Filed 1/2/13 Town of Fairfax v. Berg CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

TOWN OF FAIRFAX, Plaintiff and Appellant, v. JOHN R. BERG et. al., Defendants and Respondents.	A131225 (Marin County Super. Ct. No. CIV086177)

This case concerns the rights of the Town of Fairfax (Town) to easements over the property owned by respondents John R. and Marlia Berg (the Bergs) located at 36 Meadow Way in the Town (the Berg property). The Town appeals from a judgment finding that the easements were private appurtenant easements that did not allow public access, and that the public's use of the easements created a prohibited burden or surcharge on them. The Town contends that the court: (1) erred in its interpretation of the easements; (2) abused its discretion in failing to grant an equitable easement over the Berg property; and (3) failed to accord the Town's interpretation of the easements the deference to which it was entitled. We affirm.

FACTUAL BACKGROUND

In 1997, John Berg's parents purchased the Berg property with the intent of eventually gifting it to the Bergs. At the time of purchase, the deed to the Berg property reserved "a non-exclusive easement for ingress, egress and utility purposes, over a strip of land 30 feet wide and 20 feet wide, lying over a portion of the land" in favor of 70 Meadow Way, the property then owned by Patricia Solter and Joseph Bragado, successor

co-trustees of The Bragado Trust. The easement was appurtenant to 70 Meadow Way. The easement encompassed a dirt driveway across the Berg property from Meadow Way to the Bragado property. At the time the Berg property was purchased, there was a gate at the front of the driveway on Meadow Way adjacent to the Berg property with a chain around the top that was padlocked. There was also a no trespassing sign posted on the gate. The driveway was a gravel road comprised of drain rock and dirt, with grass growing in the middle of it, that provided access from the Berg property to two other privately owned parcels–40 Meadow Way and 70 Meadow Way. The gate was kept locked to maintain privacy and to keep the public off the Berg property.

The deed to the Berg property also reserved a second non-exclusive easement for ingress, egress and utility purposes over a 30 feet wide strip of land to provide access for the properties located at 35 Meadow Way, 40 Meadow Way and 70 Meadow Way. This easement was also appurtenant to the Bragado property.

In 2001, John Berg's parents completed the transfer of the property to the Bergs and recorded the grant deed in favor of the Bergs. In 2002, the Bergs submitted plans for the design of a new house on the Berg property to the County of Marin (County). The County approved the plans pending public notification of the pending construction. The Town objected to the plans, and appealed the approval of the permit for the construction. The Town sought to require the Bergs to install a sewer on the property rather than a septic system and to annex the property into the Town's limits. The Planning Commission approved the permit on the condition that the Bergs install a sewer connection to the public sewer. The Town appealed the Planning Commission's decision to the Board of Supervisors. The Board of Supervisors affirmed the Planning Commission's decision to issue the construction permit.

The Bergs commenced construction in May 2003. They, however, needed an encroachment permit from the Town to connect their sewer to the public sewer on Meadow Way. The Town delayed at least four months in responding to the Berg's application for an encroachment permit. It thereafter sought to require that the encroachment permit be conditioned on annexation to the Town.

The Bergs sued the Town. In a settlement conference, the court directed the Town to hold a hearing on the permit application. The Town held the hearing which resulted in the Town's Council voting to give the encroachment permit to the Bergs.

As part of the construction on their new home, the Bergs installed a new gate in June, 2005. They obtained a permit from the County to build the new gate. The Bergs provided the key code for the gate to the Town for use by the Town's employees. The Town stipulated that it had the code to the gate.

At around the same time that the Bergs were seeking a construction permit for their new home, Mark and Debra Melvin, who owned 70 Meadow Way, also applied for a permit to build on their land. The Town denied the Melvins's application. The Melvins subsequently sold 70 Meadow Way to the Town (the Town property).

The Town thereafter granted an open space easement to the Marin County Open Space District, prohibiting all development and restricting use of the Town property to passive open space uses. Because the Town property was now to be used as public space, in February 2005, the Bergs notified the Town that it objected to use of the driveway easement from its property to the Town property as a public easement, noting that the easement was established as one for access only to privately owned property.

On April 12, 2005, the Bergs recorded a Notice of Consent to Use Land pursuant to Civil Code section 813, providing that the right of the public to make any use of the property was by permission and subject to the Bergs's control.

In 2005, few people used the easement on the Berg property to access the Town property. Public use of the easement, however, intensified over the years, and in 2008, people were regularly using the easement to walk their dogs, ride bikes, and to play with their children. In April 2008, an incident occurred in which the Bergs's two dogs allegedly injured a dog that was with a neighbor who was walking across the easement toward the Town property. The neighbor later presented a veterinarian's bill to the Bergs and demanded payment. The Bergs resolved the dispute with the neighbor, and two days after the incident, installed a fence across the easement between their house and the Town property. They posted a sign reading, " 'No dog walking–No Cycling–You are entering

private property at your own risk. Please proceed along driveway to your destination.' " The sign was intended to prevent people from loitering and using the Berg property as a public park.

The Town objected to the new fence, asserting that it prevented access to the Town property and infringed on the Town's rights under the easements. The parties were unable to resolve the dispute.

In December 2008, the Town filed a complaint to quiet title to the easements. The Bergs cross-complained for quiet title and declaratory relief, seeking a declaration that they owned the Berg property free and clear of a public access easement and to declare that the existing gate on the property was permissible. Following a court trial,[1] the court found in favor of the Bergs, ruling that the easements created in the deed are private appurtenant easements that do not allow public access.

DISCUSSION

The interpretation of an easement is a question of law. (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.) We review the court's determination of the issue de novo. (*Ibid.*)

" 'It is fundamental that the language of a grant of an easement determines the scope of the easement.' [Citation] . . . . 'In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired.' [Citations.]" (*Van Klompenburg v. Berghold* (2005) 126 Cal.App.4th 345, 349; *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.) If the existence or scope of the easement hinges on findings of fact, rather than the interpretation of a writing, we apply the substantial evidence standard of review. (See *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.)

[1] Pursuant to a stipulation, the court visited the Berg and Town properties.

The Town contends that the court erred in its interpretation of the easement and that it should have exercised its equitable discretion to allow public ingress and egress across the easement to its property. We conclude that the trial court properly determined the scope of the easement.

The extent of an easement is "determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." (Civ. Code, § 806.) "The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement." (Civ. Code, § 803.) The owner of the dominant tenement may not unreasonably burden the servient tenement. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 767.)

Here, the Town, as owner of the dominant tenement, asserts that Bragado, the original grantor of the easement, contemplated further subdivision of his property which would have increased the burden on the easement over the Berg property. The Town relies on language in the deed describing the easement. The deed set forth the easement as follows: "Said easement to be appurtenant to and for the benefit of the Lands of Joseph Bragado as described in that certain Deed recorded September 5, 1984 as Instrument No. 84 42899, Marin County Records, and *any future subdivision thereof*." [2] (Italics added.) As the trial court found, however, there was no evidence presented as to Bragado's intent in creating the easements over the property other than the language in the deed. "The mere insertion of the phrase 'any future subdivision' in the [deed] did not convert [the easement] to a public easement or establish an intent to allow unfettered ingress and egress by the general public. 'Deeds are to be construed like any other contract and the intent of the parties arrived at by a consideration of the whole instrument and not of detached clauses.' *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 240."

Further, the evidence at trial demonstrated that the language in the deed did not create a public easement, but rather an easement benefitting only a particular parcel of

[2] Both easements at issue contain the identical language referring to any future subdivision.

land. John Keating, an expert in title matters, testified that the creation of a public easement would require either an offer of dedication or a grant by deed. There was no offer of dedication or grant of a public easement over the Berg property.

The Town asserts that Bragado included the language "any further subdivision thereof" because he anticipated increased vehicular traffic. It argues that the court abused its equitable powers by not balancing the burdens and benefits of the easement to the parties and not granting to the Town a public easement over the Berg property. The Town, however, fails to cite to any evidence in the record in support of its arguments. Because its factual assertions are devoid of any citations to the reporter's transcript (see Cal. Rules of Court, rule 8.204) it has therefore waived this challenge to the court's judgment. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) ["If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived."] It is not our duty to comb the record to determine whether there was substantial evidence to support the judgment. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888.) In the interests of justice, we have nonetheless independently reviewed the record and can find no support for the Town's assertions that its contemplated use of the easements was within the intent of the grantor. The deed granted an appurtenant easement for the benefit of the lands of Bragado and any further subdivision of that land. As explained by Keating, Bragado was reserving the easement over the Berg property for the benefit of his property and also, in the event that he sold a portion of it to a third party. "Any actual separate ownership within that property would have to be appurtenant to the easement." Hence, contrary to the Town's argument, there is no relevant or admissible evidence in the record suggesting that the easement was intended for the *public's* benefit. Nor did the Town establish that the public's use of the easement to access the Town property did not overburden the easement. To the contrary, the Bergs showed that the public's use of the easement had escalated over the years, that people had come onto the Berg property to walk their dogs, play with their children, and ride their bikes. Because the deed expressly provided that the easement was one for the benefit of the property owners, the public's

use thereof was in excess of the terms of the easement.[3] (See *Scruby v. Vintage Grapevine, Inc.*, *supra*, 37 Cal.App.4th at p. 702 [owner of dominant tenement must use easements and rights to impose as slight a burden as possible on the servient tenement].)

The Town further contends that its interpretation of the easement is entitled to deference because its actions were taken in accordance with open space policies. While a public agency's interpretation of a statute within its administrative expertise is accorded deference by the courts (*Jim Beam Brands Co. v. Franchise Tax Bd.* (2005) 133 Cal.App.4th 514, 521), this rule has no bearing on the interpretation of an easement which, as we have explained, is determined by the terms of the grant. (Civ. Code, § 806.) In addition, as the Bergs point out, regardless of the Town's intent to use the Town property for open space, its intended use had no bearing on the scope of the easements created many years prior to its purchase of the property.

Finally, the Town argues that its closing trial brief and its objection to the Bergs' proposed statement of decision and judgment are not in the court's file, indicating that the court may have entered judgment without considering these documents. The Town is mistaken. The court had before it the Town's Request for Further Statement of Decision (Request), filed on October 27, 2010, which included the Town's closing brief as an attachment. The Town's objection to the Berg's proposed statement of decision, filed November 24, 2010, a day after the judgment was entered, simply adopts the Request as its objection. We fail to discern how the Town could have been prejudiced if the court did not review the objection since the same information was included in its Request which the court had before it prior to entering the judgment. No error appears. (See *Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292 ["the premature signing of a proposed statement of decision does not constitute *reversible* error unless actual prejudice is shown"].)

In sum, on the record before us, the trial court properly found that the easements were private appurtenant easements that did not permit public access.

---

[3] We note that there was evidence the public could access the Town's property from another public road, via a utility access road.

DISPOSITION

The judgment is affirmed.

_____
RIVERA, J.

We concur:

_____
RUVOLO, P.J.

_____
BASKIN, J.*

* Judge of the Contra Costa County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.