

434 Fed.Appx. 666, 2011 WL 2036481 (C.A.9 (Cal.))

(Not Selected for publication in the Federal Reporter)

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.

Zhi G. WANG and Xianghui Yan,
Plaintiffs–Appellants,

v.

CITY OF PLEASANTON and Comcast Cable
Communications, LLC, Defendants–Appellees.

No. 10–16243.

Argued and Submitted May 11, 2011.

Filed May 25, 2011.

Background: Servient tenement owners brought action against city, which was dominant tenement owner, and against cable franchisee for digging a trench and installing cable in public use easement. The United States District Court for the Northern District of California, Jeffrey S. White, J., granted summary judgment against plaintiffs and denied their motion for reconsideration.

Holdings: The Court of Appeals held that:

- (1) federal statute permitted cable franchisee to dig trench and install cable, and
- (2) city's prior use of easement only to plant street trees did not constitute abandonment of easement.

Affirmed.

West Headnotes

[1] Telecommunications 372 ↪1223

372 Telecommunications

372VI Cable Television

372k1220 Rights of Way to Public or Private Property

372k1223 k. Private property in general.

Most Cited Cases

Federal statute permitted cable franchisee to dig trench and install cable in city's public use easement in servient tenement owners' front yard; cable was compatible with easement's uses, which included “poles, wires, conduits, ... and gas, water and heat mains and all public utilities.” Communications Act of 1934, § 621(a)(2), 47 U.S.C.A. § 541(a)(2).

[2] Eminent Domain 148 ↪2.15

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.15 k. Telecommunications. [Most Cited Cases](#)

Cable franchisee's municipally authorized use of city's public use easement to dig trench and install cable in servient tenement owners' front yard was not a taking. U.S.C.A. Const.Amend. 14.

[3] Telecommunications 372 ↪1223

372 Telecommunications

372VI Cable Television

372k1220 Rights of Way to Public or Private Property

372k1223 k. Private property in general.

Most Cited Cases

Under California law, city's prior use of public use easement only to plant street trees in servient tenement owners' front yard did not constitute abandonment of easement, or limit city's right to permit cable franchisee to use easement to dig trench and install cable.

*667 Marjorie Elaine Mikels, Law Office of Marjorie M. Mikels, Upland, CA, for Plaintiffs–Appellants.

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Stephen Kaus, Jill Battilega Rowe, Esquire, Edward L. Seidel, Cooper White & Cooper LLP, San Francisco, CA, for Defendants–Appellees.

Appeal from the United States District Court for the Northern District of California, Jeffrey S. White, District Judge, Presiding. D.C. No. 3:09–cv–05838–JSW.

Before: B. FLETCHER and THOMAS, Circuit Judges, and ROSENTHAL, District Judge.^{FN*}

FN* The Honorable Lee H. Rosenthal, District Judge for the U.S. District Court for Southern Texas, Houston, sitting by designation.

MEMORANDUM^{FN**}

FN** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

**1 Zhi G. Wang and Xianghui Yan appeal the district court's grant of summary judgment against them and subsequent denial of their motion for reconsideration. Wang and Yan sued Comcast Cable Communications for digging a trench and installing cable in the public use easement in their front yard. Wang and Yan also sued the City of Pleasanton, which had awarded Comcast the cable franchise. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here. We affirm.

This appeal is based on arguments and evidence advanced for the first time when Wang and Yan moved to alter or amend the judgment under Rule 59(e). The district court refused to consider their newly raised grounds. This refusal was not an abuse of discretion. *668 *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008); *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir.2000).

[1][2] The record also shows that the result would have been the same had the district court reached the merits of the motion to alter or amend the judgment. The federal and state law grounds that Wang and Yan urge are not a basis for the relief they seek, given the broad language of the easement that burdens their property and the fact that Comcast had a cable franchise from the City of Pleasanton. Federal law allows cable franchisees, such as Comcast, to use easements “dedicated for compatible uses.” 47 U.S.C. § 541(a)(2); *Cable Ariz. Corp. v. Coxcom, Inc.*, 261 F.3d 871, 872 (9th Cir.2001). The broad easement at issue includes uses for “poles, wires, conduits, ... and gas, water and heat mains and all public utilities.” Cable is compatible with these uses. See *Cable Ariz. Corp.*, 261 F.3d at 875 n. 3. Wang and Yan are incorrect that Comcast's municipally authorized use of the easement is a taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). *Loretto* held that physical intrusions may be takings, but *Loretto* did not involve an authorized use of a broad easement. This court and others have limited § 541(a)(2)'s reach to public use easements to make the statute consistent with *Loretto*. *Cable Ariz. Corp.*, 261 F.3d at 876–77. Comcast's use of the public use easement is not, as a matter of law, an unconstitutional taking.

[3] The result is the same under state law. See *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 802–05, 212 Cal.Rptr. 31 (Cal.Ct.App.1985). The argument that the City abandoned the easement or that its use was limited because it was used only to plant street trees is unavailing. Under California law, lack of a particular use is insufficient to show abandonment of a public use easement. See *Sharp v. City of San Diego*, No. D052315, 2009 WL 1133094, at *2 (Cal.Ct.App. Apr. 28, 2009) (citing cases).

Neither attorney suggested that Wang and Yan were raising a claim that Comcast had failed to restore their front yard after working in the easement

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to lay the cable. We note that during argument, Comcast's attorney stated that it would work with Wang and Yan to resolve any issues that might remain about repairing their property because of the work that was done.

****2 AFFIRMED.**

C.A.9 (Cal.),2011.

Wang v. City of Pleasanton

434 Fed.Appx. 666, 2011 WL 2036481 (C.A.9
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