Filed 1/25/12 Tavangarian v. Florman CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| ARDESHIR TAVANGARIAN et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>MICHAEL J. FLORMAN,<br><br>Defendant Respondent | B227269<br><br>(Los Angeles County<br>Super. Ct. No. SC105778) |

APPEAL from order of the Superior Court of Los Angeles County, Cesar C. Sarmiento, Judge. Affirmed.

Law Offices of Faryan Andrew Afifi and Faryan Andrew Afifi for Plaintiffs and Appellants.

Funsten & Franzen, Don Erik Franzen; Turner Law Firm, Keith J. Turner and Vartan J. Saravia for Defendant and Respondent.

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## INTRODUCTION

Plaintiffs and appellants Ardeshir Tavangarian and Tania Tavangarian appeal an order granting in part and denying in part their motion to tax costs. They make three main arguments. First, plaintiffs contend they were the prevailing parties in the litigation against defendant and respondent Michael J. Florman. Second, they contend defendant is equitably estopped from being awarded costs. Finally, plaintiffs argue the trial court improperly awarded defendant costs associated with photocopying exhibits. We conclude plaintiffs failed to meet their burden of showing the trial court made a reversible error and thus affirm the order.

## BACKGROUND FACTS

1. *The CC&R's*

Plaintiffs and defendant both own real property in the Marquez Knolls area of Pacific Palisades. Defendant's property is located at 1214 Turquesa Lane (Defendant's Property). Plaintiffs' property is located at 16684 Charmel Lane (Plaintiffs' Property). Defendant's Property is contiguous to Plaintiffs' Property and is located at a lower elevation and closer to the ocean.

The properties in the Marquez Knolls area are subject to covenants, conditions and restrictions (CC&R's) recorded with the Los Angeles County Registrar-Recorder. Section 11 of the CC&R's provides: "[N]or shall any tree, shrub or other landscaping be planted or any structures erected that may at present or in the future obstruct the view from any other lot . . . ." In *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, the court held Section 11 provides that no property owner may construct a structure that "unreasonably" obstructs the view of another property owner. (*Id.* at p. 629.)

2. *Pre-litigation Discussions*

In April 2008, before this litigation commenced, defendant contacted his neighbors—plaintiffs, Mr. and Mrs. Kalin, and Renata Hecht—regarding his intention to remodel his house. Hecht and the Kalins agreed to defendant's plans at the time, but plaintiffs did not. Mr. Tavangarian asked defendant for permission to build a pool on

Plaintiffs' Property in exchange for plaintiffs' approval of defendant's plans. When defendant refused this offer, Mr. Tavangarian threatened to sue him when construction began.

Defendant subsequently decided to construct a new house instead of remodeling the existing one on Defendant's Property. Construction began in April 2009. Thereafter, defendant held a meeting with his architect, Hecht, and Mrs. Kalin regarding defendant's construction plans. Although plaintiffs were invited, they did not attend. At the meeting defendant promised that when the framing of the new house was completed, he would give Hecht and Kalin an opportunity to discuss their views so that he could make adjustments, if necessary.

On November 23, 2009, defendant received a letter from plaintiffs' attorney demanding that he cease construction. The letter alleged defendant's planned construction would significantly block views from Plaintiff's Property. The letter was the first communication from plaintiffs or anyone on their behalf since April 2008.

On November 24, 2009, defendant met with Mr. Tavangarian. Defendant stated at that meeting his new home would not obstruct the views from Plaintiffs' Property. He further advised Mr. Tavangarian that he was travelling to Cleveland the next day to see his parents for the Thanksgiving holiday, and pleaded with Mr. Tavangarian to not file any legal action until defendant returned the following Monday.

3. *The Complaint*

On November 25, 2009—the day before Thanksgiving—plaintiffs filed a complaint against defendant. The essential factual allegation in the complaint was that the changes to the structure on Defendant's Property "have had a measurable and detrimental impact on the view of the [Plaintiffs'] Property, causing not only a diminution in its value, but affecting the use and enjoyment of the Property." The complaint set forth causes of action for (1) breach of contract (the CC&R's), (2) private nuisance, (3) permanent injunction, and (4) declaratory relief.

4. *The OSC and TRO*

On November 25, 2009, plaintiffs filed an ex parte application for a temporary restraining order (TRO) and injunctive relief. The trial court issued an Order to Show Cause (OSC) regarding plaintiffs' request for a preliminary injunction, and set a hearing on the matter on December 14, 2009. It also issued a TRO prohibiting any further construction on Defendant's Property until the hearing on the OSC.

5. *Kalin's Request Regarding Defendant's House*

In early December 2009, defendant met with Mrs. Kalin regarding the construction on Defendant's Property. At that time Mrs. Kalin asked defendant to lower the southeast corner of his house. Defendant agreed to do so.

6. *Settlement Negotiations and Stipulations Modifying the TRO and Continuing the OSC Hearing*

On December 4, 2009, pursuant to a stipulation of the parties, the trial court issued an order modifying the TRO and continuing the OSC hearing to January 5, 2010. Under the modified TRO, defendant could proceed with construction in the west area of the new dwelling. The modified TRO also provided that defendant "may (but is not required to) lower the height of the southeast corner of the New Dwelling and/or remove the eaves from the same."

On December 9 and 15, 2009, plaintiffs and defendant sent their respective representatives to inspect and take photographs from each other's properties. The parties each conducted surveys of Defendant's Property. Plaintiffs advised defendant they would resolve the matter if defendant made the following changes to Defendant's Property: (1) the southeast corner of the house is lowered by approximately two inches from its position as of December 17, 2009; (2) the southwest corner of the house is lowered by hanging the joists inside the beams; (3) all overhangs are eliminated with the exception of the eaves on the south side of the garage, which would be shortened to approximately four feet; and (4) the steel beam located about 20 feet south from the new

wall shall be lowered by approximately four inches from its height as of December 17, 2009.

Defendant claims he made the changes requested by plaintiffs at a cost of $18,000. On February 13, 2010, Mrs. Kalin signed a letter indicating that defendant's new home, "as it stands today," was "acceptable" to her.

While defendant was making changes to his new house, the parties continued to engage in settlement negotiations. In order to allow more time for settlement negotiations, the parties twice stipulated to continue the hearing on the OSC. Pursuant to these stipulations, the trial court continued the hearing to February 11, 2010 and then to February 25, 2010. In the meantime, the TRO as modified was kept in place.

7. *Plaintiffs' Motion for Preliminary Injunction is Denied*

Despite prolonged discussions, the parties did not enter into a settlement agreement. Instead, each side filed briefs and declarations regarding whether the trial court should issue a preliminary injunction in plaintiffs' favor.

Plaintiffs argued that a preliminary injunction was necessary, despite changes made to the new house on Defendant's Property, because the new house "contains a second story" and because the new construction "impacts the view" from Plaintiffs' Property. Plaintiffs claimed that the lowering of the roof of the new house "helped resolve some, but not necessarily all of the view obstructions visible from" Plaintiffs' Property.

Defendant argued that he was constructing a single-story house with a subterranean basement. He also argued the views from Plaintiffs' Property were not obstructed. Defendant attached to his declaration photographs of Defendant's Property taken from Plaintiffs' Property which he claimed indicated there was no obstruction of the views from Plaintiffs' Property either before or after the roof on the new house was lowered.

Defendant's general contractor Joe Shah stated in his declaration: "The new home is one-story in height—the same height as the original home, with a subterranean

basement that was built into the hill. A recent survey confirmed that the height in one area is 6/10ths of one inch higher on the new structure, which for construction purposes is as close as reasonably possible."

Defendant's land surveyor Michael Amoroso stated in his declaration: ". . . the difference between the disputed south-east corner area of the new house, which is 20 feet south of the new structures ridge height, is 6/10ths of one inch higher on the new structure." Amoroso further stated he disputed the survey prepared by the surveyor hired by plaintiffs, Larry Pearson, which indicated the height of the new structure was 1.56 inches higher than the original structure.

On February 25, 2010, the trial court held a hearing on the OSC regarding a preliminary injunction. At the beginning of the hearing the court announced its tentative ruling was to deny the preliminary injunction. It gave two grounds for this ruling: (1) plaintiffs did not meet their burden of showing they were likely to prevail on the merits "because there is no evidence that the defendant's home was unreasonably obstructing the view of plaintiff's [*sic*] home"; and (2) plaintiffs had not shown they would suffer irreparable harm if the injunction was not issued.

Plaintiffs' counsel expressed concerns that defendant would build his new house according to his original plans, and not as modified after the suit was filed. Defendant's attorney, however, stated that defendant was "staying with [the] adjustments" made to the new house. Defendant confirmed this statement.

Plaintiffs' counsel then stated plaintiffs did not oppose the trial court's denial of their motion for preliminary injunction if the court's ruling was based on defendant's representation he would build the new house according to the modified construction plans. The court replied by stating: "That's only one basis. I only addressed what's [alleged] in the complaint. And [in] the tentative . . . there are additional grounds for denying your request of an injunction."[1]

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[1] There is no written tentative order in the record; it is unclear whether one was issued.

At the end of the hearing, the trial court denied plaintiffs' motion for preliminary injunction and dissolved the TRO.

8. *The Complaint is Dismissed*

When the trial court denied their motion for preliminary injunction on February 25, 2010, plaintiffs did not immediately dismiss their complaint. Defendant's counsel thus issued subpoenas for depositions and documents to several third-party witnesses.

On March 24, 2010, plaintiffs filed a request for dismissal of the complaint without prejudice. The request was granted as requested the same day.

9. *Plaintiffs' Motion to Tax Costs*

On April 2, 2010, defendant filed a memorandum of costs. Defendant claimed $6,949.84 in costs, including $6,346.84 for models, blowups, and photocopies of exhibits.

On May 20, 2010, plaintiffs filed a motion to tax costs. On June 24, 2010, the trial court issued a minute order which granted the motion in part and denied it in part.

The trial court found defendant was the prevailing party pursuant to Code of Civil Procedure section 1032, subdivision (a)(4),[2] because he obtained a dismissal in his favor. The minute order stated: "The concessions Defendant made were not compelled by the court, but were voluntary. Therefore, the court finds that Plaintiffs have not 'recovered' any nonmonetary relief. Moreover, the court rejects Plaintiffs' contention that they achieved their litigation objective. In denying the preliminary injunction, the court found that 'Plaintiffs also have failed to show the likelihood on the success of the merits because there is no evidence that the defendant's home was unreasonably obstructing the view of Plaintiff's [*sic*] home.' "

The trial court, however, declined to award defendant all of the costs he sought to recover. In particular, the court found that an $859.89 charge for blowups of exhibits used at the preliminary injunction hearing was not allowable under section 1033.5,

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[2] All future statutory references are to the Code of Civil Procedure.

subdivision (a)(12). The blowups, the court found, "were not reasonably necessary to the conduct of the litigation because the court made its tentative decision, which was consistent with its final ruling, without the aid of the 'blowups.' "

Although the court found that photocopies of exhibits "were reasonably necessary to the conduct of the litigation[,]" it also found "the cost of the photocopies is unreasonable." Defendant had submitted a bill in the amount of $5,486.95. The court only allowed defendant to recover $3,404.95 for photocopies of exhibits.[3]

Plaintiffs filed a timely appeal of the trial court's June 24, 2010, minute order.

## DISCUSSION

1. *The Trial Court's Determination That Defendant Was the Prevailing Party Was Not Erroneous*

a. *Standard of Review*

A "prevailing party" for purposes of a cost award is defined by section 1032, subdivision (a)(4), which we shall discuss *post*. Like all statutes, we interpret section 1032 de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 (*Goodman*).) This standard of review applies to interpretation of the statute in general, without specific application of the facts of this case.

We review the trial court's determination that one party is a prevailing party under section 1032, subdivision (a)(4) for abuse of discretion. (*Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 852 ["A trial court's determination that one party in litigation was the prevailing party is reviewed for abuse of discretion"].) " ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the

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[3] The court found the following items were not allowable: (1) $525 for "graphics consulting"; (2) $1,245 for "graphics project administration"; and (3) $312 for "after hours/weekend/holiday service." In total, the court reduced defendant's claim for photocopies of exhibits by $2,082.

facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' " (*Goodman, supra*, 47 Cal.4th at p. 1339.)

We review any factual findings made by the trial court in connection with its costs award under the substantial evidence standard. (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 291; *Lubetsky v. Friedman* (1991) 228 Cal.App.3d 35, 39.) In determining whether substantial evidence supports a trial court's finding, we make all reasonable inferences in favor of the court's order. (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.) " '*If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*' " (*Ibid*.)

Plaintiffs contend we should determine the prevailing party de novo because the facts are undisputed. The cases they cite, however, do not support their position or apply to the determination of a prevailing party for purposes of a costs award. (See *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 705 [de novo review of lease where facts are undisputed and there is no extrinsic evidence]; *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142 ["a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo"]; *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, 1374 [whether a cost bill should be apportioned is reviewed de novo].) Moreover, contrary to plaintiffs' contention, the facts are indeed disputed. For example, the parties dispute whether the construction of a new house on Defendant's Property obstructed the views from Plaintiffs' Property and, if so, to what degree. We therefore cannot review de novo the trial court's determination that defendant was the prevailing party.

b. *Defendant Is the Prevailing Party Because a Dismissal Was Entered in His Favor*

Section 1032, subdivision (a)(4) provides: " 'Prevailing party' includes the party with a net monetary recovery, *a defendant in whose favor a dismissal is entered*, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as

against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief *and in situations other than as specified*, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." (Italics added).

The first sentence of section 1032, subdivision (a)(4) sets forth four categories under which a party is a prevailing party. The second sentence of section 1032, subdivision (a)(4) provides that, in addition to the four specified categories, the court has the discretion to declare a party a prevailing party if two criteria are satisfied: (1) a party recovers nonmonetary relief; and (2) the party does not fit into one of the four categories specified in the first sentence. (*Adler v. Vaicius* (1993) 21 Cal.App.4th 1770, 1777 (*Adler*); accord *Goodman*, *supra*, 47 Cal.4th at p. 1338, fn. 4 [a trial court has discretion to make the determination as to a prevailing party under section 1032, subdivision (a)(4), unless a party fits into one of the four categories described in the statute].)

Plaintiffs contend the trial court can, in its discretion, declare a party a prevailing party if that party recovers nonmonetary relief, regardless of whether one of the four circumstances specified in the first sentence of section 1032, subdivision (a)(4) exists. Thus, plaintiffs argue, the trial court can declare them the prevailing parties even though a dismissal was entered in favor of defendant because plaintiffs obtained nonmonetary relief, namely the TRO and defendant's out-of-court agreement to modify the construction of his house. We disagree.

In *Adler*, the Court of Appeal rejected a similar argument in a case involving analogous facts. There, the plaintiff alleged she was being harassed by the defendant. Pursuant to section 527.6, the plaintiff obtained a TRO against the defendant, restraining the defendant from coming within 150 yards of the plaintiff and her family. (*Adler*, *supra*, 21 Cal.App.4th at p. 1773.) Subsequently, before the trial court determined whether to issue a preliminary injunction, the plaintiff dismissed the action with prejudice. (*Id.* at p. 1774.) The defendant then filed a motion to recover attorney fees and costs pursuant to section 527.6, which was granted. (*Adler*, at p. 1774.)

The plaintiff argued that she was the prevailing party because she obtained nonmonetary relief, namely the TRO, which the plaintiff contended was all the relief she sought. The Court of Appeal, however, rejected that argument. In so doing, the court applied the definition of "prevailing party" set forth in section 1032, subdivision (a)(4). (*Adler, supra,* 21 Cal.App.4th at p. 1777.) The court held that under the plain language of the statute the plaintiff was not the prevailing party because a dismissal had been entered in the defendant's favor. (*Ibid*.)

The same is true here. Defendant Florman is "a defendant in whose favor a dismissal is entered" within the meaning of section 1032, subdivision (a)(4). Defendant therefore is the prevailing party under the plain language of the statute. Because this is not a situation "other than as specified" in the first sentence of section 1032, subdivision (a)(4), the trial court did not have discretion under the second sentence of section 1032, subdivision (a)(4), to declare plaintiffs the prevailing parties, even if they did recover nonmonetary relief.

c. *The Trial Court Did Not Abuse Its Discretion in Determining That Plaintiffs Did Not Recover Nonmonetary Relief*

Additionally, the trial court did not abuse its discretion in determining that plaintiffs did not recover nonmonetary relief. Although plaintiffs obtained a TRO, their motion for preliminary injunction was denied. They also did not obtain a permanent injunction or declaratory relief, both of which they sought in their complaint. Thus the only relief the trial court granted plaintiffs was the TRO. The TRO, however, was merely an interlocutory order that cannot be the basis for determining a prevailing party for purposes of costs. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 652, 664, fn. 21 ["granting of a TRO does not reflect on the merits of the underlying dispute, and does not qualify the enjoining party to 'prevailing party' status"].

Plaintiffs contend they achieved their litigation objectives because defendant allegedly changed his construction plans as a result of their lawsuit. This argument is belied by the timing of their dismissal. Even after defendant changed his construction

plans, plaintiffs pursued their motion for preliminary injunction on the grounds that the changes were not satisfactory. When the trial court denied their motion, plaintiffs still refused to dismiss their action. Plaintiffs waited until a month after the hearing on the motion, after defendant propounded discovery, before they filed their request for dismissal. This sequence of events indicates plaintiffs did not consider defendant's decision to change his construction plans a victory that satisfied their litigation objectives.

Moreover, the reason defendant changed his construction plans is a matter of great dispute. The trial court expressly found there was no evidence that defendant's home was obstructing the views from Plaintiffs' Property after defendant made the adjustments plaintiffs requested. Further, defendant presented evidence that his house was not materially obstructing the views from Plaintiffs' Property even before the lawsuit was filed. Although the trial court did not expressly make a finding on this contention at the hearing on the OSC, we must assume the trial court impliedly found in defendant's favor on this issue. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

There was substantial evidence supporting the trial court's express and implied findings that the construction of the house on Defendant's Property did not unreasonably obstruct the views from Plaintiffs' Property, either before or after the lawsuit was filed. This evidence consisted of statements in the declarations filed in support of defendant's opposition to plaintiffs' motion for preliminary injunction, as well as photographs attached thereto.

Additionally, defendant indicated in his declaration that he lowered the southeast corner of his house in response to Mrs. Kalin's request. Defendant also indicated in his declaration that he was under time pressure to resolve his dispute with plaintiffs because the terms of his construction loan required him to complete construction by April 30, 2010. Thus a reasonable inference can be made that defendant agreed to make changes to his house not because there was any merit to plaintiffs' lawsuit, but because he simply

wanted to resolve the dispute to avoid the monetary and nonmonetary negative effects of litigation.

In light of all of these facts, the trial court did not abuse its discretion in ruling that plaintiffs did not achieve their litigation objectives or otherwise obtain nonmonetary relief.

2. *Plaintiffs Forfeited Their Equitable Estoppel Argument*

Plaintiffs contend defendant is equitably estopped from recovering costs in light of his alleged bad faith litigation tactics. However, plaintiffs forfeited this argument for two reasons. First, they did not raise it below. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591 [" '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court' "].) Second, they failed to cite any legal authority or provide any legal reasoning to support their argument (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].) Indeed, plaintiffs did not even set forth the elements of equitable estoppel. We thus do not reach the merits of this argument.

3. *The Trial Court Did Not Abuse Its Discretion in Awarding Exhibit Photocopying Costs*

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) In this case, there is no statute that provides otherwise. Therefore, as the prevailing party, defendant was entitled to recover allowable costs as a matter of right.

Whether a particular item of cost is allowable is governed by section 1033.5. Under section 1033.5, "photocopies are allowable only if they are copies of exhibits; other copy costs are expressly disallowed by [the] statute." (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 618, citing § 1033.5, subds. (a)(12), (b)(3).) The cost of photocopying exhibits is allowable only if the

photocopies "were reasonably helpful to aid the trier of fact" (§ 1033.5, subd. (a)(12)) and, if so, to the extent the amount of the cost was "reasonable." (§ 1033.5, subd. (c)(3).) We review a trial court's rulings on exhibit photocopying costs for abuse of discretion. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1396.)

Here, the trial court was the trier of fact. It determined that photocopies of exhibits "were reasonably necessary to the conduct of the litigation[.]" It also determined that the amount of exhibit photocopying costs claimed by defendant was unreasonable, and that $3,404.95 was a reasonable amount. Plaintiffs did not meet their burden of showing the trial court's rulings were an abuse of discretion. We therefore affirm the trial court's award with respect to exhibit photocopying costs.

**DISPOSITION**

The trial court's order dated June 24, 2010, is affirmed. Defendant and respondent Michael J. Florman is awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

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