

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 11/29/2017

TIME: 08:30:00 AM

DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal

CLERK: Jay Browder

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: Bryan Bagnas

CASE NO: **37-2014-00044014-CU-OR-CTL** CASE INIT.DATE: 12/31/2014

CASE TITLE: **San Diego Metropolitan Transit System vs. Grand Central West LLC [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Other Real Property

APPEARANCES

The Court, having taken the above-entitled matter under submission on 11/3/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The demurrer to fifth amended cross-complaint ("FAXC"), filed by plaintiff and cross-defendant San Diego Metropolitan System ("MTS"), is overruled. MTS's motion to strike is denied. MTS has 20 days to file an answer.

The motion to dissolve preliminary injunction, filed by defendant Grand Central West, LLC ("Grand Central") is granted.

Background

The facts and circumstances giving rise to this action have been set out in prior rulings. In brief, MTS and Grand Central own adjacent properties. MTS is a public entity that operates a transportation center and GCW owns a two-story commercial building. MTS alleges Grand Central is improperly allowing its customers to exit onto MTS's property through a doorway that is supposed to be used for an emergency exit. MTS sued GCW for trespass, private nuisance, unfair competition, injunctive relief; and declaratory relief.

Grand Central filed a FAXC which asserts claims for quiet title, declaratory relief, violation of the UCL, interference with prospective economic advantage, and inverse condemnation. Grand Central also filed an amended answer which asserts, among other things, affirmative defenses based on express or implied dedication by public use, abutter's rights, and equal protection/consent.

Discussion

1. MTS's Demurrer

MTS's request for judicial notice is granted.

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1st and 2nd Causes of Action to Quiet Title for Public Easement by Express and Implied Dedication

The 1st and 2nd causes of action allege MTS dedicated a sidewalk that runs along both properties for public use. The Court overruled a prior demurrer to these causes of action because whether there has been a common law dedication is a question of fact and Grand Central's allegations raised issues of fact that are beyond the scope of demurrer. ROA # 170. Grand Central argues that the present demurrer is an improper attempt to demur to an amended pleading on grounds that could have been raised by the demurrer to the earlier pleading. Code Civ. Proc., § 430.41, subd. (b). The arguments could not have been raised by the earlier motion, however, because the case on which the demurrer is based *Scher v. Burke*, was not decided until after the prior demurrer. *Scher v. Burke* (2017) 3 Cal.5th 136.

MTS argues that these causes of action lack legal merit because common law dedication only applies to private property. *Scher v. Burke* (2017) 3 Cal.5th 136, 141. *Scher* considered the narrow issue of whether Civil Code section 1009(b) applies to nonrecreational use of roadways for vehicle access. *Id.* at 143. Section 1009(b) addresses when public use of private property can ripen into a permanent right by the public in the absence of an express offer of dedication. The court concluded that section 1009(b) applies to nonrecreational use of roadways. *Id.* at 150. However, MTS is not, in the words of section 1009(b), a "private owner of real property." MTS is a public agency. Thus, *Scher's* discussion of section 1009(b) is not relevant. And, even if *Scher's* holding were applicable, it would not apply to the express dedication claim. Thus, the demurrers to the 1st and 2nd causes of action are overruled.

7th Cause of Action for Inverse Condemnation

The 7th cause of action alleges MTS acquired the transit center property by eminent domain in July 2003 and completed the abutting walkway in early 2004. FAXC, ¶ 94. The public has used the walkway since 2004 to travel to and from the Mexico Port of Entry. *Id.* at ¶¶ 9, 96. Grand Central installed a doorway leading onto the walkway and members of the public have used it to access the walkway without objection from 2008 until March 9, 2016 when MTS obtained a preliminary injunction and required the installation of a scissor gate. *Id.* at ¶ 97. Grand Central alleges this conduct interfered with its abutter's rights of ingress and egress.

MTS argues the claim is not "ripe" because Grand Central acquired its property on April 28, 2004 after the taking occurred. *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 389 (the right to recover for impairment of access "remains in the person who owned the property at the time of the taking or damaging, regardless of whether the property is subsequently transferred to another person.") In its reply, MTS argues if there was any taking it would have occurred on July 2, 2003 when MTS acquired the transit center property by eminent domain. However, the alleged taking did not occur when Grand Central purchased the property but in March 2016 when Grand Central's access to the walkway was blocked for the first time. FAXC, ¶ 97. Thus, Grand Central has standing to assert the inverse condemnation claim.

MTS also argues no property right was taken. Property is "taken or damaged" for purposes of inverse condemnation, when "an intangible intrusion onto the property has occurred which has caused no damage to the property but places a *burden* on the property that is direct, substantial, and peculiar to the property itself." *Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 530. Preliminarily, for the reasons stated in the motion to dissolve the injunction, Grand Central has alleged a right to ingress and egress under the abutter's rights theory. See, *Short Line Associates v. City and County of San Francisco* (1978) 78 Cal.App.3d 50. A substantial impairment of access to an abutting street can constitute a

taking. *Brumer v. Los Angeles County Metropolitan Transportation Authority* (1995) 36 Cal.App.4th 1738, 1746; *San Diego Metropolitan Transit Development Bd. v. Price Co.* (1995) 37 Cal.App.4th 1541, 1547. Thus, Grand Central has alleged a burden that is direct, substantial and peculiar to its property.

MTS argues that it is not liable for any taking because the Court issued the preliminary injunction which required Grand Central to install gates. Grand Central relies on *Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 410. In *Manta*, the City of San Bernardino obtained a preliminary injunction against an adult cabaret business for violating a zoning ordinance. The injunction was eventually overturned and the ordinance was found unconstitutional. The business sued the city for violating its civil rights and sought lost profits caused while the injunction was in effect. *Id.* at 403. The issue was whether the city's actions seeking a preliminary injunction and a stay *caused* the injury. *Id.* at 408. The California Supreme Court found that it did not, holding that "where a court is provided with appropriate facts to adjudicate a motion for preliminary injunction or a motion for a stay pending appeal, the courts' intervening exercise of independent judgment breaks the chain of causation for purposes of section 1983 liability." *Id.* at 412. However, "this general rule of superseding causation does not apply when the judicial officer reached an erroneous decision as a result of being pressured or materially misled as to the relevant facts." *Id.* There do not seem to be any cases applying *Manta* to an inverse condemnation claim. However, it appears clear that, under *Manta*, the issuance of a preliminary injunction itself generally could not be the basis for an inverse condemnation claim, unless the Court was misled. This is a factual question beyond the scope of demurrer.

Grand Central's allegations are sufficient for pleading purposes. Accordingly, the demurrer to the 7th cause of action is overruled.

2. MTS's Motion to Strike

MTS moves to strike the 7th-9th affirmative defenses. A motion to strike may be filed within the time allowed to respond to the pleading. Code Civ. Proc., § 435, subd. (b)(1); Calif. Rules of Court, rule 3.1322(b). A party has 10 days after service of the answer to demur. Code Civ. Proc., § 430.40, subd. (b). Here, the first amended answer was deemed filed and served September 8, 2017. ROA # 659. The motion to strike was untimely filed on October 6. Thus, the motion to strike is denied.

3. Grand Central's Motion to Dissolve Injunction

Preliminary Matters

The Court declines to rule on MTS's objections to the previously filed declarations of Juan Noe, John Lopez, Dawn Zimmer, and Gordon Carrier and the San Ysidro Intermodal Transportation Center Environmental Assessment (Objections 1-9 and 11) because Grand Central is not relying on them. See, Resp. to Objs. MTS Policy No. 39 and the building permits (Objections 23, 25-26) are irrelevant and were not considered.

MTS's supplemental objections to Calvo's declaration (Objections 1-6) and Exhibits 13-15 (Objections 14-16) are sustained.

Grand Central's objections to the declaration of Baltazar Cruz, ¶¶ 7-8, 18, and 26 and Exhibit A are sustained.

All other objections are overruled.

Grand Central's request for judicial notice is granted as to Exhibits 1-5 and denied as to Exhibits 6-12. MTS's unopposed request for judicial notice is granted.

Substantive Ruling

On February 9, 2016, the Court granted a preliminary injunction enjoining Grand Central from using the rear wall opening of its building except as an emergency exit. ROA # 98.

Grand Central moves to dissolve the injunction. A court may dissolve an injunction upon a showing that there has been a material change in law or facts upon which the injunction was granted or that "the ends of justice would be served" by a modification or dissolution of the injunction. Code Civ. Proc., § 533. That is the case here. When the Court granted the request for an injunction, Grand Central's legal theory was that its actions did not constitute a trespass because MTS had expressly or impliedly dedicated a sidewalk for public purposes. In June 2017, the Supreme Court decided *Sher v. Burke* (2017) 3 Cal.5th 136, which arguably precludes Grand Central's express and implied dedication claims. As a result, Grand Central sought and obtained leave to amend to incorporate a theory of abutter's rights of ingress and egress in its cross-complaint and answer. ROA # 659. Thus, there has been a change in the law upon which the injunction was granted. Furthermore, it is appropriate to re-examine the injunction in the interests of justice. In deciding whether to grant an injunction the Court must consider the likelihood of success on the merits. Had the *Sher* case been the law when MTS sought an injunction, the Court would not have concluded MTS was likely to prevail.

Grand Central's abutter's rights theory is based on *Short Line Associates v. City and County of San Francisco* (1978) 78 Cal.App.3d 50. The issue in *Short Line* was whether a 20-foot strip of land abutting plaintiffs' office building and forming part of a pedestrian oriented area (Hallidie Plaza) is a street. *Id.* at 56. The court concluded that the strip of land was designed and constructed as a public street or way for the exclusive use of pedestrians and therefore plaintiffs acquired an abutting owner's right of access by operation of law. *Id.* at 57, 59.

Here, MTS acquired its property in July 2003 through eminent domain for the purpose of constructing and operating the San Ysidro Intermodal Transportation Center ("SYITC"). Grand Central's Exs. 1-3. MTS argues the area in question is not a "distinct exclusively pedestrian walkway." Previously, it was unclear whether the walkway extended across the entire MTS property. ROA #98. However, photographs now clearly show a well-defined walkway between the properties that allows pedestrians to travel north/south from one edge of the property to the other. Grand Central Exs. 32, 156-160. The walkway appears to be as much a "public street" as Hallidie Plaza. If Grand Central is able to prove up its claim as an abutting owner, then pursuant to *Short Line* it would have a right to access the walkway by operation of law, thereby negating MTS's trespass claim. This is regardless of whether MTS dedicated the sidewalk to public use. In light of this, the Court cannot find that MTS is likely to prevail on the merits. Accordingly, the motion to dissolve the injunction is granted.



Judge Katherine Bacal

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

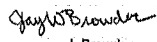
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CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
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I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 11/29/2017.

Clerk of the Court, by: , Deputy
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