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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARC MESHEKOW, Plaintiff, Cross-Defendant and Respondent, v. NESA RONN-WEIR, Defendant, Cross-Complainant and Appellant.	B175841 c/w B179026 (Super. Ct. No. BC 257584)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Fumiko Wasserman and Rita Miller, Judges. Reversed in part with directions and affirmed in part.

Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon; Law Office of Bruce Adelstein and Bruce Adelstein for Defendant, Cross-Complainant and Appellant.

Law Offices of Patrick L. Garofalo and Patrick L. Garofalo for Plaintiff, Cross-Defendant and Respondent.

Marc Meshekow sued Nesa Ronn-Weir to enforce a settlement agreement concerning a shared driveway located on Weir's property. Weir cross-complained, also seeking to enforce the settlement agreement. Meshekow prevailed on all of the claims and cross-claims except his request for damages, and the trial court awarded him over $200,000 in attorney's fees. We reverse the judgment on Meshekow's claims, including the award of attorney's fees, but we affirm the judgment on Weir's cross-claims.

BACKGROUND

Meshekow and Weir own neighboring properties in Beverly Hills. Meshekow does not have a driveway on his property, but he owns an easement for ingress and egress via a driveway on Weir's property.

In 1997, when Meshekow was building a new home on his property, disputes erupted between Weir and Meshekow. Those disputes led to litigation, which the parties settled by an agreement dated December 15, 1999. The agreement provided that the parties would jointly apply to the City of Los Angeles for a permit to widen the driveway to 12 feet. Upon the City's approval of the application, Meshekow was to deposit $20,000 in a blocked account to pay for construction of the new driveway. All such construction was to be undertaken, supervised, and completed by Meshekow. Portions of the $20,000 were to be released upon certification by counsel for both parties of the completion of specific phases of the construction, and any remaining funds were to be released following issuance of a certificate of occupancy for Meshekow's new home.

The parties amended the agreement twice. First, they executed an addendum to the agreement, explaining that certain exhibits that were supposed to have been attached to the original settlement agreement had not yet been prepared when that agreement was executed. The necessary exhibits were attached to the addendum and, pursuant to the addendum, were incorporated into the original agreement. Second, on January 29, 2000, the parties executed another amendment to the agreement. It provided, among

other things, that an attached plan for the driveway would be submitted as an exhibit to the permit application.[1]

On April 28, 2000, the City approved the parties' application. The parties continued to disagree about various aspects of the settlement and the proposed construction, and on July 30, 2001, they attempted to mediate their dispute. They failed to resolve the dispute on that day, and they did not mediate further. Meshekow never deposited the $20,000.

On September 4, 2001, Weir began construction of the new driveway. On September 10, 2001, Meshekow filed suit against Weir, seeking to enforce the settlement agreement, to prevent Weir from undertaking the construction of the driveway, and to recover damages. Weir cross-complained, likewise seeking to enforce the agreement. Both parties succeeded in obtaining preliminary injunctions. The construction of the driveway was halted and was never completed by either party.

After a three-week bench trial, the court entered judgment in favor of Meshekow on all of his claims. The court ordered specific performance of the settlement agreement and issued a permanent injunction but declined to award Meshekow damages. The court also entered judgment in favor of Meshekow on all of Weir's cross-claims and awarded attorney's fees to Meshekow.[2] Weir timely appealed.

STANDARD OF REVIEW

We review the trial court's conclusions of law de novo, and we review its findings of fact under the substantial evidence standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

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[1] We will refer to the original settlement agreement, the addendum, and the amendment of January 29, 2000, collectively as "the parties' agreements."

[2] Judge Fumiko Wasserman handled the entire case with the exception of the calculation of the attorney's fees award. After Judge Wasserman entered the judgment, which included an attorney's fees award in an unspecified amount, the case was transferred to Judge Rita Miller, who determined the amount of the award.

DISCUSSION

I. The Judgment Against Weir on Meshekow's Claims

Weir argues that the judgment against her on Meshekow's claims suffers from a number of errors requiring reversal. We agree.

First, the judgment provides that exhibit number 157, which was prepared for purposes of trial by an expert retained by Meshekow, "shall be deemed to be the Site Plan Overlay . . . of the 'New Driveway' as defined in paragraph 2 of the [original settlement agreement]."[3] Paragraph 2 of the settlement agreement does refer to a "Site Plan overlay" that was supposed to have been attached to the agreement as exhibit B. No exhibit B was attached to the agreement when it was executed. The first addendum to the agreement, however, provided that exhibit 1 to the addendum (which was in fact attached to the addendum) "shall constitute both Exhibit Numbers A and B to the [original settlement agreement]." Thus, pursuant to the parties' agreements, exhibit 1 to the addendum is the "Site Plan overlay" defined in paragraph 2 of the original settlement agreement. There is no legal basis for the trial court's decision to rewrite the parties' agreements by substituting exhibit 157, a new document prepared in the course of this litigation, for the document the parties had previously agreed to use. Meshekow did not, for example, plead or prove a cause of action for reformation. On that basis alone, the judgment must be reversed.

Second, the court granted Meshekow's request for specific performance despite the absence of evidence that Meshekow had no adequate legal remedy for the breaches he alleged. Meshekow argued that he did not need to introduce such evidence because "in an action based upon a contract for an interest in land . . . it is presumed that damages would not adequately compensate." The court's statement of decision incorporated Meshekow's reasoning verbatim and relied upon the same authorities. The

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[3] The judgment refers to exhibit "157." There is no mention of such an exhibit in the reporter's transcript, but an exhibit 157A was marked and admitted. The parties do not dispute that the trial court's references to exhibit "157" are meant to refer to exhibit 157A, and we will join the parties in assuming that is what the court meant.

reasoning is erroneous, and the authorities inapposite, because the presumption is limited to transfers of real property. (See, e.g., Civ. Code, § 3387.) The parties' agreements are not agreements to transfer real property. They are, in the main, agreements concerning the construction of certain modifications to a driveway. Damages are routinely awarded as the remedy for breaches of construction contracts, and Meshekow never even attempted to prove that damages would have been inadequate here. In fact, Meshekow does not dispute Weir's contention on appeal that *there is no evidence that Weir's construction of the driveway caused Meshekow any harm at all*. Thus, not only is there no showing that Meshekow had no adequate *legal* remedy, but there is also no showing that *any* remedy was needed. The decree of specific performance therefore cannot stand.

Because of these errors, no part of the judgment in favor of Meshekow on his first amended complaint can be affirmed. Moreover, we conclude that on remand the trial court must enter judgment against Meshekow on his claims. The first amended complaint alleges one cause of action, for breach of contract, but it seeks multiple forms of relief—damages, specific performance, and an injunction. The trial court rejected Meshekow's request for damages, and Meshekow did not appeal. Specific performance is unavailable because, after a three-week trial, there is still no evidence that Meshekow has been harmed or that his legal remedies for any such harm are inadequate. And the request for injunctive relief fails for similar reasons—there is no showing that legal remedies would be inadequate or that any of the other conditions for issuance of a permanent injunction have been satisfied. (See *Estes v. Rowland* (1993) 14 Cal.App.4th 508, 534-535; Civ. Code, § 3422.)

Accordingly, the judgment on Meshekow's first amended complaint is reversed, and the superior court is instructed to enter judgment against Meshekow on all of his claims.[4]

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[4] In connection with her cross-claims, Weir argues that the relief granted to Meshekow concerning the trimming of certain bougainvillea should be "eliminated." By reversing the judgment in favor of Meshekow on his first amended complaint and directing that judgment be entered against him,

II. The Judgment Against Weir on Her Cross-Claims

The trial court rejected all of Weir's cross-claims and expressly found that Meshekow had "fully performed as required by the [original settlement agreement]." On appeal, Weir argues that she should have prevailed on certain portions of her cross-complaint. We disagree.

Weir argues that (1) Meshekow should be compelled to pay the costs Weir incurred in constructing the new driveway; (2) in the alternative, Meshekow should be compelled to pay to Weir the $5,000 that Weir's insurance company was required to pay to Meshekow pursuant to the settlement agreement; and (3) Meshekow should be enjoined to replace a certain fence, as required by paragraph 8(*l*) of the settlement agreement. But the only cross-claim that could, theoretically, entitle Weir to any of that relief is her cross-claim for breach of contract. To prevail on that cross-claim, Weir would have to prove that Meshekow breached. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830.) A breach is an *unexcused* failure to perform a contractual obligation. (*Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 227.)

The trial court found that Meshekow did not breach, and Weir does not argue that the trial court's finding is not supported by substantial evidence. Weir does contend that it is undisputed that Meshekow has not performed certain contractual obligations, but she never argues that there is no substantial evidence that any such nonperformance (or delayed performance) by Meshekow was excused. Moreover, had Weir so argued, the argument would have failed, because the record does contain substantial evidence that, e.g., Meshekow's failure to deposit the $20,000 and begin construction of the driveway resulted from, and was excused by, Weir's own interference.

Because Weir does not even contend that the trial court's finding—that there have been no unexcused failures to perform by Meshekow—is unsupported by

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we are eliminating all affirmative relief granted to Meshekow, so we need not address the specific issue of the bougainvillea.

substantial evidence, Weir cannot obtain reversal on her cross-claim for breach of contract. And because that is the only cross-claim that could support Weir's current requests for affirmative relief, we must deny those requests and affirm the judgment on Weir's cross-complaint.[5]

III. The Award of Attorney's Fees

Because we are directing the entry of judgment against Meshekow on all of his claims, he is no longer the prevailing party. We therefore reverse the award of attorney's fees.[6]

DISPOSITION

The judgment on Meshekow's first amended complaint is reversed. The superior court is directed to enter judgment against Meshekow on all of his claims. The judgment on Weir's cross-complaint is affirmed. The award of attorney's fees is reversed. The trial court's preliminary and permanent injunctions are dissolved. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

JACKSON, J.*

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[5] We note also that we see no basis for ordering Meshekow to "return" the $5,000 to Weir. Weir's insurer, not Weir herself, paid the $5,000 to Meshekow, and Weir cites nothing in the record showing that, in the absence of the agreement to pay the $5,000 to Meshekow, the insurer would have paid the money to Weir. Weir's insurer is not a party to this litigation, and Weir does not have standing to assert its claims. If Weir's insurer wants the $5,000 back, it is free to pursue its remedies, if any, against Meshekow separately.

[6] We note that Weir is not the prevailing party either, because we are affirming the judgment against her on her cross-complaint. Neither party is entitled to attorney's fees.

* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)