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EXEMPT FROM FEES PER GOVERNMENT CODE §6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JOHN TOS *et al.*,
Plaintiffs
vs.
CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,
Defendants

No. 34-2016-00204740

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE ALLEGATIONS

Date: April 18, 2017
Time: 9:00 PM
Department: 54
Action filed: December 13, 2016
Trial Date: Not Yet Set
Reservation: 2232493

INTRODUCTION

Defendants California High-Speed Rail Authority ("CHSRA") and Board of Directors of the California High-Speed Rail Authority ("Board", and the foregoing, collectively, "Defendants") have filed a motion to strike allegations along with their demurrer against Plaintiffs' First Amended Complaint ("FAC"). Presumably, the motion to strike is a "back-up" motion in case their demurrer is overruled.

The motion to strike should be denied. Both the allegations and the prayer for relief supported by them are well-founded under California law, especially given California's policies that a complaint should be liberally construed (Code of Civil Procedure § 452; *American Airlines,*

Inc. v. County of San Mateo (1996) 12 Cal.4th 1110, 1118), and that cases should, wherever possible, be decided on their merits. (*Smeltzley v. Nicholson Mfg. Co*. (1977) 18 Cal.3d 932, 939.)

BACKGROUND

For general background, Plaintiffs refer the Court to the summary provided in Plaintiffs' Opposition to Defendants' Demurrer, submitted herewith. That information will not, therefore, be repeated here, but is incorporated herein by this reference.

Defendants attack three of the paragraphs in the Prayer for Relief, Paragraphs 2, 3, and 4, which seek injunctive relief against Defendants. Defendants also attack three paragraphs in the complaint's allegations: the second sentence of Paragraph 3, which identified the injunctive relief sought, Paragraph 14, which explains why, in the absence of a remedy, Plaintiffs will suffer irreparable harm, and Paragraph 69, which explains in more detail the nature of the injunctive relief being sought.

In short, Defendants' Motion to Strike is aimed at eliminating injunctive relief (i.e., the Second Cause of Action) entirely from the scope of relief to which Plaintiffs might, if successful, be entitled.

LEGAL STANDARD

A motion to strike "can be used to reach defects or objections to pleadings that are *not* challengeable by demurrer." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶7:156, p. 7-59 [emphasis in original].) Thus, it is typically used to attack individual or groups of allegations, rather than an entire cause of action.[1] (*See, e.g., Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 385.) However, because it does not attack an entire cause of action, "[M]atter that is essential to a cause of action should not be struck and it is error to do so." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528.)

[1] A generic motion to strike is to be distinguished from a special motion to strike under Code of Civil Procedure § 425.16.

ARGUMENT

I. DEFENDANTS' ATTEMPT TO STRIKE INJUNCTIVE RELIEF FROM THE SECOND CAUSE OF ACTION MUST BE DENIED.

Defendants make multiple arguments about why all allegations pertaining to injunctive relief, as well as all requests for injunctive relief, should be stricken. They claim the allegations and requests are improper, "… because they are based on a challenge to the Authority's Funding Plans, which must be brought in a writ proceeding." (Defendants' Memorandum of Points and Authorities in Support of Motion to Strike Allegations ["Def. P&A"] at p. 12:5-6.) They also claim the allegations and requests are either superfluous or too vague to be enforceable. Finally, they claim that the request to have funds already illegally spent restored to the state's treasury is beyond what is allowed under Code of Civil Procedure Section 526a. In short, Defendants' Motion to Strike, like their demurrer, attempts to dismiss the entire Second Cause of Action. For multiple reasons, Defendants' Motion to Strike should be denied *in toto*.

A. The motion to strike injunctive relief from the Second Cause of Action should be denied as procedurally improper.

As Defendants note, a motion to strike is proper to seek to eliminate a substantive defect in the complaint that is clear on the face of the complaint. Such a defect can be irrelevant, false, or improper matter or any part of a pleading not drawn or filed in conformity with the laws of California. (See, Def. P&A at p. 11.) However, Defendants' motion to strike the entire second cause of action is procedurally improper because it is improper for a motion to strike to attempt to strike " …matter that is essential to a cause of action … ." (*Ferraro, supra*, 161 Cal.App.4th at p. 528.) That is the role of a demurrer, not a motion to strike.

Obviously, the entire thrust of the Second Cause of Action, as its title indicates, is for injunctive relief. Having challenged the cause of action by demurrer, Defendants may not also seek its dismissal through a motion to strike.

B. **Plaintiffs' claim for injunctive relief under C.C.P. Section 526a is properly brought separately and independent of any claim for relief by administrative mandamus.**

As in their demurrer, Defendants argue that the claim for injunctive relief under Code of Civil Procedure Section 526a[2] is improper because it is really a challenge to Defendants' approval of the Funding Plans, which may only be brought by administrative mandamus. As already argued in Plaintiffs' Opposition to Defendants' Demurrer, Defendants have distorted the Second Cause of Action, attempting to convert it to a challenge to the approval of the two Funding Plans. It is not. Rather, it is a challenge to Defendants' attempt to illegally expend Prop. 1A bond funds on a project that is patently noncompliant with the bond measure's requirements.

In particular, the very Funding Plan that Defendants rely upon to justify the expenditure of bond funds shows clearly that the project, even when fully constructed in accordance with the Funding Plan, will not be "suitable and ready for high-speed train operation." Instead, all it will be ready for, once some high-speed rail cars have been bought, paid for, and delivered (something not included in the Funding Plan)[3], is to test those cars, and the track, signaling, electrification, etc., to see if they are, in fact, usable to provide the high-speed rail service that might eventually (at some unspecified future time) be instituted, once additional improvements have been planned, funded, and implemented. (FAC ¶¶ 27, 51.)

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[2] Defendants also argue that taxpayers cannot be entitled to any relief a nontaxpayer could not also seek. (Def. P&A at p. 13:14-16.) Nontaxpayers have often been denied standing for a claim under § 526a. (*See, e.g.*, *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761 [payment of state income tax insufficient to confer standing to challenge agency relying on sales and gasoline tax for funding].) Here, even if the nontaxpayer plaintiffs may not maintain the § 526a action, the taxpayers may, so the issue is immaterial.

[3] See FAC ¶¶ 27, 51; Exhibit D to Plaintiffs' Request for Judicial Notice at pp. 4-5. "The purchase of high-speed rail trains *is not part of completing the Usable Segment* but will be part of the Authority's implementation of the Valley to Valley Line. … … To purchase the trains, the Authority will request an additional appropriate of $865 million in Prop 1A funds or will use $865 million from the continuous appropriation the Legislature provided in SB 862. Those funds (if Prop 1A) will be part of a future Funding Plan that the Authority will submit." [emphasis added]

Plaintiffs' allegations about the expected actions by the Director of Finance, and of Defendants once the Director of Finance has approved the Funding Plans (FAC ¶¶ 54, 64), are also sufficient to withstand either a demurrer or motion to strike. In a challenge to a complaint on its face, as is the case for both a demurrer and a motion to strike, all properly pled allegations are assumed true. Whether the plaintiffs may have difficulty in proving those allegations is not of concern. (*Kaiser Engineers, Inc. v. Grinnell Fire Protection Systems Co.* (1985) 173 Cal.App.3d 1050, 1054.)

C. **Under the circumstances of the case, Plaintiffs claims for both preliminary and permanent injunctive relief are appropriate.**

Based on *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 749, Defendants argue that the FAC's allegations cannot support a claim for permanent injunctive relief. The situation in *Connerly* is easily distinguished and, under the circumstances of this case, both preliminary and permanent injunctive relief are appropriately requested.

In *Connerly, supra*, the plaintiff had sought both declaratory relief that a statute passed by the Legislature was facially unconstitutional and injunctive relief to prevent state officials (the governor and attorney general) from attempting to implement or enforce the legislation. (*Id*. at p. 742.) While the lawsuit was pending, another lawsuit determined that the statute was indeed facially unconstitutional. That decision was affirmed on appeal, and the Supreme Court denied review, making the decision final. (*Id*.) Despite this, the trial court granted judgment on the pleadings to the plaintiff. (*Id*.) The court of appeal reversed, finding that because the other lawsuit had finally and conclusively found the statute unconstitutional and unenforceable, there was no longer a justiciable controversy, nor any reason to expect a state agency to continue to attempt to enforce a statute that had been conclusively found unconstitutional.

Here, by contrast, there is no other case before the courts challenging the constitutionality of AB 1889. Thus, until a final judgment has been entered, there may well be a need for a preliminary injunction to prevent Defendants from proceeding with illegal expenditure of Prop. 1A

bond funds.[4] Further, even if this Court were to find the statute unconstitutional and therefore void, Defendants could appeal that decision in both the court of appeal and the Supreme Court. In the interim, a permanent injunction would be necessary to prevent continued illegal expenditures from occurring until there was a conclusive decision. Thus, unlike the situation in *Connerly, supra*, both preliminary and permanent injunctive relief are proper here.

Defendants also claim that any claim for injunctive relief against a future Funding Plan would be too vague to be enforceable. Not so.

The language in Streets and Highways Code § 2704.08 is, in itself, quite clear. In order to be able to use Prop. 1A bond funds for its construction, a usable segment must, when its construction has been completed in accordance with the funding plan, be "suitable and ready for high-speed train operation." In other words, once construction is complete, the segment, with its two stations, ought to be ready to begin carrying high-speed rail passengers. (See, Exhibit C to Plaintiffs' RJN at p. 28 – second bullet point [must have funds needed to provide service before starting construction on a segment].) That is as opposed to what AB 1889 would allow, where the segment would not be able to carry high-speed rail passengers until "after further improvements had been funded and constructed." (FAC ¶ 43.)

Perhaps Defendants may have trouble with making that determination, but Plaintiffs submit that a person of common intelligence would not need to guess about the meaning of that determination. Further, the exact language of any injunction to be entered is best addressed at the point that the Court determines the injunction is merited, not at the very start of the case. (*See, e.g., People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 23 [complaints about vagueness of injunction's language easily resolved by context of injunction]; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 534 [same].)

[4] Plaintiffs have just such a motion pending before the Court.

D. **Plaintiffs' request for relief through the restoration of illegally expended funds is proper.**

Finally, Defendants complain that there is no provision under Section 526a allowing a plaintiff to seek a court order requiring the restoration to the public fisc of funds that were illegally expended. Defendants cite to *O'Connell v. City & County if San Francisco* (1928) 204 Cal. 1 and *Fox v. City of Pasadena* (9th Cir. 1935) 78 F.2d 948, 950. (Def. P&As at p. 15:23-27.) Neither case is apposite.

In both *O'Connell* and *Fox*, what was at issue was an individual public official who allegedly illegally expended public funds. In *O'Connell*, the entire Supreme Court decision consisted of one short paragraph, finding that the demurrer in the trial court had been properly granted. A later case filled in some missing details, and concluded that, because the officials involved had acted within their proper discretion, there was no illegality involved. (*Powell v. City & County of S. F.* (1944) 62 Cal.App.2d 291, 299-300.)

In *Fox, supra*, the court of appeals never addressed the question of whether requiring reimbursement of illegally expended public funds was permissible. Rather, it decided that some of the claimed illegal expenditures were, in fact, proper and not illegal. As for the request that the City move the funds back to the proper account, that claim sounded in mandamus for failure to perform a mandatory duty, and mandamus was beyond the jurisdiction of the federal court. (*Fox, supra*, 78 F.2d at p. 950.)

In contrast, there are numerous California cases holding that under Section 526a, it *is* proper to require the public official(s) who authorized illegally expenditure of public funds to restore the public treasury, from their own pocket if necessary.

Perhaps the most striking example of this is *Mines v. Del Valle* (1927) 201 Cal. 273. In that case, the plaintiff, a Los Angeles resident and taxpayer, sued under Section 526a for the illegal expenditure of public funds by the Los Angeles Public Service Department. The Commissioners who governed that department voted, with the concurrence of the department's controller and of the city auditor and treasurer, to use Los Angeles city funds to pay for election materials to support

a city bond measure for expansion of its electrical system. (*Id*. at p. 275.) The plaintiff sued, seeking to have the defendants repay to the city treasury the funds that had been illegally expended. (*Id*. at p. 277.)

The defendants asserted that, because the bond funds would be used for expansion of the electrical system, and that was a permissible use of the funds involved, there was no illegality. (*Id*. at pp. 277-278.) The trial court granted plaintiffs judgment on the pleadings, requiring the defendant to repay the challenged amounts to the city, and costs of suit to the plaintiff. (*Id.* at p. 279.) The Supreme Court affirmed in full. (*Id*. at p. 290.) In so doing, the court noted that while the defendants should not be held personally liable for decisions that they made within their proper discretion as public officials, they violated their duty in making the illegal expenditures – an action beyond their proper discretion, and for that they could be held legally accountable.

> The converse of the argument is that the powers of municipal officers are well defined. Their modes of procedure in all matters of expenditure are pointed out with particularity. They are given by law a legal adviser, and, if not, are fully empowered to employ one. There is no occasion whatsoever for their taking any step without such advice. There is no reason for their ever making any illegal expenditure of the public's moneys. To countenance the making by these officials of an illegal expenditure in one case is to open wide the door for like expenditures in every case. (*Id.* at p. 288 [quoting from *Osburn v. Stone* (1915) 170 Cal. 480, 484].)

This same principle has been upheld repeatedly in more recent decisions. Thus in *Stanson v. Mott* (1976) 17 Cal.3d 206, 210 the Supreme Court affirmed its conclusion that a public official could be held personally liable for his approval of an expenditure of public funds that was not authorized by the agency's legal powers, if he had not exercised due care in giving his authorization. The issue, again, was the expenditure of public funds in an election campaign to support approval of a bond measure.[5] The Supreme Court recently again reaffirmed that principle in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, even though the court determined there that the election campaign expenditures involved were within the public agency's proper discretionary authority (i.e., they did not cross the line between educational/informational and advocacy).

[5] The case came to the Supreme Court after the trial court had granted a demurrer. The Supreme Court reversed and remanded to the trial court for a determination on the merits.

Here, the complaint adequately alleges that Defendant Board was responsible for approving the illegal/wasteful expenditure of public funds on the preparation and approval of the two Funding Plans. (FAC ¶¶ 2, 3, 10, 63, 67.) Plaintiffs have also alleged that those two Funding Plans were illegal in that they proposed violating the clear requirement under Prop. 1A that any usable segment being constructed using Prop. 1A bond fund be, when construction was complete, "suitable and ready for high-speed train operation." (FAC ¶¶ 51, 66.) Together, these allegations adequately support a claim that the Board approved CHSRA's illegal and wasteful expenditure of public funds towards the preparation and approval of the two expenditure plans.[6] If these allegations are proved at trial, the Board can properly be held to account for its actions and required to restore those funds to their proper source.

CONCLUSION

Defendants' Motion to Strike, along with their demurrer, attempt to sidestep the central issue here – whether Defendants have been and are attempting to use Proposition 1A bond funds, and other public funds, illegally. That important issue deserves to have its day in court. Defendants' Motion to Strike should be denied so that this case can move forward to resolution on its merits.

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[6] Defendants assert that even if there were public funds involved, they were federal grant funds that could not and should not be restored to the state treasury. (Def. P&A at p. 17:1.) Defendants appear to either assert or assume that the federal funds referenced in ¶ 26 of the FAC were also used to prepare and approve the two Funding Plans. In fact, the FAC contains no allegations about the overall sources of CHSRA's funding, and only alleges that the funds used to prepare and approve the two Funding Plans were public funds. Defendants' assertion assumes facts not in evidence, to which Plaintiffs object.

Dated: April 4, 2017

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