1. WALLACE v. WASHICK SC-20170014

Defendant Washick's Motion for Summary Judgment on the Complaint and Cross-Complaint.

Plaintiffs filed a complaint against defendant asserting causes of action for trespass to easement and trespass/nuisance related to a written easement that allegedly allows plaintiffs to use a portion of defendant's property as the front yard of plaintiffs' property; and that since the original owner of both parcels could not subdivide the property without running afoul of TRPA regulations regarding minimum lot size, the written easement was executed. (Complaint, paragraph 19.) The grant of easement was recorded on July 21, 1986. (See Complaint, Exhibit 2.)

Defendant filed a cross-complaint against plaintiffs seeking declaratory relief concerning the validity and enforceability of the subject easement and to quiet tile to the easement area on the ground that the easement was unenforceable and void as the easement effectively conveyed the easement area to the owners of the dominant tenement and the remaining portion of the servient tenement parcel located at 656 El Dorado was substantially smaller than the minimum lot size allowed by law.

Defendant/Cross-Complainant Washick moves for entry of summary judgment on the complaint and cross-complaint on the ground that the recorded express grant of the easement grants rights so expansive to the dominant tenement that it is effectively a grant of ownership of that portion of the parcel burdened by the easement thereby reducing the size of defendant's parcel to 4,320 square feet, which renders the grant of easement illegal and void as violating the City of South Lake Tahoe zoning ordinance that the minimum size for residential lots was and is 6,000 square feet.

Plaintiffs argue in opposition that the grant of the easement did not reduce the physical size of the defendant's parcel; the parcel size remains the same and meets the City ordinance minimum size requirement; and the easement only granted rights to the owners of plaintiffs' parcel for use of the subject easement area on defendant's parcel, not ownership.

Plaintiffs also asserted objections to defendant's evidence in support of the motion.

Defendant replied to the opposition and objects to the declaration of South Lake Tahoe's Director of Development Services submitted in opposition to the motion.

Plaintiffs' Objections to Defendant's Evidence Submitted in Support of the Motion

Plaintiffs' objection numbers 1 and 4 are overruled.

Plaintiff's objection number 2 objects to the court's consideration of a portion of their own operative complaint. The objection is overruled. "The pleadings determine the issues to be addressed by a summary judgment motion. (Citations omitted.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.) and, therefore, the pleadings are properly considered in ruling on demurrers.

Furthermore, with the exception of allegations that are mixed factual-legal conclusions, the allegations of the complaint are judicial admissions of fact by the plaintiffs.

A moving party in a summary judgment proceeding can rely on the opposing party's admissions of fact in the opposing party's pleadings. "In support of summary judgment, the employee defendants relied on the allegations in Munshaw's complaint that they were acting within the course and scope of their employment at all relevant times. Although a party cannot rely on its own pleadings on summary judgment, a party seeking or opposing summary judgment under these circumstances can rely on admissions of material fact made in the *opposing* party's pleadings. (*Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1034–1035, 184 Cal.Rptr. 417; Weil & Brown, Cal. Practice Guide: Civil Procedure

Before Trial 2 (The Rutter Group 1998) ¶¶ 10:19–10:20, pp. 10–6—10–7; 10:204, p. 10–71 [herinafter Weil & Brown].)" (24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199, 1210–1211.)

""A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues." (*Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433, 266 Cal.Rptr. 695; see also *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248, 4 Cal.Rptr.3d 416 [judicial admissions are conclusive concessions of the truth of those matters and are removed as issues from the litigation]; *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 613, 135 Cal.Rptr.2d 131 ["a judicial admission cannot be rebutted: it estops the maker"]; *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 871, 64 Cal.Rptr.2d 324 [judicial admissions in a complaint overcome evidence even if the opposing party seeks to contradict the prior admission.]) " 'While inconsistent *theories* of recovery are permitted [citation], a pleader cannot blow hot and cold as to the facts positively stated.' " (*Brown v. City of Fremont* (1977) 75 Cal.App.3d 141, 146, 142 Cal.Rptr. 46.) ¶ On the other hand, a mere conclusion, or a "mixed factual-legal conclusion" in a complaint, is not considered a binding judicial admission. (*Bahan, supra,* 98 Cal.App.3d at p. 812, 159 Cal.Rptr. 661.) A mixed factual-legal conclusion may be contradicted by a declaration or other evidence in order to overcome a motion for summary judgment. (*Ibid.*)" (Castillo v. Barrera (2007) 146 Cal.App.4th 1317, 1324.)

Objection number 3 is overruled.

Objection number 5 to consideration of the moving defendant's/cross-complainant's cross-complaint as evidence in support of his motion for summary judgment is sustained. While the cross-complaint and the other pleadings in the case determine the issues to be addressed by a

summary judgment motion (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.), "…a party cannot rely on its own pleadings on summary judgment…" (24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199, 1210–1211.)

Defendant's Objections to the South Lake Tahoe Director of Development Services' Declaration in Opposition to Motion

First, the defendant's objections to the declaration are improper in that they are contained in the reply, which is a reason to deny the objections.

"All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must: ¶ (1) Identify the name of the document in which the specific material objected to is located; ¶ (2) State the exhibit, title, page, and line number of the material objected to; ¶ Quote or set forth the objectionable statement or material; and ¶ State the grounds for each objection to that statement or material…" (Rules of Court, Rule 3.1354(b).)

Second, the court does not reach the defendant's objections to evidence, because the court finds that the evidence objected to is not material to its disposition of the motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code of Civil Procedure, 437c(q).)

Motion for Summary Judgment Principles

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American Can Co.* (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause

of action cannot be established. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.)" (Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 847.)

"A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show ... a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely upon the mere allegations or denials of its pleading to show ... a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ....' (*Id.*, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464 & fn. 4 [63 Cal.Rptr.2d 291, 936 P.2d 70].)" (Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal.App.4th 64, 69.)

With the above-cited principles in mind, the court will rule on the motion for summary judgment.

Defective Separate Statement of Undisputed Material Facts in Support of Motion

"…The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion." (Code of Civil Procedure, § 437c(b)(1).)

The court has the discretionary power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350. (See Truong v. Glasser (2009) 181 Cal.App.4th 102, 118.)

"(1) The Separate Statement of Undisputed Material Facts in support of a motion must separately identify: ¶ (A) Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion; and ¶ (B) Each supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion. ¶ (2) The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion. ¶ (3) The separate statement must be in the two-column format specified in (h). The statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers." (Rules of Court, Rule 3.1350(d).)

Defendant's/Cross-Complainant's separate statement fails to identify each cause of action and/or affirmative defense that is the subject of the motion and each supporting material fact claimed to be without dispute as to each cause of action and/or affirmative defense. It only states a list of purported undisputed material facts and cites evidence in support of the purported undisputed material facts.

""The separate statement is not merely a technical requirement, it is an indispensable part of the summary judgment or adjudication process. 'Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.' (*United Community Church v. Gracin* (1991) 231 Cal.App.3d 327, 335 [282 Cal.Rptr. 368].)" (*Whitehead v. Habit* (2008) 163 Cal.App.4th 896, 902, 77 Cal.Rptr.3d 679 (*Whitehead*).) ¶ *1. Requirement of Prima Facie Showing* ¶ In *Whitehead, supra,* 163 Cal.App.4th at page 902, 77 Cal.Rptr.3d 679, the

court said, "The separate statement is required, not discretionary, on the part of each party, and the statutory language makes the failure to comply with this requirement sufficient grounds to grant the motion."" (Kojababian v. Genuine Home Loans, Inc. (2009) 174 Cal.App.4th 408, 415-416.)

The failure to comply with the requirements of Rule 3.1350 is an independent reason for the court to deny the motion.

Effect of Easement

"Generally speaking, " '[a]n easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be *less* than the right of ownership.' [Citation.]" (*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702, 43 Cal.Rptr.2d 810.)" (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1023.)

Exclusive easements are not prohibited by California law and while exclusive easements may amount to almost a grant of a fee interest in the land, an intention to convey a fee interest is not imputed unless there is a clear indication of the intention to grant an ownership/fee interest in the grant of the easement. (Emphasis the court's.)

Citing Pasadena v. California–Michigan (1941) 17 Cal.2d 576, the appellate court in Gray v. McCormick (2008) 167 Cal.App.4th 1019 stated with respect to exclusive easements: "…where exclusive easements are concerned, the court noted that "an 'exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. [Citations.] No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention. [Citations.]" (*Id.* at pp. 578–579, 110 P.2d 983; accord, *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1308, 54 Cal.Rptr.2d 284.) The court confirmed that "[i]t is, of course, possible to draft an instrument ... which would make the easement exclusive." (*Pasadena v. California–Michigan etc. Co.,*

supra, 17 Cal.2d at p. 581, 110 P.2d 983.)" (Emphasis added.) (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1025.)

In determining that exclusive easements are not prohibited under California law the appellate court in Gray v. McCormick (2008) 167 Cal.App.4th 1019 discussed various appellate opinions supporting that conclusion and included the following statement with regard to one of those appellate opinions: "The trial court in *Hirshfield v. Schwartz, supra,* 91 Cal.App.4th 749, 110 Cal.Rptr.2d 861, exercised its equitable powers to grant relief in the form of a judgment for what it termed an exclusive easement, giving the defendants the exclusive right to use the property in question, until such time as they sold their property or ceased residing thereon. (*Id.* at pp. 757, 764, 110 Cal.Rptr.2d 861.) The appellate court affirmed. (*Id.* at p. 772, 110 Cal.Rptr.2d 861.) It noted, with respect to the law of prescriptive easements, that "exclusive easements, while rare, are possible [citation]...." (*Id.* at p. 769, fn. 11, 110 Cal.Rptr.2d 861.) However, it also stated that the judgment did not violate the law of prescriptive easements, because the right of exclusive use created by the judgment was not in reality a prescriptive easement. Rather, the trial court had created the right of exclusive use through the employment of its equitable powers, to grant affirmative relief to an encroacher. (*Id.* at pp. 754–755, 110 Cal.Rptr.2d 861.) ¶ Inasmuch as *Hirshfield v. Schwartz, supra,* 91 Cal.App.4th 749, 110 Cal.Rptr.2d 861, did not arise in the context of an express exclusive easement, it offers no assistance in interpreting the scope of the easement in question. It does, however, help dispel the notion that the exclusive use of the property of another is prohibited under California law, as being tantamount to the taking of fee title by a neighboring property owner." (Emphasis added.) (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1031-1032.)

The appellate court concluded that language that the dominant tenement had exclusive use of the easement area to the exclusion of the servient tenement lawfully created an

easement. The appellate court held: "The exclusive use of a defined area of the servient tenement by the owners of the dominant tenement is not prohibited under California law. In this case, the language of the instrument by which the easement was created, section 12 of the Supplemental CC & R's, clearly expresses an intention that the use of the easement area be exclusive to the owners of Lot 6, at least as to the surface thereof. It is, therefore, sufficient to create an exclusive easement under California law. (*Pasadena v. California–Michigan etc. Co., supra,* 17 Cal.2d at 578–579, 110 P.2d 983.) (Gray v. McCormick (2008) 167 Cal.App.4th 1019, 1032.) Therefore, an exclusive easement that grants exclusive use of the easement area to the owners of the dominant tenement is a lawful easement and is not a conveyance of ownership of the land to the dominant tenement.

The following facts are undisputed: defendant owns 656 El Dorado, which he acquired by grant deed on January 5, 1993; prior to June 1986 David Kurtzman and Karen Kurtzman owned both 652 and 656 El Dorado; City of South Lake Tahoe Ordinance No. 406 mandates that the minimum lot size is 6,000 square feet for residential lots in Medium Density Residential Districts; 652 and 656 El Dorado are located in a Medium Density Residential District; Ordinance Number 406 was applicable in 1986; the current City Code provides that the minimum lot size for residential lots is 6,000 square feet; the total area of 656 El Dorado Ave. is 10,398 square feet; the easement area on 656 El Dorado described in the subject grant of easement is 6,078 square feet; and the portion of 656 El Dorado not within the easement area is 4,320 square feet. (Plaintiffs' Response to Defendant's Separate Statement of Undisputed Material Facts, Fact Numbers 1, 4, and 13-19.)

As part of an agreement to sell 652 El Dorado to the Fosters in 1986, the Kurtzmans agreed to grant the express easement that is the subject of this litigation; and on July 21, 1986 the Grant of Easement was recorded. (Complaint, Exhibits 2 and 5.) The grant of easement

expressly provides: it is a non-exclusive perpetual easement appurtenant to and runs with the dominant tenement; the easement granted is the right of ingress and egress across the easement area, the right to erect and maintain a split rail fence approximately at the perimeter of the easement area, the right to landscape, maintain existing landscaping, replace and replant landscaping within the easement area, and the right to engage in outdoor recreation within the easement area, including such activities as barbecuing, horseshoes, badmitton, and like outdoor games, gardening, and like activities; and the easement is non-exclusive only to the extent that the owners, occupants, and invitees of the servient tenement are permitted use of the easement area for the right of ingress and egress only to and from the improvements that presently exist and may hereinafter exist on the servient tenement outside of the easement area. (Complaint, Exhibits 2 and 5 – Grant of Easement, paragraphs 1-3.) The grant of easement prohibits construction of structures within the easement area, other than the maintenance and reconstruction of the existing South Tahoe Public Utility District facility and excepting the maintenance, reconstruction and fencing as provided in paragraph 3; and in exercising rights to fence and landscape the easement area, the owner of the dominant tenement shall not cause fencing or landscaping to be constructed as to unreasonably impair ingress and egress to and from the servient tenement improvements. (Complaint, Exhibits 2 and 5 – Grant of Easement, paragraph 4.)

One of the grantors of the easement, David Kurtzman, explains the intent of the non-exclusive easement in his declaration in the following manner: the single family residence on the dominant tenement located at 652 El Dorado is situated in a way where the front door of the residence faces the back yard of 656 El Dorado, the servient tenement; there is and always has been an existing walkway through a gate and across the servient tenement to the front door of the dominant tenement; what was to become the easement area had always served as

the front yard of 652 El Dorado; throughout his joint ownership of both parcels the easement area was used exclusively by his family and not by the tenant residing on the servient tenement; in early 1986 he decided to sell the dominant tenement, considered the possibility of subdividing the servient tenement in order to ensure the back yard of the servient tenement would continue to be used as the front yard of the dominant tenement for the new owners, he generally understood that the Tahoe Regional Planning Agency would probably not permit the reduction of lot size of the servient tenement, and he decided due to time constraints to complete the sale of 652 EL Dorado and purchase his new home that creation of the subject easement was the most reasonable and timely solution to ensure the dominant tenement continued to have the right to exclusively utilize the easement area as a front yard and treat it as their own; he gave the dominant tenement an incredibly large easement to do pretty much anything within the easement area, but left the servient tenement owner the right to cross the easement to get into and out of existing structures on the servient tenement; and he intended that the owners, occupants, and/or invitees of 656 El Dorado be limited to their use of the easement area for the purposes of ingress and egress only to the existing structures on that parcel outside the easement area. (Defendant's Exhibit B Submitted in Support of the Motion – January 6, 2017 Declaration of David Kurtzman in Support of Ex Parte Motion for TRO, paragraphs 4-6, 8, and 9.)

The above-cited evidence submitted by defendant in support of the motion fails to meet his initial burden of proof. In fact, the evidence submitted in support of the motion raises a triable issue of material fact as to whether there was a clear intent of the Kurtzmans to convey ownership of the land in the easement area to the owners of the dominant tenement and their successors in interest, rather than only grant them a very broad, nearly exclusive easement to use the easement area land located on the servient tenement parcel. In fact, one of the

easement grantors expressly declares that he rejected the idea of subdividing the property due to legal restraints and instead decided and intended to grant an easement with reserved rights of ingress and egress for the servient tenement. This establishes that he never intended to convey ownership or a fee interest in the easement area to the owners of 652 El Dorado and instead intended to lawfully grant only a near exclusive easement. Inasmuch as defendant has not met his initial burden to establish as a matter of law with the evidence submitted in support of the motion that there was a clear intent to convey ownership of the easement area land to 652 El Dorado that reduced the size of parcel located at 656 El Dorado to approximately 4,320 square feet in violation of the law, the motion for summary judgment is denied.

TENTATIVE RULING # 1: DEFENDANT WASHICK'S MOTION FOR SUMMARY JUDGMENT ON THE COMPLAINT AND CROSS-COMPLAINT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THURSDAY, AUGUST 22, 2019. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 1:30 P.M. ON FRIDAY, AUGUST 23, 2019 IN DEPARTMENT ONE UNLESS OTHERWISE NOTIFIED BY THE COURT. ALL OTHER LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ANOTHER DATE. (EL DORADO COUNTY SUPERIOR COURT LOCAL RULES, RULE 7.10.05, et seq.) SHOULD A LONG CAUSE HEARING BE REQUESTED, THE PARTIES

ARE TO APPEAR AT 1:30 P.M. ON FRIDAY, AUGUST 23, 2019 IN DEPARTMENT ONE TO SET A LONG CAUSE HEARING DATE.