Kelly v CB&I Constructors, Inc.

11/19

Injury to Real Property; Fire as Trespass; Damage to Trees

Plaintiff owned a 34 acre ranch which contained three separate homes and pasturage, along with barns, a kennel, tack buildings, and various utility buildings. The property had 150 to 200 oak trees and a running stream. Plaintiff had lived there for 23 years in one of the houses. Later, he moved out and rented all three houses to tenants, but did not rent the entire property. Plaintiff always planned to return to the ranch and maintained it as his permanent residence. He continued to store tools and equipment at the ranch.

In June 2002, defendant was engaged in the construction of a municipal water tank approximately 15 miles from the property. Sparks ignited a brushfire which spread over 20,000 acres, including the property at issue. The fire burned the hillsides surrounding the property and destroyed many trees, including a number of oaks. The vintage barn and several other structures were destroyed, and one of the houses sustained fire damage.

After the fire heavy rains resulted in mudslides that caused extensive damage. One of the ranch houses was destroyed and a 200 foot long, 12 foot deep gully was gouged through a pasture. The fire was a substantial factor in causing the mudslides.

At trial, testimony demonstrated the property had a value of between $1.6 and $1.8 million at the time of the fire. The property had essentially no value after the fire and mudslides. Plaintiff's expert estimated the total cost of reconstruction at $2.8 million, including $438,000 to rebuild the barn, $590,375 to build a flood control system, $477,641 to restore the stream to its former course, and $423,168 to remove the silt and sand from the pastures and cover the pastures with mulch. Plaintiff's arborist appraised 91 trees as of a time prior to their damage and valued them at $411,800. In addition, 12 trees that had been washed away were valued at $132,734 for a total value of $544,534.

The jury found defendant's negligence caused the fire to enter plaintiff's property, and that defendant was reckless but did not act with malice. The court instructed the jury on damages that if plaintiff had a genuine desire to repair the property for personal reasons, and if the cost of repair was reasonable given the damage to the property and the value after repair, then the costs of repair could be awarded even if they exceeded the property's loss of value.

The jury found the plaintiff had a genuine desire to rebuild for personal reasons and awarded $2,629,810 for the present costs to rebuild and repair, $375,000 in tree damage, $99,000 in past lost rental income, and $543,000 for discomfort, annoyance, inconvenience or mental anguish. The **total award was $3,646,810**. Plaintiff moved after trial for double the tree damage and attorney fees under CCP section 1021.9. The trial court granted both motions, awarding over $850,000 in attorney fees, costs, and expert witness fees. **The total judgment was entered in the amount of $4,721,014.**

Defendant moved for new trial, contending the verdict was excessive, and that plaintiff could not recover annoyance and discomfort damages, and that plaintiff was not entitled to double damages for the trees or to attorney fees. After the trial court denied both motions, this appeal followed.

The Second Appellate District started its opinion by noting that under Civil Code section 3333, a plaintiff injured by the tortious conduct of another is entitled to an amount that will compensate for all detriment proximately caused thereby. Generally, for damage to real property, plaintiff may recover the lesser of the diminution in fair market value or the cost to repair and restore the property to pre-trespass condition. (*Safeco Ins. Co. v J & D Painting* (1993) 17 Cal.App.4th 1199)

Notwithstanding this general limitation, if a plaintiff has personal reasons to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value, a rule sometimes referred to as the "personal reasons exception." (*Orndorff v Christiana Community Builders* (1990) 217 Cal. App.3d 683) Even under

the exception, though, restoration costs are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained. Defendant argues that because the jury's damage award so vastly exceeded the value of the property, the award was excessive as a matter of law. Defendant asserts that the restoration costs, when stated as a percentage of the property's value, far exceeded any other award approved by a court in California. Such costs here exceeded the value of the property by 67 percent, while an earlier published opinion found restoration costs exceeding value by 35 percent "manifestly unreasonable." (*Heninger v Dunn* (1980) 101 Cal.App.3d 858.

The Justices stated that although such comparisons may be useful, they are of little value in determining whether the damages awarded in this case were reasonable. Damages must be assessed in the manner most appropriate to compensate the injured party for the loss sustained in the particular case. (*Armitage v Decker* (1990) 218 Cal.App.3d 887) Here there was substantial evidence that the damage to the property was extensive. Evidence showed the restoration costs were reasonably related to restoring the property to a condition similar to its condition when plaintiff previously lived there, that is, safe, habitable and suitable for use as a horse ranch. Moreover, there was substantial evidence that plaintiff had no meaningful alternative to restoration.

Accordingly, there was substantial evidence that a reasonable person in plaintiff's circumstances was justified in incurring the costs to restore the property. Defendant argues that it presented evidence of less costly methods of restoration. The jury implicitly rejected that evidence. The Appellate court may not reweigh the evidence and reconsider defendant's arguments. Rather, it must determine if there is substantial evidence to support the jury's verdict. (*Scott v Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454) Here such evidence is presented and the award was not excessive as a matter of law.

Defendant moved in limine to preclude a claim for annoyance and discomfort on the basis that plaintiff did not reside on the property. In *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, the California

Supreme Court stated that an occupant of land may recover damages for annoyance and discomfort that would naturally ensue from trespass on the plaintiff's land. Here the evidence is undisputed that plaintiff was not residing on the premises when the fire and mudslides occurred. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property.

The Justices concluded that limiting annoyance and discomfort damages to the immediate and personal possessor of property is consistent with the authorities. In *Kornoff,* and other cases, references to "occupant" and to "members of the household" suggest residency. California cases upholding an award of annoyance and discomfort damages involved a plaintiff who was in immediate possession of the property and a resident or commercial tenant. Storing possessions is not enough, there must be physical presence on the premises. Accordingly, a nonresident property owner who merely stores personal property on the premises is not entitled to recover annoyance and discomfort damages from a trespass. The trial court erred in awarding such damages.

The defendant also argues the trial court erred in awarding double damages for the loss of trees pursuant to Civil Code section 3346. At the outset, the Court noted that it is now established that the spread of a negligently set fire to the land of another constitutes a trespass. (*Elton v Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301. Health and Safety code section 13007 generally concerns injury caused to the property of another, when a fire is allowed to escape to the property of another and causes damage. Civil Code section 3346, on the other hand, specifically concerns damage to trees caused by trespass. That statute, in pertinent part, provides for wrongful injury to trees on the land of another; the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was involuntary or casual, or where the defendant had probable cause to believe the trespass was on his own land, the measure shall be twice the sum as would compensate for actual detriment.

Together, these statutes hold the tortfeasor generally liable for injury to the owner of real property caused by a negligently set fire, and specifically liable for damages to trees, in an amount which may be doubled or trebled, depending on the conduct. It has been said that the purpose of section 3346 is to educate blunderers (persons who mistake locations of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner. (*Gould v Madonna* (1970) 5 Cal.App.3d 404) The Justices conclude that under any reasonable interpretation, fire damage constitutes injury to a tree. There is no dispute the fire was a trespass or that the fire was involuntary or casual within the meaning of 3346. Accordingly, the trial court properly doubled the damages.

Finally, on the question of attorney fees defendant claims the court erred in making the award under CCP section 1021.9, which provides for fees in an action to recover damages for injury to real or personal property resulting from a trespass on lands intended for cultivation or livestock. The evidence here established this was a rural horse property zoned for agricultural use. The property had substantial facilities for horses, including barns and a tack building. All of this evidence supports the inference this property was intended for raising livestock.

Defendant contends the property was not being used for livestock at the time. The Court noted that there is no requirement the property is being used for livestock at the time of the injury, only that it was “intended” for such use. As such, the award of fees and costs is sustained.

The judgment is affirmed, except as to that portion awarding damages for annoyance and discomfort. The award of $543,000 for such damages is reversed. No costs are awarded.

/////

This case study is provided in the hope it may prove useful in your practice or in the handling of litigated cases. If you receive a forwarded copy of this message and would like to be added to the mailing list, let me know.

Mediation and Binding Arbitration are economical, private and final. Alternative dispute resolution will allow you to dispose of cases without the undue time consumption, costs and risks of the courtroom. Your inquiries regarding an alternative means to resolve your case are welcome.