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## Neighboring or Trespassing? Equitable Easement and Portable Patio Furniture

By Ronald L. Richman

A landowner who uses a portion of his neighbor's property without permission is a trespasser. An exception to this general rule occurs when the trespasser's use of his neighbor's property meets the legal requirements of a *prescriptive easement*, or the legal right of a trespasser to use a portion of his neighbor's property. A prescriptive easement arises when a trespasser's use of his neighbor's property is open, notorious, continuous, and adverse for a period of at least five years.

If the trespasser's use of a portion of his neighbor's property does not meet the requirements for a prescriptive easement, a court has the power to grant an *equitable easement*. An equitable easement allows the trespasser to continue to use a portion of the neighbor's property in exchange for a payment to the neighbor in an amount set by the court.

The right to exclusive ownership and possession of one's land is a fundamental property right. Therefore, when deciding whether to grant an equitable easement, courts will balance the hardship on the trespasser resulting from denial of an equitable easement with the hardship on his neighbor resulting from the loss of use of a portion of his property. If the hardship to trespasser is greatly disproportionate to the hardship of the neighbor, an equitable easement will be granted.

### The disputed land and the patio furniture

*Shoen v. Zacarias* (2015) 237 Cal. App. 4th 16 illustrates the point. Shoen and Zacarias are neighbors and own adjacent parcels of land on a hillside. There is a small flat patch of land, approximately 500 square feet in area, between the two properties. This small flat patch of land is owned by Shoen but accessible primarily from Zacarias's property. When Zacarias purchased her property in 2003, she thought this patch of land was on her property. In 2005, she placed portable patio furniture on it, but did not build or place any type of permanent structure on it. In 2006, Shoen learned of Zacarias's use of this patch of land but said nothing to Zacarias until 2011 when she demanded Zacarias remove the patio furniture.

### The litigation in the trial court

When Zacarias refused to remove the patio furniture, Shoen sued for trespass, nuisance and ejectment, seeking damages against Zacarias and the removal of the patio furniture. Zacarias defended the lawsuit on the ground she was entitled to an equitable easement on the patch of land. Zacarias also filed a cross-complaint against Shoen seeking damages and a determination that in the event she was not entitled to an equitable easement, she acquired a prescriptive easement on the patch of land. The trial court granted Zacarias a 15-year exclusive, equitable easement on Shoen's patch of land. In exchange, Zacarias was ordered to pay Shoen \$5,000. When making its decision, the court used a simple balancing test. It found Zacarias would suffer a greater hardship in removing the patio furniture than Shoen would suffer in giving up the use of a remote and basically inaccessible patch of land.

### The appeal

The California Court of Appeal reversed the trial court's decision. It held a simple balancing of equities is not the proper legal standard for a court to follow when deciding whether to grant an equitable easement. Rather, it held that to obtain an equitable easement over a neighbor's

property, the trespasser has to prove the hardship resulting from denial of the equitable easement will be *greatly disproportionate* to the hardship resulting from the granting of the equitable easement.

The Court of Appeal recognized equitable easements give the trespasser the right to take and occupy a portion of land owned by another. It reasoned such right conflicts with the Fifth Amendment to the US Constitution which provides: "private property shall not be taken for public use, without just compensation". Accordingly, it held trial courts should not reassign property rights to a trespasser merely based on a simple balancing of equities. Rather, a stricter standard must be used.

Applying the stricter standard, the Court of Appeal noted: 1) the patio furniture used by Zacarias was portable and not anchored by concrete; 2) the cost to remove the patio furniture would be less than \$300; and 3) at most, Zacarias would lose the right to use a very small patch of land. Under those facts, Zacarias would not suffer a hardship from denial of the equitable easement that was *greatly disproportionate* to the hardship Shoen would suffer being forced to give up a part of her property.

After denying the equitable easement, the Court of Appeal sent the case back to the trial court for a determination of whether Zacarias could prove the elements of a prescriptive easement on the patch of land. This issue is still pending in the trial court.

#### **A recommendation**

A significant number of property boundary disputes arise between adjacent property owners because they are either unsure about or don't know the exact location of their properties' boundary lines. Within a short time after the purchase of real property, a land survey to determine or confirm the location of the properties' boundary lines is recommended.

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