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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES F. RUSK,

Plaintiff, Cross-defendant and
Appellant,

v.

RICK TIMM et al.,

Defendants, Cross-complainants and
Respondents.

D058760

(Super. Ct. No. 37-2008-00059352-
CU-OR-NC)

APPEAL from a judgment of the Superior Court of San Diego County, William S.

Dato, Judge. Affirmed.

James F. Rusk appeals a grant of summary adjudication in favor of Rick Timm and Julie Timm. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case is before us a second time. We previously affirmed Judge Nugent's September 2005 order allowing the Timms to regrade a nonexclusive landscape

easement, and granting Rusk's injunction that the Timms remove a fence they had installed over the easement. (*Rusk v. Timm* (Feb. 16, 2007, D047840) [nonpub. opn.].) Rusk appealed our decision to the California Supreme Court, which denied review.

After our remittitur issued in May 2007, Rusk moved to modify Judge Nugent's injunction in the superior court. Rusk argued, "Jurisdiction has returned to this court." Rusk explained in his moving papers the developments that had occurred following Judge Nugent's injunction: "[The Timms] did remove the fence, but then reinstalled the fence only seven feet over. The new fence restricts [Rusk's] ability to use the remaining 23 feet of the easement. It appears that [the Timms] think that they have technically complied with the judgment since they did remove the fence that was installed. However, to reconstruct the same fence only seven feet over on a 30[-]foot easement is a clear violation of the spirit of the court's order. The prior fence interfered with [Rusk's] easement and the new fence is no different. ¶] *Consequently, [Rusk] requests that the court modify . . . the judgment to state: '[The Timms] shall remove the fence they installed on the easement and shall not install any fence within the boundaries of the easement.'*" (Italics added.)

Rusk set forth in detail the burden placed on his easement by the Timms' new fence: "[It] also creates an unreasonable restriction on access. As the court can see from the photographs lodged with the court . . . [Rusk] can access the easement only from one corner of the easement. Thus, regardless of which portion of the easement [he] desires to access, he must enter at the one point of entry and then traverse the slope. The slope, which as a result of [the Timms' grading], is steeper than it was previously. This is an

unsafe condition because [Rusk] would have to traverse the slope laterally. His uphill foot would be substantially higher than his downhill foot while trying to travel horizontally across the slope. It is safer to access the slope vertically, as if going up and down stairs. This restricted access becomes more difficult for the times [Rusk] desires to use garden tools which must be carried. Removal of vegetation would be more difficult as well between having to traverse the slope laterally and having to travel a farther distance since there is only one point of entry. [¶] [The Timms] claim that they need the fence because they have a pool and the applicable ordinances require the pool to be fenced. [They] do not need to place the fence in its present location to satisfy the requirement. They can simply move the fence to the top of their retaining wall at the bottom the [*sic*] slope, and off the easement, and they will comply with the code. The court is invited to examine photographs B, D, E and F in Exhibit 'C' which depicts the back yard of [the Timms]. The court will note that [the Timms] have placed a fence on top of the retaining wall at their rear property line."

The Timms opposed the motion, claiming the doctrines of estoppel and laches applied because Rusk brought the motion over two and one-half years after Judge Nugent's order. The Timms further contended Judge Nugent had declined to retain jurisdiction to hear any further disputes between the parties relating to the easement. Finally, the Timms argued Rusk's motion was frivolous, and therefore they sought attorney fees and costs under Code of Civil Procedure section 128.5.

In reply, Rusk countered the Timms' argument regarding jurisdiction: "It is too late to complain about [Judge Nugent's] order now. It is a final injunction, subject to

modification only under [Civil Code section 3424, subdivision (a)].¹ Timm argues that this court refused to retain jurisdiction to hear further disputes, but that is not the issue. This motion is not about enforcing a 'further dispute'. This motion is about enforcing the court's order as intended."

During the hearing on Rusk's motion to modify the injunction, the Timms' attorney sought Judge Nugent's clarification of his earlier order: "It is our belief that if the court would have intended that not only the fence that was in controversy was to be removed, but if the court's intent was to further say no fence is to be put back up on any portion of the easement, the court would have so ruled." Judge Nugent responded, "You're right. The construction fence is what troubled me."

Judge Nugent tentatively denied Rusk's motion: "The test here—and you put it correctly in your papers, as did everyone—is whether it's an unreasonable restriction on [Rusk's] use of the easement. And as I understand it, there's a gate that leads into it that can be used to traverse the slope and to do whatever landscaping needs are appropriate. [¶] So I don't see granting the request. In fact, I'm denying it. . . . [¶] I also can't grant any affirmative relief based on your [opposition and request for attorney fees and costs]. I understand your desire and perhaps needs, but that truly is the subject of a separate proceeding, whether it's small claims or wherever it takes you."

¹ Civil Code section 3424, subdivision (a) states: "Upon notice and motion, the court may modify or dissolve a final injunction upon a showing that there has been a material change in the facts upon which the injunction was granted, that the law upon which the injunction was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction."

Afterwards, the following exchange took place:

"[Rusk's counsel:] . . . [W]hether the fence as it exists with the gate in it represents unreasonable restriction on the easement is something that should then be heard with a new evidentiary hearing.

"[Judge Nugent:] We're not going to have any more evidentiary hearings in this case.

"[Rusk's counsel:] No, no, no. It needs to be a new case.

"[Judge Nugent:] That may be, yeah.

"[Rusk's counsel:] But I don't think the court—

"[Judge Nugent:] And that's what I hate to see you have to go forward on. You know that. But I'm simply going to be denying your modification request."

Judge Nugent exhorted the parties to resolve their dispute: "I'm telling you what you know; this isn't news. But there simply shouldn't be any reason why everybody—you don't have to be best buddies and go to dinner together, but there can't be a good reason why you can't simply agree on how to maintain that slope. It should be a piece of cake. Come up with a plan, irrigate it, and there you are. [¶] But to be fighting like this, spending the time and the money, I mean, my heart goes out to both of you. I just, I hate to see it. And I wish I could put an end to it. But that's not before me procedurally, nor do I know of a way that it would be."

Judge Nugent's September 2008 final order stated: "[Rusk's] motion to modify injunction is denied. The provision in the original judgment requiring removal of the fence was limited to the temporary construction of the fence. . . . The court has not

previously addressed the permanent fence placed in the same location. The court finds that the fence does not constitute an unreasonable interference with Plaintiff's use of the easement."

Rusk did not appeal Judge Nugent's ruling as he was authorized to do under Code of Civil Procedure section 904.1, subdivision (a)(6). Instead, in October 2008, Rusk filed a second lawsuit alleging causes of action for injunctive relief for interference with easement (first cause of action); declaratory relief (second cause of action); and private nuisance (third cause of action), and contending the same fence unduly burdened his landscape easement. Rusk's proposed remedy was a "permanent injunction restraining and enjoining [the Timms] from placing any fence, structure, or obstruction in the Easement, or from destroying [his] landscaping improvements in the Easement."

Rusk successfully filed a peremptory challenge against Judge Nugent under Code of Civil Procedure section 170.6, and the matter was reassigned to Judge Dato.

In April 2009, the Timms moved for summary judgment or, in the alternative, summary adjudication, arguing the doctrine of collateral estoppel barred all causes of action alleged in Rusk's complaint because Judge Nugent had ruled that the fence did not unreasonably interfere with Rusk's use of the easement.

In October 2009, Judge Dato granted summary adjudication in favor of the Timms on the first and third causes of action, ruling collateral estoppel applied: "[Rusk's] only significant argument is that the reasonableness of the new fence was not 'actually litigated' on the prior motion because there was no evidentiary hearing. But settled principles articulated in the Restatement [Second] of Judgments make it abundantly clear

that issues can be litigated and determined in a binding manner by means of a motion procedure without an evidentiary hearing. California law, although not entirely consistent, is not to the contrary. Accordingly, the Timms' motion is granted."

Following a trial on the remaining issues, the jury concluded Rusk did not acquire a prescriptive easement to use the Timms' land for other than landscaping, and Rusk's maintenance of three Torrey Pine trees on the landscape easement did not cause an unreasonable burden on the Timms' property. Judge Dato's judgment following trial states: "The wrought iron gate and portion of the wrought iron fence extending Westerly beyond the chain link fence as depicted in Trial Exhibit 10.1 is an unreasonable burden on the Easement." He ordered the Timms to remove the gate and that portion of the fence.

DISCUSSION

Rusk contends: "[B]ased on the record of the original injunction, the only issue that was litigated was whether Rusk was 'fenced in' by the construction fence. There was no consideration of the other aspects of the fence, such as whether the area of the easement covered by the fence was an unreasonable burden, considering the fence could be placed at the bottom of the slope, entirely outside the easement. Since the original construction fence was located 7 feet away from the slope, there was no consideration of what placing the fence on the edge of the slope would do to the access for maintenance of the slope. At least these two factual questions had never been litigated in the prior proceeding and both involved some intensive factual issues." Rusk alternatively contends the hearing on his request to modify the injunction was inadequate because

"Judge Nugent did not accept live testimony on the very important issues precipitated by moving the third fence to the edge of the slope." We disagree.

"[T]he facts determining whether the trial court properly applied collateral estoppel are uncontested, and thus application of the doctrine is a question of law to which we apply an independent standard of review." (*Roos v. Red* (2005) 130 Cal.App.4th 870, 878.)

"Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Collateral estoppel applies "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

" 'When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated ' " (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 400.)

Rusk claims Judge Nugent had jurisdiction only to modify the injunction in reference to the previously removed fence, but that he lacked jurisdiction to rule on other problems posed by the new fence, and therefore he did not do so. Preliminarily, in light of the fact that we review a court's ruling, not its reasoning (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336), we find Rusk's distinction untenable. At the hearing, when the Timms' attorney sought clarification regarding his understanding that "if the court's intent was to further say no fence is to be put back up on any portion of the easement, the court would have so ruled," Judge Nugent confirmed, "You're right." Rusk clearly stated the relief he sought: "Since [the Timms] have demonstrated an intent to engage in legal hairsplitting to serve their own needs, and harass [Rusk], the ends of justice would be served by modifying the injunction to state unambiguously that [the Timms] shall remove the fence and not place it anywhere on the easement." Judge Nugent, who was familiar with this case, reviewed Rusk's papers supporting the motion, including photographic exhibits, heard arguments, and denied Rusk's proposed relief, finding the new fence was not an unreasonable burden. It is manifest that if Judge Nugent believed the fence was in any way an undue burden on the easement, he would have ordered it removed as Rusk had requested. At any rate, we accept Rusk's concession that Judge Nugent had jurisdiction to decide whether to modify the injunction under Civil Code section 3424, subdivision (a), and conclude Judge Nugent's order was within the scope of that jurisdiction.

We also reject Rusk's interpretation of Judge Nugent's decision to not consider further evidence and Judge Nugent's statements about possible future hearings. Rusk

argues, "Reassuring Rusk's attorney that [he] was not intending to make a more general finding, Judge Nugent first refused to take any more evidence on the issue, even though there were obvious new factual issues about whether the placement of the third fence at the top of the slope increased the risk of landscaping because the slope would have to be accessed horizontally rather than vertically. . . . Next, the trial court agreed with Rusk's attorney that the more general question would have to be addressed in a new hearing [when he stated:] 'That may be, yeah. . . . And that's what I hate to see you have to go forward on. You know that. *But I'm simply going to be denying your modification request.*'" (Italics added.) In light of the state of the record and the arguments by counsel, Judge Nugent could reasonably have concluded he did not need more evidence to conclude the new fence did not burden the easement in any unreasonable way. Further, after Judge Nugent tentatively ruled, Rusk's counsel raised the possibility of further hearings. Judge Nugent commented, "That may be, yeah." In the context of the entire proceeding, a fair interpretation of that noncommittal comment was not that Judge Nugent concluded another round of litigation was needed to resolve pending issues, but rather he declined a definitive response to counsel's speculative statement.

Accordingly, we conclude that Judge Dato did not err by granting the Timms' summary adjudication motion on the ground that collateral estoppel applies. First, the same parties, Rusk and the Timms, were involved in both motions. Second, the same issue was raised in both the motion to modify the final injunction and the motion for summary adjudication: whether the new fence unduly burdened the easement. Third, the issue of the fence was actually litigated, as detailed above; Rusk's supporting papers

explained the problems with the fence and he requested its removal. As noted, the issue was properly raised, by the pleadings and otherwise, and submitted for determination, and was determined, therefore, the issue was actually litigated, and no live testimony was required. (*Barker v. Hull, supra*, 191 Cal.App.3d at p. 226.) Fourth, Judge Nugent's ruling that the fence did not unreasonably burden the easement was necessary for resolving Rusk's motion. Fifth, Judge Nugent's ruling was final and on the merits under Code of Civil Procedure section 904.1, subds. (a)(6), which permits an appeal of an order refusing to grant or dissolve an injunction.²

Rusk argues that judicial economy is not enhanced by forcing litigants to file new actions instead of expeditious motions to modify injunctions. We agree, and conclude that as a matter of public policy, collateral estoppel should apply here. "Collateral estoppel is an equitable concept based on fundamental principles of fairness." (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941.) In determining the application of collateral estoppel, "a court must consider the public policies underlying the collateral

² Rusk points out in his opening brief: "Significantly, the Timms argued that Judge Nugent considered all aspects of the third fence, including the current location of gates and the placement of the fences, so Judge Dato could not make any changes whatever to the fence. . . . Judge Dato apparently rejected this expansive version of what Judge Nugent had intended, later ordering the removal of a gate and part of a fence. . . . But, Judge Dato did agree with the Timms that Judge Nugent's order prevented him from taking evidence or hearing arguments on whether the third fence was an unreasonable burden on the Rusk easement, without reference to the injunction to remove the construction fence, finding that the issues in the two proceedings were the 'very same.' "

But Rusk does not specifically appeal this portion of Judge Dato's ruling, which is favorable to him. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 ["We will not develop the appellants' arguments for them"].) Accordingly, we regard this issue as forfeited.

estoppel doctrine to determine if the facts of the case merit its application." (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 694.) Those policies include preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation. (*Lucido v. Superior Court, supra*, 51 Cal.3d at p. 343.)

Almost four years ago, Judge Nugent observed that judicial economy has not been fostered in this case. This matter was commenced in 2005, and could have been resolved outside of the judicial system. Instead, it has continued for a long time and at significant costs to the parties. We also note that our ruling preserves the integrity of the judicial system because it gives binding effect to Judge Nugent's order. A contrary ruling at this stage would open the door to an inconsistent ruling that could unleash another round of litigation.

DISPOSITION

The judgment is affirmed. Rick and Julie Timm are awarded costs on appeal.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.