2023 WL 5672414 (Cal.App. 1 Dist.) (Appellate Brief)
Court of Appeal, First District, California,
Division Four.

Eric WIDEN, Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant.

2856-62 WASHING STREET HOA, et al., Appellants,

v.

DIVISADERO PLACE HOMEOWNERS ASSOCIATION, et al., Respondents.

No. A167010.
August 22, 2023.

San Francisco Superior Court, Case No.: CGC-15-514665
On Appeal from the decision of the San Francisco Superior Court
The Honorable Charles F. Haines

Appellant's Opening Brief

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INTRODUCTION

This appeal challenges the granting by the court of a motion for summary judgment with issuance of a permanent mandatory injunction in favor of the Divisadero Place Homeowners' Association (DP) and its individual members as against the Washington Street Homeowners' Association (WSHOA) and its members. In granting the Divisadero Place Homeowners' motion for summary judgement and issuing a permanent mandatory injunction compelling the Washington Street Homeowners to repair and maintain a property line retaining wall, the superior court failed to property consider the equities of the parties and ruled evidence on the subject to be irrelevant and inadmissible.

Among the equitable issues the court failed to consider were the issues raised by WSHOA as affirmative defenses including: (1) whether the Divisadero Place Homeowners' Association and its members had a legal duty to maintain, repair, and/or replace the retaining wall subject to this action and, (2) whether the existing nuisance condition was caused by the Divisadero Place Homeowners' Association's failure to exercise due care in carrying out its continuing obligation to repair and maintain the retaining wall. The court also excluded evidence demonstrating a material triable issue of fact as to ownership of the wall.

***2** In opposing the motion, Washington Street Homeowners Association submitted admissible evidence that the retaining wall in this action was constructed as a means of substituted lateral support for the WSHOA property after excavation by the Divisadero Place Homeowners' Association's predecessors-in-interest to facilitate construction of a building at approximately 12 feet below the level which would have been natural grade. In other words, the wall belongs to the Divisadero Place Homeowners' Association. The purpose of the wall was to provide legally required support to the adjacent land, and it was built for the sole benefit of the property now owned by the Divisadero Place Homeowners.

In their cross-complaint and summary judgment motion, the Divisadero Place Homeowners' Association asserted that the Washington Street Homeowners Association are the owners of the retaining wall, created the existing nuisance condition, and are legally obligated to repair and maintain it.

It is undisputed that the condition of the retaining wall in this case has been cited by the City and County of San Francisco as a nuisance. That was not contested, and that was as far as the trial court went in analyzing the case and issuing a ruling. This is clear from the transcript of the hearing and the notation by the court when signing the order. This appeal is not a challenge to the ruling on the existence of nuisance, but rather a challenge to court's ruling that the dispute over ownership and legal responsibility for ***3** maintaining the wall as between the parties was irrelevant, and a challenge to the failure of the court to make any effort to consider any application of equity in granting a mandatory injunction compelling one party to perform repairs without consideration of legal and equitable responsibility as between the parties. Such consideration is a clearly established requirement when fashioning equitable relief.

By failing to make a proper determination regarding the origin, purpose and ownership of the wall, and failing to consider who, as between the parties, has the obligation to repair and maintain the wall to provide lateral support, the decision in this case renders an inequitable and unjust result.

A proper application of law and principles of equity do not support the result in this case as between private citizens.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Parties, Properties, and Retaining Walls at Issue

Divisadero Place Homeowners Association and its individual members Kate Kardos, Steven Polevoi, the Eidelman Family Trust, Nicole Melet, and Stone Melet (collectively referred to herein as “DP”) own the real property located at 2308A-12 Divisadero Street, San Francisco. (CT, Vol 4, 912.)

The 2856-62 Washington Street Homeowners' Association it's individual members (Daniel P. Mulderry, Gaylen Mulderr, Peter Dubois, ***4** Leslie Zimmerman, Henrietta Hagopian, as trustee, of the Hagopian Family Trust, and Denis Harper and Zsuzsanna Saper, as Trustees of the Rita I. Harper Trust.) (collectively referred to herein as WSHOA), own the real property located at 2856-62 Washington Street, San Francisco.

The owners of the real property located at 2320-22 Divisadero Street include Eric Widen, Rebecca Widen, David Lang, and Gwen Lang. They are not parties to this appeal. (CT, Vol. 4, 912.)

An aerial view of the retaining walls is set forth in below:

IMAGE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

DP's property at 2308A-12 Divisadero Street sits downslope from the two other properties. WSHOA's property sits upslope to the east at 2856-62 Washington Street. The 2320-22A Divisadero Street owners property sits upslope to the north.

B. Notices of Violation, Abatement Proceedings, Demurrers and Appeals

Sometime in the 1890s, the owners of the DP property flattened their lot and build the retaining wall to preserve lateral support for the two ***5** upslope properties. CT, Vol. 3, p. 771; See also CT Vol. 4, 828-888.) Cracks in the wall have since developed over time. (*id.*)

In March 2014, DP reported the cracks in the walls to the San Franciso Dept. of Building Inspection (DBI), which issued notices of violation to DP as well as the upslope owners i.e. WSHOA and owners of 2320-22 Divisadero Street. Unbeknownst to the upslope owners, the DP owners and their surveyor met with the inspectors and persuaded them that the wall's footing is solely on the two upslope properties. In June 2014, DBI issued a second round of notices of violation to the upslope owners alone. (CT, Vol. 3, p. 771.)

When the upslope neighbors (WSHOA and owners of 2320-22 Divisadero Street) failed to repair the wall, DBI noticed a hearing to consider imposition of penalties, including abatement orders. At the hearing, the upslope owners contended that the wall "straddles the property lines," and their structural engineer, Brett Ferrari, opined that previous owners of DP built the walls for the sole benefit of the DP property. (CT, Vol. 3, p. 771.)

The hearing officer indicated that he could not address whether the DP owners, who, were not before him in the administrative proceeding, could also be ordered to abate the nuisance. He issued abatement orders finding the condition of the walls as described in the NOVs to be a public ***6** nuisance and required the upslope owners to repair or replace it. (CT, Vol. 3, p. 771.)

The WSHOA and the owners of 2320-22 Divisadero Street appealed to the Assessment Appeals Board (AAB). They asked that the orders be held in abeyance until they resolved their dispute with the DP owners concerning responsibility for the repairs, or that similar orders be issued to DP and its owners. (CT, Vol. 3, p. 771.)

Mr. Ferrari restated his opinion during the AAB proceedings and a surveyor noted that the survey relied upon by the DP owners shows parts of the wall crossing the property line in midair. DBI's deputy director related the prior issuance and effective withdrawal of notices of violation to the DP owners, and brief consideration was given to the possibility of remanding the matter to DBF Ultimately, the AAB voted to uphold the abatement orders. (CT, Vol. 3, p. 772.)

WSHOA and the 2320-22 Divisadero Street owners filed a request for rehearing. They offered new historical evidence that the DP property was developed before the upslope properties at WSHOA and 2320-22 Divisadero Street, as well as new survey evidence indicating that "the retaining wall existed on the DP property in areas where the wall was not bowing." The AAB denied the request for rehearing. (CT, Vol. 3, p. 772.)

***7** WSHOA and the 2320-22 Divisadero Street owners filed petitions for a writ of administrative mandamus and declaratory relief against DP and its owners. The pleadings sought declarations that the city did not determine the private parties' rights and duties inter se, and that DP and its owners have a duty to maintain the wall. The Harper Trust intervened in the proceedings initiated by WSHOA and its owners and filed a pleading also seeking a writ of administrative mandamus against the city and declaratory relief against DP and its owners. (CT, Vol. 3, p. 772.)

The city demurred to the petitions filed by WSHOA and the Harper Trust. It argued it had no duty "to identify each and every party legally responsible" for the wall, or to include DP and its owners in the proceedings, and had not been asked to make, or made a legal determination of ownership." The city noted petitioners' alternative remedy in the form of equitable relief against DP and its owners.

In response to the city's demurrer, WSHOA filed a conditional non-opposition asking the court to find that the city had not decided the private parties' rights or duties, to sustain the demurrer, and let WSHOA pursue its equitable relief claims against DP and its owners. Without making any findings the court sustained the demurrer without leave to amend. WSHOA did not seek appellate review of this order. (CT, Vol. 3, p. 773.)

The city subsequently demurred on the same grounds to the two remaining writ petitions of the Harper Trust and the owners of 2320-22 ***8** Divisadero Street. The court sustained the city's demurrers without leave to amend and the Harper Trust and the owners of 2320-22 Divisadero Street filed appeals in the case of *Eric Widen v. City & County of San Francisco*, Appellate Case No. A155075, A155078. (CT, Vol. 3, p. 773.)

In considering the appeals in *Eric Widen v. City & County of San Francisco*, Appellate Case No. A155075, A155078, this court stated that the ultimate issue to be determined on these appeals whether the city should have included DP and its owners in the city's issuance of NOVs and its administrative abatement orders. This court further stated, "If, as appellants contend, legal responsibility for the necessary repairs is shared, appellants' recourse, if any, lies in their pending claims for declaratory relief or indemnity against DP and its owners." (CT, Vol. 3, p. 770.)

In concluding its opinion *Eric Widen v. City & County of San Francisco*, Appellate Case No. A155075, A155078, this court further stated, "whatever views may have been expressed during the hearing before the board, the orders affirmed by the board determine only that appellants are obligated to abate the nuisance. The orders make no determination of the liability of others, or of the appellants' right, or lack of a right, to be indemnified by others." (CT, Vol. 3, p. 778.)

WSHOA's declaratory relief claim was subsequently dismissed without any factual or legal determination of the merits of the claim on October 20, 2022. (CT, Vol. 1, pp.19 - 24.) However, WSHOA's ***9** declaratory relief claims and this issue have been raised by WSHOA in its affirmative defenses to DP's Cross-Complaint. (CT, Vol. 1, pp. 45-49.)

C. The Pleadings: DP's Cross-Complaint and WSHOA's Amended Answer

On October 11, 2017, DP filed a Cross-Complaint against WSHOA, and the owners of 2320-2322A Divisadero Street (Eric Widen, Rebecca Widen, David Lang, and Gwen Lang.)

In their cross-complaint DP alleged two causes of action, one for public nuisance, and the other for private nuisance. Based on these two causes of action, DP sought to recover a mandatory injunction requiring WSHOA and the 2320-2322A Divisadero Street homeowners to abate the NOVs and repair the L-shaped retaining walls that boarder the parties' property lines, damages, and costs of suit. (Clerk's Transcript hereinafter referred to as "CT", Vol. 1, pp. 31-38)

On March 28, 2018, WSHOA filed an amended answer to DP's cross-complaint. WSHOA's answer consisted of a general denial and alleged two affirmative defenses. WSHOA's first affirmative defense, alleged that DP should be estopped from asserting any claim against WSHOA because the nuisance alleged in DP's cross-complaint was caused/created by DP's own conduct in that DP has an ongoing duty to repair and maintain the retaining walls. (CT Vol. 1, pp. 46-48.)

WSHOA's second affirmative defense alleged, notwithstanding the City and County of San Francisco's orders of abatement and assessments of ***10** costs issued against WSHOA and the 2320-2322 Divisadero Street Homeowners, was not a judicial determination of the legal rights and obligations by and between the parties with regard to each property owner's duty to maintain, repair, or replace the retaining wall between the parties' properties. The retaining wall was constructed by DP's predecessors in interest for the sole benefit of the properties owned by DP for the purpose of providing a substitute means of legally required support to adjacent properties. As such, DP has a duty to maintain, repair, and/or replace the retaining wall and a continuing obligation to use due care in maintaining, repairing, and/or replacing the retaining wall. (CT Vol. 1, pp. 46-48.)

D. DP's Motion for Summary Judgment

On September 28, 2022, DP filed a motion for summary judgment/adjudication. In their motion DP argues that WSHOA created a public and private nuisance by failing to abate the City's NOVs. The failure to abate the NOVs constituted a public and private nuisance per se. The only issues for the court to determine was whether a statutory violation exits and whether the statute is constitutional. (CT, Vol. 2, pp. 359-372.)

E. WSHOA's Opposition to DP's Motion for Summary Judgment

WSHOA filed opposition papers on December 1, 2022. In their opposition, WSHOA and its individual argued that DP and its individual owners owe a legal duty to the upslope neighbors to provide lateral support resulting from excavation and that the court was required to consider the ***11** equities between the parties in before it issued a mandatory injunction. There are triable issues of fact as to who built the wall and why. In order to fully adjudicate legal claims and defenses between the parties, the court must determine who is the legal owner of the retaining walls with the obligation to repair and maintain the wall. (CT, Vol. 2, 413-427.)

In their argument in opposition, WSHOA presented admissible evidence to the court through the declaration of Brett Ferrari showing the walls in this case consist of two walls that form an L-Shape along the property lines of 2856-62 Washington Street, 2320-22 Divisadero Street, and 2308A-12 Divisadero Street. (See CT, Vol. 4., pp. 830- 888.)

The walls were built by the predecessors in interest of DP and constructed for the sole benefit of the DP owners in order to create a level lot for construction on that parcel. DP controls all access to the walls. (CT, Vol. 4., p. 831-834.) The DP lot is located at a lower elevation which is down slope from the WSHOA property and the 2320-22 Divisadero Street property. (CT, Vol. 4., p. 831-834.) In order to build on the DP lot, DP's predecessor's in interest needed to level the lot. (CT, Vol. 4., p. 831-834.) The walls at issue were most likely built by DP's predecessor's in interest during the excavation for the purpose of providing lateral support to the neighboring lots that sit up hill which are 2856-62 Washington Street property and the 2320-22 Divisadero Street property. (CT, Vol. 4., p. 831-834.) This is based on the lower elevation and slope of the DP lot as well ***12** as the construction and location of the walls. (CT, Vol. 4., p. 831-834.) The retaining walls were built on the opposite sides of the property lines on the north and east boundaries to maximize DP's useful area. (CT, Vol. 4., p. 831-834.) This was a common land grab practice done either with or without the neighbors' consent or knowledge. (CT, Vol. 4., p. 831-834.) The properties at 2856-62 and 2320-22 Divisadero Street were built subsequent to the time when DP's predecessors in interest excavated their lot and built the walls. (CT, Vol. 4., p. 831-834.) Small portions of the foundations of 2856-62 Washington Street and 2320- 22 Divisadero Street were built on top of the existing retaining walls. (CT, Vol. 4., p. 831-834.) This is not a preferred foundation condition and indicates that the two buildings at 2856-62 Washington Street and 2320- 22 Divisadero Street were built after the walls were constructed. (CT, Vol. 4., p. 831-834.) The downward pressure of the foundations stabilizes the portions of the walls on which they sit. (CT, Vol. 4., p. 831-834.) This is why there is no existing damage to these areas of the walls. (CT, Vol. 4., p. 831-834.) The portions of the walls that are failing and subject to the City's NOV are located in the areas that are not under the building foundations of 2856-62 Washington Street and 2320- 22 Divisadero Street properties. (CT, Vol. 4., p. 831-834.) It is unrealistic to suggest that the DP property was excavated for the sole purpose of providing a foundation to the 2856-62 Washington Street and 2320- 22 Divisadero Street properties. (CT, Vol. 4., p. 831-834.) ***13** It is clear from the topography of the subject properties that the retaining walls were built solely for the benefit of the DP property, which is the lower elevated property. (CT, Vol. 4., p. 831-834.) There is no reason for the WSHOA and 2320-22 Divisadero Street owners to excavate a neighboring lot that they do not own or control. (CT, Vol. 4., p. 831-834.) It appears that there have been previous attempts to repair and maintain the failing portions of the walls from the DP side. (CT, Vol. 4., p. 831-834.)

There is visible plaster parge coat in the cracks in the walls from the DP side. (CT, Vol. 4., p. 831-834.) It is reasonable to conclude that the various attempts to repair and maintain the walls were performed by the DP owners' predecessors in interest. (CT, Vol. 4., p. 831-834.) This is based on the fact that the DP owners control access to the walls and the fact that the attempts to repair and maintain the walls were done to the side of the walls controlled by DP. (CT, Vol. 4., p. 831-834.) It is also based on the fact that the DP owners have reportedly not performed any maintenance on the walls during their ownership. (CT, Vol. 4., p. 831-834.) The current retaining walls are in need of some deferred maintenance. (CT, Vol. 4., p. 831-834.) It does not appear that the condition of the walls are getting worse and there is no indication that “failure is imminent”, due to the current longevity of the walls and their survival of major and minor earthquakes over the past 125 years. (See CT, Vol. 4., pp. 830-888.). This evidence was ignored by the court. (CT, Vol. 4, 915.)

***14 F. The Hearing on DP's Motion for Summary Judgement**

The superior court held a hearing on DP's motion for summary judgment on December 15, 2022. During the hearing WSHOA's attorneys informed the court that notwithstanding the existence of the nuisance condition established by the City's NOVs, the court was obligated to consider the equities of the parties in fashioning equitable remedy based on the factual circumstances present in the case. WSHOA asserted equitable defenses alleging that DP has a continuing legal duty to repair and maintain the wall and that the nuisance condition present in the walls was caused by DP's failure to carry out that duty. Thus, the court should consider this fact in fashioning an equitable remedy between the parties. (CT, Vol. 4, pp. 950-955.)

G. The Court's Order Granting Summary Judgment

On January 10 2023, the superior court issued an order granting summary judgment in favor of DP as against WSHOA and the 2320-22 Divisadero Street owners. The superior court ruled that DP had shifted their burden and Cross-Defendants failed to create a triable issue of material fact with competent admissible evidence regarding nuisance. Therefore, DP is entitled to judgment against WSHOA and Divisadero Street Cross-Defendants as a matter of law. (CT, Vol. 4, p. 912.)

Among the findings in support of its ruling, the superior court found that, the foundation walls of WSHOA and 2320-22 Divisadero Street form ***15** an L-shape around the DP property. (CT, Vol. 4, at pp. 912-13.). This finding implies that WSHOA and 2320-22 Divisadero Street owners own the walls. Ownership was a fact that was clearly disputed by the parties in the proceedings.

The court also found the defects in the walls have caused those walls to bow and bulge over the property line of 2308A-12. Divisadero Street, and therefore encroach on to [DP's] airspace." (CT, Vol. 4, at pp. 912-913.)

In concluding the ruling, Judge Haines added a hand written provision that states: "The ruling on the motion for summary judgment/adjudication is limited to the sole cause of action before the court - nuisance. No other issues were before the court on this motion. The court does not rule on any objections since the objections are not relevant to this decision." (CT, Vol. 4, 915.)

H. The Notice of Appeal

On January 12, 2023, WSHOA filed a notice of appeal. (CT, Vol. 4, p. 927.)

III.

STATEMENT OF APPEALABILITY

The court's order granting summary judgment in favor of DP as against WSHOA is appealable as an order granting summary judgment and on the grounds that it grants an injunction. (Code of Civ. Proc., § §904.1(a)(1)and(6).)

***16 IV.**

STANDARD OF REVIEW

Summary judgment is proper only when the papers submitted show there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ.Proc., § 437c, subd. (c).) A plaintiff seeking summary judgment must sustain the burden of proof on all theories of its complaint and must also negate all issues raised by the answer and cross-complaint. (*Hayward Union etc. School Dist. v. Madrid* (1965) 234 Cal.App.2d 100, 120.)

"Appellate review of summary judgment is limited to the facts presented in documents submitted to the trial court…The appellate court exercises its independent judgment regarding the legal effect of undisputed facts disclosed by the parties' papers, utilizing the same three-step analysis required of the trial court… [Courts] first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, [courts] determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, [it] determines whether the opposition demonstrates the existence of a triable, material factual issue." (*Antonopoulos v. Mid-Century Insurance Company*, 63 Cal. App. 5th 580, 277 (1st Dist. 2021.).)

If the trial court has erred, either in failing to find a triable issue of fact where there is one, or in failing to apply undisputed facts to a correct ***17** principle of law, then the judgment must be reversed. (*Khan v. Shiley Inc.*, 217 Cal. App. 3d 848, 854, (4th Dist. 1990).

Where the ultimate facts are undisputed, whether a permanent injunction should issue becomes a question of law, in which case the appellate court may determine the issue without regard to the conclusion of the trial court. [Citations.] (*Monterey v. Carrnshimba, (2013)* 215 Cal.App.4th 1068, 1081.)

V.

LEGAL ARGUMENT

A. THE TRIAL COURT ERRED BY GRANTING INJUNCTIVE RELIEF WITHOUT CONSIDERING THE EQUITIES OF THE PARTIES.

In this case it is undisputed that the City of San Franciso issued Notices of Violations and declared that the condition of the foundation/retaining walls made them unsafe and therefore a nuisance.

However, finding that a nuisance exists is only the first step of the analysis on the road to relief, regardless of whether it is classified as a nuisance per se, public or private. It should be noted that the order of the court confirms that the nothing further was considered in a handwritten note authored by Judge Haines on the bottom of the order, which states:
"The ruling on the motion for summary judgment/adjudication is limited to the sole cause of action before the court - nuisance. No other issues were before the court on this motion. The court does not rule on any objections since the objections are not relevant to this decision."

***18** After finding that a nuisance exists, the court should have then considered and determined whether injunctive relief was appropriate as a remedy, and in what form. This requires that the court consider the equities of the parties which includes consideration of the facts relating to the origin, purpose, and ownership of the walls.

Here, Appellants raised and argued, under affirmative defenses supported with sufficient facts in the opposition, that they denied ownership of the wall, argued that Respondents owed a duty of lateral support and denied responsibility for repair as between the parties. These points and the evidence offered in support were ruled irrelevant by the court.

1. THE GRANTING OF INJUNCTIVE RELIEF REQUIRED EQUITABLE CONSIDERATION.

A mandatory injunction requires fact based equitable consideration. This is restated and emphasized in Witkin and many cases, including guidance from the California Supreme court:
"An action seeking the remedy of a permanent injunction is equitable in nature and triable by a court having equity jurisdiction and sitting without a jury."

(a) [§ 267] In General., 6 Witkin, Cal. Proc. 6th Prov Rem § 267 (2022)

"A permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant, and that equitable relief is appropriate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 642; [§ 267] In General., 6 Witkin, Cal. Proc. 6th Prov Rem § 267 (2022); ***19** 2 Cal. Proc. (6th), Jurisdiction, § 50; 3 Cal. Proc. (6th), Actions, § 137; infra, § 280.)

California adheres to the rule, particularized to injunctive relief, that "[i]njunction 'is an extraordinary power, and is to be exercised always with great caution"' (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1040.)

"Injunction is the method of abatement in equity, and the most frequent instances of employment of mandatory injunction include the removal of nuisances. 14 R.C.L. p. 315 et seq. It appears that one who suffers damage from a continuing nuisance has two causes of action and two remedies; the one, a suit for damages which is an action at law, and the other, a suit to enjoin or abate the nuisance, which is in equity; and he may pursue either or both at his election, and may prosecute separate actions concurrently, or may join both causes of action in one suit. (internal citations omitted)"

(*Katenkamp v. Union Realty Co.*, (1936) 6 Cal. 2nd 765, 776)

"It is the general rule in this state that while the right to injunctive relief under proper circumstances is well established, its issuance is largely discretionary with the court and depends upon a consideration of all the equities between the parties. No hard and fast rule can be adopted which will fit all cases and hence each must be determined upon its own peculiar facts [citation]."

(*Pahl v. Ribero* (1961) 193 Cal.App.2d 154, 161.)

2. THE SUPERIOR COURT IS REQUIRED TO MAKE EQUITABLE CONSIREATIONS BETWEEN THE PARTIES WHEN THERE IS AN ENCROACHMENT.

One of the findings in the superior court's order granting summary judgment in favor of DP as against WSHOA is that an encroachment exists. The court's order states: "The reasons the Court's order, and the evidence in support of those reasons are as follows: … The defects in the walls have caused those walls to bow and bulge over the property line of 2308A-12 ***20** Divisadero Street, and therefore encroach on to [DP's] airspace." (CT, Vol. 4, at pp. 912-913.)

In considering encroachments, the court is also called upon to exercise equitable consideration:
"It is our view that the better reasoned cases hold that in encroachment cases the trier of the fact possesses some discretion in determining whether to grant or to deny the mandatory injunction. In exercising that discretion, and in weighing the relative hardships, the court should consider various factors. It starts with the premise that defendant is a wrongdoer, and that plaintiff's property has been occupied. Thus, doubtful cases should be decided in favor of the plaintiff. In order to *deny the injunction, certain factors must be present:* 1. Defendant must be innocent - the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant. But where these factors exist, the injunction should be denied, otherwise, the court would lend itself to what practically amounts to extortion.' [Emphasis supplied.]"

(*Pahl v. Ribero*, 193 Cal.App.2nd 154, at p. 163, citing: *Christensen v. Tucker*, 114 Cal.App.2d 554, at pages 562-563.)

Thus, in finding that an encroachment exists and deciding whether to issue injunctive relief, the superior court was required to consider the factors set forth in by this court *Pahl v. Ribero*, 193Cal. App. 2nd154, at p. 163. Here, the superior court clearly ignored the evidence submitted by WSHOA on this point. (See CT, Vol. 4, 911-915.)

***21 3. RESPONDENTS RELY ON CASES OF GOVERNMENTAL ENFORCEMENT WHICH ARE UNIQUE EXCEPTIONS TO THE GENERAL RULE.**

Respondents argued to the court that because there was a nuisance per se, the normal requirements of equitable consideration discussed above do not apply and the court need not consider any evidence on the subject of equity or the defenses raised by Appellants. To justify that argument, Respondents ignored the general rule as between private parties and cited cases of enforcement by appropriate government agencies exercising an express enforcement power given to them by law.

In support of their "nuisance per se" argument, DP relied upon the following cases: *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087; and *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1166 and dicta from *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1207 - citing *City of Costa Mesa v. Soffer*, (1992) 11 Cal.App.4th 378, 382;

Those cases and quoted statements of the law are not applicable here because they stand for a public policy driven rule that applies in government enforcement actions where a government agency has initiated an enforcement action against a private party. As the California Supreme Court has explained:
"It is sometimes difficult to determine which of these rules is applicable in a particular case. It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to ***22** defeat the effective operation of a policy adopted to protect the public. *See Miller v. McKinnon*, 20 Cal.2d ,3, 124 P.2d 34, 140 A.L.R. 570, and cases cited therein; *Pan American Petroleum Co. v. United States*, 273 U.S. 456, 505, 506, 47 S.Ct. 416, 71 L.Ed. 734; *American Surety Co. of N.Y. v. United States*, 10 Cir., 112 F.2d 903, 906."

(*San Diego County v. California Water & Tel. Co.* (1947) 30 Cal.2d 817, 826.)

This rule was again stated and followed in *People ex rel. Dept. of Transportation v. Outdoor Media Group*:
"Equitable defenses such as estoppel do not apply because the Act defines OMG's violation as a nuisance per se. "[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public."

(*People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1078.)

However, in enforcement actions between private parties, the court is required to make equitable considerations between the parties in granting an injunction to abate a nuisance.

DP has primarily relied on the case of *Beck Development Corp v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160 for the proposition that once a legislative body declares a particular condition to be a nuisance, a nuisance per se is established and the only issues for the for the court to consider are whether a statutory violation occurred and whether the statute is constitutional. (CT, Vol., p. 368, lns 4-14.) However, on closer examination, this language was dicta repeated from an enforcement ***23** case, *City of Costa Mesa v. Soffer*, (1992) 11 Cal.App.4th 378, 382. The court in Beck found no nuisance and issued no injunction.

The *Beck Development Co.* case involved action that *Beck Development Co.* initiated against the government and a prior owner who was private party. On appeal, the court determined that no nuisance per se had been demonstrated. In ultimately discussing *Beck Development Co.'s* right to an injunction, the court found that it was barred from obtaining relief by the defense of consent and statute of limitations. (*Beck Development Corp. v. Southern Pacific Transportation*, 44 Cal.App.4th 1160, 1214-15.) In arriving at this conclusion, the court examined and considered the factual history between the parties as well as the origin of the nuisance condition. That examination should have been performed in this case, but it was not. It was ruled to be irrelevant.

DP does not cite any case law wherein in the court granted a mandatory injunction based on "nuisance per se" as between private parties where the court ignored equitable considerations between the parties.

B. THE COURT ERRONEOUSLY MADE A FINDING REGARDING OWNERSHIP OF THE WALLS WHEN THIS FACT WAS CLEARLY IN DISPUTE.

The court's order states: "The reasons the Court's order, and the evidence in support of those reasons are as follows: … The foundation walls of [WSHOA] and 2320-22 Divisadero Street form an L shape around [DP]." (CT, Vol. 4, at pp. 912-913.)

***24** This statement appears to be a finding by the superior court that WSHOA and the owners of 2320-22 Divisadero Street own the walls in this dispute.

The legal ownership over the walls was clearly put in dispute by the parties. (See CT Vol. 1, p. 36, lns 2-5 - DP Cross-Complaint denies ownership over the walls and denies WSHOA right to contribution. CT, Vol. 3-4, pp. 578-665 - DP denies ownership of walls in responses to request for admissions; CT Vol. 1, p. 45-49 - WSHOA denies ownership and obligation to repair and maintain walls in Amended Answer to Cross-Complaint; CT, Vol. 3, pp. 828-888 - Decl. of B. Ferrari; CT, Vol. 2, pp. 442-443 - WSHOA Sep. Statement of Fact.)

Thus, to the extent that this finding can be construed as a finding that WSHOA and the 2320-22 Divisadero Street owners are the legal owners of the walls, it was an error for the court to ignore the material factual dispute and make such a finding.

C. RESPONDENTS OWE AN UNDENIABLE DUTYTO PROVIDE LATERAL SUPPORT WHICH REQUIRES THEM TO MAINTAIN THE WALLS.

In opposing the motion, Appellants submitted considerable evidence, reflected in the record, demonstrating that the wall they are now ordered to repair was built by DP's predecessors in interest to provide lateral support to Appellants' land after DP's predecessors in interest excavated their land to create a better building site. All evidence on this point was erroneously ***25** ruled irrelevant and excluded from consideration. The legal significance of that evidence is discussed here.

Under Civil Code section 832, a property owner who excavates his or her own land has a legal responsibility to provide lateral support for neighboring property. Section 832 provides:
"Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement" (Civ. Code § 832)

One who negligently withdraws lateral support of another's land is subject to liability for harm resulting to the land. (*Lee v. Takao Building Development Co.* (1985) 175 Cal.App.3d 565,568.) "Whoever negligently deprives a landowner of the support for his land performs an unlawful act, and [the] general rule is that all who unite in such acts are wrongdoers and are responsible in damages." (Id. at p. 569, italics omitted; see *Wharam v. Investment Underwriters* (1943) 58 Cal.App.2d 346, 349 [no person may use their property so negligently as to cause damage to or destruction of his neighbor's property].) Conversely, a landowner is not

responsible for damages if they took title and possession after the act causing the removal of lateral support and uncontrovertibly did not participate in the act that resulted in the removal of support. (Ibid.)

In *Sager v. 0 'Connell* (1944) 67 Cal.App.2d 27, plaintiff brought an action for abatement of a nuisance alleging that his adjoining up-slope neighbor had permitted a wall erected on its property to become decayed ***26** resulting in dirt and debris to fall onto its down-slope property. Defendant cross-complained contending that its property was at its natural level and that the previous owner of plaintiff's property had excavated and built the wall for purposes of providing lateral support to which defendant's property was entitled. (Id. at pp. 29-30.) Defendant further alleged that plaintiff had permitted the wall to become decayed causing dirt and debris from its up-slope property to fall onto plaintiff's property. (Id. at p. 30.)

The court found that the evidence supported the conclusion that plaintiff's down-slope property had been excavated and a bulkhead (retaining wall) had been built on plaintiff's property for the purpose of providing lateral support. (*Sager*, supra, 67 Cal.App.2d at p. 30.) The court also ruled that a subsequent purchaser of the land can be liable for the removal of lateral support caused by the excavation of a previous owner when he or she is guilty of some act of negligence in connection with the lateral support of the adjoining property.

In *Sager*, the court found a subsequent purchaser liable for the deterioration of a bulkhead (retaining wall)[1] because the owner negligently permitted lateral support to weaken. (Id. at p. 32.) There, the court held that "[t]he fact that a prior owner was negligent in permitting the bulkhead to ***27** decay will not excuse a subsequent owner from a continuing negligence." (Id. at p. 33.)

In the instant case, the facts remarkably resemble the *Sager* case. Here, Divisadero Place (cross complainant down-slope owner) has brought a claim for, among other things, abatement of nuisance against its up-slope neighbors, cross defendants. Divisadero Place contends that the Wall is owned by cross defendants. Cross defendants contend that cross complainant Divisadero Place has ownership and sole responsibility for the Wall because of its history and the ongoing duty to provide lateral support.

Here, Respondents' predecessor-in-interest fulfilled its responsibility to provide lateral support by erecting the Wall to support the up-slope properties after excavating the hillside. As evidenced by the survey and report of Engineer Brett Ferrari, that predecessor also encroached by either negligently or intentionally building the wall on the opposite side of the property line so it lies within the property of Appellants.

While DP posits various theories as to who built the Wall and who is responsible for it, each is unavailing. The facts and circumstances of this case all support the conclusion that the DP's predecessor-in-interest excavated the property and erected the wall to provide lateral support. This court has even stated so in its opinion in *Eric Widen v. City & County of San Francisco*, Appellate Case No. A155075, A155078. (See CT Vol. 3, p. 771 - "Sometime in the 1890s, the owners of Divisadero Place flattened ***28** their lot and build the retaining wall, preserving lateral support for the two upslope lots.")

WSHOA requested judicial notice of this opinion. (CT, Vol. 2, pp. 436-438.) However, it was ignored by the superior court.

No contrary evidence has been presented to show that the portion of the wall which is failing served any purpose other than to provide lateral support for the up-slope property. There are other portions of the wall on which buildings were later built, and as to which some shared responsibility might be argued, but those portions are not failing or in need of repair.

The evidence indicates that absent excavation there would be no need or reason for the walls. It remains the responsibility of DP to use due care in maintaining the walls built by its predecessors to avoid harming the up-slope properties. (See *Sager*, supra, 67 CalApp.2d 27.)

Under the rule stated in *Sager*, DP has the responsibility to repair the wall because allowing it to decay constitutes continuing negligence and a failure to provide lateral support. (Id. at pp. 32-33.) This clearly should have been considered by the court before issuing any injunctive relief.

D. CONCLUDING ILLUSTRATION BY ANALOGY

To illustrate the oversight in the superior court's ruling and application of law, we offer the following example:

***29** Let us suppose that a property owner excavates their property, finds toxic material, and then simply dumps the toxic material on their neighbor's property. Now the innocent neighbor's land has toxic materials on it. Let's say the excavating and dumping neighbor then calls the city to report their fear of the dangerous toxic material on their innocent neighbor's land.

Performing its duty regarding the existence of a dangerous condition, the city inspects and then issues a notice of violation to the neighbor on whose land the toxic waste is now located. The condition would, as here, be established as nuisance per se by the city order, and the city could compel a cleanup including obtaining injunctive relief by way of enforcement. Unlike a private injunction request, there are no equitable defenses to a government enforcement action. The innocent neighbor would be compelled to clean up the mess on his property. As noted in the decision of this court on the appeal of *Eric Widen v. City & County of San Francisco* Appellate Case No. A155075, A155078 cited above, the city enforcement does not adjudicate the rights as between the private parties as to ultimate responsibility.

But, as noted in that decision, as between the neighbor who excavated and dumped and the innocent neighbor, the court would ultimately give due consideration in law and equity as to who would bear responsibility. WSHOA raised these issues before the superior court and the superior court failed to give them any consideration.

***30 VI.**

CONCLUSION

The affirmative defenses raised by WSHOA create triable issues of fact. The superior court erred by failing to consider the equities between the parties before granting a permanent injunction to abate the nuisance condition. The superior court's order granting summary judgment should be reversed.

Respectfully submitted,

Dated: August 22, 2023

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Footnotes

1 The Encarta Dictionary defines a bulkhead as a retaining wall: "a wall built to hold back something, for example, water or soil."