

When The Encroachment Is Continuing And Not Permanent ... Court Of Appeal Rules That An Adjoining Property's Owner's Trespass and Nuisance Claims Involving A Lot Line Fence And Vehicles On A Driveway Were Continuing Rather Than Permanent Encroachments

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In California, as well as many other jurisdictions, even a small, slight property line encroachment can result in property disputes between adjoining owners. Also, in congested, urban areas, it is not uncommon for an owner of a neighboring property to use (sometimes unwittingly) a portion of the adjoining property owner's driveway. The question then becomes whether a trespass and/or nuisance claim would be barred by the three year statute of limitations. Where an encroaching fence or use of vehicles on an adjoining property's owner's driveway has occurred over a number of years, the property owner which engaged in the trespass will typically argue that the three year statute of limitations for trespass has expired (on the theory that the encroachment is permanent in nature). The complaining property owner, of course, will argue that the encroachments are continuing, rather than permanent encroachments, which are not subject to the three year statute of limitations running from the first date of any encroachment.

This exact scenario was ruled upon in the matter of Ali Madani v. Michael Rabinowitz (2020) Westlaw 881412 ("Madani case"). In the Madani case, Ali Madani sued his next door neighbor, Michael Rabinowitz. Madani brought trespass/nuisance claims seeking to remove a portion of Rabinowitz' fence which encroached on Madani's property, and also to enjoin Rabinowitz from continuing to park old, inoperable cars on a driveway that Madani owned, and to collect damages from Rabinowitz for the latter's use of the driveway for that purpose.

Rabinowitz did not deny the encroachment claims, but raised a statute of limitations defense, arguing that he had purchased his property in 2000 (and Madani had lived on his property since June 1979). Prior to the filing of suit, Madani had attempted to resolve the matter amicably by pre-litigation requests to move Rabinowitz' fence and to have Rabinowitz remove his old, inoperable vehicles. Madani even obtained a survey which demonstrated the encroachments. Unable to resolve the matter informally, Madani filed suit seeking damages and injunctive relief based upon theories of trespass and nuisance. Rabinowitz in a Cross-Complaint also sought to quiet title based on theories of adverse possession and prescriptive easement, and, alternatively, sought equitable relief, under California Civil Code § 871.1, California's Good Faith Improver's Statute. He later abandoned his adverse possession claim.

The matter went through a bench trial. The Court ruled that Madani's trespass/nuisance claims were not barred by the statute of limitations (which would have been three years) as Rabinowitz' fence and vehicles were continuing rather than permanent encroachments), and that Rabinowitz did not prove he was entitled to judgment based on his prescriptive easement and good faith improver claims.

The matter was appealed. The Court of Appeal ruled that the Trial Court had correctly found Madani's trespass and nuisance claims were not time barred. The Court of Appeal noted that a "permanent nuisance" is considered to be a permanent injury to property for which damages are assessed once and for all; while a continuing nuisance is considered to be a series of successive injuries for which a plaintiff must bring successive actions. The Court of Appeal noted that there appeared to be some conflicting, published opinions on the subject, but ruled that the nature of the injury, i.e., the encroaching fence (which was only two feet) and use of a driveway, involved continuous, not permanent trespass.

The Madani case is important because it provides solid authority for a good faith homeowner who has attempted to resolve a minor property border dispute, to wait, perhaps even more than three years, before filing suit over a property line fence or driveway usage.

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