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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHING LUNG “PATRICK” HSU et al.,

Plaintiffs and Appellants,

v.

RIVERSIDE COUNTY TRANSPORTATION
COMMISSION et al.,

Defendants and Respondents.

E062473

(Super.Ct.No. RIC10014447)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Affirmed.

Hubbard Law Firm, David F. Hubbard and Mordecai Eli Underwood for Plaintiffs
and Appellants.

Best Best & Krieger, Mark A. Easter, Scott W. Ditfurth and Irene S. Zurko for
Defendant and Respondent Riverside County Transportation Commission.

Jeanne E. Scherer, Jeffrey R. Benowitz, Glenn B. Mueller, John Frederick Smith and Mathieu G. Blackston for Defendant and Respondent State of California.

Plaintiffs Ching Lung “Patrick” Hsu and Wen Sung Hsu appeal from a judgment entered after a court trial in which the court found defendants Riverside County Transportation Commission (RCTC) and the State of California Department of Transportation (CalTrans) not liable to the Hsus in inverse condemnation. The Hsus sued for damages to the remainder of their property after a portion of the property was taken in eminent domain proceedings for the purpose of widening a state highway and improving a connecting road. They contend that the project caused flooding on the remainder of their property. The trial court found the action barred by estoppel and also found that the Hsus did not meet their burden of proving defendants liable for the flooding. We will affirm the judgment.

BACKGROUND

In 1999, the Hsus purchased undeveloped property (the property) in Riverside County adjacent to California State Route 74 (Highway 74) near Perris. In 2004, a portion of the property was taken in eminent domain proceedings for a project to improve Highway 74. As part of the project, Theda Street, which bisected the condemned portion of the property, was realigned and elevated to improve its intersection with Highway 74. In the eminent domain proceedings, the Hsus were paid for the approximately one acre of the property that was taken, and they were also paid severance damages as compensation for the removal of approximately 40,000 cubic yards of dirt from the property. Plaintiff

Patrick Hsu,¹ who was a retired civil engineer formerly employed by CalTrans, testified in the eminent domain trial that he needed to replace the fill dirt in order to grade the property, on which he intended to build a ministorage facility. Unless the property was filled and graded, he testified, water would “pond” on the property. Hsu contended that his sole concern was the loss of dirt that he needed to grade the property, to make it level. He testified in the inverse condemnation proceeding that he did not anticipate that the project would cause additional runoff onto his property and cause flooding, which he differentiated from “ponding.”

The project began in 2004 and was completed in 2006. According to Hsu, soon after construction began on the project, the property began to flood. He first noticed flooding in 2005. He testified that he had driven past the property approximately twice a month for a number of years, beginning before he purchased it, and had never seen it flooded. Every year since 2005, he saw water, mud and silt flowing onto his property from the watershed. He contacted the executive director of RCTC and explained his concerns. The director put him in contact with the construction engineer in charge of the project, Karl Sauer. Sauer told Hsu that the project had changed the drainage flow in the area, directing water that had previously flowed into a ravine onto Hsu’s property.²

¹ References hereafter to “Hsu” refer to Patrick Hsu. Wen Sung Hsu did not testify.

² Hearsay objections to emails purporting to have been written by Sauer were sustained. However, the court overruled hearsay objections to Hsu’s testimony concerning what Sauer told him.

Other property owners in the area reported new flooding problems as well.

RCTC declined to take any action to remedy the flooding problem on the Hsus' property, deeming it unrelated to the Highway 74 project, although it did address the flooding problems other property owners reported. On July 22, 2010, the Hsus filed their complaint for inverse condemnation.³ In it, they alleged that the project as built failed to include two drainage improvements called for in the approved plans for the project. These are referred to as "drainage facilities 66 and 67." They alleged that as a proximate and direct result of the omission of those drainage facilities, the property is now subject to flooding during rain storms.

The Hsus' civil engineering expert, Richard Doolittle, testified that the project altered the water course in the area, redirecting runoff onto the Hsus' remaining property and dramatically increasing the amount of water that flows onto the property. He examined the hydrology study performed in 2003 for the project, which showed the original flow pattern of water drainage from a 550-acre watershed above the Hsu's property, and explained that the roadbed of the newly elevated portion of Theda Street blocked the original flow of the major water course and directed a substantial portion of the water onto the Hsus' property. He explained that the drainage facilities built as part of the project did not address the flow of water onto the Hsus' property. However, he also

³ The complaint is not included in the record on appeal. On our own motion, we take judicial notice of the complaint, a copy of which we have obtained from the Riverside County Superior Court. We also take judicial notice of three documents from the superior court file in the eminent domain proceeding (Riverside County case No. RIC386647), as requested by the Hsus in their motion for judicial notice, filed October 21, 2015. (Evid. Code, § 452, subd. (d).)

testified that if drainage facilities 66 and 67 had been built, they would have reduced the increased water flow onto the property by only about 30 percent. Thus, with or without those drainage facilities, the project would have caused flooding to the remaining property.⁴

RCTC explained that although drainage facilities 66 and 67 were included in the plans marked “as built,” this was an error, and that the facilities were not included in the original plans and were not intended to be included in the project. RCTC also denied that the flooding the Hsus’ property experienced was caused by the project. RCTC’s expert testified that during the eminent domain proceeding, he investigated whether the project would cause any flooding concerns on the property. He determined that the project did not alter the water course.

Trial was bifurcated, commencing with a court trial to determine liability.⁵ The trial court held that the question of flooding was addressed in the eminent domain proceedings, based on Hsu’s testimony that he was concerned that the project, specifically the elevation of Theda Street, would cause his property to become a “retention basin.” Accordingly, the court held that the Hsus’ claim was barred by collateral estoppel. The court also held that the inverse condemnation action was barred by estoppel by judgment because the damage caused by the project was reasonably foreseeable at the time of the

⁴ Plaintiffs do not address this fact in their briefing.

⁵ Liability for inverse condemnation is decided by court trial, while damages are tried to a jury, if the court determines that the defendant is liable. (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1546, fn. 6.)

prior action. The court further found that the Hsus had failed to prove that the defendants were liable for inverse condemnation because they did not prove that the defendants failed to act “reasonably and non-negligently” and because they failed to prove that they remediated the property with the severance award they received in the eminent domain proceedings or that they would have suffered the same flooding damages if they had remediated the property.

LEGAL ANALYSIS

PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY ERROR IN THE TRIAL COURT’S RULING THAT THE ACTION IS BARRED BY ESTOPPEL

The Hsus challenge the trial court’s collateral estoppel ruling, arguing that although the court found that the flooding was foreseeable, they are entitled to compensation without regard to whether flooding was a foreseeable consequence of the project. They also contend that even if foreseeability is an issue, the court’s finding that flooding was reasonably foreseeable is not supported by substantial evidence. They do not address the trial court’s ruling that the action is also barred because drainage and flooding concerns were actually addressed in the eminent domain action.

“There are two aspects to the res judicata effect of a final judgment on the merits: (1) The judgment bars the parties (or those in privity with them) from litigating the same cause of action in a subsequent proceeding and (2) the parties (or those in privity with them) are collaterally estopped from litigating in a subsequent proceeding on a different cause of action any issue actually litigated and determined in the former proceeding.

[Citations.] To the extent that [an inverse condemnation action] seeks to recover damages

resulting from the construction of the improvements in the manner proposed in the eminent domain case, it involves the same cause of action and plaintiff is precluded from litigating issues which were or *could have been* litigated in the former action. [Citation.] To the extent that plaintiff's claim for damages involves a different cause of action, he is collaterally estopped from litigating those issues which were *actually* litigated and determined in the eminent domain action." (*Ellena v. State of California* (1977) 69 Cal.App.3d 245, 253-254 (*Ellena*), italics added.) An issue which is foreseeable is, of course, one which could have been litigated in the earlier proceeding. (*City of Salinas v. Homer* (1980) 106 Cal.App.3d 307, 314, citing *Ellena*.) Here, the trial court held that the action is barred both because the issue of flooding was actually litigated in the prior action and because flooding was reasonably foreseeable. We address those holdings separately.⁶

Foreseeability

Legal Principles

When part of an owner's property is acquired for a public project, whether by eminent domain or by consent, the owner is presumed to have been fully compensated by the award or payment for all reasonably foreseeable severance damages that may result from the construction, operation or maintenance of the public project. (*Ellena, supra*, 69 Cal.App.3d at p. 254.) However, the property owner can recover in inverse condemnation for subsequent damage to the remainder of the property under certain

⁶ The trial court also found that the project was built in the manner proposed at the time of the eminent domain proceedings. Although the Hsus' theory at trial was that it was not built according to plans because of the omission of drainage facilities 66 and 67, they do not assert any error with respect to that finding.

circumstances. (*Cox v. State of California* (1970) 3 Cal.App.3d 301, 308 (*Cox*)). If the remaining property is damaged by “extrinsic causes,” i.e., damages “caused by the construction or operation of the same project on the land of other owners,” the owner may recover compensation for that damage in an inverse condemnation action, “at least where the remainder suffers actual physical injury, whether foreseeable or not, which neither a private citizen nor government in the exercise of its police power would have a right to inflict [citations].” (*Id.* at pp. 308-309, italics omitted.) “In contrast, where the remainder is damaged by public works construction or *operation not on the land of others but on land deeded for such use by the owner of the remainder or taken from him by condemnation, the test becomes one of foreseeability*. In that event, the doctrines of estoppel by deed or estoppel by judgment will preclude the owner from recovering by inverse condemnation such of those later damages to the remainder as could reasonably be expected to result from the necessary and ordinary use of the public project on the land granted or condemned. [Citations.]” (*Id.* at p. 309, italics added.)

The Hsus assert that they are entitled to compensation for the flooding of the remainder of their property regardless of foreseeability because the project caused the remainder to flood “from an off-site location” or “off-property.” This is how the Hsus understand the phrase “extrinsic causes” as used in *Cox, supra*, 3 Cal.App.3d 301. Interpretation of case law is a question of law subject to independent review on appeal. (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333.) In context, it is clear that by “extrinsic causes,” the court in *Cox* meant damages caused by the construction or operation of the project on the land of other owners, as opposed to the land acquired from

the plaintiff. (*Cox*, at pp. 308-309.) The full quote is: “Similarly, a conveyance for purposes of a public project, or a release of damages resulting from acquisition of the owner’s land therefor, does not effect a waiver of damages caused by the construction or operation of the *same project on the land of other owners*. [Citations.] After his remaining property is damaged by *such extrinsic causes*, the owner may recover compensation for that damage in an inverse condemnation action [citations], at least where the remainder suffers actual physical injury, whether foreseeable or not, which neither a private citizen nor government in the exercise of its police power would have a right to inflict.” (*Ibid.*, original italics omitted, 1st & 2d italics added.) Accordingly, foreseeability is a bar to the inverse condemnation claim if the cause of the flooding is a portion of the project that is on the condemned portion of the Hsus’ property.

The Hsus’ misunderstanding on this point was perhaps fostered by a footnote in our opinion in a prior appeal in this case, in which we reversed the trial court’s grant of summary judgment for defendants. In that footnote, we stated that there might be a triable issue of fact as to whether the damage to the property resulted from extrinsic sources, as that term is used in *Cox*. (*Hsu v. Riverside County Transportation Commission* (May 22, 2013, E054922) [nonpub. opn.].) However, we erroneously stated, “The foreseeability test only applies when the landowner’s parcel is damaged by public works construction *on the remainder parcel itself*. (*Cox v. State of California, supra*, 3 Cal.App.3d at pp. 308-309[, italics added].) However, the parties do not focus on this potential issue.” (*Hsu, supra*, E054922.)

The Hsus assert that the trial court ignored this “direction” from this court,

apparently understanding this footnote to constitute law of the case, although we note that they do not use that term. Law of the case, however, applies only to a statement of a rule of law necessary to the decision of the case. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) As stated in the footnote, the issue was not raised by the parties and was merely noted as a potential issue. The citation to *Cox* is therefore not necessary to the decision. In their trial brief, the Hsus argued that law of the case also applies to “opinions that, although ‘not essential’ to appellate disposition, were offered as guidance to the trial court,” citing *Lucky United Properties Investment, Inc. v. Lee* (2013) 213 Cal.App.4th 635, 651. However, what that case actually holds is that “application of the law of the case doctrine is appropriate where an issue *presented and decided* in the prior appeal, even if not essential to the appellate disposition” was offered and intended to guide the trial court on remand. (*Ibid.*, italics added.) The issue was not presented and decided in the prior appeal in this case, and it was not intended to guide the trial court but at most to alert the parties to a potentially triable question of fact.

Accordingly, the footnote did not establish as law of the case that the flooding need not have been foreseeable if the source of the flooding was off the remainder of the property.

Factual Findings

Underlying the court’s ruling is the implied finding that the source of the flooding was on the condemned portion of the Hsus’ property. The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.)

Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Id.* at p. 873.) Where two or more inferences can reasonably be drawn from the evidence, the reviewing court cannot substitute its inferences for those of the trial court. (*Id.* at p. 874.)

Here, the Hsus' expert witness, Richard Doolittle, identified the elevated roadbed of new Theda Street as the cause of the flooding, in that it filled in the existing major water course and caused water which would otherwise flow away from the Hsus' property to be redirected onto the property. Exhibit 3-1, a post-project map prepared by Doolittle, shows old Theda Street running in a straight line across the Hsus' property and shows new Theda Street curving across the Hsus' property. Michael Thornton, RCTC's expert witness, also testified that the realigned new Theda Street "bisect[s] the original Hsu property," i.e., runs through the condemned portion of the property. The Hsus do not cite any evidence that new Theda Street is not on the condemned portion of their property, and in fact the issue was not addressed during the inverse condemnation trial, presumably because it was undisputed. Accordingly, the trial court's conclusion that the claim is barred if the flooding was reasonably foreseeable is supported by substantial evidence.

The Hsus contend that the trial court's ultimate finding, that the flooding was reasonably foreseeable, is not supported by substantial evidence because both Patrick Hsu

and the defendants' expert witness, Michael Thornton, testified that they did not foresee flooding. However, the question is not whether the flooding was actually foreseen but whether it was reasonably foreseeable. (*Cox, supra*, 3 Cal.App.3d at p. 309.) The testimony of the Hsus' own expert supports the trial court's finding that it was foreseeable. According to Doolittle's testimony, his examination of the hydrology study done as part of the project and the project plans led him to conclude that without different or additional drainage facilities, the elevation of Theda Street was going to result in diverting the water course onto the Hsus' property. It was not necessary for the project to be built in order for an expert in hydrology to arrive at that conclusion. Accordingly, Doolittle's testimony constitutes substantial evidence that flooding was foreseeable at the time of the eminent domain proceedings, regardless of whether the parties actually foresaw it.

Whether the Issue Was Actually Litigated in the Prior Proceeding

If an issue has actually been litigated and decided in a prior proceeding between the parties, collateral estoppel bars a subsequent action. (*Ellena, supra*, 69 Cal.App.3d at p. 253.) The trial court found, as a separate basis for finding the inverse condemnation action barred, that "drainage and flooding [issues] were actually discussed" during the eminent domain action. However, the Hsus do not address this aspect of the trial court's ruling in their briefing. Rather, they limit their argument on estoppel to the applicability of the foreseeability test and the sufficiency of the evidence to support the trial court's finding that flooding was foreseeable. Because they have not addressed the issue, we deem it forfeited. (*RED Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489,

500 [issues not raised in opening brief need not be addressed].) In any event, the issue is moot because, even if the court's finding on this issue was not supported by substantial evidence, we would nevertheless affirm the judgment based on the trial court's ruling that the action is barred under the foreseeability test enunciated in *Cox, supra*, 3 Cal.App.3d at pages 308 through 309.

Conclusion

Substantial evidence supports the findings underlying the trial court's conclusions that the inverse condemnation action was barred on the issue of foreseeability and that the potential for flooding was actually addressed in the eminent domain proceedings. For this reason, we need not address the Hsus' remaining contentions.

DISPOSITION

The judgment is affirmed. The defendants are awarded costs on appeal.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.