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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOHN ZIPPERER et al., Plaintiffs and Appellants, v. COUNTY OF SANTA CLARA, Defendant and Respondent.	H028455 (Santa Clara County Super. Ct. No. CV020384)

Plaintiffs John and Cecilia Zipperer sued the County of Santa Clara on various theories, based on allegations that their solar home was malfunctioning as a result of shading from trees growing on defendant's adjoining property. The trial court sustained defendant's demurrer to plaintiffs' first amended complaint, without leave to amend. This appeal followed. For reasons explained in the opinion, we agree with the trial court's determination that plaintiffs have not stated any cause of action against defendant, nor is there any reasonable possibility that the defects in their complaint can be cured by amendment. Treating the order sustaining the demurrer as a judgment of dismissal, we therefore affirm.

FACTS[1]

In the mid-1980s, plaintiffs built a solar home on their property in Los Gatos, after obtaining permits to do so from defendant.

[1] Because this case comes to us following a demurrer, we take the facts from plaintiffs' first amended complaint, the operative pleading. (See *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195.)

In 1991, defendant acquired a parcel of land that adjoins plaintiffs' property, and defendant placed that land in a Parks Reserve. There is a grove of five or six trees growing on defendant's land. Since 1991, those trees have been growing at the rate of 10 to 15 feet per year. By 2004, the trees were about 100 feet taller than when defendant acquired the land.

In 1997, plaintiffs' solar system began to malfunction because the trees on defendant's land interfered with the sunlight reaching their solar panels. Despite numerous requests from plaintiffs, and notwithstanding verbal promises by "certain officials and certain individuals that this situation would be corrected," defendant did not trim or remove the trees.

PROCEDURAL HISTORY

In April and May 2004, plaintiffs filed tort claims with defendant. According to plaintiffs, "there was no time limit" for filing these claims, because their injury was of a "continuing" nature. Defendant rejected the claims.

In May 2004, plaintiffs brought this action against defendant. The verified complaint asserted causes of action for nuisance, trespass, statutory violations constituting negligence, and intentional infliction of emotional distress. As to their negligence claim, plaintiffs alleged that defendant violated various statutes, including the Solar Shade Control Act.

In July 2004, defendant demurred to the complaint. In support of its demurrer, defendant asked the trial court to take judicial notice of a Santa Clara County ordinance entitled "Exemption from Solar Shade Control Act." Plaintiffs opposed the demurrer, but not defendant's request for judicial notice.

In September 2004, after a hearing on the matter, the trial court sustained defendant's demurrer, granting plaintiffs leave to amend their complaint within 20 days.

Plaintiffs filed a verified first amended complaint in September 2004. Among other things, the amended complaint asserted a new cause of action for breach of

contract, as well plaintiffs' previous claims for nuisance, negligence, trespass, violation of statute, and emotional distress. As to their new contract claim, plaintiffs alleged a contract with defendant based on its grant of building permits for their solar home. Plaintiffs attached the permits as an exhibit to the amended complaint.

The first amended complaint drew another demurrer, which defendant filed in October 2004. Again, plaintiffs opposed the demurrer.

Following a hearing held in December 2004, the trial court entered its formal order sustaining defendant's demurrer without leave to amend. Defendant gave notice of the order in January 2005.

This appeal ensued.

THRESHOLD ISSUES

Before analyzing the substantive issues raised in this appeal, we first address two threshold procedural questions: whether we may review the challenged order at all, and if so, what standards govern that review.

Appealability

Although plaintiffs' form notice of appeal refers to a judgment of dismissal, the appellate record contains no judgment. This appeal thus appears to have been taken from the order sustaining defendant's demurrer to plaintiffs' first amended complaint, without leave to amend. "Orders sustaining demurrers are not appealable." (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) But "an appellate court may deem an order sustaining a demurrer to incorporate a judgment of dismissal." (*Molien v. Kaiser* Foundation Hospitals (1980) 27 Cal.3d 916, 920.) It is particularly appropriate to do so when the absence of a final judgment results from inadvertence or mistake. (*Id.* at p. 921.)

In this case, defendant does not argue for dismissal of the appeal, and the issues are fully briefed. (See *Gu v. BMW of North America, LLC*, *supra*, 132 Cal.App.4th 195.)

Under the circumstances, we will decide this case on its merits by treating the order as incorporating a judgment of dismissal.

Standard and Scope of Review

We review a trial court's decision to sustain a demurrer for an abuse of discretion. (See, e.g., *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) We likewise review a trial court's denial of leave to amend for an abuse of discretion. (*Ibid.*) "As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460. See also, e.g., *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Gu v. BMW of North America, LLC, supra*, 132 Cal.App.4th 195.) "Nevertheless, where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*City of Atascadero*, at pp. 459-460.)

In analyzing the existence of liability under the governing substantive law, "we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

On appeal, "the plaintiff bears the burden of demonstrating that the trial court erred." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) If the claimed error is the trial court's refusal to permit amendment of the complaint, the "plaintiff has

the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1081.)

In this case, plaintiffs bear the further burden of particularity in pleading their tort-based causes of action, since defendant is a public entity. "Under the Government Tort Liability Act, all liability is statutory. Hence, the rule that statutory causes of action must be specifically pleaded applies, and every element of the statutory basis for liability must be alleged." (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 579, pp. 675-676. See, e.g., *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 792-793.)

With those principles in mind, we consider the sufficiency of plaintiffs' complaint under the governing substantive law.

ANALYSIS

In the unpublished portion of this opinion, we address each of the six asserted causes of action of plaintiffs' first amended complaint. We conclude that none is viable nor is there any reasonable possibility of cure. In the published portion of this opinion, we discuss only plaintiffs' third cause of action, which asserts negligence.

RT NOTE: Only the third cause of action was certified for publication. For reference, the uncertified portion is in small print.

First Cause of Action: Breach of Contract

To state a cause of action for breach of contract, plaintiffs must allege these elements: (1) the existence of a contract with defendant; (2) defendant's breach; and (3) damages. (CACI No. 300.) To survive demurrer, the complaint must indicate whether the contract is written, oral, or implied by conduct. (See Code Civ. Proc., § 430.10, subd. (g); *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458-459.)

Plaintiffs' Factual Allegations

In their first amended complaint, plaintiffs allege that they "entered into a contract with defendant Santa Clara County for Plaintiffs to construct an alternative energy home." Attached to the complaint are

permit applications. Plaintiffs further allege that they built their home in reliance on defendant's "implied-in-fact [] and express promises" that it "would do nothing to defeat . . . the specific kind of building construction required by the County to support said Solar Systems." Plaintiffs allege that defendant breached the contract by not trimming or removing the trees on its adjoining parcel, and that they have been damaged as a result of that breach.

The Parties' Contentions

The parties disagree on the fundamental question of whether a contract was formed. Plaintiffs insist that there is a contract, arising from defendant's promise to allow them to construct a solar home according to county requirements. They contend that defendant breached an implied covenant that it would do nothing to deprive plaintiffs of the benefits of their solar home. Defendant disputes plaintiffs' contract claims. Defendant urges the need for a written agreement, since plaintiffs essentially claim a solar easement, and it asserts that the requisite instrument is lacking.

Our resolution of this issue begins with a review of the elementary principles of contract law.

Governing Substantive Law: General Principles

"A contract is an agreement to do or not to do a certain thing." (Civ. Code, § 1549.)[2] Mutual assent is one of the essential elements of a contract; consideration is another. (§§ 1550, 1565, 1605. See generally, 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 6, p. 44.) But even in the absence of consideration, a promise may be actionable under the doctrine of promissory estoppel. (See *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672.) " 'The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange.' " (*Ibid.*)

"A contract is either express or implied." (§ 1619.) "An express contract is one, the terms of which are stated in words." (§ 1620.) "An implied contract is one, the existence and terms of which are manifested by conduct." (§ 1621.) The "implied-in-fact contract entails an actual contract, but one

[2] In this section of the opinion, which discusses plaintiffs' first cause of action, further unspecified statutory references are to the Civil Code.

manifested in conduct rather than expressed in words." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455.) "Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract." (CACI No. 305.)

Some contracts are required by law to be in writing in order to be valid. (See. e.g., § 1624 [statute of frauds].) Thus, for example, an agreement for the sale of an interest in real property is invalid unless there is a sufficient written memorandum of the contract, signed by the party to be charged. (§ 1624, subd. (a)(3).) As relevant here, a common law easement for light and air generally may be created only by express written instrument. (See, e.g., *Sher v. Leiderman* (1986) 181 Cal.App.3d 867, 875; cf., e.g., *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 355 [document lacking express grant did not create easement for view]; see generally, 4 Witkin, Summary of Cal. Law, *supra*, Real Property, § 436, p. 617; *id.* at § 457, p. 635; 6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15.10, p. 37.) Likewise, a statutory "solar easement" may be created only by an instrument containing specified terms. (§ 801.5; see 6 Miller & Starr, Cal. Real Estate, *supra,* § 15.11, p. 42.)

Analysis

As we now explain, the facts as alleged by plaintiffs do not and cannot support a cause of action for breach of contract, because there was no valid agreement between the parties.

1. The relationship between plaintiffs and defendant was not contractual.

No contract was created by plaintiffs' successful application to build a solar home on their property. To the contrary, "the gist of the allegations is that the parties are in the relationship of real estate developers to government land use regulators, and not in a contractual relationship." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49. See also, e.g., *Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 957 [grant of land-use permit is an adjudicatory governmental act].)

2. No solar easement was created.

Pared to its essence, plaintiffs' contract theory is that defendant promised to allow sunlight to reach their property – in other words, that defendant agreed to a solar easement. A "solar easement" is

statutorily defined as "the right of receiving sunlight across real property of another for any solar energy system." (§ 801.5, subd. (a). See 6 Miller & Starr, Cal. Real Estate, *supra,* § 15.11, p. 41.)

Under the statute, an agreement for a solar easement must be in a written instrument that contains specified information. (§ 801.5, subd. (b).) "Any instrument creating a solar easement shall include, at a minimum, all of the following: [¶] (1) A description of the dimensions of the easement expressed in measurable terms, … or the hours of the day on specified dates during which direct sunlight … may not be obstructed, or a combination of these descriptions. [¶] (2) The restriction placed upon vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement. [¶] (3) The terms or conditions, if any, under which the easement may be revised or terminated." (*Ibid.*)

Plaintiffs concede that they have no statutory solar easement.

Despite that concession, plaintiffs nevertheless press the argument that an express, written instrument is not required. They rely on two statutes in support of that argument. In their appellate brief, plaintiffs cite Government Code section 814, which provides: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." In their amended complaint, plaintiffs cite section 1621, which recognizes implied-in-fact contracts.

Neither of the statutes cited by plaintiffs assists them in overcoming the need for a written instrument. On the facts as alleged, the governing provision is section 801.5, which specifically requires a writing in order to create a solar easement. Under familiar rules of statutory construction, "a specific statutory provision relating to a particular subject controls over a more general provision." (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 270. See Code Civ. Proc., § 1859.) Here, section 801.5 plainly is the more specific provision, since it sets forth with particularity the requirements for creation of a solar easement. We therefore apply that section rather than the more general provisions cited by plaintiffs, which simply acknowledge governmental contract liability (Gov. Code, § 814) and define implied-in-fact contracts (§ 1621).

3. There is no implied covenant.

According to plaintiffs, defendant breached an implied covenant that that it would do nothing to deprive them of the benefits of their solar home. Plaintiffs also posit defendant's breach of the implied covenant of good faith and fair dealing. Those arguments lack merit.

In order for a term to be implied in a contract, there must first be a contract. "For, as has been universally recognized, 'where words do not amount to an agreement, covenant does not lie.' " (*Stockton Dry Goods Co. v. Girsh* (1951) 36 Cal.2d 677, 680.) "The rules which govern implied covenants have been summarized as follows: '(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract.' [Citation.]" (*Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136, 142.)

The same fundamental requirement of an underlying contract applies to the implied covenant of good faith and fair dealing. "The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Smith v. City and County of San Francisco, supra,* 225 Cal.App.3d at p. 49.) " 'The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.' " (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094.)

As explained above, there is no contract here. Thus, there is no implied covenant.

4. The facts as alleged do not support a claim of promissory estoppel.

Although plaintiffs nominally assert defendant's breach of contract, their allegations suggest a promissory estoppel claim. (See *Smith v. City and County of San Francisco, supra,* 225 Cal.App.3d at p. 48.) "California recognizes the doctrine of promissory estoppel. 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in

reliance on his promise, if injustice can be avoided only by its enforcement.' " (*Ibid.*) Liability thus is imposed for "a unilateral promise based not on consideration but on another party's detrimental reliance, with no reciprocal duties on the part of the promisee." (*Id.* at p. 49.) "The party claiming estoppel must specifically plead all facts relied on to establish its elements." (*Id.* at p. 48.)

Plaintiffs' first amended complaint falls short of stating a promissory estoppel claim, for it fails to allege any promises by defendant that could have induced plaintiffs' reliance in building a solar home. In their points and authorities submitted below, plaintiffs conceded that there was no showing "that the County made a promise to provide sunlight to the solar collectors" in plaintiffs' home. In their amended complaint, plaintiffs state only that they "assumed that the County of Santa Clara would cooperate with the Plaintiffs in maintaining their level of Solar energy that existed when these systems were approved . . . ." Assumptions by plaintiffs are not the same as promises by defendant. The only allegation of any express promises by defendant refers to a period more than a decade later, after plaintiffs' solar system began to fail: "That certain verbal promises were made to Plaintiffs by certain officials and certain individuals that this situation would be corrected, but no one followed through."

Given the timing of defendant's asserted promises, they cannot have induced plaintiffs' reliance in building their solar home. Plaintiffs therefore have failed to state a cause of action for promissory estoppel.

5. There is no reasonable possibility of cure by amendment.

If allowed to amend their pleading, plaintiffs state, they would include "more specific details on the written portions of the plans" for construction of their solar home and on "the implied terms" of the asserted contract including the covenant of good faith and fair dealing. As explained above, however, the construction plans and permits do not establish a contract. Nor do plaintiffs' other allegations demonstrate a contract. And without a contract, there are no implied covenants. In short, plaintiffs do not offer any facts that would remedy the defects in their cause of action for breach of contract. Nor do we perceive any reasonable likelihood that those defects can be overcome, given the facts of this case.

Second Cause of Action: Nuisance

Plaintiffs argue that they have stated a cause of action for nuisance. Defendant disagrees, citing precedent from this court, *Sher v. Leiderman, supra,* 181 Cal.App.3d 867.

Governing Substantive Law: General Principles

Nuisance is defined by statute as follows: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway, is a nuisance." (Civ. Code, § 3479. See generally, 11 Witkin, Summary of Cal. Law, *supra*, Equity, § 121, pp. 802-803; *id.* (2004 supp.) at p. 543.) Generally speaking, liability for nuisance requires a substantial and unreasonable invasion of the plaintiff's interest in the use and enjoyment of the land. (11 Witkin (2004 supp.) § 125, p. 544.)

"California nuisance law does not provide a remedy for blockage of sunlight," as this court recognized in *Sher v. Leiderman, supra*, 181 Cal.App.3d at p. 872. As we said there: "It is well settled in California that a landowner has no easement for light and air over adjoining land, in the absence of an express grant or covenant. [Citations.] Nuisance law is in accord: blockage of light to a neighbor's property, except in cases where malice is the overriding motive, does not constitute actionable nuisance, regardless of the impact on the injured party's property or person." (*Id.* at p. 875.) We reasoned that the plaintiffs' "predicament, shading of their house by a neighbor's trees, has never come under the protection of private nuisance law, no matter what the harm to plaintiff." (*Id.* at p. 878.)

So far as our research discloses, there is no contrary authority in California. (Cf., *Kucera v. Lizza* (1997) 59 Cal.App.4th 1141, 1150-1151 [not reaching the question].)

Analysis

In an effort to breathe life into their nuisance claim, plaintiffs attempt to distinguish this case from our earlier decision in *Sher v. Leiderman.*

First, plaintiffs say, this case is unlike *Sher* because the parties here have a special relationship between them "by virtue of the building permit contract." That argument is without merit. On the facts as alleged, there is no special relationship giving rise to a duty on defendant's part. "Appellants offer no authority for the existence of a special relationship between local land use regulators and citizens seeking to develop their property, and we have found none." (*Smith v. City and County of San Francisco, supra,* 225 Cal.App.3d at p. 52.)

Next, plaintiffs attempt to distinguish this case from *Sher* on its facts. As plaintiffs point out, the Shers' home had only "passive solar features" – it did not "make use of any 'active' solar collectors or panels." (*Sher v. Leiderman, supra,* 181 Cal.App.3d at p. 873.) By contrast, plaintiffs urge, their residence is an *active* solar home. In this context, however, that is a distinction without a difference. The fact that the Shers' home possessed only passive solar features had no bearing at all on our application of nuisance law. (See *id.* at pp. 875-880.) That fact came into play only in connection with our discussion of the Solar Shade Control Act. (See *id.* at pp. 880-883.)

In sum, plaintiffs have offered no valid basis for distinguishing *Sher v. Leiderman.* Nor have they suggested any reason for us to depart from its analysis, which we believe is still sound. In the face of that precedent, plaintiffs cannot state a cause of action for nuisance.

Third Cause of Action: Negligence

One essential element of a cause of action for negligence is a legal duty. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) "That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship." (*Id.* at p. 985.) In this case, plaintiffs base their negligence claim on the asserted breach of a statutory duty arising under the Solar Shade Control Act. (See Pub. Res. Code, §§ 25980-25986.)[3]

[3] In this section of the opinion, which discusses plaintiffs' third cause of action, further unspecified statutory references are to the Public Resources Code.

Governing Substantive Law: The Solar Shade Control Act

"The Solar Shade Control Act . . . provides limited protection to owners of solar collectors from shading caused by trees on adjacent properties." (*Sher v. Leiderman, supra,* 181 Cal.App.3d at p. 880.) Enacted in 1978, the Act has been described as "protecting active or passive solar energy systems (SES's) against obstruction by later-planted or later-grown trees and foliage . . . ." (*Kucera v. Lizza, supra,* 59 Cal.App.4th at p. 1152, statutory citation omitted.)

In pertinent part, the Act provides: "After January 1, 1979, no person owning, or in control of a property shall allow a tree or shrub to be placed, or, if placed, to grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 percent of the collector absorption area" during mid-day hours as specified in the statute. (§ 25982; see generally, 11 Witkin, Summary of Cal. Law, *supra,* Equity, § 137 p. 820.)

The Act permits local jurisdictions to exempt themselves from its operation. The exemption provision states: "Any city, or for unincorporated areas, any county, may adopt, by majority vote of the governing body, an ordinance exempting their jurisdiction from the provisions of this chapter. The adoption of such an ordinance shall not be subject to the provisions of the California Environmental Quality Act (commencing with Section 21000)." (§ 25985.)

The Parties' Contentions

The parties disagree on whether the Solar Shade Control Act applies in this case.[4] Under defendant's interpretation of the Act, there can be no liability here because defendant did not plant or "place" the trees for purposes of the statute. In other words, there is no statutory violation because these were not "later-planted" trees. (*Kucera v. Lizza*, *supra*, 59 Cal.App.4th at p. 1152.) Plaintiffs dispute that interpretation, urging that defendant is liable under the Act, because it permitted the trees to grow. As plaintiffs see it, liability attaches for these "later-grown" trees. (*Ibid.*)

The parties also disagree about the statutory exemption. Defendant asserts that it is exempt from the Act, having adopted an ordinance as authorized by section 25985. Plaintiffs argue against application of the exemption here, asserting "that there was already in existence a continuing duty on the part of the County" when it adopted the ordinance and a continuing breach of that duty when plaintiffs' solar system began to fail. Plaintiffs thus contend: "The County should be liable for any of the damages they had already caused." They characterize defendant's use of the exemption provision as "a quasi-ex post facto application on the part of the County." As we understand it, the essence of plaintiffs' argument on this point is that defendant's ordinance offends constitutional principles because it operates retroactively, defeating their preexisting damage claims. Defendant does not specifically meet that contention.

[4] A review of the chronology of pertinent events will be helpful to an understanding of the parties' contentions. In 1979, the Solar Shade Control Act took effect. (§ 25982.) In 1984-1985, plaintiffs built their solar home with county permits. In 1991, defendant acquired the adjoining parcel of land, with the trees already on it, and it placed that land in a Parks Reserve. In 1997, plaintiffs' solar system began to fail. In 2002, defendant adopted an ordinance exempting itself from the Solar Shade Control Act. In 2004, plaintiffs filed this action.

Analysis

As we now explain, plaintiffs' statutory claim cannot be maintained because defendant is exempt from the Solar Shade Control Act by virtue of its adoption of a qualifying ordinance, as permitted by section 25985. Given that determination, we need not address the parties' differing interpretations of other provisions of the Act.

" 'In passing on the validity of an ordinance or a statute it will be presumed that it is valid.' " (*City of Industry v. Willey* (1970) 11 Cal.App.3d 658, 663.) "We interpret ordinances by the same rules applicable to statutes." (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 290.)

Here, plaintiffs do not make a facial attack on the validity of either the ordinance or the enabling statute. Instead, they object to defendant's use of the statutory exemption to the extent that it operates retrospectively to extinguish their statutory claims.

"Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute without a saving clause will terminate all pending actions based thereon.' " (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829.) In other words, where "the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns . . . ." (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 690.) Furthermore, legislative action "can effect a partial *repeal* of an existing statute." (*Ibid.*) " 'The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time. ' " (*Governing Board*, at p. 829.) That common law principle has been codified in California, as follows: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." (Gov. Code, § 9606.) The substance of the legislation determines

whether it constitutes a repeal. (*Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 13.)

Applying the foregoing principle to the case at hand, we conclude that plaintiffs' cause of action was eliminated by defendant's ordinance. In reaching that conclusion, we consider four factors: the statutory nature of the plaintiffs' claim; the unvested nature of plaintiffs' claimed rights; the timing of the elimination of those rights; and the nature of the mechanism by which the right of action was eliminated.

Addressing the first factor, we observe that plaintiffs' claim is wholly statutory, arising as it does from defendant's asserted violation of the Solar Shade Control Act. Plaintiffs' claim is "a cause of action unknown at the common law . . . created by statute . . . ." (*Department of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316, 320.) It derives from special remedial legislation. (See *Southern Service Co., Ltd. v. Los Angeles, supra*, 15 Cal.2d at p. 12.) In other words, plaintiffs "possessed no right or remedy . . . which existed apart from the statute itself and which the legislature could not cut off by repeal." (*Id.* at p. 11 [right to tax refund or credit "is purely statutory"].)

We next consider whether the nature of plaintiffs' rights prevents abolition of their claim. Repeal of a remedial statute destroys a pending statutory action unless "vested or contractual rights have arisen under" the statute. (*Department of Social Welfare v. Wingo, supra,* 77 Cal.App.2d at p. 320; see Gov. Code, § 9606.) In this case, no such rights have arisen. As explained in the unpublished portion of the opinion, plaintiffs have no contractual rights against defendant. Nor do plaintiffs have any vested right in maintaining their statutory claim. " 'No person has a vested right in an unenforced statutory penalty or forfeiture.' " (*Department of Social Welfare*, at p. 320. Accord, *People v. One 1953 Buick* (1962) 57 Cal.2d 358, 366; *Chapman v. Farr* (1982) 132 Cal.App.3d 1021, 1024-1025.) Until it is fully enforced, a statutory remedy is merely an " 'inchoate, incomplete, and unperfected' " right, which is subject to legislative abolition. (*People v. One 1953 Buick, supra*, 57 Cal.2d at p. 365.)

The third factor in determining whether a statutory claim has been extinguished is timing. Whenever the Legislature eliminates a statutory remedy "before a judgment becomes final," the legislative act "destroys the right of action." (*Department of Social Welfare v. Wingo, supra*, 77 Cal.App.2d at p. 320.) Repeal thus "wipes out the cause of action unless the same has been merged into a final judgment." (*Wolf v. Pacific Southwest etc. Corp.* (1937) 10 Cal.2d 183, 185.) " 'If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal." (*Southern Service Co., Ltd. v. Los Angeles, supra*, 15 Cal.2d at p. 12. See also, e.g., *Chapman v. Farr, supra*, 132 Cal.App.3d at pp. 1024-1025.) Here, the statutory right that plaintiffs assert was eliminated in 2002, two years before they filed this suit.

Finally, we turn to the legislative mechanism by which the right of action is abolished. Typically, that mechanism is repeal or amendment of the remedial statute. (See, e.g., *Brenton v. Metabolife Internat., Inc., supra*, 116 Cal.App.4th at p. 690.) But we know of no rule of law that limits the Legislature to those methods. To the contrary, as our high court has observed, even where "the words of the [] statute are not expressly words of repeal without a saving clause, [] the effect is the same in so far as the application of the principles is concerned when the legislature by apt expression has withdrawn the right and remedy in particular cases, including all pending actions based thereon." (*Southern Service Co., Ltd. v. Los Angeles, supra*, 15 Cal.2d at p. 13.) The critical point is that "the legislature may take away the right of action itself." (*Ibid.*) Our high court thus has alluded to the Legislature's "power to enact a statute which would cut off the right theretofore accorded the plaintiff . . . ." (*Id.* at p. 12) It also has spoken of the Legislature's power to "withdraw" a statutory right or remedy. (See *id.* at pp. 11, 12; *International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, 421.) As noted above, we look to the substance of the legislation – not its label – to determine whether it operates as a repeal. (*Southern Service Co., Ltd. v. Los Angeles, supra*, 15 Cal.2d at p. 13.) The

pivotal issue is whether the legislation constitutes "a substantial reversal of legislative policy" that represents "the adoption of an entirely new philosophy" vis-à-vis the prior enactment. (*People v. One 1953 Buick, supra,* 57 Cal.2d at p. 363.)

In this case, we conclude, the statutory right of action was eliminated by the exemption provision, which operated as a valid repeal method. Here, at the very time that the Legislature created the statutory right of action under the Solar Shade Control Act, it expressly empowered cities and counties to foreclose such actions against them. In this case, once defendant exercised that power, plaintiffs' statutory cause of action was abolished. Just as surely as if the Legislature had repealed the Solar Shade Control Act in its entirety, the "statutory authority for [plaintiffs'] action … has now been withdrawn." (*International etc. Workers v. Landowitz, supra,* 20 Cal.2d at p. 421 [right to enjoin violation of ordinance was lost upon repeal of the enabling statutes].) Put another way, "the legislature by apt expression has withdrawn the right and remedy" that otherwise would be available to plaintiffs under the Solar Shade Control Act. (*Southern Service Co., Ltd. v. Los Angeles, supra,* 15 Cal.2d at p. 13.) That legislative choice embodies "a substantial reversal of [the] legislative policy" that underpins the remainder of the Act and "an entirely new philosophy" concerning its mandatory application to local jurisdictions. (*People v. One 1953 Buick, supra,* 57 Cal.2d at p. 363.) In short, we conclude, the exemption provision – put in place by the Legislature and adopted by defendant – is a valid mechanism for extinguishing a statutory claim under the Solar Shade Control Act.

To sum up, plaintiffs' statutory cause of action is abolished. Plaintiffs enjoyed no vested rights in this statutory claim, which was unknown at common law, and which was not pursued to final judgment before its elimination by defendant's use of the exemption provision. That exemption operated as a form of repeal when defendant adopted it, extinguishing plaintiffs' statutory right of action. Because the mechanism of repeal was

authorized by the Legislature, the elimination of plaintiffs' claim under these circumstances does not implicate retrospectivity concerns.

Fourth Cause of Action: Trespass

In their opening brief on appeal, plaintiffs concede that they cannot state a cause of action for trespass. This concession is proper. (See, e.g., *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 935-936 [trespass action " 'may not be predicated upon nondamaging noise, odor, or light intrusion' "]; see also, e.g., *Odello Brothers v. County of Monterey* (1998) 63 Cal.App.4th 778, 792-793 [trespass action does not lie against public entity defendant].)

Fifth Cause of Action: Violation of Statute

Similarly, plaintiffs concede on appeal that this claim is nothing more than a "restatement" of their third cause of action for negligence. We agree.

Sixth Cause of Action: Infliction of Emotional Distress

Plaintiffs' final claim is for intentional infliction of emotional distress.[5] On appeal, plaintiffs assert that they could state actions for both intentional and negligent infliction of emotional distress, if given leave to amend. Defendant contends that neither tort is available on these facts.

Governing Substantive Law: General Principles

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant; (2) extreme or severe emotional distress to the plaintiff; and (3) actual and proximate causation between the two. (*Potter v. Firestone Tire & Rubber Co., supra,* 6 Cal.4th at p. 1001.) In order to be outrageous, the defendant's conduct must be either intentional or reckless, and it must be so extreme as to exceed all bounds of decency in a civilized community. (*Ibid.;* see generally, 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 404, pp. 484-485; *id.* (2004 supp.)

[5] In plaintiffs' initial complaint, the claim – as captioned and as asserted – is explicitly specified as *intentional* infliction of emotional distress. In plaintiffs' amended complaint, the caption of this cause of action does not specify the asserted tort as intentional, but plaintiffs allege that defendant's conduct was "intentional and malicious."

§ 404, pp. 336-337.) Furthermore, that conduct must be specifically directed at the plaintiff. (*Potter*, at p. 1002.)

As for negligent infliction of emotional distress, no such independent tort exists. (*Potter v. Firestone Tire & Rubber Co., supra*, 6 Cal.4th at p. 984.) "The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. [Citations.] That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship." (*Id.* at pp. 984-985.)

Analysis

As we now explain, plaintiffs cannot state a viable claim against defendant on either theory.

1. Plaintiffs cannot state a claim for intentional infliction of emotional distress.

Plaintiffs' cause of action for intentional infliction of emotional distress cannot be sustained, because the complaint fails to allege the requisite outrageous conduct by defendant. By definition, defendant did not engage in outrageous conduct, since it did not act outside the law. As explained above, defendant has not breached a contract, violated an actionable statute, or committed a tort against plaintiffs. (Cf., *Potter v. Firestone Tire & Rubber Co., supra*, 6 Cal.4th at pp. 976, 1000-1001 [illegal dumping of toxic substances].)

2. Plaintiffs cannot state a claim for negligent infliction of emotional distress.

Plaintiffs' negligent infliction claim likewise fails. As this court has said, "such a cause of action does not lie where the injury is to property and there is no special relationship between the parties . . . ." (*Sher v. Leiderman, supra*, 181 Cal.App.3d at p. 883.) And as explained above, there is no special duty between the parties here. (*Smith v. City and County of San Francisco, supra*, 225 Cal.App.3d at p. 52.) Duty is an essential element of the tort. (*Potter v. Firestone Tire & Rubber Co., supra*, 6 Cal.4th at p. 984.) Because there is no duty here, plaintiffs could not state a cause of action for negligent infliction of emotional distress, even if allowed to amend their complaint.

CONCLUSION

Applying the governing substantive law to the facts as alleged by plaintiffs, none of the six causes of action asserted in their first amended complaint is viable. Furthermore, there is no reasonable possibility that the defects in pleading can be cured

by amendment. For that reason, the trial court did not abuse its discretion in sustaining defendant's demurrer without leave to amend.

DISPOSITION

Treating the trial court's order as incorporating a judgment of dismissal, we affirm.

_____
McAdams, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
Mihara, J.

Trial Court:	Santa Clara County Superior Court Superior Court No. CV020384
Trial Judge:	Hon. William Elfving
Attorney for Appellant:	Albin E. Danell
Attorney for Respondent:	Office of the County Counsel Ann Miller Ravel County Counsel Michael L. Rossi Deputy County Counsel

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