitted there is an existing drainage swale on his property that runs down the middle of the property, if only “[p]art of the time.” He claims never to have seen water drainage go through the swale. He also acknowledges that there had been sheet water run off from adjacent property onto his lot, although he denied any need for “channeling to any specific location.” Because the easement, if left outstanding, would prevent him from “erecting any structures that prevent access to or use of the Drainage Easement,” he requested that the easement be rendered void by stipulation, but the Burkes “refused to cooperate.” Therefore, Strider prayed that “Sheet 3 of 4 of the Parcel Map be declared void pursuant to Civil Code section 3412,” that sheet 3 of 4 be delivered to the court for cancellation, and that a new sheet 3 of 4 of the Parcel Map be prepared without reference to the disputed drainage easement. He alleged the drainage easement was “void due to mistake or inadvertence when the Parcel Map was created, or in the alternative, is void due to abandonment and or by lack of reasonable necessity.”

Defendants moved for summary judgment on the ground plaintiff’s complaint was barred by a statute of limitations of either three or four years, or by laches. The trial court

agreed with defendants that plaintiff's action for cancellation under Civil Code section 3412 was barred by the four-year statute of limitations set forth in section 343 of the Code of Civil Procedure; rejected plaintiff's argument that *Muktarian, supra*, 63 Cal.2d 558, holding that the statute of limitations does not start running in an action to quiet title as long as the plaintiff remains in possession of the property, applies to actions under Civil Code section 3412; and granted defendants' motion for summary judgment. Following entry of judgment, plaintiff timely appeals.

## **DISCUSSION**

### ***Plaintiff's Contentions***

On appeal, plaintiff renews his argument that the holding of *Muktarian v. Barmby, supra*, 63 Cal.2d 558, is not limited to quiet title actions, but also applies to actions brought under Civil Code section 3412 to cancel an instrument, as long as the plaintiff remains in undisturbed possession of the property. He contends that the gravamen of his complaint is substantially the same as the gravamen of a quiet title action, namely "his desire to preserve and define his property rights in his parcel by removing a cloud thereon." He further asserts that, despite the unity of interests at stake, he could not have sued to quiet title because "there exists [sic] no deeds that reflect the purported drainage easement at issue; thus, there were no adverse deeds that claim against, or interfere with, Strider's property rights." In a footnote, he dismisses "the City Resolution that references an easement" as a belated attempt by the Burkes "to incorporate that resolution somehow into Burke's own deed."<sup>1</sup>

### ***Standard of Review***

"Because plaintiff appealed from the trial court's order granting defendant summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Johnson v. American Standard, Inc.*

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<sup>1</sup> Because we reject plaintiff's claim that *Muktarian, supra*, 63 Cal.2d 558, applies in this case, we need not address his further arguments that, applying *Muktarian*, the statute of limitations did not start to run until the Burkes filed their cross-complaint, or that laches does not bar his claim.

(2008) 43 Cal.4th 56, 64.) In this case, we must determine whether defendants have shown plaintiff's action is barred by the statute of limitations. " 'If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.' [Citation.] In performing our de novo review, we view the evidence in the light most favorable to plaintiff as the losing party. [Citation.] In this case, we liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor. [Citation.]" (*Id.* at p. 64.)

***The Statute of Limitations Applies to This Action Under Civil Code Section 3412***

Civil Code section 3412, under which this action was brought, provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civ. Code, § 3412.) It is well-established that "Civil Code section 3412 is not a statute of limitations, nor does it contain one within it. . . . To find out whether actions intended to enforce rights recognized in the Civil Code are timely, we almost invariably look to the provisions of the Code of Civil Procedure. [¶] It is true . . . that there are some actions as to which there are no applicable statute of limitations. . . . But an action to cancel an instrument under Civil Code section 3412 is not one of them." (*Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1325–1326 (*Robertson*)). In *Robertson*, this court traced the rule to *Moss v. Moss* (1942) 20 Cal.2d 640 (*Moss*), in which our Supreme Court concluded, after examination of a broad range of cancellation actions, that no public policy excluded cancellation actions from the general four-year statute of limitations contained in Code of Civil Procedure section 343.<sup>2</sup> (*Robertson, supra*, at pp. 1325–1326.) *Robertson* observed that the *Moss* rule had been applied by this court in a

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<sup>2</sup> Code of Civil Procedure section 343 provides: "ACTIONS FOR RELIEF NOT HEREINBEFORE PROVIDED FOR. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

number of subsequent cases<sup>3</sup> and concluded: “In short, if there were ever any merit to the position that there is no limitations period for actions brought under Civil Code section 3412 to declare an instrument void, post-*Moss* and *Zakaessian* there certainly is none.” (*Robertson, supra*, at pp. 1326–1327.) Thus, a four-year statute of limitations applies.

Despite the great weight of authority against his position, Strider maintains that his case is governed by the rule stated in *Muktarian, supra*, 63 Cal.2d 558, that “no statute of limitations runs against a plaintiff seeking to quiet title [while he is] in possession of the property.” He argues that the rationale of *Muktarian* applies to his situation, namely that “[i]n many instances one in possession would not know of dormant adverse claims of persons not in possession. [Citation.] Moreover, even if, as here, the party in possession knows of such a potential claimant, there is no reason to put him to the expense and inconvenience of litigation until such a claim is pressed against him.” (*Id.* at pp. 560–561.)

However, to toll the statute of limitations under plaintiff’s theory, the possession must be exclusive and undisputed. (*Ankoanda v. Walker-Smith* (1996) 44 Cal.App.4th 610, 616. See also 3 Witkin, Cal. Proc. (5th ed. 2008) Actions, § 490, p. 631.) “[U]ndisputed can only sensibly mean the absence of a dispute before the present controversy and attendant lawsuit arose.” (*Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1230.)

Plaintiff’s asserted right to easement-free possession was never undisputed. “When a lot conveyed by deed is described by reference to a map, the map becomes part of the deed.” (6 Miller & Starr, Cal. Real Estate (3d ed. 2006) § 15.26, pp. 15-97–15-98, citing *Danielson v. Sykes* (1910) 157 Cal. 686, 690.) In this case, a private drainage easement across Lot 3 for the benefit of Lot 2 was created as a matter of necessity, and as a precondition to approval of the proposed Valley View Subdivision, when the original grantors subdivided their property into the four lots depicted in Parcel Map 119. Whether

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<sup>3</sup> See, for example, *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725; *Wade v. Busby* (1944) 66 Cal.App.2d 700, 702; *Estate of Pieper* (1964) 224 Cal.App.2d 670, 688–689; *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 212–213.

deemed to have been created by implication or reservation, the benefit and the burden of the easement were conveyed to the Burkes and to Strider by virtue of the fact that their respective lots were described by reference to Parcel Map 119 in their deeds.

The existence of the easement was in dispute even before the lot was conveyed to Strider. Prior to the close of escrow in 1999, he was aware of the easement's origins and its appearance on Parcel Map 119; he was concerned that its placement in the middle of the lot would hinder his future ability to build; he sought the assurances from the seller and a city engineer that, despite its appearance on the parcel map incorporated by reference into his deed, the easement did not really exist; and he understood that to resolve the problem posed by the easement, he would have to take further affirmative steps to extinguish it. Thus, the dispute over the existence of easement predated instigation of the current litigation by 11 years. Under these circumstances, the trial court did not err in finding that Strider's complaint for cancellation of an instrument was barred by the four-year statute of limitations contained in Code of Civil Procedure section 343. The court properly granted defendants' motion for summary judgment.

**DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Banke, J.