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A TALE OF TWO PROCEEDINGS

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What if a private person were to trespass on your property to see if you *might* be violating coastal regulations? If evidence were obtained as a result of the trespass, would it be admissible by the California Coastal Commission in an enforcement action and later in court, or would it be a Fourth Amendment violation as an unreasonable search?

What if, when challenged in court, the trespassers file an anti-SLAPP motion claiming that they were merely exercising their freedom of speech in reporting you to the Coastal Commission?

These two issues recently arose in a case where The Zumbrun Law Firm represents the property owners against both the Coastal Commission and two trespassing neighbors.

The property owners bought 40 acres of undeveloped land in the Santa Monica Mountains located in Southern California. They wanted to expose their children to hiking, camping, gardening and recreational activities in a rural setting away from the hubbub of city life.

When they purchased the property, it had an abandoned asphalt road across it that had been used to go up the hillside property to a clearing that was perfect for agriculture. Since the goal was to get back to nature, there

was no intent to build any structures. So the family put themselves to work clearing out the road that was now covered with brush, dirt, rocks and a few encroaching tree branches.

At times they brought in a backhoe to deal with the more difficult areas. This created noise, which caught the attention of a neighbor employed by the National Parks Service. Since the time of purchase, the site was signed "No Trespassing" and had a gate and fence to further discourage trespassers.

One day the neighbor and her husband entered the property to see what was going on. They went around the gate and the "No Trespassing" sign, thus knowingly trespassing. While on the property, they took pictures of the cleanup work. Next, using her National Park Services e-mail account at work, the wife e-mailed the Coastal Commission and complained that our clients were building a new road without a permit. The neighbors admitted that they had trespassed. The Commission's staff admitted in a sworn statement that they "located the entrance to the property, but were unable to see much because very little of the property is visible from the public road."

Subsequently, without independent corroboration, the Coastal Commission commenced an enforcement proceeding which

eventually ended up in court. The first court proceeding sought a writ of mandate dealing with the trespass issue.

Our firm argued that the bulk of the evidence adduced by the Commission was the result of trespass, forcible entry, and hearsay and therefore cannot be considered “substantial evidence” of unpermitted development. Substantial evidence is evidence that is reasonable in nature, credible, and of solid value, and relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Commission’s reliance on evidence taken as a result of trespass on private property, evidence taken as a result of forcible entry in violation of a civil inspection warrant, the hearsay allegations of an anonymous “neighbor,” and use of unauthenticated photographs all fail to meet the standard of evidence reasonable in nature, credible, and of solid value. (See *Ashford v. Culver City Unified School District* (2005) 130 Cal. App. 4th 344, 349, 350; *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 [uncorroborated hearsay does not constitute substantial evidence].)

Ultimately, the mandate judge ruled that “[p]etitioners also contend that certain evidence was obtained from trespassing on petitioners’ property and therefore it is not admissible as evidence in an administrative proceeding. Petitioners cite no authority for the existence of any such exclusionary rule, and the court knows of none.”

The case then moved from the mandate court to a trial court for another proceeding--damages against the neighbors for trespassing. In their defense, the neighbors filed an anti-SLAPP (strategic lawsuit against public participation) motion under Code of Civil Procedure § 425.16, relating to claims arising from a permissive exercise of the constitutional right to free speech. A SLAPP suit is where someone wants to punish someone else for his or her exercise of free speech such as testifying against a property

owner’s request for a permit. Section 425.16 is intended to protect against lawsuits brought primarily to chill the valid exercise of the constitutional right of free speech.

An act in furtherance of a person’s right of free speech in connection with a public issue includes any written or oral statement or writing made before a legislative, executive or judicial proceeding or any other official proceeding authorized by law. This protection includes the constitutional right of free speech in connection with a public issue or an issue of public interest.

Filing such a motion brings the lawsuit to an immediate stop. The court will then determine whether the plaintiff has established a probability of prevailing on the claim. If not, the action is dismissed and the defendant is awarded attorney fees and costs.

The trespassers filed their anti-SLAPP motion, contending that their communication to the Commission was protected speech and that trespassing was necessary to their exercise of free speech.

In opposing the anti-SLAPP motion, the property owners argued that their complaint does not implicate the trespassing parties for reporting their illegally obtained observations to the Coastal Commission. Their complaint seeks remuneration for the unlawful entry onto their private property, without their knowledge or permission, and for the damage done as a result. The principal thrust or gravamen of the claim determines whether section 425.16 applies. The property owners argue that the gravamen of the claim is the illegal trespass.

The trial court ruled as follows on the anti-SLAPP motion: “Under the anti-SLAPP statute, a court is required ‘to engage in a two-step process: First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity . . . If the court finds such a showing has been made, it then determines whether the plaintiff has

demonstrated a probability of prevailing on the claim. On a motion brought pursuant to Code of Civil Procedure § 425.16, the moving party bears the initial burden of showing that the action falls within the class of suits subject to the special motion to strike. The defendant need not first establish that his or her actions are constitutionally protected under the first amendment as a matter of law. However, a defendant is required to make a prima facie showing that plaintiff's suit arises from any act of defendant in furtherance of the right to petition or the right of free speech under the federal or state constitution in connection with an issue of public interest. Thus, 'the act which forms the basis for the plaintiff's cause of action must itself have been an act in furtherance of the right of petition of free speech.'" (Citations omitted.)

"Turning to the seventh cause of action for trespass, the Court finds that this cause of action does not arise from protected activity. Trespass itself is not a protected activity under the anti-SLAPP statute. Defendants try and categorize the cause of action for trespass as part of the investigation undertaken in order to gather information needed to report the allegedly unlawful activities of Plaintiffs to the Coastal Commission. They also argue that the cause of action for trespass (or at least the damages claimed) is really based on the reporting of the information to the Coastal Commission, and not the actual trespass itself. These arguments are not persuasive." (Citation omitted.)

"The petition for writ of mandate ... undoubtedly alleges physical trespass, which, as noted above, is not a protected activity. However, it also alleges damages based on the reporting of the information discovered both through the trespass and through observations made without trespass. Thus, to the extent that this cause of action can be categorized as a mixed cause of action—that is, a cause of action which involves both protected (reporting to the Coastal Commission) and

unprotected activities (trespass)--the Court finds that the protected activity alleged is merely incidental to the unprotected activity. The only reference in the complaint to the communication to the Coastal Commission is in the damages sought where, among other things, Plaintiffs allege they were damaged by the actions taken by the Coastal Commission on the basis of the information discovered through the alleged trespass. However, this is just one of several injuries allegedly sustained by Plaintiffs. They also allege annoyance and mental suffering as a result of the trespass itself, and not as a result of the communication." (Citations omitted.)

A third proceeding now follows, which will be the full trial on all the remaining issues in this case and includes inverse condemnation (whether a regulatory action by a governmental entity that goes too far constitutes a compensable taking without due process of law), trespass of land, and civil rights violations for an award of damages. The trial has been scheduled for the fall of 2009.

The right to exclude others has long been the most jealously guarded component of property rights. It is encouraging, to say the least, that the court in this case recognized the grave implication of a ruling which would sanction not reward trespass on private property.

**Ronald A. Zumbrun is Managing Attorney of The Zumbrun Law Firm, a Sacramento-based public issues firm. Zumbrun's column appears in the Daily Recorder on the second Monday of each month. The firm represents the two property owners who are involved in the subject litigation. You can learn more about The Zumbrun Law Firm at www.zumbrunlaw.com.*