John Philbrick et al v. Eric Michielssen 16CVP-0133

Re: Motion for Summary Adjudication

Date: February 6, 2018

Plaintiffs John Philbrick and Diane Elizabeth Allen, Trustee of the Clyde Philbrick Family Survivor's Trust and the Clyde Philbrick Family Exemption Trust (collectively "Plaintiffs" or "Philbrick") filed this action against defendant Eric Michielssen ("Michielssen") seeking to quiet title to an alleged easement running across property owned by Michielssen.

Philbrick and Michielssen are owners of adjoining real property in Santa Margarita, California. Michielssen owns property located at 1360 Parkhill Road ("Michielssen Property"). Philbrick collectively owns two large ranch parcels to the north of Michielssen ("Philbrick Property"). Prior to 1923, Irving and Lizzie Butchers owned the Philbrick Property, Michielssen Property, and other property. On May 7, 1923, the Butchers conveyed the Michielssen Property, an adjoining lot ("Lot 1") and other property to George and Martha Orme (the "Ormes") by grant deed ("1923 Deed").

The Butchers continued to own the Philbrick Property, and the 1923 Deed reserved a 30 foot right of way for road purposes ("Easement"). However, the coordinates for the Easement in the 1923 Deed recorded with the County of San Luis Obispo place it across Lot 1, in a place where no road existed or exists. Philbrick alleges that the description of the easement in the 1923 Deed is a scrivener's error, and the intended easement was a dirt road that was used historically by the Butchers (and to this day by Philbrick) that runs across Michielssen's property.

The Philbrick Property passed from the Butchers to their surviving daughters Bessie and Bertha. In 1982, Bertha was the last surviving child. She subdivided the Philbrick Property into three parcels and deeded one parcel to Clyde Philbrick (Bessie's stepson and plaintiff John Philbrick's grandfather) and his wife, and one parcel to Clyde, his wife, and plaintiff John Philbrick. The three parcels thereafter passed to Plaintiffs, who own different interests in the parcels but collectively own the entire Philbrick Property. When the property was subdivided, Bertha and Clyde were allegedly informed about the scrivener's error. They were also allegedly told by Robert E. Biggs, a surveyor hired to prepare the 1982 parcel map that recording the final parcel map for the subdivision would correct the error in the easement.

In 2009, Michielssen purchased the Michielssen Property from Thomas Benton McNarry Jr., who had purchased it from the Ormes. Philbrick alleges that Michielssen was told by John Philbrick and the realtor prior to his purchase of the Michielssen Property that Philbrick had an Easement to the dirt road running across it. Philbrick further alleges that they have used the road regularly, particularly to move large farm equipment.

Philbrick alleges that various events have soured the relationship between the neighbors, and that in 2015 Michielssen first claimed that Philbrick did not have an easement to cross the Michielssen Property and that Philbrick's use was solely permissive. Michielssen has since denied Philbrick access to the easement and continues to claim Philbrick has no legal standing to a right of way through his property. As a result, Philbrick filed this action. The First Amended Complaint alleges five causes of action for 1) Quiet Title to Express Easement, 2) Quiet Title to Prescriptive Easement, 3) Quiet Title to Prescriptive Easement,4) Quiet Title to Equitable Easement and 5) Declaratory and Injunctive Relief ("FAC").

Michielssen moves here for summary adjudication of Philbrick's first two causes of action pursuant to Code of Civil Procedure section 437c(p)(2). Michielssen as the moving party has the initial burden to make a prima facie showing that there are no triable issues of material fact and that he is entitled to adjudication as a matter of law. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal. 4th 826, 850) If Michielssen makes a prima facie showing then the burden shifts to Philbrick to produce admissible evidence showing a triable issue of material fact exists. (Code Civ. Proc. §437c(p)(2).) Michielssen sets forth 29 undisputed material facts ("UMF") in his separate statement.

Philbrick's first cause of action for Quiet Title to Express Easement alleges that an express Easement was created by reservation in 1923 that burdens the Michielssen Property in favor of the Philbrick Property, and that although the Easement contains a scrivener's error, that the easement has been continuously and openly used since 1923, and that Michielssen had actual and constructive notice of the existence of the express Easement. In that cause of action Philbrick seeks to quiet title to the express Easement with reformation of the scrivener's error, if necessary, as of the date Michielssen purchased the Michielssen Parcel.

Michielssen moves for summary judgment on the grounds that the first cause of action is barred by the statute of limitations, and because Philbrick has not and cannot produce evidence that the Ormes knew of the alleged scrivener's error in 1923 or made a mistake of fact regarding the location of the Easement.

The statute of limitations in a quiet title action is determined by the nature of the underlying theory of relief. (*Walters v. Boosinger* (2016) 2 Cal. App. 5th 421, 428; Turner, et al., Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitations (The Rutter Group 2018) ¶ 4:811.) A three year limitation period under Code of Civil Procedure section 338(d) for actions based on fraud or mistake applies where reformation of a deed is a prerequisite to quieting title. (*See Welsher v. Glickman* (1969) 272 Cal. App. 2d 134, 139-140.) Philbrick's first cause of action is based on an express easement in the 1923 Deed, and Michielssen argues that the gravamen of that cause of action is the reformation of the 1923 Deed to correct an alleged scrivener's error. (Citing FAC, ¶¶ 14, 15, 36, 39.) Therefore, he argues that a three-year statute of limitations applies to Philbrick's first cause of action.

A plaintiff's claims are deemed to have accrued, for purposes of the running of the statute

of limitations, when the plaintiff discovers the facts underlying his cause of action. (Code Civ. Proc., § 338(d); *Jolly v. Eli Lilly & Co.* (1988) 44 Cal. 3d 1103, 1114.) It is undisputed that the 1982 parcel map describes a purported problem with the legal description of the Easement in the 1923 Deed, and that both Bertha and Clyde had knowledge of the alleged scrivener's error on or before August 5, 1982. (UMF Nos. 6-9.) It is further undisputed that Bertha and Clyde owned the Philbrick Property prior to Plaintiffs. (UMF Nos. 11-14; FAC, ¶¶ 1-4.) Michielssen argues that when a party has knowledge of the facts which form the basis of a cause of action, the expiration of that action is binding on the party's successors in interest. (Citing *Sec. First Nat. Bank v. Ross* (1963) 214 Cal. App. 2d 424, 431.) Michielssen makes a prima-facie showing that because Bertha and Clyde knew about the scrivener's error in 1982, the first cause of action to quiet title to express easement is barred by the three-year statute of limitations.

In opposition, Plaintiffs argue that the gravamen of the claim is not dependent upon reformation, and that reformation is not specifically prayed for in Plaintiff's prayer for relief. Plaintiffs cite *Wilkerson v. Thomas* for the proposition that where a court can quiet title by construing and interpreting ambiguous language of a deed, it need not reform the deed, and further that section 338 would not have applied to a quiet title action. (*Wilkerson v. Thomas* (1953) 121 Cal. App. 2d 479, 485.)

Plaintiffs then argue that they have discovered new evidence in a family ledger that suggests there is an original copy of the 1923 Deed that may not have the scrivener's error, and that therefore reformation would not be necessary. They explain that the practice in the recorder's office at the time was to type a copy of the deed to be recorded and held in the public records, and the original was returned to the requesting party. Plaintiffs request that if the motion is not denied, then it should at least be continued in order to allow Plaintiffs further time to locate the original deed. Plaintiffs further argue that the language of the 1923 Deed plotting the Easement is ambiguous on its face, because it says "of the County Road" rather than "to the County Road", which means there is no stopping point for the Easement.

In reply, Michielssen argues that Plaintiffs arguments about ambiguity are raised for the first time in opposition to the motion. The FAC references an alleged scrivener's error and/or reformation 13 times, with no reference to any ambiguity or question about the Easement running "to" or "of" the county road. They argue that 1) case theories cannot be raised for the first time in opposition to a Motion for Summary Adjudication (*Laabs v. City of Victorville* (2008) 163 Cal. App. 4th 1242, 1253, as modified on denial of reh'g (July 7, 2008)); 2) the statute of limitations has expired regardless of any ambiguity under the five-year statute of limitations for real property claims because the claim accrued in 1982 (Code Civ. Proc., § 318); and 3) that the purported ambiguity is illusory as the1923 clearly and unambiguously describes an Easement across Lot 1, rather than the Michielssen Property. Even if the Easement were ambiguous as to its point of termination, there is no ambiguity that it runs across Lot 1, not the Michielssen Property. Moreover, even if Plaintiffs located an original 1923 deed that describes an easement against the Michielssen Property, the recorded 1923 Deed would then be erroneous, not ambiguous, requiring reformation of the recorded deed.

Plaintiffs next argue that the error in the legal description was modified by the recording of the 1982 parcel map, which noted that there appeared to be an error in the deed regarding the placement of the Easement, which imparted constructive notice to future buyers. Plaintiffs finally argue that their cause of action did not accrue in 1982, because at the time Clyde and Bertha believed that the parcel map corrected the deed, and that the claim for quiet title does not accrue until a claim is pressed against the plaintiff. (citing *Salazar v. Thomas* (2015) Cal.App.4th 467, 477.)

Michielssen argues in reply that the rule stated *Wilkerson v. Thomas* and *Salazar v. Thomas* and cited by Plaintiffs, which states that the statute of limitations on an action to quiet title does not begin to run against one in possession of the land, only applies where the owner seeking to quiet title is in exclusive and undisputed possession of the property, which Plaintiffs were not. (*Ankoanda v. Walker-Smith* (1996) 44 Cal. App. 4th 610, 616; Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitations (The Rutter Group 2018) ¶ 4:811.7.) Here, Plaintiffs' Easement, if any, was non-exclusive and non-possessory. (UMF 1.)

Michielssen further argues that the 1982 parcel map did not affect the Michielssen Property. Neither Michielssen nor his predecessor signed the parcel map. He argues that pursuant to recordation of a tract or parcel map is not sufficient to establish or extinguish an easement. (*California Subdivisions Map Act*, 2nd Ed. § 2.20 (CEB).) Further, the statute of fraud prevents enforcement of an agreement transferring interest in real property against non-signatory. Additionally, he argues that the parcel map does not purport to affect the Michielssen Property, as it is outside of the delineated subdivision, and moreover it depicts the plotted easement crossing Lot 1. Michielssen argues that even if Bertha and Clyde received bad advice from First American Title Company, which issue is never raised in the FAC, that ignorance of the law does not delay the running of the statute, only ignorance of the facts themselves. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal. 3d 1103.) Here, Plaintiffs do not dispute their predecessors knew of the scrivener's error in 1982, just that they were incorrect of the legal effect of recording the parcel map.

Finally Michielssen argues that Plaintiffs' requested extension of time should be denied because they cannot show diligence in attempting to find the original deed, as the litigation has been ongoing for 18 months and Plaintiffs have yet to serve discovery on Michielssen, and because an unrecorded easement cannot be enforced against a bona fide purchaser without knowledge, and Plaintiffs do not dispute that Michielssen had no prior notice of an original deed that differs from the recorded deed.

The Court agrees with Michielssen that the cause of action for reformation of the 1923 Deed accrued in 1982, when it was undisputed that Plaintiffs' predecessors became aware of the alleged scrivener's error. The Court further agrees that the gravamen of the cause of action as pleaded is clearly based on the scrivener's error, and that the three-year statute of limitations applies. The Court notes, however, that even if the five-year statute of limitations applied, the first cause of action would be time barred. As to Plaintiffs' request for further time to find the original deed, Plaintiffs have had 18 months to look

for the deed. Moreover, even if an original deed were located showing the easement to run across the Michielssen Property, there would still be a scrivener's error in the recorded deed that would need to be rectified to quiet title to an express easement. Finally, because Plaintiffs did not have exclusive possession of the Easement, the statute of limitations began to run in 1982 upon discovery of the scrivener's error, and the cause of action would be time-barred regardless of the contents of any original deed.

Plaintiffs have failed to meet their evidentiary burden. Because the Court finds that the first cause of action is time-barred, it declines to reach Michielssen's second grounds, that Plaintiffs cannot present any evidence of mutual mistake. Michielssen's motion for summary adjudication of Plaintiffs' first cause of action is granted.

Michielssen next moves for summary adjudication of Philbrick's second cause of action for Quiet Title to Implied Easement on the grounds that an easement cannot be implied where it is contradicted by the terms of the 1923 Deed, and where there was no permanent use of the Easement by the common owner of the Philbrick Property and the Michielssen Property.

Michielssen argues an easement cannot be created by implication unless there is clear evidence that it was intended by the parties. (*Tusher v. Gabrielsen* (1998) 68 Cal. App. 4th 131, 141.) The implication only arises where the conveyance documents fail to mention the easement and the parties fail to indicate a contrary intention. Michielssen argues that here only evidence of the parties' intent is the 1923 Deed itself, which places an Easement across Lot 1. (UMF No. 23.)

Michielssen further argues that to find an easement by implication, there must be a common ownership of a parcel and a transfer of one parcel to another, and that prior to the division of title, there must have been an existing, obvious and apparently permanent use of the quasi-easement by the common owner. (California Real Estate, 4th Ed., § 15:20 (Miller & Starr).) Michielssen argues that here the parties' common grantor, Irving Butchers, owned the Michielssen Property for just 6 days in May 1923, Plaintiffs have no evidence of use during that time, the short duration of Mr. Butcher's ownership is incompatible with the long, continued and obvious use required to establish an easement by implication. (UMF 27-29.)[1] Michielssen makes a prima facie showing that there can be no easement by implication.

In opposition, Plaintiffs argue that there is evidence that the Butchers family was using the existing road for ingress and egress prior to acquiring the Michielssen Property. They cite an Army Corps of Engineers War Department topography map of the area, dated 1919, that shows the road running across the Michielssen Property, up to the Butchers' homestead and back to the county road, and that a reasonable interpretation would be that the Butchers were using the road and crossing the property owned at that time by someone named Richardson, with permission. (Plaintiffs' Exhibit 12.) However, Michielssen objects to admission of the 1919 map and Plaintiffs' request for the Court to

[1] Plaintiffs dispute that Irving Butchers only owned the Michielssen Property for six days, arguing that he owned it for seven days. The Court does not find this difference to be material.

take judicial notice of the map because it is not authenticated or certified, and because courts cannot take notice of the truth of the matters stated in public records. (*Shaeffer v. State of California* (1970) 3 Cal. App. 3d 348, 354 .) Moreover, they argue it is irrelevant because there is no testimony that the map shows any road where they claim, and even if there is such a map, it does not necessarily follow the Butchers used the road.

While Plaintiffs request that the Court take judicial notice of the 1919 map, they provide declaration authenticating the map. The map does not appear to be certified, and there is no evidence as to the source or authenticity of the map. (*See Quelimane Co. v. Stewart Title Guar. Co*. (1998) 19 Cal. 4th 26, 46, as modified (Sept. 23, 1998) [writings must be authenticated for a court to take judicial notice]; *Goodwin v. McCabe* (1888) 75 Cal. 584, 589 [certified copy of map may be admitted into evidence].) The Court cannot take judicial notice of the map.

Plaintiffs have failed to meet their burden of showing an existing, obvious and apparently permanent use of the Easement by the Butchers by admissible evidence. Michielssen's motion for summary adjudication as to Plaintiffs' second cause of action is granted.

Michielssen's motion for summary adjudication as to Plaintiffs' first and second causes of action is granted.

Michielssen's evidentiary objections nos. 4, 5, 6, 7, 9 are granted. Michielssen's evidentiary objections nos. 1-3 are denied. The Court does not rule on Michielssen's evidentiary objections nos. 8, 10-19, as the evidence to which Defendant objects was not material to the disposition of the motion. (Code Civ. Proc. §437(q).)