

Not Reported in Cal.Rptr.3d, 2004 WL 27725 (Cal.App. 4 Dist.)

Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

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Court of Appeal, Fourth District, Division 2, California.

John R. HECKENLIVELY, Plaintiff and Appellant,
v.

David STOREY, Defendant and Respondent.

No. E033512.

(Super.Ct.No. INC 034054).

Jan. 6, 2004.

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon, Judge. Affirmed in part and reversed in part.

Bennett & Erdman, Jeffrey W. Erdman, Estaire R. Press; Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes**, for Plaintiff and Appellant.

Scott N. Harlow, for Defendant and Respondent.

OPINION

KING, J.

INTRODUCTION

*1 Plaintiff John R. Heckenlively appeals from an order denying his application for a preliminary injunction. In the application, plaintiff sought to oust defendant David Storey from plaintiff's Palm Springs residence, pending trial on the merits of plaintiff's ejectment action. Plaintiff also sought orders directing defendant not to commit waste or damage to the property, to allow plaintiff access to the property, and to allow plaintiff's agents access to the property for the purpose of making repairs and improvements.

We conclude that the trial court properly refused to order defendant to vacate the property, be-

cause the evidence showed he was a tenant at will and the tenancy was never terminated. We further conclude, however, that the trial court should have ordered defendant not to commit waste, to allow plaintiff access to the property, and to allow plaintiff's agents reasonable access to the property to make repairs and improvements. The evidence showed that these orders were necessary to preserve the status quo and prevent damage to the property.

FACTS AND PROCEDURAL HISTORY

On February 14, 2003, plaintiff filed a verified complaint against defendant for ejectment, seeking to oust defendant from plaintiff's Palm Springs residence. On the same date, plaintiff obtained a temporary restraining order (TRO), without any notice to defendant. The TRO required defendant to vacate the property, not to commit waste, and to allow plaintiff and his agents access to the property until he vacated the property. An order to show cause (OSC) regarding a preliminary injunction was set for February 25, 2003. Before the OSC, defendant vacated the property.

Plaintiff's verified complaint and declaration in support of the application showed that plaintiff purchased the property in 1999 and was its sole title holder. Plaintiff averred that in or about January 2000 he had hired defendant, whom he described as his "longtime friend," "to oversee and assist with improvements/maintenance being made to the Property...." Plaintiff said he agreed to pay defendant commissions and allowed him to occupy the property while the work was being completed. But in June 2002, plaintiff said, "the work ... was coming to an end and Defendant's services were no longer required."

On June 6, 2002, plaintiff's attorney "sent written notification" to defendant informing him that, as of June 15, 2002, his services were no longer required, and demanding that he vacate the property by June 30, 2002, or pay monthly rent of \$1,800, plus utilities, beginning July 5, 2002. Thereafter,

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plaintiff said defendant refused to vacate the property or pay rent, that he threatened to cause damage to the property, and that he "changed alarm and gate codes," and took "other actions" to prevent plaintiff and his agents access to the property. Plaintiff said defendant prevented necessary repairs to the property's roof, pool, and landscaping.

Following the grant of the TRO, and before the February 25, 2003, hearing on the OSC re preliminary injunction, defendant appeared and filed opposing papers. He also filed a peremptory challenge to Judge Stafford, the judge who granted the TRO. Thereafter, Judge Sheldon was assigned to the case.

*2 In his opposing declaration, defendant claimed plaintiff had "seriously misled" the court regarding the nature of their relationship. Defendant said he and plaintiff had been involved in "a domestic relationship, as gay lovers," since 1981, and had lived together in various residences in Culver City and Palm Springs for 22 years. He said plaintiff was a doctor and professor, and he was "the 'Doctor's wife' (for lack of a better term)." He denied threatening plaintiff or denying him access to the property. He claimed "a possessory interest in the subject property akin to the interest in a marital residence, or based on a constructive trust."

In reply, plaintiff noted he had acknowledged that defendant was his "longtime friend." He said he and defendant "initially shared an intimate relationship" but denied that defendant was his "lover" or "wife." He said defendant was "nothing more than a former friend who worked for [him] on a commission basis and was compensated for his work by both monetary payment and room and board ." He said he and defendant maintained separate bedrooms throughout the time they lived together.

Plaintiff denied he ever agreed to share the Palm Springs residence with defendant. He said he had always paid for all repairs and improvements, and mortgage payments, taxes, and utilities on the Palm Springs and Culver City residences. He said

the only common financial accounts he had maintained with defendant were for the purpose of paying for remodeling projects on his properties. He said defendant had become "increasingly hostile and physically ... abusive" toward him, and as a result, he was no longer able to visit the Palm Springs property.

Plaintiff also submitted declarations from Stephen Sims and Sandy Belew, whom plaintiff had hired to assist with landscape designs for the Palm Springs property. Sims and Belew said defendant had been "extremely hostile and belligerent" toward them and had "refused to cooperate" with them. As a result, they advised plaintiff they would work with him only after he had "resolved the situation" with defendant.

On February 25, 2003, Judge Sheldon denied plaintiff's application in its entirety, based on the supporting and opposing papers. He noted, "It appears to me that there's [a] prima facie case made out of a domestic relationship. I wouldn't throw a woman or husband out of the house if they had been there for decades. That's the order. Thank you." Thereafter, defendant moved back into the Palm Springs residence.

On April 4, 2003, plaintiff petitioned this court for a writ of mandate (case number E033451), challenging the trial court's order denying the preliminary injunction. Shortly thereafter, plaintiff appealed from the same order (case number E033512). In view of the appeal, we treated the writ petition as one for a stay. (Code Civ. Proc., § 923; *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 536-539.)

*3 Accordingly, on April 22, 2003, we issued an order prohibiting defendant from "committing any acts of waste on the property or from taking action to prevent [plaintiff] and his agents from having access to the property prior to conducting repairs." On May 14, 2003, we further ordered that "[plaintiff's] agents are to have access to the property during normal business hours only." The or-

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ders remain in full force and effect pending the disposition of this appeal.

On May 21, 2003, plaintiff filed a motion for an order to show cause regarding contempt of this court's April 22 and May 14, 2003, orders. On June 11, 2003, we appointed Judge Sheldon as a referee of this court. We directed Judge Sheldon to "hear evidence on and make findings relevant to [plaintiff's] contention that [defendant] has been interfering with workers conducting repairs and renovations on the subject property, has committed acts of waste, and otherwise violated previous orders made by this court."

The evidentiary hearing was held on August 18, 2003. Plaintiff, Sims, and defendant testified. Judge Sheldon found that defendant had not committed waste, and did not "interfere or prevent" plaintiff's agents or workers from performing work on the property. Based on these findings, we denied plaintiff's motion for an order to show cause regarding contempt.

Meantime, we granted plaintiff's request to treat his writ petition as his opening brief on the appeal. On our own motion, we combined the records in the two cases and deemed the exhibits filed with plaintiff's writ petition as an appendix filed pursuant to California Rules of Court, rule 5.1. We also ordered this appeal expedited.

DISCUSSION

The Trial Court Properly Refused to Order Defendant to Vacate the Palm Springs Residence Pending Trial, But Should Have Ordered Defendant Not to Commit Waste, to Allow Plaintiff Access to the Property, and to Allow Plaintiff's Agents Reasonable Access to the Property

"The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) "The trial courts consider two interrelated questions in deciding whether to issue a preliminary injunction: 1) are the plaintiffs likely to suffer greater injury from a deni-

al of the injunction than the defendants are likely to suffer from its grant; and 2) is there a reasonable probability that the plaintiffs will prevail on the merits. [Citations.]" (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206 (*Robbins*).) The party challenging the trial court's order has the burden of showing an abuse of discretion. (*IT Corp., supra*, at p. 69.) The grant or denial of a preliminary injunction is not an adjudication of the parties' ultimate rights in controversy. (*Robbins, supra*, at p. 218.)

" "[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court's province to resolve conflicts." "[Citation.] Thus, even when presented by declaration, 'if the evidence on the application is in conflict, we must interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order.' [Citation.]" (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.)

*4 "Although the trial court has broad discretionary powers to grant or deny a request for a preliminary injunction, it has 'no discretion to act capriciously.' [Citation.] It must exercise its discretion 'in favor of the party most likely to be injured.' [Citations.] If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Robbins, supra*, 38 Cal.3d at p. 205.) "The function of a preliminary injunction is not merely to contain ongoing damage but to prevent prospective damage." (*Nutro Products, Inc. v. Cole Grain Co.* (1992) 3 Cal.App.4th 860, 867, citing *Robbins, supra*, at p. 205.)

As noted, plaintiff's verified complaint and declaration described defendant as a "longtime friend" whom plaintiff hired in 2000 to oversee repairs and improvements to the Palm Springs residence, and who refused to vacate the property or pay rent after plaintiff asked him to leave in June 2002. Plaintiff also demonstrated that he was the prop-

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erty's sole title holder. In response, defendant claimed he and plaintiff were lovers and had lived together in various residences since 1981.

This evidence, construed in the light most favorable to defendant, showed that defendant was plaintiff's tenant at will. A tenancy at will arises when a person enters real property with the owner's permission. (*Ellingson v. Walsh, O'Connor & Barneson* (1940) 15 Cal.2d 673, 675.) The evidence was undisputed that defendant entered or began living in the Palm Springs residence with plaintiff's permission.

A tenancy at will is terminable upon 30 days' written notice to the tenant. (Civ.Code, § 789.) "A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than 30 days, to be specified in the notice." (Civ.Code, § 789.) The written notice must generally be served on the tenant personally. (Code Civ. Proc., § 1162.)

Defendant's tenancy at will was never terminated. The June 6, 2002, letter from plaintiff's attorney did not terminate the tenancy, because it demanded that defendant vacate the property by June 30, 2002. Thus, the letter did not give defendant 30 days' notice to vacate. Additionally, there was no showing that the letter was properly served. Instead, it was apparently served by mail. Plaintiff's verified complaint for ejectment also failed to terminate the tenancy. It did not give defendant 30 days' notice to vacate the property, but merely asserted an immediate right to possession. Thus, the trial court properly refused to order defendant to vacate the property pending trial.

Nevertheless, the trial court should have ordered defendant not to commit waste, to allow plaintiff access to the property, and to allow plaintiff's agents reasonable access to the property for the purpose of making repairs and improve-

ments. The evidence showed that, without the benefit of these orders, plaintiff could suffer damages, and the issuance of these orders would cause defendant no harm.

*5 Additionally, the evidence presented at the August 18, 2003, evidentiary hearing on this court's order to show cause re contempt showed that, although defendant had not violated this court's April 22 and May 14, 2003, orders, he had refused plaintiff's agents access to the property during March 2003. Thus, the evidence warrants a preliminary injunction that preserves the status quo and prevents future damage to plaintiff's property.

Lastly, the preliminary injunction should clearly allow plaintiff any access to his property, and not solely for the purpose of making repairs or improvements. There is no basis for allowing defendant to exclude plaintiff from plaintiff's property, or to allow plaintiff access for the sole purpose of making or coordinating repairs and improvements.

DISPOSITION

The order denying plaintiff's application for a preliminary injunction is reversed. The matter is remanded to the trial court with directions to enter an order directing defendant: (1) not to commit waste or take any other action that would cause damage to the property; (2) to allow plaintiff access to the property; and (3) to allow plaintiff's agents access to the property during normal business hours for the purpose of making repairs or improvements to the property.

This court's April 22 and May 14, 2003, orders shall remain in full force and effect pending issuance of the trial court's order. The parties shall bear their respective costs.

We concur: McKINSTER, Acting P.J., and RICHLI, J.

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