15 July 2015

MEMORANDUM

TO: Small Claims Judge

FROM: Deborah Taylor-Pearce, Plaintiff

RE: Subdivision boundary fencing issues involved in this case

My case is about collecting on a bad debt, and about my right to assert control over my own private property, including who I permit to use it, and the terms under which this permissive use is given and revoked.

The defendant and I live in different, but adjoining, subdivisions.

I have lived in my house (11390 Markab Drive) almost 35 years, and my husband is the original owner.

Since the defendant purchased her home (8491 Menkar Road) in October 2012, she has been aggressively using my private property (a masonry wall) for an illegal enclosure. In August 2014 I offered the defendant a choice—stop using my wall and rebuild your subdivision boundary fencing by the end of September 2014, or pay me rent for the continuing use of my wall.

To this date, Ms. Lewis chooses to continue her use of my private property.

She also chooses not to pay what she owes.

Since the end of May 2014, I have sent the defendant two demand letters, followed by 16 invoices, and her mounting bad debt now totals $2,572.85.

The Historical Context

Our situation is illustrated in the two maps which I've attached for the court (*see* Attachments 1 and 4). I live at 11390 Markab Drive (marked on both maps as plaintiff's home), on the west edge of the Larwin Mesa View No. 12 subdivision, built in 1971. The defendant lives behind us (to our northwest) at 8491 Menkar Road, on the east edge of the Mira Mesa North No. 2 subdivision, which was built by a different developer later in 1975. Our houses face in opposite directions (ours faces east, hers faces west), so it is our back gardens which are adjacent.

When my husband, who is the original owner, purchased our 11390 Markab Dr. property in December 1971, there was nothing behind him to the west but open space, as far as the eye could see. Since the developer of our Larwin Mesa View No. 12 subdivision ***never*** put up any division fencing, my husband paid for all the fencing built a few years later to enclose his property, and since he was the only one to use the fencing he built on the boundary at the west end of his property, it has always belonged to him exclusively, and never been a real boundary fence, regardless of its initial location on the property line.

In 1975, construction began on the MIRA MESA NORTH NO. 2 subdivision to our west when the developer first graded and enclosed the area with a run of subdivision boundary fencing spanning the length of Markab Drive, as shown on the overview map (*see* Attachment 1). Of note, the developer located this run of MIRA MESA NORTH NO. 2 subdivision boundary fencing 21 inches west of our subdivision's western boundary line, thus establishing a 21-inch clearing between adjoining subdivisions that still exists today. Attachment 2 shows the resulting arrangement of double fences—to the west, a long run of MIRA MESA NORTH NO. 2 subdivision boundary fencing, and to the east, a patchwork of private fences put up by individual homeowners of the Markab Dr. properties—with a 21-inch clearing between them that has been the established pattern of land use from 1975.

As stated above, only after first enclosing the area did the developer begin building houses in the MIRA MESA NORTH NO. 2 subdivision, with properties staggered such that two houses on Menkar adjoin our Markab Dr. property to the west (*see* Attachments 1 and 4). As a result,

- The eastern boundary line of the 8491 Menkar Rd. property northwest of us (defendant's residence) spans 71% of the length of the plaintiff's western boundary line.
- The eastern boundary line of the 8485 Menkar Rd. property southwest of us spans the remaining 29% of the length of the plaintiff's western boundary line.

Originally, both the Menkar Rd. properties behind us were enclosed on their eastern boundary by a continuous run of subdivision boundary fencing, which the developer set back 21 inches from my husband's standing fence. The newly-fenced enclosure, plus 21-inch clearing, ensured our privacy and security, preventing future residents of the MIRA MESA NORTH NO. 2 subdivision from having direct access to our LARWIN MESA VIEW NO. 12 subdivision properties, some of which—like those of my husband's subdivision neighbors to north and south—were still unenclosed when the new houses went up along Menkar Rd.

For us, these protections unravelled in the late 1990s, when Barbara and Jeff Vasquez, homeowners of the 8491 Menkar Rd. property to our northwest (defendant's residence), chose not to maintain their subdivision boundary fencing, allowing it to collapse. This left their lot without any fencing in back, and it has remained so ever since, as recorded in Attachment 3, a real-estate listing from 2010 which describes the defendant's property as only "partially" fenced.

Rather than demand that Barbara and Jeff Vasquez replace and maintain their subdivision boundary fencing, I permitted them and subsequent owners/occupants of the 8491 Menkar Rd. property to use our private property (first a wood fence, and now a masonry wall), which we assiduously maintain because of our swimming pool. So this permissive use has been going on since the late 1990s, as evidenced by the fact that when we replaced our wood fencing with a masonry wall in 1999, we ourselves restored the 21-inch clearing between subdivisions to its proper grade and condition, bringing in two yards of topsoil at a cost to us of $90.51.

Afterwards, Barbara and Jeff Vasquez pretty much kept within the bounds of their original fenced enclosure: the only thing they planted in the newly-accessible 21-inch clearing behind our masonry wall was a bed of marigolds. One would have to climb the embankment and trample the flowers to access our wall, and their children never did so.

At this point, I wish to state clearly for the record: the stretch of our masonry wall, built in 1999, which now encloses the west end of our property, is ***not***—and never has been—division fencing. It is our private property: not just because homeowners in the MIRA MESA NORTH NO. 2 subdivision have always had their own fenced enclosure, and were never intended to share ours; and not just because we paid for it ourselves; but because it is physically located to the east of our LARWIN MESA VIEW NO. 12 subdivision boundary line, fully on our private property (*see* Attachment 4 for map detail). This is not the case with the sections of masonry wall enclosing the south and north boundaries of our lot, which we also paid for ourselves, but which we built straddling the property line, thus making these walls true division fences that are shared with our subdivision neighbors to our south and north (again, *see* Attachment 4 for a more detailed diagram of the fencing in question). Fences situated like this on a boundary line are owned by both property owners when both are using the fence. When either property is sold (as was the case of the coterminous property to our north, which was sold in 2011), the new owner also purchases the shared ownership of the fence and, in so doing, automatically assumes the rights and responsibilities of co-ownership.

But the defendant has no such claim to co-ownership.

Matters of subdivision boundary fencing, illegal enclosure, and trespass onto our private property first became an issue for us in 2011 when the tenants then living in the rental southwest of us at 8485 Menkar Rd. (*see* Attachment 4 for map detail) removed their subdivision boundary fencing at the end of 2010; extended their west-to-east run of partition fencing shared with the owner of the defendant's residence (at that time, Qinghao Xu and Yaquin Yu) up to our wall, for an illegal enclosure; built a large two-story children's play structure right against our masonry wall, thus giving their children and children's friends easy physical access to the top of our wall and to our property (including our swimming pool), and giving everyone using the platform structure—adults and children, alike—visual access to our entire back garden and much of our home's interior; and then later encroached about a foot onto the property of our subdivision neighbor to the south (at 11382 Markab Dr.), whose back fence is set back that much from their western property line. We first complained about these developments on 1/17/2011, but it wasn't until almost a year later, in December 2011, that I was able to force these tenants (and their landlord) to rebuild their subdivision boundary fencing (which, in retaliation, they relocated only 8 inches from our wall).

Hence, it was "*déjà vu* all over again" when, on 5/27/2014, an adolescent boy accessed our wall from the defendant's back garden during a birthday party, supervised by adults who should have known better. I, and a neighbor, saw the child standing on the northwest corner of our wall, only nine feet from our swimming pool, and only 66 inches above the dirt floor of our planter box (*see* Attachment 6, area marked by a red circle). This single incident was, for me, a tipping point, prompting me to rethink the double standard of permissive use I had exercised since the 1990s, allowing the owner/occupants of 8491 Menkar Rd. (to our northwest) to use our wall for an illegal enclosure, while denying this same access to the owner/occupants of 8485 Menkar Rd. (to our southwest), whose subdivision boundary fencing had been better maintained, and thus held up longer.

But the unwelcome presence on my wall of yet another gawking child was not the only reason I wrote my first demand letter to the defendant (dated 5/28/2014), formally rescinding all prior agreements with the previous owners of 8491 Menkar Rd. concerning permissive use of my private property.

I was by this point increasingly upset by the defendant's aggressive use of our private property, which has added considerably to the costs we have traditionally borne from permitting others to use our wall as a shared resource. So much invasive vegetation planted too close to and against my wall has caused accumulating damage to our wall's finish and foundation; has attracted unwanted vermin onto our property (since our wall encloses our property and that of my subdivision neighbors to the north and south, rodents and other creatures now have a clear thoroughfare to our three Markab Dr. homes); has littered my garden, including our swimming pool, with debris, all of which adds to our maintenance costs; and is now so intrusive it interferes with my own plans for developing my back yard.

I am able to date the defendant's aggressive use of our masonry wall to enclose her back garden to December 2012, a little over a month after Ms. Lewis purchased the 8491 Menkar Rd. property to our northwest from Qinghao Xu and Yaquin Yu. As documented in Attachment 5, a photo taken on 12/2/2012, the defendant has used—and continues to use—our masonry wall to support a thick vegetative enclosure at the rear of her garden (*see*, for example, the wall-grown bougainvillea, held in place by four eyebolts and string trellis). Some of the greenery shown in this photo was there before the defendant moved in: for example, the banana trees and palm tree, shown overhanging our wall in Attachment 6. These were planted by previous owners of the property, and during my 2011–12 dispute with the owner and tenants of the 8485 Menkar Rd. property to our southwest, I let my emotions get the better of me, and encouraged Qinghao, the previous owner of the defendant's property, to maintain the banana trees. But invasive plants, such as the bougainvillea which has been trained to grow up and over my wall (as documented in Attachments 5 and 6), was cultivated by the defendant, after Qinghao had agreed to keep the shrubby vine well away from my wall.

Demand Letter 1 (dated 5/28/2014) was my first communication, of any kind, with the defendant, with whom I had no arrangements—formal or otherwise—regarding use of my wall. In case the defendant thought that my arrangement with Qinghao's family automatically extended to her when she became the new owner, and that permissive use of my private property was a given, I gave her four months (June–September 2014) to adjust to the changed *status quo* as a courtesy (see Demand Letter 2, dated 8/3/2014). But such informal agreements as I had with Qinghao—even when they are about actual division fencing—do not transfer automatically from one homeowner to the next, and even if they did, either party is always free to change their mind, as have I. My informal arrangement with Qinghao's family concerning their use of my private property was never legally binding, and was specific to the individuals involved.

If the defendant purchased the 8491 Menkar Rd. property behind us—and has since made improvements to that property—contingent upon her ability to take further advantage of our good will, she should have cultivated that good will, contacted me, and gotten my agreement in writing first.

But, for whatever reason, she did not seek me out. From the beginning, she has pursued her aggressive enclosure activities, which make illegal use of my private property, without consultation or consent.

The Law

By law, the defendant is required to maintain her Mira Mesa North No. 2 subdivision boundary fencing. According to California Civil Code, section 840,

> The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance.

Moreover, Cal. Civ. Code § 841(a) states:

> Adjoining landowners shall share equally in the responsibility for maintaining the boundaries and monuments between them.

As I have documented above, there were originally two fences between the plaintiff's and defendant's properties, the defendant's being the only *boundary* fence affected by the statute. And in the case of the other Larwin Mesa View No. 12 subdivision lot adjoining the defendant's (i.e., the 11410 Markab Dr. property to our north, which was still unenclosed when the defendant's house was built), there was only one fence period: the subdivision boundary fencing, erected in 1975 by the developer of the Mira Mesa North No. 2 subdivision, enclosing the defendant's 8491 Menkar Rd. property.

While I do believe that the defendant has a responsibility to maintain her subdivision boundary fencing and cease her illegal enclosure activities, this is not the issue that brings me to court today. My claim is over back rent owing to her willful acts of illegal enclosure since she received my Demand Letter 1 (dated 5/28/2014) and Demand Letter 2 (dated 8/3/2014), setting out the new pay-for-use policy which applies to all owners and occupants of the 8491 Menkar Rd. property to our northwest who use my masonry wall as replacement Mira Mesa North No. 2 subdivision boundary fencing.

For over 140 years, California Civil Code section 841 stipulated that payment is required when someone encloses her property using an existing fence. As enacted in 1872, Cal. Civ. Code § 841(2) provided that "coterminous owners are mutually bound equally to maintain"

> The fences between them, unless one of them chooses to let his land lie without fencing; in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.
>
> (*Cal. Civ. Code § 841(2)*, prior to 2013)

The specific language regarding enclosure was dropped from the law, however, when the California state legislature revised the original statutory language in August 2013 (Assembly Bill 1404, the "Good Neighbor Fence Act of 2013," Stats. 2013, ch. 86). AB 1404 was written with the intent of updating, for a more modern urban age, what by the 21st century had become an antiquated understanding of the benefits associated with, and the purposes served by, a boundary fence. Recognizing that "an adjoining landowner who clearly receives little or no benefit from a boundary fence should not be forced to subsidize an adjoining landowner's fence construction," the Legislature re-worked Cal. Civ. Code § 841(2), replacing the 140-year-old language concerning enclosure with a more nuanced presumption of equal benefit and responsibility for the *reasonable* costs of construction, maintenance, or necessary replacement of *division* fencing:

> Where a landowner intends to incur costs for a fence described in paragraph (1), the landowner shall give 30 days' prior written notice to each affected adjoining landowner. The notice shall include notification of the presumption of equal responsibility for the reasonable costs of construction, maintenance, or necessary replacement of the fence. The notice shall include a description of the nature of the problem facing the shared fence, the proposed solution for addressing the problem, the estimated construction or maintenance costs involved to address the problem, the proposed cost sharing approach, and the proposed timeline for getting the problem addressed.
>
> (*Cal. Civ. Code § 841(2)*, as rev. 2013)

The presumption (in the new paragraph 1) is that

> Adjoining landowners are presumed to share an equal benefit from any fence dividing their properties and, unless otherwise agreed to by the parties in a written agreement, shall be presumed to be equally responsible for the reasonable costs of construction, maintenance, or necessary replacement of the fence.
>
> (*Cal. Civ. Code § 841(b)(1)*, as rev. 2013)

The new statute thus provides for joint expense and maintenance of property line (*a.k.a.* boundary, division, partition) fences, but is no longer directly applicable to my claim against the defendant, where the existing fencing (my masonry wall) used for an enclosure is ***not*** division fencing, but private property. Nonetheless, I would argue that the spirit of the original 1872 law—that it is not fair to use someone else's property without reasonable compensation—still holds, and is more broadly applicable in this case, than the letter of the law, as revised in 2013.

Since the section of masonry wall situated to the east of my subdivision's western boundary is private property rather than division fencing, I, as owner, retain the right to control, limit, and revoke my consent to its use at any time. And, as I interpret the law, ownership includes the right to charge those who use my private property—be it a room in my home, an open field, or a masonry wall—rent, for as long as their use of my property continues.

As long as the defendant uses my masonry wall for an illegal enclosure—choosing to invest in other home renovations, rather than replacing her subdivision boundary fencing—she ought to compensate me for the many benefits she derives thereby, and pay the rent that I ask.

I've been fighting off challenges to my property rights from residents in the subdivision behind us—who, for some reason, think they have a right to force me to subsidize their home ownership—for well over four years now.

So I look forward to having this matter resolved, once and for all, in a court of law, and hope you'll find in my favor.

Respectfully submitted,

Deborah Taylor-Pearce

Attachments (6):

1. MAP 1: Overview of MIRA MESA NORTH No. 2 subdivision boundary fencing.
2. Photograph taken on 10/9/2011: Showing double fences—to the west, a run of MIRA MESA NORTH No. 2 subdivision boundary fencing, still located where it was erected by the developer, and to the east, a patchwork of private fencing put up by some, but not all, homeowners of LARWIN MESA VIEW No. 12 subdivision properties—with a 21-inch clearing between them (as established in 1975).
3. Real estate listing for defendant's "partially"-fenced (due to missing MIRA MESA NORTH No. 2 subdivision boundary fencing) property when sold in 2010.
4. MAP 2: Detail showing defendant's use of plaintiff's private property for illegal enclosure.
5. Photograph taken on 12/2/2012: Documenting defendant's aggressive use of plaintiff's masonry wall (specifically, the wall-grown bougainvillea), in December 2012.
6. Photograph taken on 9/30/2014: Documenting defendant's continuing use of plaintiff's masonry wall (with wall-grown bougainvillea now invading our garden) at the end of September 2014, the cut-off date for Ms. Lewis's rent-free use of our wall.