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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, QUENTIN KOPP, TOWN OF ATHERTON, a municipal corporation, COUNTY OF KINGS, a subdivision of the State of California, MORRIS BROWN, PATRICIA LOUISE HOGAN-GIORNI, ANTHONY WYNNE, COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, and CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, BOARD OF DIRECTORS OF THE CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1-20 inclusive,

Defendants.

Case No. 34-2016-00204740

REPLY IN FURTHER SUPPORT OF DEMURRER

Date: April 18, 2017
Time: 9:00 a.m.
Dept: 54
Judge: Raymond M. Cadei
Trial Date: None set
Action Filed: December 13, 2017

Reservation No. 2232493

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INTRODUCTION

Plaintiffs' Opposition to the Authority's Demurrer relies on the mistaken premise that they may challenge an administrative decision that can only be reviewed by writ of mandate and convert it into a civil lawsuit merely by alleging a taxpayer action under Code of Civil Procedure section 526(a). The Second Cause of Action, asserting that an administrative decision of the Authority violates the Bond Act because it relies on an allegedly unconstitutional amendment to the Bond Act, thus fails because it may only be brought in a writ proceeding. The First Cause of Action, challenging the constitutionality of that Bond Act amendment, can and should be tried in that same writ proceeding, when there is a decision ripe for review. Here, however, both claims were brought prematurely, which cannot be cured by amendment and is thus fatal to the complaint. Accordingly, the Court should grant the Demurrer without leave to amend.

ARGUMENT

I. CIVIL PROCEDURE SECTION 526A MAY NOT BE USED TO CONVERT A WRIT PROCEEDING INTO A CIVIL ACTION.

Plaintiffs rely on no published authority to support their argument that they are not required to challenge the Authority's decision in a writ proceeding to compel the Authority to set aside its decision approving the funding plans, but instead may bring a civil action to challenge that decision under Code of Civil Procedure section 526a ("Section 526").[1] As set forth in Defendants' moving papers, there is none. (Demurrer at pp. 14-15; see *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 707 (hereafter, *CHSRA*). Instead, Plaintiffs rely on an unpublished order of this court in *Tos v. High-Speed Rail Authority* (Super. Ct. Sac. County, No. 34-2011-00113919) (hereafter, *Tos I*), and the Court of Appeal's

[1] In *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, the Supreme Court held that the trial court had erred in dismissing plaintiffs' complaint without leave to amend instead of allowing the plaintiff to cure its defects by amendment or treat it as a writ petition. Plaintiffs here are not arguing that their complaint should be treated as a writ petition; they are arguing that they may proceed via civil complaint. (Opposition at p. 9-10.)

unpublished order denying a petition for writ of mandate challenging that order in *California High-Speed Rail Authority v. Superior Court*, No. C076042. Even if these decisions had any precedential value, and they do not, they do not support the argument Plaintiffs make. In *Tos I*, the Court properly treated the claims alleged under Section 526a as writ claims in all respects.

In *Tos I*, the petitioners divided their case into two parts, expressly stated writ claims, in which they sought a ruling that the preliminary funding plan at issue in that case violated the Bond Act, and also claims that petitioners alleged under Section 526a, in which they sought a broader ruling that the system that the Authority was developing could not comply with the Bond Act. (See Request for Judicial Notice in Support of Reply in Further Support of Demurrer ("Defendant's RJN"), Exh. 1 [*Tos I*, Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate (Nov. 25, 2013)], p. 5.) After the writ claims were resolved, the *Tos I* respondents filed a motion for judgment on the pleadings on the remaining Section 526a claims. (Plaintiffs' Request for Judicial Notice ("Plaintiffs' RJN"), Exh. A.) The respondents argued that the Section 526a claims were in fact writ claims that had been resolved by the Court's ruling on the writ claims, and that any claims not resolved as a result of the writ hearing were not ripe. (Plaintiffs' RJN, Ex. A. at pp. 2-3.)

In denying respondents' motion, Judge Kenny did *not* rule that plaintiffs could pursue their remaining claims under Section 526a as a civil cause of action; to the contrary, he ruled that defendants were not entitled to judgment on those claims as a matter of law, and that plaintiffs had alleged a cause of action *for issuance of a writ of mandate.*

> [T]he Court concludes that petitioners have alleged facts sufficient to state a cause of action for review of an administrative determination by respondent California High-Speed Rail Authority to commit to the building of a high-speed train system that does not comply with the substantive design requirements of Proposition 1A . . . . At a minimum, the facts alleged state *a cause of action for issuance of a writ of mandate under Code of Civil Procedure section 1085.*

(*Id.*, Exh. A at p. 4, emphasis added.) Judge Kenny subsequently granted the respondents' motion to limit the evidence at trial to the administrative record, which is another way of saying that he ordered that plaintiffs' remaining claims would be treated as writ claims. (Defendant's RJN,

Exh. 2) Plaintiffs subsequently sought to augment the administrative record, and in ruling on that motion, Judge Kenny expressly applied the law governing evidence in writ proceedings:

> [T]he record before the Court will need to consist of the documents relied upon by the Authority in making the decisions being challenged in this matter. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366-67/.)

(Defendant's RJN, Ex. 3 at p. 4.) After a writ hearing based on the administrative record and counsel's arguments, the Court entered judgment in favor of respondents. (Defendants' RJN, Exh. 4 at p. 2.) Thus, even if the unpublished orders in *Tos I* were grounds to ignore governing published authority, those orders do not support plaintiffs' argument that they have adequately alleged a civil cause of action under Section 526a.

Plaintiffs' argument that they "are not seeking here to overturn Defendants' approval of the two funding plans" (Opposition at p. 9), and therefore need not proceed by mandamus, is meritless. Section 526a simply provides standing to challenge governmental action involving allegedly illegal expenditures where it would not otherwise exist. It cannot be used as a means of avoiding proper procedures for challenging public agency decisions. (*Daily Journal Corp. v. City of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557-1558.) Attacks on quasi-legislative actions on the grounds that they are a waste of public money are simply not authorized by Section 526a. "Section 526a does not allow the judiciary to exercise a veto over the legislative branch of government merely because the judge may believe the expenditures are unwise, that the results are not worth the expenditure, or that the underlying theory of the Legislature involves bad judgment." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138; *Humane Society of U.S. v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356.) Before a court may find that expenditure of the bond monies to implement an Authority funding plan is illegal, the court must first find that the funding plan does not comply with the Bond Act – and that necessarily would require a finding that the Authority decision to approve the funding plan was an abuse of discretion and violated the Bond Act. (See *Hess Collection Winery v. Cal. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1596-97.) Thus, the allegations of the Second Cause of Action, that funding plans approved by the Authority violate the Bond Act, and seeking

to enjoin the expenditure of bond funds (FAC ¶¶ 51-52, 5465-66, Prayer 2-3), are substantively indistinguishable from the writ claims that were resolved in *CHSRA*, *supra*, 228 Cal.App.4th 676.)[2]

II. THE FIRST CAUSE OF ACTION ALSO SHOULD BE DISMISSED BECAUSE THAT CLAIM SHOULD BE RESOLVED IN A WRIT PROCEEDING CHALLENGING AN APPROVED FUNDING PLAN.

Plaintiffs concede that their facial challenge to AB 1889 is bound together with their challenge to the Authority's funding plans. (See Opposition at p. 8.) The Authority's Demurrer argued that "[p]laintiffs also cannot meet the second prong of the ripeness test – they cannot demonstrate that they will suffer hardship if they are required to bring their claims in an action challenging a funding plan that has actually been approved by the Director of Finance. (See *Pacific Legal Foundation v. California Coastal Com.* [(1982) 33 Cal.3d 158, 172-173].)" (Demurrer at p. 21.) In response, plaintiffs argue that they should not be required to file a new action for mandamus challenging AB 1889 in connection with the now-final Central Valley Funding Plan, complaining that requiring them to do so will allow the Authority to expend bond funds in the interim. That argument lacks merit. First, plaintiffs are not entitled to enjoin expenditure of the bond proceeds in any case, for the reasons discussed in the Authority's Opposition to Plaintiffs' Motion for Preliminary Injunction, filed April 6, 2017. Second, any hardship is entirely self-inflicted. Plaintiffs were given notice of the deficiencies in their complaint in the parties' meet and confer on March 7, 2017.[3] Had plaintiffs promptly filed a complaint that corrected those deficiencies, the Authority's answer to that pleading would have been on file by now.

[2] In *CHSRA*, plaintiffs ought to overturn the Legislature's appropriation of bond funds; here plaintiffs seek to enjoin the Authority from spending those appropriated funds.

[3] With respect to plaintiffs' failure to bring this action as a writ proceeding, plaintiffs cannot even claim ignorance, since plaintiffs John Tos and County of Kings, represented by plaintiffs' counsel of record in this case, litigated and lost this argument in *Tos I*.

III. THIS ACTION SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND BECAUSE IT WAS FILED PREMATURELY

Plaintiffs do not challenge, and therefore implicitly concede, the basic legal framework applicable here: (1) events occurring subsequent to the filing of a complaint are not assumed to be included in the lawsuit, and must be added by supplemental complaint brought by noticed motion; and (2) not even a supplemental complaint can cure a complaint that did not state a ripe claim when filed. "Any rule of procedural law that allows one to be sued for conduct in which one has not engaged because one is 'expected' to do the wrong thing is Kafkaesque." (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 206.)

Here, plaintiffs concede that they filed this action before the Director of Finance had acted on either Central Valley Funding Plan or the Peninsula Funding Plan. (Opposition at pp. 3-4.) Plaintiffs argue that they "have adequately alleged that while funding may not yet have been formally given, the funding is a foregone conclusion." (Opposition at p. 4.) Plaintiffs neglect to cite to such an allegation in the FAC, and there is none. (See FAC ¶ 53 [referring to "possible approval" of the funding plans by the Director of Finance].) The FAC on its face shows that it was filed prematurely, and subsequent events not reflected in the FAC cannot cure that.

CONCLUSION

The Court should sustain the Authority's Demurrer without leave to amend.

Dated: April 11, 2017

Respectfully Submitted,

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SA2016104863

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Tos, John, et al. v. California High-Speed Rail Authority**
No.: **34-2016-00204740**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **[GOLDEN STATE OVERNIGHT]**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On April 11, 2017, I served the attached **REPLY IN FURTHER SUPPORT OF DEMURRER** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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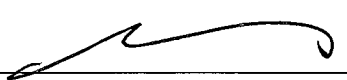
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2017, at San Francisco, California.

Susan Chiang
Declarant



Signature

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