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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

GERALD TOSTE et al.,

Plaintiffs and Appellants,

v.

COUNTY OF EL DORADO,

Defendant and Respondent.

C070100

(Super. Ct. No. PC20070291)

This appeal is the sixth installment in baseless litigation filed by attorney Charles Kinney arising out of easements on land owned by Kinney’s clients, plaintiffs Gerald and Robin Toste (the Tostes), for the benefit of their neighbors, the Smedbergs.¹

¹ In the first, we affirmed an award of compensatory and punitive damages against Gerald Toste for willfully interfering with one of the easements. (*Smedberg v. Toste* (Dec. 10, 2008, C056578) [nonpub. opn.].) In the second, we sanctioned the Tostes and Kinney for filing a frivolous appeal that “recycl[ed] the same arguments” from the first appeal. (*Smedberg v. Toste* (Sept. 28, 2009, C058031) [nonpub. opn.].) In the third, we affirmed the dismissal of the El Dorado Superior Court as a party in the Tostes’ action for inverse condemnation. (*Toste v. Superior Court* (Oct. 27, 2009, C058938) [nonpub. opn.].) In the fourth appeal, we affirmed an order denying Gerald Toste’s challenge of the denial of his claim of exemption to the Smedbergs’ wage garnishment. (*Smedberg v. Toste* (Mar. 6, 2012, C068218) [nonpub. opn.].) In the fifth appeal, we affirmed the resulting judgment following a summary judgment in favor of First American Title Insurance Company in a lawsuit the Tostes filed against First American after First

Kinney is no stranger to the courts. He has been declared a vexatious litigant in Los Angeles Superior Court in 2008 and in the Court of Appeal, Second Appellate District, Division Two, in 2011. (*In re Kinney* (2011) 201 Cal.App.4th 951, 960.) In those instances, Kinney “pursued a persistent and obsessive campaign of litigation terror against his neighbors and the City of Los Angeles” (*Id.* at p. 953.) Those cases, as does the litigation here, arose out of a property dispute against neighbors involving easements. (*Id.* at p. 954.) “As one trial judge aptly wrote in a statement of decision, Kinney is ‘a relentless bully’ who displays ‘terrifying arrogance’ by filing ‘baseless litigation against the City [of Los Angeles] and its citizens.’ ” (*Id.* at p. 953.)

This appeal fares no better. On behalf of the Tostes, Kinney contends the El Dorado County Superior Court (the trial court) erred in sustaining a demurrer to the Tostes’ third amended complaint without leave to amend in favor of defendant the County of El Dorado (the county). He argues the Tostes alleged viable causes of action for: (1) dangerous condition on public property; (2) inverse condemnation; and (3) declaratory relief. We find these arguments meritless and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a lawsuit the Tostes filed against the county for its acts or omissions with respect to the Smedbergs building a road on one of the easements.

To put this case in context, we begin with some background. In 1977, the Smedbergs bought a large piece of property that was divided into five parcels. The property is bisected by a creek that makes it difficult to access the east portion of the property from the west portion of the property. The Smedbergs’ home and driveway are on the west side of the creek. To provide access to the parcels on the east side of the creek, two contiguous easements were created near the southeast portion of the

American missed one of the easements encumbering the Tostes’ property. (*Toste v. First American Title Insurance Company* (March 28, 2012, C067520) [nonpub. opn.]

Smedbergs' property. They were in existence when the Smedbergs bought the property in 1977. These easements are sometimes referred to as the north easement and the south easement. The south easement runs the length of the northeast boundary of the Toste property. The north easement runs the length of the southwest boundary of two parcels contiguous to the Tostes. One of the two parcels is owned by Hugo Giusti and his son Ronald Giusti. (*Smedberg v. Toste, supra*, C056578, at pp. 3-4.)

The Smedberg family sought to build a driveway over the easements to a house they planned to construct on the property. Gerald Toste built a fence between the boundary of the two easements, and began piling obstructions along the easements and engaging in harassing and obstructionist behavior on the property and toward members of the Smedberg family. (*Toste v. Superior Court, supra*, C058938, at p. 2.)

In July 2006, the Smedbergs filed a complaint against the Tostes to quiet title to the easements, to obtain declaratory relief, and to obtain an injunction and damages for negligence. They also sought a preliminary injunction to stop the Tostes from blocking their use of the easements and to compel them to remove a fence and other obstructions from the easements. The trial court granted the preliminary injunction. (*Toste v. Superior Court, supra*, C058938, at p. 3.)

The Tostes filed a cross-complaint against members of the Smedberg and Giusti families, alleging the Tostes adversely possessed the disputed easements. (*Toste v. Superior Court, supra*, C058938, at p. 3.)

The case went to trial in June 2007. The trial court granted the Guistis' motion for a directed verdict against the Tostes as to their claim that they adversely used (and therefore acquired a prescriptive easement in) one of the easements. Thereafter, the jury rejected the Tostes' remaining claims of adverse possession of the easements. It also found Gerald Toste liable for nuisance and awarded the Smedbergs \$65,000 in compensatory damages and \$40,000 in punitive damages. (*Toste v. Superior Court, supra*, C058938, at p. 3.)

Based on the evidence presented at trial, the court granted a permanent injunction, enjoining the Tostes “from harassing, annoying, intimidating, interfering with and obstructing the plaintiffs and the plaintiffs’ invitees in their improvement, maintenance and use of the easement.” (*Toste v. Superior Court, supra*, C058938, at p. 3.)

In May 2007, a month before that case went to trial, the Tostes filed the complaint in this case against the county. In its third amendment to that complaint filed in May 2011, they alleged causes of action for dangerous condition of public property, inverse condemnation, and declaratory relief. (We will detail the allegations of the complaint further in the discussion section.) The county filed a demurrer, and the trial court sustained the demurrer, this time without further leave to amend. The Tostes appeal from the resulting judgment.

DISCUSSION

I

Standard Of Review

We apply the following settled standard of review to an order sustaining a demurrer without leave to amend: “The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The burden is on the Tostes to demonstrate the manner in which the complaint could be amended to state a viable cause of action.

(*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

II

Dangerous Condition Of Public Property

The Tostes contend the trial court erred in sustaining the demurrer because they stated a cause of action for dangerous condition of public property. The third amended complaint alleged as follows: The dangerous condition arose from the construction of a 500-foot long and 40-foot wide private road on one of the easements from the Smedbergs' parcel across the Tostes' property to the public Blair Road. The county approved the grading permit and the Smedbergs built the road. The county's approval was "without a public hearing, without public input, and/or without conformance to the [g]eneral [p]lan and/or applicable rules and regulations." The road came within 50 feet of a creek that crosses the Tostes' parcel, a violation of "existing regulations regarding perennial stream protection," which resulted in obscured visibility and adverse road conditions due to moisture and snow. There were nearby trees and bushes that impaired vision where the private road formed a T-intersection with Blair Road. There was a blind corner due to the elevation drop off Blair Road as it passes by the Tostes' parcel. The road did not have a fire turnout lane for emergency vehicles. The Tostes were subject to fear for their safety, excessive noise from vehicles using the road to and from Blair Road, and dust and rocks kicked up by the vehicles using the road that were deposited on the Tostes' parcel.

The court sustained the demurrer without leave to amend, ruling that "conditions along the length of the private easement road cannot form the basis for a claim against defendant [c]ounty," and that to the extent the blind corner at the intersection could support a claim for a dangerous condition on the public road, the Tostes did not allege sufficient injury caused by the blind corner. The trial court got it right.

“Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” (Gov. Code, § 835.)

As the trial court ruled, there were at least two fatal flaws to the Tostes’ claim of dangerous condition of public property.

One, most of the Tostes’ allegations of dangerous condition related to the private road on the Smedbergs’ easement that is not on public property. These allegations include issues about where the road is located in relation to a creek and the lack of a fire turnout lane. The statute makes clear the dangerous condition must be on public property to be actionable. (Gov. Code, § 835 [“public entity is liable for injury caused by a dangerous condition of *its* property” (Italics added).].)

Two, as to the allegation that involves the creation of a dangerous condition at the T-intersection that is on the public Blair Road (because of obscured visibility due to vegetation and a drop in elevation), the problem with these allegations is one of injuries and causation.

The injuries the Tostes allege from these conditions are “fear for their safety, excessive noise from vehicles using the road to and from Blair Road, and dust and rocks kicked up by the vehicles using the road that were deposited on the Tostes’ parcel.” These injuries are insufficient. To be actionable under Government Code section 835, fear must be the type of emotional distress that is actionable under the common law.

(*Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 711.) Where, as here, the Tostes have not been physically injured as a result of the alleged dangerous condition, the harm must be “severe and debilitating” to be actionable. (See, e.g., *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 919-920 [where the defendant hospital erroneously diagnosed wife with syphilis, husband may recover for emotional distress where his wife then believed her husband had infected her through an extra-marital affair causing tension and hostility and the breakup of their marriage and initiation of dissolution proceedings].)

As to the injury of dust and rocks being kicked up on the Tostes’ parcel (and the injury of fear for that matter), the problem is one of causation. Here, the Tostes have alleged numerous actions by the county, such as the lack of public hearing, the lack of public input before approval of the road, and failure to conform the road to the general plan, but they have not tied these violations to the injuries allegedly suffered. For example, was it the lack of public hearing that caused the dust and rocks? Was it the lack of public input? Was it the failure to conform to the general plan? Or was it something else?

Despite three amendments to their complaint, the Tostes still have failed to state a cause of action for dangerous condition of public property and have not proposed how they could do so. The trial court did not err in sustaining the county’s demurrer to the third amended complaint without leave to amend.

III

Inverse Condemnation

The Tostes contend the trial court erred in sustaining the demurrer because they stated a cause of action for inverse condemnation. The third amended complaint alleged the county’s liability for inverse condemnation based on its approval in August 2006 of a grading permit for the road that the Tostes claimed was based on “unresolved and disputed access easements.”

This contention need not detain us long because inverse condemnation does not apply here. At the heart of an inverse condemnation action must lie a taking of, or damage to, private property for some public works undertaking or other activity by an agency with the power to condemn. (8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 1143, p. 784.) This case involved no taking of or damage to the Tostes' property for a public purpose. Rather, the building of the road only affected the Tostes' property, vis-à-vis, the lawful holders of rights in the easements, the Smedbergs, who had a right to build a road on the easement.

IV

Declaratory Relief

The Tostes claim the trial court erred in sustaining their demurrer because they stated a cause of action for declaratory relief. Their third amended complaint alleged they desired a judicial determination and declaration of rights of their property relating to the easements, the nature of the creek on Tostes' property (whether it is seasonal or perennial), and the rights under the county's general plan, among other things.

Declaratory relief is available "in cases of actual controversy relating to the legal rights and duties of the respective parties" (Code of Civ. Proc., § 1060.) "The purpose of a declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." ' ' (Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal.2d 719, 729.)

Here, there was no actual controversy serving any practical end. There was no actual controversy with respect to the easements because we previously have determined the Tostes have no claim to the easements. (*Smedberg v. Toste, supra*, C056578, at pp. 8, 11-12.) There was no actual controversy serving any practical end with respect to the nature of the creek because it is on private property, for which the county bears no liability. Finally, there is no actual controversy serving any practical end with respect to whether the county violated its general plan or failed to hold public hearings before

issuing the grading permit because as we have explained in part II of the discussion, the Tostes have alleged no causal relationship between these alleged acts or omissions and the alleged harm they suffered.

DISPOSITION

The judgment (order of dismissal) is affirmed. The county is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

ROBIE, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.