STEVE NICOLAIDIS et al., Plaintiffs and Appellants,
v.
KEVIN WECHTER, Defendant and Respondent.

D071176

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

August 14, 2017

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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(Super. Ct. No. 37-2014-00035942-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Reversed.

Mulvaney Barry Beatty Linn & Mayers, John H. Stephens and Christopher B. Ghio for Plaintiffs and Appellants.

Bryan M. Garrie for Defendant and Respondent.

In 1973, plaintiffs Steve and Zoe Nicolaidis purchased a home in a La Jolla development (the development). At that time, they enjoyed largely uninterrupted southerly views towards the Mission Bay and Point Loma shorelines. However, as the landscaping on other properties in the development matured, portions of their southerly view became obscured. By 1990, the Nicolaidises were complaining that trees on various properties to the south, including trees on the property then owned by Hector and Christina James (the property), were in violation of the landscaping height limitations imposed on lots in the development by the declaration of restrictions governing the development.

Defendant Kevin Wechter acquired the property from the Jameses in 2003, and shortly thereafter the Nicolaidises renewed their request that trees on the property be trimmed. When the Nicolaidises' requests in various contexts were repeatedly rebuffed, they filed the present action against Wechter in 2014.

The trial court severed and considered first Wechter's claim that the action was time-barred. Concluding that the applicable limitations period had run before the Nicolaidises initiated their lawsuit, the court entered judgment in favor of Wechter. Although we agree with the trial court that the applicable statute of limitations is provided by Code of Civil Procedure[1] section 336, subdivision (b), potential factual issues remain in applying that five-year limitations period which preclude a summary disposition of Wechter's affirmative defense on the applicable statute of limitations. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Development and the Properties

The development is made up of single family homes and is governed by a set of covenants, conditions, and restrictions (the CC&R's). These restrictions include, among other things, protections for views for the benefitted properties. The Nicolaidises, original owners of a home in the development, purchased their home in 1973. Wechter, the owner of the home that is the subject of this action, purchased his property

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in 2003. Wechter's property is situated several lots to the south of the Nicolaidises' property.[2] Both properties are within the development governed by the CC&R's.

B. The View Restrictions

The CC&R's state that "[n]o structures shall be placed or landscape materials allowed to grow upon any of the lots in such a manner as to substantially impair the view from adjacent lots." They also restrict hedges from exceeding 36 inches in front yard setbacks and 72 inches elsewhere and require all landscaping be "maintained in a neat and orderly condition at all times after installation."

The CC&R's declare that the owner of any property may bring an action to enforce the CC&R's, and that any violation of the CC&R's "constitutes a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable and may be exercised by . . . the owner of any of said property." Finally, the CC&R's state that "the failure to enforce any of such covenants or restrictions herein contained shall in no event be deemed to be a waiver of the right to do so thereafter."

C. Dispute over Landscaping

Wechter's property, originally purchased by the Mooshagians from the developer in 1972, was sold to the Jameses in 1977. Wechter acquired the property in 2003. Over the years, the Nicolaidises had a long history of demanding that the trees on Wechter's property, as well as other properties, be reduced to restore the views they previously enjoyed. In the early 1990's, for example, the Nicolaidises asked the Jameses (as well as neighbors of the Jameses, the Orpheys) to abide by the landscaping limitations and cut the trees down to no higher than the roof line of the house. Although the trees had been thinned through trimming, the Nicolaidises claimed their height would create a total blockage of their view once the trees filled in with new growth. There was some evidence that, during the 1990's and into the early 2000's, the Jameses (as well as the Orpheys and other neighbors in the vicinity) did cut and/or trim their trees, which temporarily restored some or all of the southerly views enjoyed by the Nicolaidises.

When Wechter purchased the Jameses' property in 2003, the trees and hedges (which had been partially trimmed prior to late 2002) had become overgrown again. Steve Nicolaidis wrote to Wechter in December 2003 asking him to trim the trees to remove the existing view blockage. Wechter responded (1) he preferred not to make any significant changes to his landscaping until he completed his landscaping plan, and (2) he would agree to trimming only if he could have sole discretion in directing the trimming and Nicolaidis agree to pay for the trimming.

The Nicolaidises continued asking Wechter to trim his trees and, periodically, Wechter did perform some trimming.[3] In November 2013 the Nicolaidises again sought Wechter's cooperation. When this was unsuccessful, however, they hired a lawyer to demand that Wechter comply with the CC&R's. In June and August of 2014, the Nicolaidises' counsel wrote to Wechter asserting that he was required to reduce his landscaping to remove the view impairments in order to comply with the CC&R's. Wechter rebuffed the Nicolaidises' demand, asserting (1) the Nicolaidis property was not an "adjacent" lot entitled to assert any view restrictions as against the Wechter property, (2) the Nicolaidises are provided with fewer protections by the CC&R's because they do not own a "view lot" within the criteria adopted in 1990 by the development's architectural and planning board, and (3) the Nicolaidises would be barred by laches from enforcing any restriction.

D. The Lawsuit and Ruling

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The Nicolaidises filed this lawsuit against Wechter in October 2014 alleging claims for breach of the CC&R's and for nuisance. Wechter pled the bar of the five-year statute of limitations under section 336, subdivision (b), as an affirmative defense, and moved to have the statute of limitations issue tried first under section 597. Although the court granted Wechter's motion and "proceeded with the special defense of the statute of limitations only," it acknowledged that "we haven't had a trial, but I don't know what more there is . . ." in light of the exhibits proffered by the parties. After considering the arguments and certain documentary evidence, the court apparently concluded Wechter had demonstrated the undisputed documentary evidence, viewed in the light most favorable to the Nicolaidises,[4] showed the action was barred by section 336, subdivision (b), as a matter of law because the actionable substantial impairment of their views was (or reasonably should have been discovered) more than five years before they filed this action. It also rejected the Nicolaidises' claim that the view impairment constituted a continuing nuisance for which the statute of limitations accrues each day. Accordingly, the court entered judgment in favor of Wechter.

DISCUSSION

The Nicolaidises contend that section 336, subdivision (b), does not apply to violations of CC&R's when such violations constitute a continuing nuisance. They claim that because Wechter's violations of the CC&R's constitute a nuisance that is abatable, their claims are not subject to any statute of limitations under the rationale of *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379 (*Cutujian*). The Nicolaidises alternatively assert that even if section 336, subdivision (b), is applicable, that subdivision specifically provides that a "failure to commence an action for violation of a restriction within the period prescribed . . . does not waive the right to commence an action for any other violation of the restriction . . . ." They contend this part of the statute demonstrates that their failure to commence an action for earlier blockages does not preclude them from commencing an action for the substantial impairment of their views occurring within five years of the date of this action.

A. Section 336, Subdivision (b), Is Applicable to the Nicolaidises' Claim

The parties do not dispute the present restriction barring "landscape materials . . . grow[ing] upon any of the lots in such a manner as to substantially impair the view from adjacent lots" is a deed restriction within the meaning of Civil Code section 784.[5] Under section 336, subdivision (b), the Legislature declared there is a five-year statute of limitations for an action alleging violation of a deed restriction, and the limitations period commences running from actual or constructive discovery of the violation.[6] (*Pacific Hills Homeowners Assn. v. Prun* (2008) 160 Cal.App.4th 1557, 1563-1564 [statute of limitations for enforcement of restriction is five years under § 336, subd. (b), and applies to both recorded and unrecorded restrictions].) A plain reading of the statute convinces us that an action by the Nicolaidises alleging violation of the restriction must be commenced within five years.

Characterizing the impairment of their view corridor is a "continuing nuisance," the Nicolaidises asserts that the five-year limitations period is of no significance because a new statute of limitations accrues each day the nuisance continues. (See, e.g., *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 106; *Kafka v. Bozio* (1923) 191 Cal. 746, 751-752.) However, the actionable conduct here is not a nuisance under California law, continuing or otherwise, because an impairment of a view corridor does not violate any obligation upon which a cause of action for nuisance may be predicated. (See, e.g., *Venuto v. Owen-Corning Fiberglas*

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Corp. (1971) 22 Cal.App.3d 116, 127 (*Venuto*) ["in this state an owner of property may construct or erect on his land any sort of structure provided it is not such as the law will pronounce it a nuisance, but it is not a nuisance merely because it obstructs the passage of light and air to the building of the adjoining owner or merely because it obstructs his view" (italics omitted)]; accord, *Taliaferro v. Salyer* (1958) 162 Cal.App.2d 685, 690 [obstructing view not actionable as nuisance]; *Pacifica Homeowners' Association v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1156 [rights to unobstructed views can only be created by agreement, statute or governmentally imposed conditions].) The Nicolaidises cite no authority (apart from *Cutujian*) suggesting that a party who engages in conduct that would not be actionable independent of a contractual undertaking can be liable for maintaining a nuisance merely because such conduct interferes with the use and enjoyment of another person's property. We are persuaded instead that the Nicolaidises' action can only be predicated on breach of a *contractual* limitation on Wechter's free use of his property—the restriction created by the CC&R's—which falls squarely within the provisions of section 336, subdivision (b).[7]

Relying on *Cutujian*, *supra*, 41 Cal.App.4th 1379, the Nicolaidises assert that a continuing breach of the CC&R's is also deemed a continuing nuisance for which no statute of limitations applies. In that case, a vacant lot suffered damage in the late 1970's but remained vacant until the plaintiff acquired it in 1988. A covenant "imposed upon the [defendant] an affirmative duty to maintain the slope areas in the development in a neat and safe condition, a duty which included 'the repair and replacement of landscaping and improvements *when necessary or appropriate* . . . .' " (*Id.* at p. 1387.) In conjunction with making plans to build on the lot, the plaintiff demanded that the defendant repair the damage. (*Id.* at p. 1382.)

Cutujian arose prior to the enactment of section 336, subdivision (b), when an action asserting violation of CC&R's was treated as an action arising from a written instrument such that the applicable limitations period was four years. (*Cutujian*, *supra*, 41 Cal.App.4th at p. 1385.) The Court of Appeal noted that "[t]he issue in this case is not *what* statute of limitations applies to Cutujian's action, but *when* the statute of limitations commenced to run." (*Ibid.*) It observed that courts had developed three competing theories: (1) upon an actual demand for performance; (2) upon a demand for performance modified by the requirement that the demand be made within a reasonable time; or (3) there is a continuing breach as long as the duty is not performed regardless of demand. (*Id.* at p. 1386.) The court then examined the specific covenant sought to be enforced and, after noting the covenant imposed a duty to repair " '*when necessary or appropriate*' " (*id.* at p. 1387) observed that "[i]t would seem to go without saying that repair of the building pad . . . was not 'necessary or appropriate' until a purchaser of the lot actually was ready to build a residence. The pad was damaged, apparently by rainfall, before any purchaser was ready to build . . . . During all of that time, the Association had a duty to repair the building pad. However, there was little sense in doing so at times when no construction was planned." (*Ibid.*) *Cutujian* concluded that, because the CC&R's imposed a "duty . . . expressly defined as arising 'when necessary or appropriate,' " and such "duty became necessary[] by reason of a lot owner's intent to begin construction of a residence," the four-year statute of limitations was tolled until the lot owner demanded performance, and an action filed shortly after the defendant failed to perform was timely filed. (*Id.* at p. 1388.)

Only after *Cutujian* held the action was timely filed did it then opine—in dicta and with minimal discussion or analysis—that failing to repair the damage interfered with the plaintiff's use of the land and therefore

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was a nuisance. And because it was abatable through repair, the court suggested it was a continuing nuisance for which no limitations period applied.[8] (*Cutujian*, *supra*, 41 Cal.App.4th at p. 1389.) But *Cutujian* also observed that the nuisance analysis "is . . . essentially redundant in view of our conclusion that his cause of action for breach of the CC&R's was timely." (*Id*. at pp. 1389-1390.)

We decline the Nicolaidises' invitation to rely on *Cutujian* here for several reasons. First, *Cutujian* is legally inapposite because it was decided in a different statutory milieu. As noted, *Cutujian* arose before the adoption of section 336, subdivision (b), so the court was obliged to determine by judicial gloss when the four-year statute under section 337 should commence running. However, the statutory lacuna that *Cutujian* resolved—*when* the relevant period commences running—was subsequently supplanted by section 336, subdivision (b), which expressly declares that the statute begins running "from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation," rendering *Cutujian's* principal analysis obsolete. Second, *Cutujian* is factually distinguishable because the particular obligation owed was premised on the "necessary or appropriate" language of the restriction, and hence involved an obligation that was never triggered. (Cf. *Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1227 ["*Cutujian* involved performance of a CC&R's covenant not tied to a precise time . . . . Instead of being linked to any particular time, the 'necessary or appropriate' language made the obligation open-ended"].)

Finally, and most importantly, the aspect of *Cutujian* relied on by the Nicolaidises—*Cutujian's* conclusion that breach of the CC&R's is independently actionable as a continuing nuisance—was dicta. That dicta has gained no traction in any other published case and would, if followed, significantly undermine the running of the statute of limitations contemplated by section 336, subdivision (b). We reject the Nicolaidises' argument that *Cutujian* retains vitality in suggesting that breach of a CC&R provision on view impairments can be independently actionable as a continuing nuisance. Instead, we conclude the trial court correctly found that any such action must be premised on a violation of the covenant creating the restriction on view impairments, which is subject to the limitations period provided for by section 336, subdivision (b). (See *Mock v. Shulman* (1964) 226 Cal.App.2d 263, 269 [recognizing the common law doctrine of right to light and air is not recognized in California but can be created by instrument as servitude attached to the land]; accord *Ezer v. Fuchsloch* (1979) 99 Cal.App.3d 849, 862 [view obstruction restrictions enforced as restrictive covenants].)

B. In Applying Section 336, Subdivision (b), Factual Issues Remain

Although we conclude the trial court correctly *selected* the appropriate statute of limitations, this does not end our inquiry. We must also examine whether the trial court correctly *applied* the statute in light of the limited record before us when it ruled, as a matter of law, the statute of limitations had expired on the Nicolaidises' action.

We begin by noting that section 336, subdivision (b), after requiring an action be commenced with five years from the time of actual or constructive discovery of the violation, also expressly provides that "[a] failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction . . . ." Because the specific restriction states "no . . . landscape materials [shall be] allowed to grow upon any of the lots in such a manner as to *substantially impair* the view from adjacent lots" (italics added)

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the impact of section 336, subdivision (b), on the Nicolaidises' rights is twofold. First, once the allegedly offending landscaping reached a sufficient density to qualify as a "substantial" impairment of views from adjacent lots, any claim for violation of the restriction based on that impairment would be barred under section 336, subdivision (b), after five years. However, under section 336, subdivision (b), the failure to pursue the claim for violation of the restriction based on *that* impairment would not "waive the right to commence an action for any other violation of the restriction," and therefore the Nicolaidises would not be barred from pursuing a claim based on a *different* violation of the restriction against substantial impairments of their view.

Ordinarily, the question of whether a statute of limitations has expired presents factual questions and may be decided by a court as a matter of law only when the facts are undisputed or are susceptible of only one legitimate inference. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1113; *Communities for a Better Environment v. Bay Area Air Quality Management District* (2016) 1 Cal.App.5th 715, 722.) In other contexts, the courts have recognized that factual issues as to when the plaintiff suffered the requisite appreciable injury sufficient to trigger the statute of limitations often preclude determining limitations questions as a matter of law. (See, e.g., *Adams v. Paul* (1995) 11 Cal.4th 583, 588 [where actionable harm "may occur at any one of several points in time . . . the determination is generally a question of fact"]; cf. *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1086.)

These principles apply to the Nicolaidises' claim because of the nature of the restriction they seek to enforce. The CC&R's do not preclude all landscaping, nor do they specify any definitive height limitation on landscaping. They are only violated when landscape materials grow in a manner that "substantially impair[s] the view" from benefitted properties. Whether a particular configuration of height and density of growth has reached a critical mass so as to substantially impair the view would appear to be a peculiarly factual issue and depend on all the circumstances involved. (Cf. *Petersen v. Friedman* (1958) 162 Cal.App.2d 245, 248 [whether aerials and antennae obstructed view and interfered with view easement were questions of fact]; *Seligman v. Tucker* (1970) 6 Cal.App.3d 691, 697 [whether structure violated proscription against unreasonably obstructing views from other lots is assessed in view of all the circumstances]; cf. *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 593 [whether neighbor's activities were sufficient to qualify as "substantial interference" amounting to a deprivation of the right to quiet enjoyment is a fact question precluding summary judgment].) More importantly, the key factual issue for statute of limitation purposes is *when* the critical mass occurred, and more specifically, whether the critical mass *upon which the present claim is based* was reached more than five years before the Nicolaidises' present lawsuit was filed.

In the proceedings below, the Nicolaidises' trial brief on the statute of limitations issue argued, in the alternative, that "[e]ven if the breach occurred only once—something which is practically impossible [] since each new growth creates a new violation—[Wechter] trimmed his trees in 2013 and again about four weeks ago." There was evidence that, over the years, Wechter's predecessor trimmed or laced the trees. The Nicolaidises asserted at oral argument that once Wechter's predecessor performed those trimmings and toppings, "[t]hey were not substantial impairments." They also produced evidence that Wechter again performed some trimming in 2013, and argued this "means the statute would be 2018" because "the way they're done . . . [t]hat is not a substantial impairment," and

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hence Wechter "renewed the statute of limitations in 2013 . . . ."

Thus, whatever statute of limitations may have expired for violation of the CC&R's between 2000 and 2013, the record contains some evidence (viewed most favorably to the Nicolaidises) from which a trier of fact could have concluded that violation was eliminated or cured by the 2013 trimming.[9] Because section 336, subdivision (b), specifically provides that the failure to pursue the claim for violation of the restriction (e.g. based on impairments between 2000 and 2013) would not "waive the right to commence an action for any other violation of the restriction," the Nicolaidises would not be time-barred from pursuing a claim based on a violation of the restriction if the trier of fact were to conclude that their views were restored to an insubstantial impairment but thereafter were substantially impaired anew within five years of the date this action was filed. These issues present significant factual questions that cannot, at least on this record and in this procedural context, be decided as a matter of law. A trial is required.

DISPOSITION

The judgment is reversed. The parties shall each bear their own costs on this appeal.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

Footnotes:

[1.] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

[2.] Because of the distance between the Nicolaidises' and Wechter's properties, and the fact Wechter's property is visible only in a southerly direction from parts of the Nicolaidises' home, there are disputes over whether (1) the landscaping on Wechter's property "substantially" impacts the Nicolaidises' view and (2) the Nicolaidises' property is "adjacent" to Wechter's property within the meaning the view impairment provisions of the CC&R's. Because the trial court's ruling was premised on an erroneous application of the statute of limitations, the merits of these disputed claims were not addressed below, and we do not address them on appeal.

[3.] The Nicolaidises' trial brief averred that Wechter "laced" some of the trees in 2007. They also submitted photographs showing that, in the fall of 2013, Wechter topped and laced some of the trees.

[4.] We note that, when a defendant (either by a nonstatutory motion or under section 597) interposes the statute of limitations as a complete defense and the court grants the motion based on an offer of proof as to the evidence, as it appears to have occurred here, the court's ruling may be affirmed only if the proffered evidence, even if viewed in the light most favorable to the plaintiff, shows the action is time-barred as a matter of law. (Cf. *Neff v. New York Life Ins. Co.* (1947) 30 Cal.2d 165, 167.) This is the same standard that applies to review of an order granting summary judgment on statute of limitations grounds where we assess whether the evidence, viewed most favorably to the party opposing the motion, showed the action was time-barred as a matter of law. (See *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418-419.) Although this matter was not resolved through a formal motion for summary judgment under section 437c, a similar standard of review applies. Indeed, the parties on appeal agree we should review de novo the trial court's ruling granting judgment as a matter of law.

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5. Civil Code section 784 provides " 'Restriction,' when used in a statute that incorporates this section by reference, means a limitation on, or provision affecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction."

6. Section 336, subdivision (b), establishes a five year statute for "[a]n action for violation of a restriction, as defined in Section 784 of the Civil Code. The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable . . . ."

7. The language of section 336, subdivision (b), clearly and unambiguously encompasses within its time limitations a claim for violation of a "negative easement" (Civ. Code, § 784), such as a view preservation deed restriction. However, even assuming there was any ambiguity over whether the legislative enactment was intended to preserve the ability of a plaintiff to recast a claim for violation of a deed restriction into a nuisance claim to avoid application of section 336, subdivision (b), the Law Revision Commission comments and legislative history confirm our construction that the statute was intended to apply. (See *Catch v. Phillips* (1999) 73 Cal.App.4th 648, 654 [courts may consult Law Revision Commission comments accompanying recommended legislation to ascertain intent of statute].) Section 336, subdivision (b), was enacted as part of a package of statutory changes in 1998. (Stats. 1998, ch. 14, § 3 (Assem. Bill No. 707).) In its report recommending adoption of this package of reforms, including section 336, subdivision (b) (see *Marketable Title: Enforceability of Land Use Restrictions*, 26 Cal. Law Revision Com. Reports 289 (1996)), the Law Revision Commission observed that "[t]he statute of limitations applicable to violation of a restriction on land use is likewise not clear. Although it is assumed that the general five-year statute applicable to real property actions applies, there is authority to the contrary. In theory, at least, a covenant could be governed by the four-year statute applicable to a contract founded upon a written instrument, a condition could be governed by the five-year statute applicable to real property actions, *a negative easement could be governed by the three-year statute applicable to abatement of a nuisance*, and an equitable servitude could be subject to both equitable doctrines . . . . Just as these various forms of land use restrictions that serve the same functions should be uniformly subject to a 60-year expiration period, so should *violation of the restrictions be uniformly subject to a clear single statutory limitation period*. The general five-year limitation period for an action to recover real property is appropriate in an action for violation of a land use restriction; its application should be made clear by statute." (*Id.* at pp. 295-296, fns. omitted, italics added.) Thus, the legislative history surrounding the enactment makes clear that *all* actions asserting a violation of a deed restriction, including claims pleaded as nuisance claims, were intended to be governed by the *same* five-year statute of limitations.

8. *Cutujian*, cited Civil Code section 3479 in its nuisance discussion (41 Cal.App.4th at p. 1389), and the Nicolaidises argue that because that section provides that "[a]nything which is . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . .

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is a nuisance," they have stated a claim for statutory nuisance that permits application of the continuing nuisance exception to the statute of limitations. This argument assumes "anything" that obstructs the free use of property is a statutorily actionable nuisance, but the law is to the contrary. (See *Venuto v. Owen-Corning Fiberglas Corp.*, *supra*, 22 Cal.App.3d at p. 127 [owner may maintain structures and "it is not a nuisance merely because it obstructs the passage of light and air . . . or merely because it obstructs his view"].) Thus, Civil Code section 3479 adds nothing to the Nicolaidises' contentions on appeal.

9. On appeal, Wechter alternatively argues we should affirm the judgment because the Nicolaidises' action was barred by laches. While the trial court observed laches is "not certainly a frivolous defense," it did so "without making a determination" on Wechter's laches claim. "Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances . . . ." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) Wechter cites no authority permitting an appellate court to rule on such a defense in the first instance, and we express no opinion on the viability such a defense might have on remand.

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