Filed 6/9/22 Orangecrest Country Community Assn. v. Burns CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ORANGECREST COUNTRY COMMUNITY ASSOCIATION,

Plaintiff and Respondent,

v.

SANDRA BURNS,

Defendant and Appellant.

E074445

(Super.Ct.No. RIC1813722)

OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Cornelis, Judge. Affirmed.

Sandra Burns, in pro per.; Keiter Appellate Law and Mitchell Keiter for Defendant and Appellant.

Tinnelly Law Group and Sarah A. Kyriakedes, for Plaintiff and Respondent.

Defendant Sandra Burns sought approval to build a wall across her front yard, and when her homeowners association said no, she built it anyway. After multiple attempts to get her to stop construction (and later to mediate the issue) failed, the association sued Burns, seeking a permanent injunction requiring her to remove the wall. Following a two-day bench trial, the judge found Burns had willfully violated her community's declaration of covenants, conditions, restrictions and reservations (CC&R's) and issued the injunction.

On appeal, Burns asserts two grounds for reversal. She argues the trial judge erred by failing to find that: (1) the affirmative defense of equitable estoppel applied to justify her construction of the wall, and (2) the association acted unfairly and discriminatorily because they have allowed other homeowners to build walls in their front yards. We conclude these contentions lack merit and affirm.

I

FACTS

Burns owns a home in Orangecrest Country, a residential community managed by Orangecrest Country Community Association (the association). She purchased the home subject to the association's governing documents, which include the community's CC&R's and Architectural Guidelines.

Under Article VII, section 7.18 of the CC&R's, a homeowner may not alter the exterior appearance of their lot without prior approval from the association's Architectural Committee (the committee). Among other criteria, before approving an

alteration, the committee must find that it "will not be detrimental to the appearance of the surrounding area" and "will be in harmony with the surrounding structures." (CC&R, Art. VIII, § 8.4.1.) Certain structures, however, are flatly prohibited. As relevant here, section 4.11 of the Architectural Guidelines restricts homeowners from installing any walls or fences in the front "setback," which is the area from the property line located in the center of the street to the front of the home. In practical terms, the setback is the front yard.

On April 27, 2017, Burns submitted an application requesting approval for six modifications to her property—front yard landscaping, painting, a patio cover for the backyard, new rain gutters, and stucco walls in the side yard and front yard. On May 9, the association sent Burns a "partial approval" letter informing her that her plans submitted on April 27 "for installation of front yard landscape, rear yard patio cover, painting and rain gutters . . . have been approved by the Architectural Committee with the following conditions: **The stucco walls in the front yard have been denied**." (Emphasis in original.)

On June 30, the association learned that contractors had begun construction on a wall in Burns's front yard. That same day, the association reached out to Burns by mail, email, and telephone. Elmorabit sent Burns an email and left her a voice message informing her that she lacked approval for the wall she was building on her property and asking her to stop construction immediately. The association sent Burns a cease and desist letter saying the wall being built on her property had not been approved, pointing

her to the approval requirement in Article VII, section 7.18 of the CC&R's, and asking her to "cease work immediately." The following day, Burns called Elmorabit and "made some remark about not having time for this."

On July 2, Etienne Caroline, the president of the association's board of directors, spoke with the construction workers at Burns's property, told them to check to see if Burns had approval to build the wall, and left his telephone number for her to call him. Burns called Caroline later that day and hung up on him after a brief, contentious conversation.

About a week later, on July 10, the association gave Burns notice they would hold a disciplinary hearing on her noncompliance on August 10. Construction was completed on Burns's wall sometime later that month,.

On August 8, Burns submitted a new application for a wall in her front yard on which she wrote, "no stucco!! Per approval with conditions letter dated 5/9/2017." On August 9, the association sent Burns a denial letter stating the committee had never approved her wall and demanding she remove it.

At the disciplinary hearing the following day, Burns told the association's board of directors she had "nothing to say" to them. On August 15, the association sent her a Hearing Decision letter informing her that she had until September 1 to remove the unapproved wall from her front yard.

When Burns failed to remove the wall or respond to their attempts to mediate the dispute, the association filed this lawsuit. In the parties' joint pretrial statement, Burns

informed the court she would not be offering any affirmative defenses at trial. She stipulated that she had received the partial approval letter denying the stucco walls in the front yard and that she had instructed her contractors to build "a wall without stucco" across the front of her property sometime in June or July 2017. She also stipulated that the association had sent her a cease and desist letter and that the wall was still present on her property.

Riverside County Superior Court Judge Steven Counelis presided over the two-day bench trial. The association called four witnesses—Elmorabit, Caroline, Jeff Smith (the association's architecture expert), and committee member Dennis Friedman. The first two witness described their interactions with Burns about her wall and the association's attempts to resolve the issue. Smith explained the purpose of the setback rule was twofold—to maintain a consistent open and expansive design and to prevent interference with utility easements. He said Burns's wall, which was seven feet tall at its highest point, clearly violated the setback rule. Not only was it located in the setback area (or front yard), but Burns had it installed only seven feet beyond her property line, which was immediately adjacent to the sidewalk and interfered with the public's right-of-way. Smith explained that under the applicable city zoning ordinance, any wall located in the setback area cannot exceed three feet in height, except semitransparent parts of the wall can be as high as four feet tall. Friedman said that during his four years serving on the committee they had never approved a "full size" front yard wall. He said the committee would approve short retaining, landscaping, or decorative walls in the front yard, but

nothing taller than three feet. The association also presented evidence that they had recently enforced the setback rule against another resident with a tall front wall similar to the one Burns erected, resulting in the wall's removal.

Burns, who represented herself at trial as she does on appeal, cross-examined the association's witnesses but called no witnesses of her own and did not testify on her own behalf. During her cross-examination of Friedman, Burns attempted to impeach his testimony that the committee had never approved a full-size front yard wall by showing him photographs of three other properties in the community that had walls in the front yard. The first photograph depicted a short retaining wall covered by landscaping. The second depicted a short wall on the side of the front yard that ran perpendicular to the side walk and separate that homeowner's yard from their neighbor's. And the third depicted an even shorter wall running across a portion of the front yard located several feet behind the sidewalk. Friedman said he wasn't familiar with the second and third walls because he wasn't on the committee when they were approved but said the first wall was a permissible retaining wall that didn't violate the setback rule.

During closing statements, Burns argued she did in fact have approval to build the wall. She argued the phrase "[t]he stucco walls in the front yard are denied" in the May 9 partial approval letter constituted a "conditional approval" to build a wall, so long as it wasn't made of stucco. She said, "You just don't put the term conditional approval not relating to anything. So I don't have a reading comprehension problem. I have a Ph.D. I think I can read, and I think I can articulate what I'm reading. . . . I spent $10,000 on that

wall. I wouldn't be sitting here [having] dedicated 28 months to this case if I truly believed I don't have in my possession a conditional approval for the wall. That's it, Your Honor."

The judge rejected Burns's claim of conditional approval, finding that even if she had initially (and unreasonably) read the May 9 letter as a conditional approval, the association disabused her of that interpretation when construction began. The judge found Burns "was put on notice, that there was no approval . . . [and] willfully violated the CC&R's [and] chose to proceed with construction of the wall in opposition to communications from the homeowners association." He found Burns "led herself to believe that she may establish her own loophole and proceed with construction."

The judge entered judgment in the association's favor and issued a mandatory injunction ordering Burns to remove the wall and to submit an application to restore the landscaping that had been removed to construct the wall. Burns filed this appeal.

II

ANALYSIS

A. *Equitable Estoppel*

For the first time on appeal, Burns argues that the doctrine of equitable estoppel justifies her construction of the wall. Based on principles of fairness, we do not consider factual theories not raised during trial. (*Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171, 191; see also *Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 847 [permitting a party to "'adopt a new and different theory on appeal

. . . would not only be unfair to the trial court, but manifestly unjust to the opposing litigant'"].) But even if we were to consider this newly raised defense, we would conclude it doesn't apply.

"'The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279.)

The crux of estoppel is that one party has intentionally misled another to do something injurious to themselves that they otherwise would not have done. (*Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1227.) But "simple reliance on a false statement or conduct is not enough." (*Ibid.*) To invoke the doctrine of equitable estoppel, "the reliance must be reasonable." (*Ibid.*)

According to Burns, the association intentionally misled her to believe she had been given conditional approval for the wall by stating in the May 9 letter that "[t]he stucco walls in the front yard have been denied." She claims she believed she could install the wall on the condition she not use stucco. The problem with this argument is

that Burns's claimed reliance was not reasonable. To begin with, there is no basis for her interpretation of the May 9 letter. The association couldn't have been more clear. The letter was entitled a "partial approval" is because everything in Burns's application except the wall had been approved; nothing about the direct assertion "[t]he stucco walls in the front yard have been denied" suggests a condition or the opportunity for negotiation. But even more importantly, even if there were two ways to interpret the May 9 letter, the association made it abundantly clear that it had flatly denied the walls on June 30, when they contacted Burns through multiple media to ask her to stop construction and reiterate that she did not have approval for the wall. Thus, if Burns *had* raised an equitable estoppel defense at trial, the defense would have failed.

B. *Evidence of Other Walls*

Next, Burns claims she presented evidence the association acted unfairly and unreasonably by allowing other homeowners within the community to construct walls in their front yards, and she argues the judge should have afforded that evidence more weight. We conclude the judge properly afforded little significance to the existence of the other walls because they bore no similarity to Burns's wall.

When a homeowners association seeks to enforce its CC&R's, the association bears the burden of demonstrating "that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious." (*Pacific Hills Homeowners Assn. v. Prun* (2008) 160 Cal.App.4th 1557,

1565-1566.) The homeowner, however, bears the burden of proving the affirmative defense of waiver—that is, that the association has allowed so many violations of a particular restriction to stand that it has effectively given up its right to enforce the rule. (E.g., *Id*. at p. 1567 [homeowner bears the burden of producing "evidence of another homeowner's violation" of the CC&R's to "support their waiver argument"].)

Here, the association demonstrated they followed their own standards and procedures, but Burns failed to provide evidence that the association had allowed another wall like hers to stand. According to the testimony of Elmorabit and Friedman, the committee reviewed Burns's application under the rules and criteria contained in the CC&R's and Architectural Guidelines and denied her wall proposal based on the setback rule in section 4.11 of the Architectural Guidelines. They communicated this decision in their May 9 letter to Burns; sent letters, emails, and made phone calls demanding that Burns comply with the decision once they found out she was moving forward with construction; held a disciplinary hearing and informed her of the outcome; invited her to participate in alternative dispute resolution; and—when none of those responses worked—finally filed suit. They also presented evidence of a similar wall they successfully had removed for violating the same setback rule. This evidence supports a finding that the association followed their ordinary procedures in reviewing and partially denying Burns's application and in attempting to enforce their decision.

Burns, on the other hand, did not present any evidence the association had allowed other homeowners to build similar nonconforming walls. As we've noted, none of the

three walls Burns relies on are higher than three feet, and none abut (and run parallel to) the sidewalk. Because of these differences, the judge's determination that he was "not persuaded by that argument at all" is entirely reasonable. We are unpersuaded by Burns's claim the judge committed legal error by *ignoring* the evidence of the other walls she presented during trial. Rather, our review of the judge's ruling satisfies us that he *considered* the evidence Burns presented but simply found it insufficient to prove the other walls were in any way similar to hers or even in violation of the setback rule. It was *Burns's* burden (not the association's) to demonstrate the association had let residents erect walls like hers in the community, and she failed to carry that burden.

We conclude Burns's claims of error fail and uphold the order granting the injunction.

III

DISPOSITION

We affirm the judgment. Respondent shall recover their costs on appeal.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.