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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

APPLEGATE PROPERTIES, INC.,

Plaintiff and Respondent,

v.

CORONADO CAYS HOMEOWNERS
ASSOCIATION,

Defendant and Appellant.

D062829

(Super. Ct. No. 37-2010-00097505-
CU-OR-CTL)

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

John S. Meyer, Judge. Affirmed.

Epsten Grinnell & Howell, Anne L. Rauch and Rian W. Jones for Defendant and Appellant.

Troutman Sanders, Louis M. Segreti and Andrew K. Puls for Plaintiff and Respondent.

The Coronado Cays Homeowners Association (Association) appeals a judgment in favor of Applegate Properties, Inc. (Applegate), the owner of Montego Bay Marina (the Marina), granting Applegate an easement through a common area of Montego Bay Villas

(the Village), a condominium subdivision managed by the Association. The Association claims the trial court erred in granting a prescriptive easement, implied easement and equitable easement through the Village. We conclude that the trial court properly granted a prescriptive easement; accordingly, we need not address the arguments pertaining to an implied or equitable easement.

FACTUAL AND PROCEDURAL BACKGROUND

The Association manages the Coronado Cays common interest development, which contains a number of subdivisions. The Village is a condominium subdivision created in 1981 that is part of the Association. The Association manages the common areas of the Village on behalf of the homeowners under a declaration of covenants, conditions, and restrictions (CC&Rs). A special use permit issued by the City of Coronado in 1968 and amended in 1995, governed the docks within the Coronado Cays development and provided that the docks were originally designated for the exclusive use by Coronado Cays residents.

In 1981, the developer of the Coronado Cays applied for a permit to construct the Marina. The Marina is situated on the water directly adjacent to the Village condominium complex. The Marina is burdened by "Wharfage CC&Rs" recorded by the developer of the Coronado Cays. The Wharfage CC&Rs provide that the wharfage area is subject to the Coronado Cays CC&Rs. In 1989, the developer transferred its leasehold interest in the Marina to Hardesty, Puckett, Queen & Company (Puckett). At this time, the Association's property was not gated.

In 1991, the Association enclosed the Village with a fence for security reasons. With keyed gates, the Association restricted access to the Village to Village owners, tenants, and guests. The only land access to the Marina was over a concrete walkway that ran from a public street through the Village common area.

At that time, the Association required that nonresident tenants, meaning tenants of the Marina who do not own a home or reside in the Coronado Cays, pay a \$100 deposit to obtain a gate key that allowed access to the Marina. Puckett objected to the key deposit and asserted prescriptive easement rights for its nonresident tenants. Ultimately, Puckett paid the deposit and then distributed keys to its nonresident tenants. Puckett testified that the Association did not prevent him from renting slips in the Marina to nonresidents of the Coronado Cays.

In March 1992, Puckett sold the Marina to Montego Bay Marina, Ltd., an entity formed by Henry P. Purdon to purchase the Marina. The Association changed its position to not allow nonresidents of the Coronado Cays to moor their boats at the Marina. When Purdon owned the Marina, however, his Marina tenants included nonresidents of the Coronado Cays. Purdon provided keys to nonresident tenants to allow them access to the Marina.

In February 2003, the Association informed Purdon that it would be changing the gate locks and that only Association residents would be given keys. Purdon, however, claimed that he obtained five keys in exchange for providing the Association with a list of Marina tenants and their addresses. Purdon testified that in May 2003, he had six Marina tenants that were non-Association residents. Purdon sold the Marina to

Applegate after fully disclosing the dispute with the Association to Gerald Nelson, Applegate's owner and president. The sale of the Marina closed in early February 2004.

John Probasco, a Village resident, ran the day-to-day operations for Applegate from 2004 to October 2009. Probasco received use of a slip as compensation for his time. Probasco testified that Applegate inherited nonresident tenants when it purchased the Marina and that it had about six to eleven nonresident tenants at any given time. Probasco obtained gate keys for the nonresident tenants from the Association. Probasco provided keys to nonresident tenants knowing this was forbidden by the Association.

Probasco met with Larry Peterson, the Association's general manager, from time to time to discuss issues, including nonresident tenants using the common area to get to the Marina. Peterson informed Probasco that the CC&Rs limited access to the Marina to Coronado Cays homeowners or renters and that sponsorship of nonresidents was not permitted. Nonetheless, Applegate's nonresident tenants continued to access the Marina through the Village common area.

Peterson similarly testified that he had many conversations with Probasco regarding nonresident tenant access to the Marina. Peterson stated that it is the Association's policy that keys to the Village are authorized only for Village owners or tenants, or Coronado Cays residents that lease a slip from the Marina, and that the Association had the authority to enforce this policy through its security department. He testified that it violated Association policies and governing documents to distribute keys to nonresidents and that the Association did not give Probasco or Applegate permission to hand out gate keys to nonresidents of the Village.

Richard Eddy served as the Village director from August 2009 to July 2011. Eddy stated that nonresident tenants were not permitted to use the docks or to use the common area to access the Marina. Since the Association first provided keys, it was always the rule that nonresidents were not to receive keys. Nonetheless, Eddy stated that the Association knew that Probasco had been providing keys to nonresident tenants and that some of the nonresident tenants accessed the Marina through keys received from Probasco. Terry Rickman assisted Eddy as the assistant director of the Village from August 2009 to July 2011. Rickman knew that Probasco was an Applegate representative and that Probasco was not permitted to distribute keys to nonresidents.

In 2010, the Association again changed the locks, which prompted Applegate to bring this action. Applegate sought to quiet title to an easement across the Village common area and for damages. After hearing the evidence and argument, the court ruled that Applegate was entitled to easements by prescription, implication and equity. The trial court issued a written statement of decision and entered a judgment in favor of Applegate. The Association timely appealed.

DISCUSSION

I. *General Legal Principles*

"An easement is a restricted right to specific, limited, defineable use or activity upon another's property, which right must be *less* than the right of ownership." (*Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1261.) An easement may be created by, among other methods, prescription. (6 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 15:13, p. 15-62.) The party claiming the existence of a prescriptive easement "must show use of

the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years." (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.) "Whether the elements of prescription are established is a question of fact for the trial court [citation], and the findings of the court will not be disturbed where there is substantial evidence to support them." (*Ibid.*)

The trial court's finding of the existence of a prescriptive easement must be based upon clear and convincing evidence. (*Connolly v. Trabue* (2012) 204 Cal.App.4th 1154, 1162.) The requirement of clear and convincing evidence, however, applies only in the trial court. (*Ibid.*; *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 208.) In this court, "[t]he usual rule of conflicting evidence is applied, giving full effect to respondents' evidence, however slight, and disregarding appellant's evidence, however strong." (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

II. Analysis

In its written statement of decision, the trial court found that Applegate's use of the easement was hostile, open and notorious, and continuous for at least five years. The

Association does not challenge the finding that Applegate's use of the easement was continuous for at least five years. Accordingly, we deem any challenge to this element forfeited. (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 455 ["an argument not raised in the opening brief is forfeited on appeal"].)

The element of hostility means "'the claimant's possession must be adverse to the record owner, "unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter."'" (*Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1045.) The evidence shows that use of the easement area by Applegate's nonresident tenants was hostile to the Association.

Nelson never asked the Association for permission allowing its nonresident tenants to access the walkway to the Marina. Nelson testified that he attempted to settle the dispute with the Association regarding nonresident access to the Marina. Although the Association rejected Applegate's proposal, nonresident tenants continued to use the walkway to access the Marina. Probasco testified that after Peterson informed him that the CC&Rs limited access to the Marina to Coronado Cays homeowners or renters and that sponsorship of nonresident tenants was not permitted, Applegate continued to have nonresident tenants access the Marina through the Village common area. Probasco also provided keys to nonresident tenants knowing this was forbidden by the Association. Peterson confirmed that he and no one working for the Association gave Probasco or Applegate permission to hand out gate keys to nonresidents of the Village.

To escape the conclusion that substantial evidence shows hostile use of the easement area, the Association argues that the element of hostile use cannot be satisfied

as a matter of law based on the Association's interpretation of its governing documents and the language of Applegate's lease agreement. "'Governing documents' means the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, which govern the operation of the common interest development or association." (Civ. Code, § 1351, subd. (j), undesignated statutory references are to this code.) (Effective January 1, 2014, the Davis-Stirling Common Interest Development Act (§ 1350 *et seq.*) was repealed and recodified effective January 1, 2014. (See Stats. 2012, ch. 180 (A.B. 805), § 2.) In this opinion, we refer to the former version of the statute, which was in effect at the time of trial.)

The Association first cites to a provision in its CC&Rs regulating "[u]se of [c]ommon [a]reas" that states, "only Owners, lessees of Owners, occupants of Residences and invitees of Owners or lessees of the Village may use the Village Common Area in each Village." The Association takes the position that this provision allows any owner to (1) permit nonresident tenant access to the Marina over the common area and (2) provide nonresident tenants with gate keys. The Association notes that Probasco, an owner, gave permission to nonresident tenants to access the Marina over the common area as his guest and claims that Probasco acted within his rights to provide nonresident tenants with gate keys under the CC&Rs. The Association asserts that nothing in its governing documents prohibits an owner from allowing nonresident tenants access through the property as its invitee. Relying on section 1357.110, the Association argues that any change in a rule

must be in writing and, essentially, its unwritten policies or rules regarding denying keys to nonresident tenants as testified to by its representatives are irrelevant.

We reject this assertion. As we shall explain, the Association's reliance on section 1357.110 is misplaced as this statute was not in effect when the Association changed its policy in February 2003.

The legislature enacted section 1357.110 et seq. in 2003 with a January 1, 2004, effective date. (Stats. 2003, ch. 557 (A.B. 512), § 10; see Cal. Const., art. IV, § 8, subd. (c)(1) [absent urgency clause, a statute enacted at a regular session of the Legislature becomes effective on January 1 of the following year].) This statutory scheme "establishes procedural requirements for the adoption of the 'operating rules' of a common interest development association. [Citations.]" (*Clear Lake Riviera Community Assn. v. Cramer* (2010) 182 Cal.App.4th 459, 469.) "Operating rules" are regulations adopted by the board of directors of the association that apply to the management and operation of the development, or to the Association's business and affairs. (§ 1357.100.) Subdivision (a) of section 1357.110 provides that an operating rule is valid and enforceable only if the rule is in writing. Pursuant to subdivisions (a) and (b) of section 1357.150, however, the requirements of these sections apply only "to a rule change commenced on or after January 1, 2004" and do not affect "the validity of a rule change commenced before January 1, 2004."

Here, the undisputed evidence shows that prior to February 2003, the Association allowed nonresident tenants to access the Marina over the Village common area. The undisputed evidence also shows that in February 2003, the Association changed the locks

on the gates and instituted a policy whereby it would deny gate keys to nonresident tenants. Documents produced at trial show that after February 2003, the Association (1) had a policy preventing nonresident tenants from obtaining keys or accessing the Marina through the Village common area, and (2) informed owners that nonresident tenants could not access the Marina through the Village common area. Peterson, the Association general manager and individual responsible for enforcing the CC&Rs, testified it would be a violation of the Association's governing documents if Probasco or any other homeowner distributed keys to nonresidents.

This evidence shows that the Association changed its rules regarding nonresident tenant access to the Marina in February 2003, before the effective date of section 1357.110. Turning to the Association's governing documents, we note that the CC&Rs allow the Association to adopt rules regarding the common areas of the Village, but do not specify that any rules be in writing.

We also reject the Association's contention that the element of hostility is defeated as a matter of law by Applegate's slip lease agreements which stated that the "[slip lessee] understands that yacht owners may access the Marina by water only, unless the [slip lessee] is a resident of the Coronado Cays, or is furnished with a key obtained and provided by a resident of the Coronado Cays." This language does not amount to an admission by Applegate that its use of the easement area was by permission of the Association. Rather, this language shows that Applegate was openly violating the Association's policy that nonresident tenants were to be denied keys and access to the Marina over the easement area.

As substantial evidence supports the trial court's finding that Applegate's use of the easement area was hostile to the Association, we next address whether the evidence supports the trial court's finding that Applegate's use of the easement area was open and notorious.

To establish a prescriptive easement, the use must be visible, open and notorious so as to impart actual or constructive notice of the use to the owner of the servient tenement. (*Connolly v. McDermott* (1984) 162 Cal.App.3d 973, 977.) Open, visible, and notorious use of the property raises an inference that the owner has either actual or constructive notice of the use. (*Hails v. Martz* (1946) 28 Cal.2d 775, 778.) On this element, the trial court viewed the property and noted that the easement area, a paved walkway, was visible as it was the only land access to the Marina. It also found that the trial testimony established that the Association had actual knowledge that nonresident tenants assessed the Marina using the easement area. These findings are amply supported by the record and are not challenged by the Association.

Instead, the Association contends that Probasco's strategy of providing Applegate's nonresident tenants gate keys obtained from the Association under pretext as an owner, and then identifying the tenants as sponsored guests by various owners of the Association, vitiated any claim that use of the Association's common area for nonresident tenant access to the docks was open and notorious. This assertion, however, is undermined by Peterson's and Eddy's testimony that the Association knew Probasco had been providing keys to nonresident tenants and some of the nonresident tenants accessed the Marina through keys received from Probasco. This evidence supports the trial court's

conclusion that the Association had actual knowledge of Applegate's use of the easement area to access the Marina.

We affirm the judgment in favor of Applegate on the ground the evidence supports the trial court's finding of a prescriptive easement. Accordingly, we need not address the trial court's alternative findings.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.