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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUBY'S DINER LAGUNA BEACH,  
LTD,

Cross-complainant and Appellant,

v.

PAUL R. ESSLINGER, as Trustee, etc., et.  
al.

Cross-defendants and Respondents.

G045113

(Consol. with G045616)

(Super. Ct. No. 05CC02237)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail A. Andler, Judge. Reversed and remanded.

Pillsbury Winthrop Shaw Pittman, Scott A. Sommer and Christine A. Scheuneman for Cross-Complainant and Appellant.

Rutan and Tucker, Stephen A. Ellis and Gerard M. Mooney for Cross-Defendants and Respondents.

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Ruby's Diner Laguna Beach LTD, (Ruby's) appeals from a judgment disposing of its cross-complaint against its landlord, Paul R. Esslinger, acting in his capacity as trustee of the Paul H. Esslinger and Marie M. Esslinger Trust (Esslinger). In its cross-complaint, Ruby's sought to hold Esslinger liable for the expenses it incurred as a result of being named as a defendant in the main action, which was a lawsuit brought by a neighboring landowner, Laguna Terrace Park, LLC (LTP), to challenge the validity of an easement over its own property which formed part of the premises leased to Ruby's.

Ruby's contends the trial court erred by sustaining demurrers to its claims for relief against Esslinger based upon (1) a provision in the parties' lease which allows for recovery of defense costs in cases where, *without fault* on Ruby's part, it is made a party to a lawsuit instituted by a third party against Esslinger, *arising out of or resulting from any act or transaction of Esslinger* and (2) Esslinger's alleged breach of the covenant of quiet enjoyment guaranteed by both the lease and statute. Additionally, Ruby's argues that even if the court's demurrer rulings were correct, it nonetheless erred by refusing to grant judgment in Ruby's favor after trial on its remaining cross-claims seeking recovery against Esslinger based upon theories of equitable indemnity and contribution.

We reverse the judgment on the cross-complaint, and remand the case to the trial court with directions to overrule Esslinger's demurer to Ruby's claim alleging Esslinger breached his obligation to pay Ruby's defense costs under Section 21.10 of the parties' lease. The issues of whether either Esslinger or Ruby's was "at fault" in connection with the LTP complaint, or whether that complaint arose entirely or partially out of the acts or transactions of either, were factual issues which could not have been resolved by demurrer.

With the exception of that single cause of action to be addressed on remand, we find no flaw in the trial court's handling of Ruby's cross-complaint. Ruby's assertion that LTP, the neighboring landowner, is an entity controlled by Esslinger's son, Steven, and thus that the main case amounts to mere "family litigation" which should have been resolved among the Esslingers without involving Ruby's, is a non sequitur. Under the terms of the lease agreement entered into by Ruby's and Esslinger, it is the *substance of the claim* asserted by the third party, rather than the third party's *identity*, which is relevant in assessing whether Esslinger can be held contractually liable for defense costs incurred by Ruby's. The same holds true for the other theories of liability asserted by Ruby's. Esslinger cannot be held liable for defense costs incurred by Ruby's simply because the person who sued Ruby's was a relation of Esslinger.

Moreover, we find no error in the court's order sustaining Esslinger's demurrer to Ruby's claim that his refusal to pay for its defense constituted a violation of the covenant of quiet enjoyment contained in the parties' lease. The covenant of quiet enjoyment protects the tenant against acts *by the landlord*, or by third parties *claiming under the landlord*, that interfere with the tenant's use and enjoyment of the property. That covenant does not require the landlord to protect the tenant against the independent acts of third parties – even if those third parties are family members. In any event, LTP's lawsuit did not impair Ruby's continued *use of the leased premises*, and thus did not implicate its right of quiet enjoyment.

Ruby's remaining contentions – that the court erred by entering judgment in favor of Esslinger on its cross-claims for equitable indemnity and contribution – fail as well. Ruby's has asserted no basis for equitable relief other than the fact LTP is controlled by Esslinger's son. That is insufficient.

Finally, Ruby's challenge to the propriety of the attorney fees award rendered in favor of Esslinger is explicitly premised on the presumed success of its challenge to the judgment entered in favor of Esslinger on the cross-complaint. Because we are remanding the case for further proceedings in connection with one of Ruby's claims, we must reverse and remand the attorney fees award as well.

## FACTS

In 1989, Ruby's leased property in Laguna Beach owned by Marie M. Esslinger, in her capacity as trustee of the Paul H. Esslinger and Marie M. Esslinger Trust. Esslinger later succeeded Marie M. Esslinger as trustee of that trust. The leased property includes one parcel owned entirely by Esslinger (the fee parcel), as well as a "non-exclusive easement for ingress and egress, and road and parking purposes" over an adjacent parcel owned by LTP, an entity controlled by Esslinger's son, Steve.

With the permission of Esslinger, Ruby's reconfigured the driveways providing access in and out of the fee parcel – essentially requiring all persons to enter the premises via the easement – and added a curb along the south side of the fee parcel, adjacent to the easement. Ruby's also painted additional parking stalls on a portion of the easement.

In 1999, LTP made its own alterations to the easement, including the installation of fire lanes, "no parking" signs and poles to address the perceived traffic and safety issues created by Ruby's use of the easement for parking purposes.

In 2005, LTP filed suit against Esslinger, challenging the validity of the easement on various grounds, and seeking to quiet title to the easement in its favor. LTP alleged both that the easement must be viewed as "null and void" from the time of its

purported creation in 1966, because the dominant tenement had not been properly described in recorded documents, and that the easement was rendered invalid as a consequence of its having been used “far beyond its scope and purpose” by both Esslinger and by third parties acting “at the express direction and authority of [Esslinger].”

Esslinger and LTP litigated their dispute for four years without including Ruby’s as a party. But just as the trial was to commence, Esslinger filed a motion in limine arguing that in light of the relief requested by LTP, and Ruby’s status as lessee of the disputed easement, Ruby’s qualified as an indispensable party to the litigation. Esslinger demanded LTP either add Ruby’s as a party or dismiss the case. Although LTP opposed the motion, arguing Ruby’s was not directly affected by what it characterized as the “main issue” in the case – i.e., its assertion that the easement had not been validly created in 1966 – the court disagreed and granted the motion. Thus, in April 2009, Ruby’s was joined as a defendant in LTP’s fourth amended complaint.

In that fourth amended complaint, LTP reiterated its contentions that the easement had not been validly created in 1966 and that “Esslinger and Ruby’s are using the [e]asement far beyond its scope and purpose.” LTP also alleged with greater particularity that Ruby’s acted wrongfully when it “redesigned and reconfigured” the parking lot in 1989, which it did with Esslinger’s “express and/or implied approval.” (Bold omitted.)

LTP also alleged that its 1999 installation of fire lanes, “no parking” signs and poles on the easement qualified as actions which were “open, notorious and adverse” to Esslinger’s and Ruby’s interests in the easement since they “obstructed the use of the easement for Esslinger’s [p]roperty.” It alleged that those facts supported a claim that

Esslinger's and Ruby's interests in the easement had also been extinguished by adverse possession.

Ruby's answered LTP's fourth amended complaint and filed a cross-complaint against both Esslinger and LTP, alleging claims for breach of lease and breach of the covenant of quiet enjoyment against Esslinger only, quiet title against LTP, and equitable indemnity and contribution against both Esslinger and LTP.

In support of its claim for breach of lease, Ruby's relied on Section 21.10 of the parties' lease agreement, which provides in pertinent part, that “[s]hould [Ruby's], without fault on [Ruby's] part, be made a party to any litigation instituted by . . . any third party against [Esslinger] . . . arising out of or resulting from any act or transaction of [Esslinger] . . . , [Esslinger] covenants to save and hold [Ruby's] harmless from any judgment rendered against [Ruby's] or the Premises or any part thereof, and all costs and expenses, including reasonable attorneys' fees, incurred by [Ruby's] in connection with such litigation.” (Italics added.)

Tracking that quoted language of Section 21.10, Ruby's alleged it had been made a party to the easement litigation, initially brought by LTP against Esslinger alone, and that arose out of Esslinger's acts and transactions, “[t]hrough no fault of its own,” and thus it was entitled to have Esslinger indemnify it against the cost of its defense. Ruby's further alleged it had made a written demand on Esslinger to perform the indemnity obligation, and Esslinger refused to do so.

Ruby's also alleged that in section 3.2 of the lease, Esslinger warranted that so long as Ruby's performed its obligations under the lease, it would enjoy the right to “freely, peaceably and quietly” use the leased premises, and that contractual warranty had been breached when Ruby's was made a party to litigation pertaining to the easement.

Ruby's claim for breach of the covenant of quiet enjoyment was based specifically on Civil Code section 1927, which provides that every lease of a thing carries with it an implied covenant of quiet enjoyment of the thing hired. Ruby's alleged that if LTP's claims pertaining to the easement were found to be valid, that would amount to a breach of the statutory covenant.

Ruby's claim for equitable indemnity alleged that while it denied the allegations of LTP's complaint, if it were found liable to LTP, its liability would be "passive and secondary," while the liability of cross-defendants would be "primary and/or superseding." On that basis, Ruby's alleged it would be entitled to "total equitable indemnity [for] "any and all liability adjudged . . . relating to the Complaint."

Ruby's claim for contribution alleged that while it denied the allegations of LTP's complaint, if it were found liable to LTP, then cross-defendants would be "jointly liable and obligated to contribute toward payment or repayment of said damages." Ruby's further alleged it was entitled to contribution from cross-defendants for whatever "attorneys' fees, court costs and expenses" it incurred in connection with the case.

Esslinger filed a series of demurrers to Ruby's claims for breach of lease and breach of the covenant of quiet enjoyment, on the ground that the alleged facts were insufficient to constitute a cause of action. With respect to the breach of lease, Esslinger focused primarily on Ruby's allegation that it was "without fault" for the claims alleged by LTP. Esslinger argued that because LTP's complaint was based in part on Ruby's own conduct – specifically, Ruby's reconfiguration of the driveways to require all patrons to enter through the easement, its creation of the curb adjacent to the easement and its placement of painted parking slots on the easement – LTP's complaint against Ruby's was not merely derivative of Esslinger's own alleged acts or transactions, and

thus Ruby's could not be viewed as having been brought into the litigation "without fault."

Esslinger also argued he could have no liability for breach of the covenant of quiet enjoyment unless Ruby's were actually or constructively evicted from some portion of the leased premises, which had not occurred; and that in any event, the quiet enjoyment provision included in the parties' lease did not extend to the easement property.

The trial court sustained both of Esslinger's demurrers, but gave Ruby's several opportunities to amend its causes of action. In a series of amended cross-complaints, Ruby's made efforts to recast the two causes of action – first as two separate causes of action for declaratory relief and then as one cause of action seeking declaratory relief to determine the parties rights and obligations under the lease and a second cause of action seeking damages for breach of the lease.

Ultimately, however, the trial court concluded Ruby's was unable to state a cause of action against Esslinger based on either the language of Section 21.10 or his alleged breach of the covenant of quiet enjoyment. Consequently, the court sustained Esslinger's demurrers to both Ruby's causes of action for declaratory relief and breach of lease, without leave to amend.

The case then proceeded to trial on LTP's complaint against Esslinger and Ruby's, as well as on the remaining claims stated in Ruby's third amended cross-complaint – i.e., its unchallenged causes of action for equitable indemnity and contribution, and its cause of action for quiet title against LTP only.

At the conclusion of the trial, the court ruled LTP had failed to prove any of its claims against either Esslinger or Ruby's. Specifically, it ruled the easement had been validly created and benefitted the entirety of Esslinger's fee parcel. The court also ruled

LTP “failed to prove any ‘overburdening’ of the Easement or ‘trespass’ by [Esslinger] or Ruby’s,” or that LTP had a right to quiet title to the easement in its favor on any theory. Having disposed of LTP’s complaint, the court then ruled that Ruby’s “failed to establish cross-claims for equitable indemnity and contribution” against Esslinger.

Esslinger subsequently moved for an award of attorney fees against Ruby’s, arguing that in accordance with the terms of the attorney fees provision contained in the parties’ lease agreement, his status as prevailing party on Ruby’s cross-complaint entitled him to an award of reasonable fees incurred in defense of that cross-complaint. The court agreed and awarded him \$58,277 in fees against Ruby’s.

## DISCUSSION

Ruby’s primary contention on appeal is that the court erred in sustaining Esslinger’s demurrers to its claims for relief based on theories of breach of contract and declaratory relief. Although these claims seek different forms of relief, they are both grounded on identical allegations that: (1) Section 21.10 of the parties’ lease obligates Esslinger to pay Ruby’s costs and expenses, including reasonable attorneys fees, incurred in connection with LTP’s complaint; and (2) the covenant of quiet enjoyment contained in the parties’ lease, as well as the one established by statute, require Esslinger to indemnify Ruby’s against the expense of defending LTP’s complaint.

But in determining whether a cause of action is or can be stated, we address the substance of the claims alleged rather than either the form in which they are pleaded or the relief requested. “[I]n ruling on a demurrer, the trial court is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle

the plaintiff to relief. [Citation.]” (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908 [274 Cal.Rptr. 186].) We consequently view these allegations as an attempt to state distinct claims for: breach of Section 21.10 of the parties’ lease; and breach of the covenant of quiet enjoyment.

Moreover, we review the court’s demurrer rulings de novo (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415), and the rules we apply are well-settled: ““We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d. 311, 318.) Significantly, because “[a] demurrer tests the sufficiency of a complaint by raising questions of law,” we are “not bound by the trial court’s construction of the complaint” and we must make our own independent interpretation. (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.)

Here, Ruby’s argues the trial court erred by (1) misinterpreting Section 21.10 of the parties’ lease, which contains the provision relied upon by Ruby’s to establish Esslinger’s contractual obligation to defend it against LTP’s complaint, and (2) misapplying the law applicable to its claim for breach of the covenant of quiet enjoyment. We address those points in turn.

*1. Ruby's Claim for Recovery of its Defense Costs Based on Section 21.10 of the Lease*

The contractual language relied upon by Ruby's to establish Esslinger's liability for the cost of its defense is found in Section 21.10 of the parties' lease. It states that "[s]hould [Ruby's], without fault on [Ruby's] part, be made a party to any litigation instituted . . . by any third party against [Esslinger] . . . arising out of or resulting from any act or transaction of [Esslinger] . . . , [Esslinger] covenants to save and hold [Ruby's] harmless from any judgment rendered against [Ruby's] or the Premises or any part thereof, and all costs and expenses, including reasonable attorneys' fees, incurred by [Ruby's] in connection with such litigation."

Ruby's breaks down its right to recovery against Esslinger under this provision into three elements and argues the allegations of its cross-complaint necessarily satisfied each of those elements: First, Ruby's alleged the litigation it was required to defend was originally instituted by a third party, in this case, LTP, against Esslinger; second, Ruby's alleged the litigation arose out of or resulted from an act or transaction of Esslinger's by which Ruby's apparently means the transaction creating the easement; and third, Ruby's alleged it had been made a party to the litigation "without fault" on its part.

In sustaining the demurrer to this claim without leave to amend, however, the trial court focused on the fact that the causes of action asserted by LTP in its complaint were founded at least partly on alleged wrongdoing *committed by Ruby's itself*, including Ruby's reconfiguration of the ingress and egress to its leased premises and its allegedly inappropriate and unsafe overuse of the easement, and not entirely on the allegedly ineffective creation of the easement. As the court explained, even LTP's assertion that the easement must be declared "invalid" was based in part on the allegation that *Ruby's* had been using the easement "beyond its scope and purpose." The trial court concluded that because Ruby's own conduct formed part of the factual support for LTP's

claims, Ruby's could not be viewed as having been made a party to the litigation "without fault on [its] part," and thus Ruby's was not entitled to hold Esslinger responsible for the cost of its defense pursuant to Section 21.10.

In our view, the trial court correctly assessed the potential flaw in Ruby's claim against Esslinger under Section 21.10; i.e., the fact that the causes of action alleged by LTP were based in part on Ruby's own acts and not entirely on the acts and transactions of Esslinger. In other words, Ruby's may not have been merely an innocent bystander in the LTP lawsuit.

But having said that, we nonetheless conclude the trial court erred by foreclosing Ruby's effort to seek relief based on the provision. Whether Ruby's is without "fault" in connection with LTP's lawsuit, or even whether that lawsuit could be fairly characterized as "arising out of the acts and transactions" of Esslinger as that term is used in Section 21.10, are fact-intensive issues which cannot be conclusively resolved by mere reference to the allegations of LTP's complaint. As Ruby's points out, the notion of "fault" implies some sort of wrongdoing, and since Ruby's specifically alleged in its cross-complaint that it was *without fault* in connection with the LTP litigation, that allegation could not be conclusively negated by LTP's mere assertion, in the main complaint, that it was. Until such time as LTP was actually able to establish that some act of Ruby's adversely impacted another party's rights in connection with the easement, Ruby's remained at least arguably "without fault" in connection with the its complaint, and no demurrer could be sustained on the basis of a contrary determination.

But acknowledging that point does not, as Ruby's supposes, lead inevitably to the conclusion it is entitled to a judgment in its favor on the cross-complaint, merely because it was subsequently absolved of liability to LTP on the main complaint.

Esslinger too was absolved of any liability to LTP at trial, and thus he has what appears to be an equal claim to being “without fault” in the litigation.

We note Section 21.10 is not a provision which is intended to benefit Ruby’s exclusively. Instead, Section 21.10 incorporates three distinct provisions, which confer identical and *reciprocal* rights on both Ruby’s and Esslinger to recover defense costs from their counterpart in certain situations. The first provision simply states that if the parties engage in litigation directly *against each other*, whichever one prevails shall be entitled to an award of reasonable attorney fees and costs from the other. The second and third provisions, which are mirror images of each other, then give both Ruby’s and Esslinger the right to recover defense costs against the other if, through no fault of their own, they find themselves enmeshed in litigation involving their counterpart and any *third party*, which arises out of the acts and transactions of their counterpart. Thus, Section 21.10 provides Esslinger with a co-equal right to seek defense costs *from Ruby’s* “should [Esslinger], without fault on [Esslinger’s] part, be made a party to any litigation instituted . . . by any third party against [Ruby’s] . . . arising out of or resulting from any act or transaction of [Ruby’s].”

Given the reciprocal nature of these rights, and the fact *both Ruby’s and Esslinger* prevailed on LTP’s complaint – we certainly could not say, as a matter of law, that Ruby’s would necessarily be entitled to recovery against Esslinger under Section 21.10. Without the benefit of the complete trial record, we could only guess whether that record might have revealed some basis for concluding that either Ruby’s or Esslinger should be viewed as bearing “fault” for being made a party to LTP’s complaint, even in the absence of any determination of liability on the merits; or whether the record might have demonstrated, as a practical matter, that LTP’s complaint actually arose out of LTP’s discontent with Ruby’s extensive use of the easement, rather than any legitimate

concern about flaws in the easement's creation; or even whether the complaint simply arose from the acts or transactions of *both* Ruby's and Esslinger, in a manner which should have precluded either one from recovering defense costs from the other. More significantly, since Ruby's claim under Section 21.10 was no longer at issue by the time of trial, we have no basis to know what conclusions the trial court might have drawn on these or other issues, or what additional evidence or arguments the parties might have offered with respect to the proper interpretation and application of the provision, had they known Ruby's claim remained viable.

For these reasons, we conclude the judgment on the cross-complaint must be reversed, and the case remanded with directions to overrule Esslinger's demurrer to Ruby's cause of action for breach of lease, and to allow that claim, based solely on the provisions of Section 21.10 of the lease, to be adjudicated on the merits.

## *2. Ruby's Cannot State a Cause of Action Against Esslinger Based on the Covenant of Quiet Enjoyment*

Ruby's effort to state a separate claim for recovery of its defense costs based on the covenant of quiet enjoyment, however, dies here. The covenant of quiet enjoyment is included in Section 3.1 of the lease, which provides: "[Esslinger] covenants and warrants that so long as [Ruby's] shall perform the obligations of Tenant contained herein and shall not be in material default in the performance of any such covenants, that [Ruby's] . . . shall freely, peaceably, and quietly have, hold and enjoy the use and enjoyment of the Premises . . . ."

According to Ruby's, its right to quietly enjoy the leased premises was impaired by its forced involvement in the instant litigation because it "incurred several hundred thousand dollars of attorney's fees responding to the action brought by LTP," and

because it was “suddenly faced with . . . the risk of losing the main entrance and parking necessary for the operation of the restaurant.”

Those allegations fail to state a cause of action for at least two reasons: First, because a lessor’s covenant of quiet enjoyment constitutes a warranty by the lessor against *his own acts*, or the acts of those claiming under him, not against the acts of third parties. (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846.) In this case, it was LTP, and not Esslinger, who dragged Ruby’s into litigation about the validity of the easement, and thus LTP which caused the alleged damage Ruby’s complains of. We acknowledge Ruby’s point that it was Esslinger, and not LTP, who actually asserted Ruby’s was required to be added as a defendant to the complaint, but dismiss it as a red herring. In arguing Ruby’s qualified as an indispensable party in the case, Esslinger was merely pointing out the legal consequences of the claim asserted by LTP. Significantly, the trial court agreed with Esslinger, and its ruling has not been challenged on appeal. Additionally, we note that the remedy sought by Esslinger for LTP’s failure to name Ruby’s as an indispensable party was either an order requiring LTP to add Ruby’s as a party, or *a dismissal of LTP’s complaint*. We have little doubt which option Esslinger would have preferred.

At oral argument, Ruby’s cited *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, to support the proposition that a landlord’s breach of the covenant of quiet enjoyment may be based on third party conduct. The case, however, does not support that broad contention. In *Andrews*, the plaintiffs were tenants in a mobile home park, and their claim for breach of the covenant of quiet enjoyment was based on the antics of one of their fellow tenants in the park – not a stranger (legally speaking) to the landlord. The court noted that a claim for breach of the covenant can be based on acts of the landlord *or by someone claiming under the landlord* – and in that case, the fellow

tenant's use of the premises was pursuant to his lease with the landlord. Thus, the plaintiffs had stated a viable claim for breach of the covenant against the landlord, based on the acts of someone claiming under it. In a footnote, the *Andrews* court explicitly rejected the very point Ruby's makes: "The implied covenant of quiet enjoyment runs between the tenants and the landlord from whom they are renting the property. Therefore, while nuisance activities on neighboring premises, not owned or controlled by the aggrieved tenant's landlord, may interfere with a tenant's quiet enjoyment, such conduct does not amount to a breach of the covenant of quiet enjoyment as between tenant and landlord." (*Id.* at p. 590, fn.9)

Because it was LTP, and not Esslinger, who sued Ruby's, Esslinger cannot be held liable for the consequences of that act on the theory it qualified as a violation his covenant of quiet enjoyment.

The second problem with Ruby's claim for breach of the covenant of quiet enjoyment is the one relied upon by the trial court in sustaining the demurrer. As explained in *Petroleum Collections Inc. v. Swords*, *supra*, 48 Cal.App.3d at p. 846, what the covenant of quiet enjoyment protects is the "tenant's right to *use and enjoy the premises* for the purposes contemplated by the tenancy." (Italics added.) While we agree with Ruby's that a claim for breach of the covenant is not dependent upon a showing that the tenant has been actually or constructively *evicted* from the premises (*Guntert v. City of Stocton* (1976) 55 Cal.App.3d 131, 139-140 [where landlord's breach of the lease substantially interferes with the tenant's ability to conduct his business on the premises as specifically contemplated by the lease, tenant can remain in possession and sue for damages], it is nonetheless true the claim requires evidence that the tenant's "possession of leased property has been interfered with . . . ." (*Petroleum Collections Inc. v. Swords*, *supra*, 48 Cal.App.3d at p. 846.) Here, that never occurred. Ruby's at all times remained

in possession of the disputed easement, and there is no allegation that either LTP or Esslinger ever made efforts to restrict Ruby's ability to use it. Instead, as Ruby's concedes in its brief, the only damage it suffered in this case, other than the expenditure of defense costs, was "the risk" of losing the use of the disputed easement. Because that risk never came to fruition, Ruby's cannot state any claim for breach of the covenant of quiet enjoyment.

*3. Ruby's Has Not Demonstrated an Entitlement to Recovery on its Remaining Causes of Action*

Almost as an afterthought, Ruby's contends that even assuming the trial court ruled properly when it sustained Esslinger's demurrers to its causes of action for declaratory relief and breach of contract, those rulings caused its remaining claims for equitable indemnity and contribution to "become operable," and thus the court erred in refusing to grant it the relief sought pursuant to those theories. According to Ruby's, this is true because "[w]hen the terms and provisions of a contract are inapplicable to a particular factual setting, the equitable principles of implied indemnity 'come into play.'" (Citing *E.L. White Inc., v. City of Huntington Beach*, *supra*, 21 Cal.3d. at p. 508.)

Even assuming we agreed with this rather conclusory characterization of the interplay between legal and equitable principles (and we express no opinion on the point), we find Ruby's argument unpersuasive. The sole basis for Ruby's claim of entitlement to equitable relief against Esslinger is its characterization of the easement dispute as "a bitter family fight between Esslinger and his son." As we have already explained, we view the dispute as more complex than that, and we reject Ruby's implied assertion that it was merely an innocent bystander. In fact, since the easement was created in 1966, and LTP apparently made no attempt to raise any issue over it until

1995 – six years after Ruby’s lease term commenced – when LTP painted fire lanes on the easement, and installed poles and “no parking signs,” a reasonable argument could be made that LTP’s paramount concern was not the alleged flaws in the easement’s creation, but instead Ruby’s perceived overuse of it.

We conclude Ruby’s has failed to demonstrate the court erred by refusing to employ equitable grounds as a basis for holding Esslinger liable for its defense costs.

*4. Our Limited Remand Necessarily Requires Reversal of the Court’s Award of Attorney Fees in Favor of Esslinger*

Ruby’s final contention is that the trial court erred by awarding attorney fees to Esslinger. That award was made pursuant to the initial provision of 21.10, authorizing an award of fees to “the prevailing party” in any litigation directly between Ruby’s and Esslinger.

Ruby’s contention is simply premised on the assumption we will reverse the judgment entered against it on the cross-complaint and will conclude it was entitled to at least some relief against Esslinger. We have done the former, although the latter remains to be determined. Under these circumstances, the issue of which party qualifies as “the prevailing party” on Ruby’s cross-complaint cannot yet be determined. We consequently reverse the attorney fees award in favor of Esslinger and remand the issue to the trial court to be reconsidered after Ruby’s claim for breach of lease based on Section 21.10 has been finally determined.

## DISPOSITION

The judgment is reversed, and the case is remanded to the trial court with directions to overrule Esslinger's demurrer to Ruby's cross-claim alleging Esslinger breached his obligation to pay Ruby's defense costs under Section 21.10 of the parties' lease. After that cause of action has been resolved on the merits, the parties may assert whatever claims they have for recovery of attorney fees as prevailing party on the cross-complaint. The parties are to bear their own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.