2016 WL 4440396

Court of Appeal,
First District, Division 1, California.

Paul GALINDO et al., Plaintiffs and Respondents,
v.
CIVIC CENTER HOTEL, LLC et al., Defendants and Appellants.

A144594
|
Filed 8/23/2016

San Francisco County, Super. Ct. No. CGC14540325

Attorneys and Law Firms

Mark Hooshmand, San Francisco, CA, for Plaintiffs and Respondents.

Guy Wainwright Stilson, Low Ball & Lynch, David Paul Wasserman, Wasserman-Stern, Glenn Allen Friedman, Lewis Brisbois Bisgaard & Smith LLP, San Francisco, CA, Jeffry Albin Miller, Lewis Brisbois Bisgaard & Smith LLP, San Diego, CA, for Defendants and Appellants.

Opinion

Humes, P.J.

Defendants are the owner and operators of a residential hotel in San Francisco. They appeal from a preliminary injunction requiring them to hire a licensed pest control operator to eradicate an infestation of the hotel by mice, cockroaches, and bedbugs. We affirm.

BACKGROUND

The plaintiffs are 50 past or present tenants of the Civic Center Hotel (hotel), a single-room-occupancy (SRO) hotel in San Francisco. The hotel is owned by defendant UA Local 38 Pension Trust Fund and operated under lease by defendants Civic Center Hotel, LLC and Balwantsinh Thakor. In July 2014, plaintiffs sued defendants to compel the improvement of living conditions at the hotel, which was alleged to be uninhabitable due to defendants' failure to keep the premises in good repair, provide heat and hot water, collect trash and clean on a regular basis, and prevent the presence of pests.

In September 2014, plaintiffs sought a preliminary injunction requiring defendants to proceed with improvements, including "hiring a licensed pest control operator to generate and execute a plan to eliminate bedbugs, roaches, mice, and rats." The motion was supported by declarations of four tenants who, among other things, discussed pest problems.[1] Lori Morris, a tenant since 2012, stated she "catch[es] mice in [her] room every day using a trap baited with peanut butter" and had been bitten by mice and bedbugs while sleeping. Her declaration was accompanied by a picture of holes chewed by mice in the room's baseboard. Morris also said that the garbage area was overrun with cockroaches. Mary Teleb, a tenant since 2010, has been repeatedly bitten by bedbugs and notices cockroaches in her room regularly. Her cat catches mice in the hotel "almost every day," and the vermin chew holes in her clothes. Stephen Abrush, a tenant since 2002, said he sees cockroaches in his room "every day" and mice "a few times a week." Once, a mouse crawled out of the drain in his bathtub, while others have crawled under the door. Abrush had also been bitten by bedbugs. Maria Olguin, a tenant since 2005, had scars from bedbug bites and saw "at least one mouse" in her room every day.

[1] The motion for the preliminary injunction addressed several aspects of the hotel's operation in addition to pest control. Because this appeal concerns only pest control, we do not address the evidence of these other aspects.

In support of their opposition, defendants submitted a declaration from Gopal Shah, the on-site property manager of the hotel. Shah stated that the hotel retains a registered pest control company, which provides regular monthly service and can be brought in on as needed basis. Each floor of the hotel has a garbage chute, and garbage is collected six days a week. The hotel also employs a housekeeping staff, which cleans common areas, including bathrooms, daily. At the time, there were no outstanding notices of violation pending against the hotel.

Also submitted with the opposition and plaintiffs' reply were excerpts from the depositions of some of plaintiffs' declarants. Morris testified that she uses a combination of pesticides and a sonic wave generator to keep the cockroaches and other vermin in her room under control.

Although the pest control company used by the hotel comes by once per week, she found it ineffective and no longer permitted the service to enter her room because her own pest control efforts were more effective. Morris keeps a dog in her room and places food and water out for the dog twice a day, which attracts the mice. Teleb keeps a cat that she also feeds daily from an open bowl. Although the pest control company comes to her room monthly, it has been ineffective in eradicating bedbugs and mice.

In connection with their reply brief, plaintiffs submitted a declaration from a licensed pest control operator who confirmed evidence of bedbugs, cockroaches, mice, rats, and pigeons at the hotel, including the presence of bedbugs on a used mattress that was stored with new mattresses, cockroaches, and mouse and rat feces throughout the common areas, and severe infestations of insect and rodent pests in several rooms. He outlined a number of steps needed to bring the pest problem under control, including installing mouse- and rat-bait stations, sealing points of rodent access, baiting all units for cockroaches, and treating all beds infested with bedbugs.

At the initial hearing on the motion, the trial court found "serious pest control concerns" at the hotel. Rather than directing immediate entry of a preliminary injunction, the court ordered the parties to meet and confer "regarding solutions to the pest control problems" and required them to submit a joint statement regarding the meet and confer. The motion for a preliminary injunction with respect to other aspects of hotel operation was denied. No joint statement was ultimately filed.

The trial court subsequently found that defendants failed "properly to meet and confer" and, without making findings, entered a preliminary injunction "enjoining Defendants from operating the Civic Center Hotel without hiring a licensed pest control operator to generate and execute a plan to, as far as is reasonably possible, eliminate bedbugs, roaches, mice and rats at the hotel."

DISCUSSION

In appealing the preliminary injunction, defendants contend that (1) plaintiffs failed to demonstrate a likelihood of success on the merits, (2) plaintiffs failed to demonstrate irreparable harm, (3) the injunction was "impermissibly vague and overbroad," and (4) the court erred in failing to require a bond. We are not persuaded.

"Pursuant to Code of Civil Procedure section 526, trial courts are authorized to issue injunctions during the litigation. A trial court deciding whether to issue a preliminary injunction weighs two interrelated factors—the likelihood the moving party will prevail on the merits at trial *and* the relative balance of interim harms that are likely to result from the granting or denial of preliminary injunctive relief. [Citations.] Generally, weighing these factors lies within the broad discretion of the superior court." (*County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 315, italics in original.) "The ultimate goal ... is to minimize the harm which an erroneous interim decision may cause." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.)

" 'The party challenging an order granting or denying a preliminary injunction has the burden of making a clear showing of an abuse of discretion. [Citation.] An abuse of discretion will be found only where the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence. [Citation.]' [Citation.] 'Where the evidence with respect to the right to a preliminary injunction is conflicting, the reviewing court 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." ' " (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443.)

A. Likelihood of Success.

Defendants have a statutory duty under Civil Code section 1941 to maintain the hotel free of "dilapidations ... which render it untenantable." (*Id.*; *Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 461.) Among the conditions that render a building "untenantable" for purposes of section 1941 is the presence of "garbage, rodents, and vermin." (Civ. Code, § 1941.1, subd. (a)(6).)

As detailed above, the four tenants provided ample evidence of vermin in their rooms. Given the ability of pests to move freely through a large building like the hotel, the trial court could readily have inferred that the problem was not restricted to these four tenants' individual rooms. The declaration of the pest control operator who examined the hotel confirmed as much. Ample evidence was presented to support the conclusion that plaintiffs will prevail on their claim for a violation of Civil Code section 1941.[2]

[2] Defendants argue that because the trial court's injunction was a mandatory one, a higher standard for entry of the injunction applies, requiring " ' "the right [to an injunction to be] clearly established." ' " (See *City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 299.) It can be argued that the trial court's injunction merely sought to enjoin the

violation of a statute, which does not carry an elevated burden. (*Ibid.*) We need not resolve the issue because we conclude that the trial court did not abuse its discretion even under the higher standard.

In their submissions to the court, defendants made no attempt to prove that pests were not a problem. They provided evidence that they had retained a pest control service, but they did not attempt to demonstrate that the service's work has been effective. Civil Code section 1941 contains no exception relieving a landlord of the obligation to maintain a tenantable dwelling merely because the landlord has made an unsuccessful effort to comply with its standards.

In contending that plaintiffs failed to demonstrate a likelihood of success, defendants focus on the conduct of the individual tenants, essentially blaming the presence of pests on the tenants, one of whom no longer cooperated with the pest control service and two of whom kept pets. But pests were found in rooms with and without pets, and they were found in the rooms of tenants who did and did not cooperate with the pest control service. In other words, the presence of pests cannot be attributed solely to the conduct of individual tenants.

In any event, the tenants' conduct would not excuse defendants from compliance with Civil Code section 1941 unless it was shown to satisfy the provisions of section 1941.2. Under that section, a landlord is relieved of the duty to maintain a tenantable dwelling if the landlord demonstrates that the tenant failed to keep the premises "clean and sanitary" and that this failure "contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under section 1941 to effect the necessary repairs." (§ 1941.2, subd. (a)(1), (2).) Defendants make no mention of section 1941.2 and made no serious attempt in the trial court to demonstrate the circumstances necessary to absolve them of the duty to maintain the hotel free of pests under the statute. In the absence of such evidence, the trial court had no basis for relieving defendants of their duty.

B. Irreparable Harm.

Defendants argue that plaintiffs failed to demonstrate irreparable harm because they can be compensated for the "discomfort" caused by pests.

To begin with, plaintiffs were under no obligation to demonstrate "irreparable" injury. The test in California, as discussed above, is the "balance of harms," which is satisfied if the court concludes "the interim harm to the plaintiff if the injunction is denied outweighs the interim harm to the defendant if the injunction is issued." (*San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, 1226.) Here, the harm to plaintiffs was clear. If the injunction was denied, they would have to suffer from the consequences of inadequate pest control. Contrary to defendants' characterization, these consequences are more than mere "discomfort"; they also include the risk of disease, damage to clothing, pain from bug bites, inconvenience, and general disgust. At the same time, the harm to the defendants from the injunction is unclear and unconvincing.[3] The requirement that defendants implement an effective pest control program will not necessarily require substantial additional expenditures because, by defendants' own admissions, they already use a pest control service. In any event, defendants provided no evidence of the magnitude of any added expense. Accordingly, the trial court did not abuse its discretion in concluding that the balance of harms weighed in favor of plaintiffs.

[3] Defendants argue that the harm to them would be the closure of the hotel, but that is a false choice. Defendants have not shown that it is impossible to find "a licensed pest control operator to generate and execute a plan to, as far as is reasonably possible, eliminate bedbugs, roaches, mice and rats at the hotel."

Even if irreparable injury were necessary, the trial court would not have abused its discretion in finding such injury here.[4] Irreparable injury is injury that "cannot be adequately compensated in damages." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.) " '[T]o say that the harm is irreparable is simply another way of saying that pecuniary compensation would not afford adequate relief or that it would be extremely difficult to ascertain the amount that would afford adequate relief.' " (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 801.) The damage flowing from a pest infestation is clearly irreparable under these standards since it is difficult to value monetarily the injury caused by an unpleasant environment and the risk of disease.

[4] At least two cases, relying on 19th century authority, have held that the entry of a mandatory injunction requires irreparable injury. (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295-296.)

C. Vagueness and Overbreadth.

"An injunction is unconstitutionally vague if it does not clearly define the persons protected and the conduct prohibited." (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1167.)

The trial court's injunction required defendant to "hir[e] a licensed pest control operator to generate and execute a plan to, as far as is reasonably possible, eliminate bedbugs, roaches, mice and rats at the hotel." Defendants argue that the trial court's failure to spell out the exact steps the pest control operator must take makes the injunction ambiguous. We disagree. The requirement of the trial court's order was clear and unambiguous: implementation of a pest control program that was effective in controlling pests in the hotel. Whether defendants are in compliance with the injunction can be readily determined by monitoring the presence of pests. Because it is defendants' responsibility under Civil Code section 1941 to determine the means for providing a tenantable dwelling, the trial court properly left implementation of the injunction to defendants.

Defendants also argue that the phrase "as far as is reasonably possible" is "inherently vague." The degree to which pests can be controlled at the hotel can be determined only upon careful inspection, which is anticipated in the court's order. The injunction was not rendered ambiguous merely by the court's recognition that it might not be possible to eliminate every last bug.

Defendants also contend that the injunction is overbroad because "rodents and insects can never be completely eradicated." As noted above, the injunction does not require complete eradication of the pests, but only control to the extent reasonably possible. It is therefore not overbroad on this ground.

Finally, defendants argue that the injunction is overbroad because it requires them to control pests throughout the hotel, while the evidence submitted concerned only the rooms of four residents. The trial court could readily infer from the evidence presented that the pest problem was endemic to the entire hotel; there was no requirement that evidence be submitted for each room individually. Given defendants' legal duty to keep the entire hotel pest free, the injunction was not overbroad by covering the entire building.

D. Failure to Require a Bond.

As best we can determine from the record, neither party raised the issue of a bond in the trial court proceedings. Plaintiffs did not ask for a bond to be waived in their motion, and defendants in their opposition neither commented on that failure nor otherwise demanded the posting of a bond. Even after the trial court announced its intention to enter an injunction at oral argument on the motion, neither party raised the bond issue. As a result, it is raised for the first time in this court.

In entering a preliminary injunction, the trial court ordinarily must require the posting of an appropriate bond. (Code Civ. Proc., § 529; *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10 (*ABBA*).) The court has the discretion, however, to waive the undertaking if the plaintiff is indigent. (Code Civ. Proc., § 995.240.) Further, where the defendant fails to object in the trial court to the failure to require a bond, the defendant can be deemed to have waived the right to a bond. (*City of Los Angeles v. Superior Court* (1940) 15 Cal.2d 16, 23.) This is particularly true when it can be inferred that the defendant's silence was tactical, such as when the defendant wants to focus the court's attention on other arguments raised in opposition, or if the issue was raised for the first time on appeal. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 746-749 (*Smith*).)

At oral argument, defendants relied on *ABBA* to argue that we are categorically precluded from concluding that they forfeited the posting of a bond. Their reliance is misplaced. In *ABBA*, *supra*, 235 Cal.App.3d 1, neither party addressed the bond issue before the trial court entered a minute order granting a preliminary injunction. The defendants first raised the issue when they objected to the plaintiff's proposed form of the final order. (*Id.* at p. 9.) On appeal, the plaintiffs argued that the defendants had waived the right to a bond by failing to raise the issue before the court's ruling. In rejecting this argument, *ABBA* held that "nothing in [section 529] conditions the trial court's obligation to require [a bond] upon a request from the parties. To the contrary, an injunction does not become effective until an undertaking is required and furnished. ... Since an undertaking is an indispensable prerequisite to the issuance of a preliminary injunction, regardless of whether the party to be restrained has reminded the court to require the applicant to post one, the restrained party does not waive its right to that statutorily mandated protection by failing to affirmatively request it." (*Id.* at p. 10.)

Plaintiffs' contention that this passage from *ABBA* means that the bond requirement can never be waived is inconsistent with both *City of Los Angeles*, *supra*, 15 Cal.2d 16 and *Smith*, *supra*, 182 Cal.App.4th 729. In *City*

of Los Angeles, the parties stipulated to entry of an injunction while the trial was continued. (*Id.* at p. 18.) Over a year later, the defendant moved to dissolve the injunction on the ground that no bond had been required. The motion was denied. (*Id.* at p. 19.) In affirming, the Supreme Court held, "In view of the facts and circumstances which gave rise to the execution of the stipulation, and considering the length of time which had elapsed during which no complaint was made by the petitioners concerning the lack of any bond, they must be deemed to have waived any rights which theretofore they may have had in that regard." (*Id.* at p. 23.)

In *Smith*, the plaintiff argued that a bond was unnecessary in its motion for a preliminary injunction. The defendant did not address the issue in its opposition, and the issue did not arise during the hearing on the motion. The court's order expressly declined to require a bond. (*Id.* at p. 738.) The defendant raised the lack of a bond for the first time on appeal. Reviewing the pertinent law, *Smith* concluded that the requirement of a bond could be waived, citing *City of Los Angeles* and other decisions. (*Smith.* at pp. 740-742, 744.) As to *ABBA*, the court noted that the decision had not addressed whether a bond could be waived *at all*. (*Smith,* at p. 742.) Instead, the court held, "[*ABBA*] stands for the narrower proposition that an appellate court will not *find as a matter of law* that a restrained party waives its statutory right to a bond by failing to affirmatively request it when neither the moving party nor the court has raised the topic prior to the trial court's ruling." (*Id.* at p. 744, italics in original.) *Smith* upheld the trial court's implied finding because the defendant did not oppose the plaintiff's request to omit a bond, inferring that defendant "chose not to raise the bond requirement as part of a tactical decision to focus on the arguments that would result in the preliminary injunction being denied." (*Id.* at p. 746.) In addition, the court noted, "we are disinclined to allow parties to ... sav[e] the injunction bond issue for appeal when it could have been dealt with more efficiently in the lower court with much less detriment to the party who obtained the injunction. Addressing the issue [for the first time] on appeal would encourage 'sandbagging.' The resulting inefficiencies are an unacceptable burden on the administration of civil litigation, especially in light of the current workload and budgetary constraints under which superior courts operate." (*Id.* at pp. 748-749.)

We conclude that defendants' failure here to request a bond in the trial court constituted a forfeiture of the argument. As did *Smith* under the circumstances of that case, we conclude that *ABBA* is factually distinguishable. The *ABBA* defendant did not wait until appeal to raise the bond issue. It objected when the final form of the order granting the injunction was proposed, and the trial court therefore had an opportunity to consider and address the issue. Here, like the defendant in *Smith*, defendants did not raise the issue of a bond until appeal. Under *Smith*, that failure alone is sufficient grounds for finding a forfeiture. (*Smith*, at p. 749.)

Even if that were not enough, we would infer a waiver because there is sufficient reason to conclude that defendants failed to raise the issue for tactical reasons. This is an action by residents of SRO housing to force their landlord to comply with its legal obligation to provide habitable accommodations. Residents of SRO housing are ordinarily poor, and plaintiffs undoubtedly would have invoked the waiver provision of Code of Civil Procedure section 995.240 if the bond issue had been raised. And any damages from a wrongful preliminary injunction likely will be minimal, since the injunction merely requires defendants to comply with their pre-existing statutory obligation to maintain a pest-free building. Had the trial court been asked, there is a good chance it either would have waived the bond requirement or required a nominal bond. Under these circumstances, we conclude that there is a sufficient basis to infer that defendants elected not to raise the bond to focus the court on the merits of their argument, thereby waiving the requirement of a bond. (*Smith*, *supra*, 182 Cal.App.4th at p. 746.)

DISPOSITION

The order of the trial court is affirmed. Plaintiffs may recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

We concur:

Margulies, J.

Banke, J.

All Citations

Not Reported in Cal.Rptr.3d, 2016