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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREG CASSIDY,

Plaintiff and Appellant,

v.

JORGE CARVAJAL et al.,

Defendants and Respondents.

G052079

(Super. Ct. No. RIC1107559)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Daniel A. Ottolia, Judge. Affirmed.

Law Offices of Beck & Greer and Richard B. Beck for Plaintiff and Appellant.

Ritchie, Klinkert & McCallion, James E. Klinkert and Paul J. Gutierrez; The Giardinelli Law Group, Kelly A. Neavel and Edward J. Zorn, for Defendants and Respondents.

INTRODUCTION

Appellant Greg Cassidy sued his next-door neighbors Jorge and Carlota Carvajal and the homeowners association to which they all belonged after the Carvajals built a fence on the property line between the two houses. Cassidy sought an injunction ordering the fence to be removed. The Carvajals cross-complained against Cassidy, seeking a restraining order against him. The trial court ruled in the Carvajals' favor on both issues, denying Cassidy's injunction and issuing the restraining order.

We affirm the judgment. Cassidy produced no evidence of a tort or other wrongful act committed by the Carvajals, a prerequisite for injunctive relief. It is undisputed that they applied to the homeowners association for permission to build the fence and received the association's approval. The fence does not encroach on Cassidy's property or on any common areas. Cassidy faults the homeowners association for failing to follow the rules for approving the fence, but he settled with the association before trial, and the trial went forward without the association.

Similarly, we do not find the trial court abused its discretion when it granted the restraining order. The trial court credited evidence from the Carvajals indicating a threat of harm from Cassidy. Although the actions are in the past, the threat is not, especially in light of the court's decision about the fence.

Cassidy raises two other issues on appeal. First, he argues the Carvajals improperly introduced evidence barred by res judicata or collateral estoppel. This issue was waived by failing to address it properly in the trial court. Finally, he asserts that deficiencies in the court's statement of decision require reversal. We find no such deficiencies, and, in any event, Cassidy has not shown how he was prejudiced by any omissions in the statement of decision.

FACTS

The parties reside in Canyon Lake, a common interest development near the Cleveland National Forest in Riverside County. Each numbered lot is subject to conditions, covenants, and restrictions (CC&R's). The lake itself is a reservoir. Originally owned by Temescal Water Company and leased to the Canyon Lake developers, at the time of trial the reservoir belonged to the Elsinore Valley Municipal Water District. The water district owns not only the water and the land underneath the water, but also a strip of shoreline surrounding the reservoir. Consequently, any homeowner wanting to install a floating structure (a dock, say) or a structure on the strip of shoreline (like a boat ramp or stairs) must get an encroachment permit from the water district.

People who bought homes in the Canyon Lake development had to become members of the Canyon Lake Property Owners Association (CLPOA). The CC&R's provides for an Architecture Control Committee (ACC) to handle "any remodeling, reconstruction, alterations, or additions" on any structure or improvement "on any lot." A homeowner who wanted to build a dock therefore had to apply to and get written approval from the ACC *and* an encroachment permit from the water district.

The Carvajals, retired physicians, have a house next door to Cassidy in Canyon Lake. Although they bought the lot in 1982, it was not their primary residence until 2005. Appellant Cassidy and his wife are a younger couple, with children still at home. Both the Carvajal and Cassidy lots have lakeshore frontage.

Cassidy acquired his property in 1999. In 2004, he obtained permission from the ACC and the water district to build a seawall and a concrete patio behind his house, fronting the lake. The patio extended onto the Carvajals' property; Cassidy knowingly included this part of their property in his project.

Carlota Carvajal testified that after she and her husband made Canyon Lake their primary residence, they would return from trips to find Cassidy's chairs, heaters,

and other property on their portion of the patio. In addition, the Carvajals received a notice from the CLPOA in March 2009 requiring them to clean up the patio; the offending object, however, was Cassidy's. The Carvajals therefore sought and obtained permission from the ACC in April 2009 to construct a fence on the patio along their property line. In effect, the fence cut off Cassidy's access to a portion of the patio. Cassidy threatened to sue the Carvajals, and he protested to the ACC, but his protests and efforts to win reversal of the ACC's approval were in vain.

At this point, things went decidedly downhill. It is unnecessary to recount all the skirmishes, not all of which are comprehensible from the record.¹ The incidents that figured in the judgment will be discussed below.

Cassidy filed suit against the CLPOA and the Carvajals, seeking an injunction ordering the removal of the fence. After reciting the history of the patio and the fence, the operative first amended complaint alleged, "The actions described above were undertaken by Defendant CLPOA negligently and carelessly and in breach of their fiduciary duty owed to the Plaintiffs [*sic*], and proximately caused damage to Plaintiffs as herein described. Furthermore, the actions described above in paragraph[s] 10 through 14 were undertaken by Defendant CLPOA will full knowledge of their breach of the CC&R's and ACC RULES and in willful[,] conscious and reckless disregard for their fiduciary duty owed to Plaintiffs."

The Carvajals filed a cross-complaint, seeking, among other things, a restraining order against Cassidy. The case was tried to the court over three days in October 2013. Before trial, Cassidy settled with the CLPOA, and the trial proceeded against the Carvajals only. The trial court issued a statement of decision denying

¹ The record contains a lot of pictures and diagrams and a lot of "over here" and "over there" testimony. In addition, the Carvajals are South American, and English is not their first language. While they did not need an interpreter, their responses to some questions require a bit of untangling. Jorge also has some hearing loss and required assistance through a device that did not always work. The resultant record is problematic.

Cassidy's request for an injunction regarding the fence and granting the Carvajals' request for a restraining order against Cassidy.

DISCUSSION

Cassidy has identified four issues on appeal. He asserts the trial court erred by denying his request for an injunction to remove the fence and by granting a restraining order in the Carvajals' favor. Cassidy also complains the Carvajals reopened matters that had been disposed of in 2009, when a different judge denied an earlier request by the Carvajals for a restraining order against him. Finally, he asserts the trial court's statement of decision is incomplete, warranting reversal of the judgment.

A judgment is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Under ordinary conditions, such as those present here, we review the result, not the trial court's reasoning. (See *Florio v. Lau* (1998) 68 Cal.App.4th 637, 653.)

I. Denying Cassidy's Request for Injunction

"The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion. [Citation.] The exercise of discretion must be supported by the evidence and, 'to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard.' [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. [Citation.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.) The party challenging the ruling has the burden of demonstrating such abuse. (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 146.)

With respect to the injunction, a threshold question is whether Cassidy stated any claim that would support injunctive relief against the Carvajals. (See *Nelson v.*

Pearson Ford Co. (2010) 186 Cal.App.4th 983, 1020-1021; *USS-Posco Industries v. Edwards* (2003) 111 Cal.App.4th 436, 444.) The next question is whether he supplied any evidence to support the claim.

Although Cassidy's first amended complaint named CLPOA and the Carvajals as defendants in a "cause of action" for injunctive relief, the complaint alleged wrongdoing only against the CLPOA. He alleged that *the association* approved the fence "with full knowledge of their [*sic*] breach of the CC&R's and ACC RULEs and in willful[,] conscious and reckless disregard for their fiduciary duty owed to Plaintiffs [*sic*]." Cassidy did *not* allege that the Carvajals owed him a fiduciary duty or that they had breached the CC&R's. Cassidy settled with the association before trial, leaving only the Carvajals as targets for injunctive relief.

"A permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate. . . ." [Citation.]" (*Benasra v. Mitchell Silberberg & Knupp* (2002) 96 Cal.App.4th 96, 110; see *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.)

Nothing at trial established that the Carvajals had committed "a tort or wrongful act." They indisputably complied with the procedure for obtaining the association's permission to construct the fence, they did obtain permission, and they constructed the fence according to the permission granted. No evidence established that their fence trespassed or encroached on Cassidy's property or on any common property. Cassidy presented no evidence that the Carvajals had granted him an easement for the part of the patio on their property.

Even if the CLPOA did not follow ACC procedure, the Carvajals are not responsible for its conduct. Nothing at trial established that the association was the

Carvajals' agent, servant, or employee or the other way around. There was no evidence that the Carvajals colluded with anyone on the architecture committee to obtain permission to build their fence improperly.

A permanent injunction is not a cause of action; it is a remedy. (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973.) There must be an underlying cause of action to support it. (*Ibid.*) Cassidy based his request for an injunction on a violation of the CLPOA rules when the Carvajals' fence was approved and a refusal to enforce the CC&R's. The rule violator, if there was one, was the association, and the Carvajals have no duty to enforce the CC&R's. When it came time to issue the injunction, however, the association was out of the picture.²

On appeal, Cassidy criticizes the Carvajals' compliance with the permitting procedure on two grounds. First, the Carvajals did not get an encroachment permit for the fence. Second, the application itself was defective. The evidence presented at trial supports neither criticism.

As the trial court found, Cassidy presented no evidence the Carvajals needed an encroachment permit for the fence. The exhibit Cassidy cited in his opening brief to support this argument refers to structures on the "lake bed," such as docks. Cassidy did not present evidence that the fence stretched all the way into the lake bed. Cassidy further asserts that the Carvajals used the wrong application form, did not show where the property lines were, or explain that the fence was going to be built on the patio Cassidy installed. The CC&R's do not specify a type of application form or require that the application give information about the structure underlying a fence. The application included a plan showing where the fence was to be installed and indicating the property

² The Carvajals moved under Code of Civil Procedure section 631.8 for judgment on several grounds, one of which was that Cassidy had not proven an underlying tort to support injunctive relief. The court denied the motion, stating it "would like to hear the case in its entirety before making a ruling. I think the plaintiff has met its burden at least to get past the [section] 631.8 burden." They renewed this argument in their post-trial briefs and raised it again in their brief on appeal. Cassidy did not address the issue in his reply brief.

lines of the house next to the Carvajals' house (Cassidy's) and the house next to that. Cassidy acknowledges that the CC&R's permit the ACC to approve fences along the property lines of lakefront properties "where, in the opinion of the [ACC] a fence or other enclosure, as a structure or esthetic feature of a design concept, will contribute to and be in keeping with the character of the area." The CLPOA CC&R's differ in this respect from those at issue in *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, in which the CC&R's did not afford the homeowners association *any* discretion to allow trees to obscure the views of the homeowners' lots. (*Id.* at p. 1123.)

Substantial evidence supported the trial court's refusal to grant Cassidy's request for injunction. As explained in the statement of decision, he failed to meet his burden of proof that the ACC – with or without cooperation from the Carvajals – had done anything outside the rules that would warrant interference by the court. Cassidy has failed to show on appeal how the court erred or how he met his burden.³

II. The Restraining Order against Cassidy

As part of the judgment, the trial court entered a permanent injunction against Cassidy, enjoining him "from harassing, annoying, molesting, physically or verbally abusing the Carvajals, their family, or their guests." Cassidy asserts on appeal: (1) the basis for the injunction no longer exists and will not recur in the future; (2) the injunction is too general and uncertain; and (3) the incidents upon which the court based the injunction would not cause a reasonable person emotional distress.

Civil Code sections 3420 et seq. provide the standards for permanent injunctions in general. An injunction may issue "[w]here pecuniary compensation would not afford adequate relief" and "[w]here the restraint is necessary to prevent a

³ The court also based its decision on judicial deference to the ACC's decision. (See *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 265.) Cassidy argues that the court should not have deferred to the ACC's decision. Before judicial deference even comes into play, however, the complaining homeowner must show some departure from the rules. Cassidy failed to make this showing.

multiplicity of judicial proceedings[.]” (Civ. Code, § 3422, subds. (1), (3).) We review the trial court’s decision to issue a permanent injunction for abuse of discretion. An injunction based on past acts is proper if there is evidence that they will probably recur. (*Rosicrucian Fellowship v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 144.) A court may also grant a permanent injunction under Code of Civil Procedure section 526 for the same reasons cited in Civil Code section 3420. (See Code Civ. Proc., § 526, subds. (a)(4), (5), (6), (7).)

The Carvajals presented the trial court with an extensive narrative of acts they claimed were motivated by Cassidy’s desire to harass, annoy, and intimidate them. The court credited some of these incidents as proven and did not accept others. It then issued the injunction in the terms described above.

It is true that some annoyances the Carvajals described were removed before the trial. It is also true that the Carvajals showed themselves to be extraordinarily prone to alarm. For example, they reported to police an object they saw on Cassidy’s second-floor balcony that they took to be some kind of weapon (cannon) or CIA-type listening device aimed at them. It turned out to be a climbing pole for the Cassidy cats, lying on its side. Similarly, they attributed sinister motives to the Cassidy children when they came into the Carvajals’ back yard to search for said cats.⁴

Nevertheless, the scope of the injunction can be traced in part to Cassidy’s ingenuity in finding unexpected ways to annoy the Carvajals after they put up the fence. For example, he acquired two garden gnomes sculpted in a bent-over posture with their pants down and set them up at his property line with their backsides facing the Carvajals’ house.⁵ He put up bird feeders at the property line so that bird droppings, husks, and seeds fell onto the Carvajals’ walkway to their dock. While these manifestations of petty

⁴ The trial court characterized the Carvajals as “oversensitive to any perceived sleight [*sic*]” and rejected any suggestion that searching for the cats constituted a trespass.

⁵ Cassidy admitted at trial that he installed the gnomes to retaliate for the fence.

spite have been removed, there is no telling what Cassidy may think of next, especially as the fence is going to remain where it is. Trying to list all the ways Cassidy could harass the Carvajals, other than mooning gnomes and messy birds, and enjoying each way would be a hopeless task.

Moreover, leaving aside gnomes and bird feeders, the trial court found to be true claims that Cassidy had behaved in a threatening manner toward the Carvajals. The court cited a scuffle over trash cans, during which Carlota sustained an injury to her hand. She recounted an incident when she was crossing the street in front of her house; Cassidy drove up behind her and frightened her by stamping on his brakes and honking his horn. She also testified that Cassidy tailgated her and Jorge in their car, and she believed he tried to push them off the road. Jorge testified to incidents that occurred shortly after the fence was installed in which Cassidy followed Jorge's car while honking his horn and flashing his lights. These incidents suggest a real potential for harm to these two elders.⁶

Cassidy denied he had anything to do with the injury to Carlota's hand. He also denied chasing the Carvajals in his car or trying to scare Carlota. The court did not believe him. Instead it found the Carvajals' testimony about Cassidy to be "truthful." We don't get to second-guess factual calls.

Cassidy's criticisms of the restraining order itself are without merit. We do not believe its language is too vague for Cassidy to understand what he is not to do. The fact that the gnomes and bird feeders are now gone is encouraging, but by no means decisive. And under Civil Code section 3422, it is not necessary that the Carvajals suffer emotional distress, although the evidence shows they did. The standard is the inadequacy of monetary compensation as relief and/or the prevention of a multiplicity of lawsuits. If the Carvajals have to institute a lawsuit every time Cassidy thinks up a new way to

⁶ The Carvajals' exact ages were not given at trial, but Carlota testified that she came to the United States after obtaining a medical degree in 1963, and Jorge testified that he had practiced medicine for 42 years before retiring in 2005.

bedevil them, there will be no end of proceedings. We cannot conclude that the trial court abused its discretion in granting the injunction against Cassidy.

III. The 2009 Restraining Order Petition

In 2009, the Carvajals sought a temporary restraining order (TRO) against Cassidy. They listed 14 incidents of harassment, only one of which could be identified with certainty as being raised again at trial.⁷ A hearing took place in October 2009. The only information presented at trial about the 2009 hearing was that Jorge played a tape recording of a conversation with Cassidy at the hearing and the court denied the request for a TRO.

Cassidy made a motion in limine to exclude testimony regarding the events alleged in connection with the TRO on the ground they had all happened two years before the Carvajals filed their cross-complaint. The court deferred ruling on the motion, and it was never decided. On the second day of trial, Cassidy moved to amend his answer to assert res judicata as an affirmative defense. The court denied the motion to amend on the grounds that (a) it was too late and (b) the motion was too skimpy to allow thoughtful consideration.

Cassidy characterizes the testimony recounting the actions mentioned in the declaration attached to the 2009 request for the TRO as “relitigat[ing]” the 2009 restraining order and argues at length about res judicata and/or collateral estoppel. We need not address the substance of this argument.

Even were we to assume denying a motion for a restraining order against civil harassment has res judicata effect, res judicata is an affirmative defense that is waived unless timely asserted. (*JSJ Limited Partnership v Mehrban* (2012) 205 Cal.App.4th 1512, 1526; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813 [affirmative defenses waived if not pleaded].) Cassidy did not

⁷ The Carvajals listed two car incidents in the 2009 TRO petition, but it was not clear whether these were the same incidents they spoke of at trial.

plead res judicata in his answer to the second amended cross-complaint. He did not seek to amend his answer until the middle of trial.⁸ The court denied this request as untimely, and Cassidy correctly does not argue on appeal that the court abused its discretion. The res judicata defense, if one existed, was waived.

As for collateral estoppel, Cassidy did not raise this issue in the trial court at all. Although the defense need not be pleaded, it must be raised, if not by the pleadings then by the evidence. (See *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 88-89.) Cassidy presented no evidence that any issue from 2009 was the same as those discussed at trial and that the court ruled on those issues in 2009. (See *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910 [issue necessarily decided in previous suit identical to issue in present suit].) When the subject was discussed in chambers, in connection with Cassidy's res judicata argument, all the court could tell from the evidence presented was that the request for a TRO in 2009 was denied. No reason was given for the denial, and no findings from 2009 were presented at trial. This defense, too, was waived. (See *ibid.*)

IV. Cassidy's Objections to the Statement of Decision

"The main purpose of an objection to a proposed statement of decision is not to reargue the merits, but to bring to the court's attention inconsistencies between the court's ruling and the document that is supposed to embody and explain that ruling." (*Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292.) In fact, "[T]he doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment." (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) A subsidiary purpose of the objections is to identify issues presented at trial that the statement of decision did not address. (*Heaps v. Heaps, supra*, 124 Cal.App.4th at p. 293.)

⁸ Cassidy knew this testimony was on deck, because he made a motion in limine to exclude it. The motion was not, however, based on res judicata.

On appeal, Cassidy complains only about the portion of the statement of decision relating to the injunction against him. He asserts that the statement is defective because it did not address these “principal controverted issues”: “Under what legal authority does the Court grant the injunction against . . . Cassidy? What is the burden of proof required to support an injunction against . . . Cassidy? What specific actions by . . . Cassidy are wrongful? What specific actions by . . . Cassidy does the Court seek to enjoin? What specific actions by . . . Cassidy were constitutionally protected? What specific actions by . . . Cassidy had no legitimate purpose? Was Carlota Carvajal moving . . . Cassidy’s trash can when the incident occurred? What evidence supports a finding the wrongful conduct will occur in the future?”⁹

The legal authority and burden of proof are legal issues; a statement of decision is not required to address legal issues. (See, *e.g.*, *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 220.) The court identified “specific actions” of Cassidy it found wrongful – placing the bird feeders and the gnomes to annoy the Carvajals and physically intimidating them, citing the car incidents and the trash can incident as examples. The court specifically enjoined Cassidy from harassing, annoying, molesting, and physically or verbally abusing the Carvajals, their family, or their guests. The remaining “issues” are actually evidentiary questions.¹⁰ Cassidy appears to imply that insufficient evidence supports the trial court’s decision.

“A trial court in rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts. [Citations.] . . . [para.] . . . Only where a trial court fails to make findings as to a material issue which would fairly disclose the determination by the trial court would reversible

⁹ Cassidy also included “Objections to proposed statement of decision as to Cassidy F[irst] A[mended] C[omplaint],” but the things he identified on appeal as defective addressed only aspects of the restraining order entered in favor of the Carvajals.

¹⁰ Cassidy presented no argument about the constitutionality of his actions at trial. On appeal he argues that placing the gnomes on his property line was constitutionally protected. That train has long since left the station.

error result. [Citation.] Even though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission to make such finding is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citation.]” (In re Marriage of Garrity and Bishton (1986) 181 Cal.App.3d 675, 686-687, superseded by stat. on other gnds.)

Cassidy cites *McCurter v. Older* (1985) 173 Cal.App.3d 582, disapproved in *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, for the proposition that the failure to explain the factual and legal basis of its decision on a principal controverted issue is reversible error. The case does not support Cassidy’s argument. In *McCurter*, the court failed to address an entire cause of action; it also failed to address whether the parties had an agency relationship, which was essential to determine the parties’ liability for this cause of action. (*McCurter v. Older, supra*, at p. 593.) By contrast, the details mentioned in Cassidy’s objections do not rise to the level of “principal controverted issues.”

The trial court’s statement of decision was consistent with its ruling, and it dealt with the controverted issues presented by the Carvajals’ cross-complaint by the time the court had to make a judgment. Cassidy’s objections were without merit. Nor has he shown how the evidence would support a finding in his favor that “would have the effect of countervailing or destroying other findings.”

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.