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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

J&R SAN FRANCISCO, INC. et al.,

Plaintiff and Respondent,

v.

MEREDITH FONDAHL,

Defendant and Appellant.

A141841

(City & County of San Francisco
Super. Ct. No. CGC-12-521881)

Defendant Meredith Fondahl appeals from an order denying her petition to compel arbitration in a dispute with J&R San Francisco, Inc. (J&R) arising from the sale of her home. The trial court denied the petition on the ground that there was a potential for inconsistent rulings by an arbitrator and a court on claims involving the scope of an easement for ingress and egress to the property. We affirm.

BACKGROUND

Fondahl sold her home at 1155 Washington Street in San Francisco to J&R in 2011. The property is considered to be “landlocked” because there is no access to Washington Street other than over an easement for ingress and egress on a driveway that runs through a portion of 1165 Washington (the “Fung Property”), a property owned by Chu Quan Fung (Fung) and his wife as trustees of a family trust. In a standard-form seller’s disclosure statement, Fondahl answered “no” to the question: “Are there any current or potential disputes or claims which affect or are likely to affect the Property (e.g., boundary disputes, or rights being asserted by others which could affect the Property)?” Fondahl also sent the following email to her real estate agent addressed to

“prospective buyers” to “clarify questions we have been receiving about the driveway easement that benefits 1155 Washington.”

“The previous (original) owners of 1155 Washington established and recorded a dominant easement for 1155 Washington for use of the driveway. . . . [¶] When we moved in, Mr. Fung had been using the garage as overflow parking in addition to his two car garage and the driveway space in front of it. As good neighbors, we indicated that we did not have an objection with him using the driveway for overflow parking as long as he was always able to clear the easement of any vehicle in a matter of minutes so our path was not blocked whenever we arrived or chose to leave the house, no matter what time. This worked for us as we were often away and we have found him to be a good neighbor. He has complied and the informal arrangement has worked for 11 years. Mr. Fung is aware that the driveway is an easement. Our agreement is neither formalized nor recorded. From my perspective the new owner of 1155 Washington has the right to clear access of the easement. My expectation was always that if we were coming and going regularly, Mr. Fung would most likely tire quickly of constant requests and cease to park in the driveway.”

After receiving this communication, J&R consulted with counsel about “the possibility that [the Fung Property] has ‘presumed’ rights to the driveway because they have been using it all these years,” but proceeded with the purchase of 1155 Washington.

In February 2012, J&R wrote Fung and demanded that he discontinue parking on the easement. Fung refused, and asserted he had obtained prescriptive rights to park on the easement through hostile use during Fondahl’s ownership of 1155 Washington. In June 2012, J&R sued Fung for declaratory relief, seeking a determination that J&R had a right to unobstructed use of the easement and that Fung had no right to park there. The complaint alleged that Fung had no prescriptive parking rights because he parked on the easement with the express permission of 1155 Washington’s previous owners. Fung cross-complained seeking a declaratory judgment that the easement was for pedestrian ingress and egress only. Fung alleged that his family had parked on the easement since

1979, and that this use had been “open and notorious . . . , continuous, uninterrupted, hostile, exclusive and under a claim of right.”

Fung testified in a deposition that he had argued with Fondahl about half a dozen times about parking on the easement. She told him she did not want him to park there, he replied that “we’d been parking there ever since we owned the house,” and she threatened to take him to court. The last time he spoke with Fondahl, she asked him not to park on the driveway because she was trying to sell the property. She told him that the parking would hurt her chances of selling, and he responded, “ ‘I’ve been parked there all this time.’ . . . ‘Why don’t you just be honest with the buyer that I have the right to park there?’ ” Fondahl testified in a deposition that Fung told her he had parked on the driveway for many years and had a right to park there. She occasionally had heated words with Fung about the parking.

J&R added Fondahl as a defendant in the case. The second amended complaint asserts causes of action against her for breach of contract, real estate seller’s nondisclosure of material facts, breach of the covenant of good faith and fair dealing, intentional misrepresentation, and negligent misrepresentation. These causes of action are based on her representations that the owner of 1155 Washington was entitled to unrestricted access to the property over the easement, and failure to disclose Fung’s claim to parking rights on the easement. The second amended complaint also includes a cause of action against Fondahl and Fung jointly for civil conspiracy.

Fondahl moved to compel arbitration of the causes of action against her in the second amended complaint, other than the civil conspiracy claim. The motion was based on the purchase agreement for 1155 Washington, which provided for arbitration of “[a]ny dispute or claim in law or equity arising out of this Contract or any resulting transaction” The motion was denied on the grounds that “there is a potential for

inconsistent ruling by arbitrator and trial court and a cause of action [the conspiracy count] that cannot be sent to arbitration.”¹

DISCUSSION

Enforcement of an arbitration agreement may be denied when “[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.” (Code Civ. Proc., § 1281.2, subd. (c).) “A party relying on [Code of Civil Procedure] section 1281.2 [subdivision] (c) to oppose a motion to compel arbitration does not bear an evidentiary burden to establish a likelihood of success or make any other showing regarding the viability of the claims and issues that create the possibility of conflicting rulings. [Citation.] . . . Moreover, [Code of Civil Procedure] section 1281.2 [subdivision] (c) prohibits a trial court from considering the merits of a party’s claims when ruling on a motion to compel arbitration.” (*Acquire II, Ltd. v. Colton Estate Group* (2013) 213 Cal.App.4th 959, 972.) “The issue to be addressed under [Code of Civil Procedure] section 1281.2, subdivision (c) . . . is not whether inconsistent rulings are inevitable but whether they are possible if arbitration is ordered.” (*Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 567.)

The declaratory relief action between J&R and Fung puts in issue the extent of Fung’s right to park on the easement. This same issue could arise if damages were to be

¹ After the motion to compel arbitration was denied, the court granted the request of J&R and another plaintiff not involved in this appeal to proceed with trial of the declaratory relief dispute with Fung. We denied Fondahl’s request to augment the record with evidence of these facts on the ground that they were not before the trial court when it ruled on the motion to compel. Fondahl has again tried to put these fact before us in a motion for judicial notice. We deny the motion for the same reason we denied the augmentation request. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Fondahl has filed a supplemental motion for judicial notice of: (1) a judgment against Fung on the claims for declaratory relief, which determined among other things that he has no right to park along the easement; and (2) Fung’s stipulation not to appeal the judgment. We again deny this supplemental motion for the reason stated. (*Ibid.*)

awarded in an arbitration between J&R and Fondahl should Fondahl's disclosures concerning Fung's permissive use of the easement property be found to have been fraudulent or otherwise inadequate.

Civil Code section 3343, provides: "(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including . . . [¶] . . . [¶] (2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud." Similarly, Civil Code section 1102.13 provides that "any person who willfully or negligently violates or fails to perform any duty prescribed by [statutes specifying the disclosures required upon transfer of residential property] shall be liable in the amount of actual damages suffered by a transferee." (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1545 [" 'actual damages,' as used in [Civil Code] section 1102.13 means compensatory damages as measured by [Civil Code] section 3343".])

The measure of J&R's use and enjoyment of its property depends to a degree on Fung's right to park on the easement. If Fung is determined to have that right, and Fondahl failed to disclose facts relevant to the existence of that right, then J&R can claim to have been damaged by Fondahl's omission to the extent the value of 1155 Washington was impaired by the limited scope of the easement. (Civ. Code, §§ 3343, subd. (a)(2), 1102.13; *Saunders v. Taylor, supra*, 42 Cal.App.4th at p. 1545.) Thus, Fondahl is mistaken in arguing that "the non-disclosures alleged by J&R cannot have caused any damages that would require an arbitrator to determine Mr. Fung's right to park."

Fondahl's other challenges to the court's ruling are unavailing. Relying upon Civil Code section 3344's provision for recovery of "out-of-pocket" losses, Fondahl contends that J&R is entitled to damages only for the difference between what J&R paid for the property and the actual value of the property at the time of the purchase in 2011 when the scope of the access easement was unclear. However, this argument ignores the

statute's provision for damages based on loss of use and enjoyment of the property. (Civ. Code, § 3343, subd. (a)(2).)

Fondahl argues that J&R can only recover damages that were proximately caused by her non-disclosure, and any non-disclosure was not the proximate cause of harm because J&R's damages are due to Fung's "habitual parking on the easement." But this argument raises the issue of Fung's claimed entitlement to the parking. If Fung is determined to have the right to park on the easement, then Fondahl could be found solely responsible for the resulting loss of use and enjoyment of J&R's property.

Fondahl argues that when she sold the property, she "had no obligation to either determine the scope of the easement or predict how the trial court might eventually decide the issue. [She] could only disclose in 2011 what she knew at that time" We do not necessarily disagree, but whether her disclosures were adequate raises a question for a trier of fact. An arbitrator could reasonably find that her disclosures were insufficient because she failed to mention that Fung claimed a right to park, and were misleading insofar as they suggested there were never arguments on the subject.

Fondahl cites *Stevenson v. Baum* (1998) 65 Cal.App.4th 159 (*Stevenson*), for the proposition that a seller has no duty to disclose an easement's "effect on the use of the property, or prior experiences with the easement," but *Stevenson* is inapposite. There, buyers of a mobile home park sued the seller for fraudulent concealment related to an easement held by an oil company for ingress, egress, and pipeline purposes. The contract of sale stipulated that title was to be free of easements other than those "of record." (*Id.* at p. 162.) The court affirmed a summary judgment for the seller, noting that the buyers could have determined all material facts concerning the easement if they had examined public records prior to the purchase. (*Id.* at p. 166.)

Here, a check of public records would not have revealed all arguably pertinent information about the easement. " "In general, a seller of real property has a duty to disclose: ". . . facts materially affecting the value or desirability of the property which are known or accessible only to him . . . [and] not known to, or within the reach of the diligent attention and observation of the buyer" ' " (*Stevenson, supra*, 65

Cal.App.4th at p. 165 (italics omitted).) J&R had no source of information about Fung's claim over the easement other than Fondahl.

DISPOSITION

The order denying the motion to compel arbitration is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.