Court of Appeal, First District, Division 3, California.

Beverly CHINN, Plaintiff and Appellant,

v.

Marilyn HESS et al., Defendants and Respondents.

No. A114362.

(Alameda County Super. Ct. No. HG04176053)

Not Reported in Cal.Rptr.3d, 2007 WL 1430192 (Cal.App. 1 Dist.)

May 16, 2007.

*1 This appeal stems from a common law claim for trespass and the unlawful felling of a tree. Plaintiff and appellant Beverly Chinn ("appellant") appeals the judgment entered in favor of Marilyn Hess and her brother and gardener, Melvin Forrest ("respondents"). The trial court found appellant consented to removal of the tree through the ostensible agency of her tenants, Michael and Linda Schmidt ("the Schmidts"). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and respondent-Hess owned adjoining properties on Gibraltar Drive in Fremont. Appellant did not live at her property, but rented it to the Schmidts. On July 2, 2003, respondent-Forrest came onto appellant's property and cut down a plum tree which grew there. The plum tree obstructed construction of a new fence, which appellant and Hess had agreed to build between the properties.

On September 20, 2004, appellant filed suit against respondents alleging common law trespass and "Willful Trespass and Wrongful Cutting of a Tree" under Code of Civil Procedure section 733. The complaint alleged respondents acted maliciously, in bad faith and without appellant's consent or permission. Respondents answered with a general denial and six affirmative defenses, including consent.

At trial the main issue was whether respondents believed appellant had consented to their cutting down the tree. The Schmidts each testified they knew appellant wanted to keep the tree and they became aware of the tree-

felling too late to prevent it. They also stated respondents acted without their knowledge or permission.

In contrast, respondent-Forrest testified he had begun merely trimming the tree when the Schmidts came outside and "we all agreed as a mutual agreement just to take [the tree] down." Respondent-Hess corroborated this, stating "And it was a mutual agreement that the tree needs to come out in order for them to put the fence up. And I had had a previous conversation with Mrs. Schmidt about this[.]" Respondents also presented the testimony of four other neighbors who saw the tree-felling. Each stated the Schmidts were present when Forrest cut down the tree; they made no objection to Forrest felling the tree; and, Michael Schmidt assisted with removal of the fallen branches.

The trial court found appellant never expressly granted permission to remove the tree. Nevertheless, the trial court held in favor of respondents. The court found the Schmidts' testimony was not credible, particularly in light of its contradiction by respondents and the other neighbors. Consequently, the court held respondents acted with the consent of the Schmidts, who were appellant's ostensible agents. In its statement of decision the court said: "[I]t is plaintiff's burden to prove the absence of agency as part of her [burden of] proof of absence of consent. However, even if defendants had the burden of proof on the issue of ostensible authority ... the Court finds that defendants met that burden." This appeal timely followed.

DISCUSSION

*2 Appellant first contends the trial court incorrectly assigned her the burden of proving absence of consent, including proving the Schmidts were not her ostensible agents. Specifically, appellant avers the burden of proving ostensible agency is with the party asserting agency, and there is no exception to this rule in trespass cases.

We note lack of consent is an element of the tort of trespass. (Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal.App .3d 1, 16-17; County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292, 315 [peaceable entry on land by consent is not actionable as trespass].) However, we need not decide today whether appellant had to disprove agency in order to establish trespass where respondents claimed consent through ostensible agency. The trial court ultimately concluded respondents had carried their burden in demonstrating ostensible agency. In short, the trial court never placed the burden of proof on appellant. Accordingly, appellant's contention fails.

This brings us to the dispositive issue of whether the trial court erroneously concluded respondents met their burden of showing ostensible agency.[1] The trial court concluded as follows: "[E]ven if defendants had the burden of proof on the issue of ostensible authority, upon reflection the Court finds that defendants met that burden. The Court finds it is uncontroverted that Plaintiff gave the Schmidts authority to speak to Defendant Marilyn Hess regarding the tree and the fence. Once the Schmidts were empowered to speak for Plaintiff, Plaintiff chose not to communicate with Defendant Marilyn Hess, did not respond to messages, did not drive approximately two miles to see the fence, and relied solely on the Schmidts to represent her regarding the fence/tree issue, as she relied upon them to take care of the garden of the residence they were renting from Plaintiff. Consequently, defendants have established that, by a combination of her intentional conduct and her want of ordinary care, Plaintiff caused defendants reasonably to believe that the Schmidts had authority to consent to removal of the tree. Judgment shall, accordingly, be entered for defendants."

Ostensible authority in an agent is established by showing "the principal, intentionally or by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority. [Citations.] Ostensible authority must be established through the acts or declarations of the principal and not the acts or declarations of the agent. [Citations.] ... Also, where the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability. [Citations.] (Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal.App.4th 422, 438-439.) The issue of whether a person was acting as an agent of a principal "is a question of fact. [Citations.]" (Ibid.) "We must accept the trial court's findings on agency as conclusive if supported by substantial evidence, whether

---

[1] Appellant contends the trial court erred by allowing respondents to rely on ostensible agency for consent because they did not assert a defense of ostensible agency in their answer, and thereby waived it. This contention is without merit because appellant failed to object at trial to any of the evidence admitted to show ostensible agency. (Schrader Iron Works, Inc. v. Lee (1972) 26 Cal.App.3d 621, 634 [failure to object to unpleaded estoppel defense waived on appeal where issue was fully litigated at trial]; Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789, 793-794 [failure to plead defense of design immunity did not preclude adjudication of that issue and a review thereof on appeal "where (1) a case is tried on the merits, (2) the issues are thoroughly explored during the course of the trial and (3) the theory of the trial is well known to the court and counsel"].) Appellant also contends she was "blindsided and sandbagged" at trial by the defense of consent based on ostensible agency. This claim is unconvincing because respondents included consent in two of their six affirmative defenses. Moreover, the testimony appellant elicited from the Schmidts demonstrates her awareness that their authority to grant respondents permission to cut down the tree was at issue.

contradicted or uncontradicted. [Citations.]" (Ibid.) In applying the substantial evidence standard of review, "'[w]e must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence. [Citation.]' [Citation.]" (Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal.App.4th 644, 653.)

*3 We conclude substantial evidence supports the trial court's finding respondents showed ostensible agency. Appellant delegated responsibility for gardening and maintenance to Michael Schmidt. Both Schmidts had communicated on appellant's behalf and about the fence project with Hess. In the absence of any direction from appellant herself, Hess reasonably believed the Schmidts had spoken with appellant, obtained her approval to remove the tree and conveyed that approval to her. We accept and defer to the trial court's finding the Schmidts' testimony to the contrary was not credible. (Engineers & Architects Assn. v. Community Development Dept., supra, 30 Cal.App.4th at p. 653.) In sum, we agree respondents carried their burden of showing they reasonably believed the Schmidts had authority to allow them to cut down the tree.[2]

DISPOSITION

The decision of the trial court is affirmed. Appellant to bear both parties' costs for this appeal.

---

[2] Appellant also advances a new argument based on the application of a Fremont municipal ordinance requiring a permit to cut down a tree. Appellant cannot assert on appeal a legal theory she did not raise at trial. (People ex rel. Dept. of Transportation v. Superior Court (2003) 105 Cal.App.4th 39, 46.)