 # 9 TENTATIVE 9:15 a.m. Friday, July 23, 2021

OSCAR DeLa TORRE v. CITY OF SANTA MONICA, et al. [21STCV08597]

RULING ON DEMURRER OF DEFENDANT CITY OF SANTA MONICA TO PLAINTIFF'S FAC

MEET & CONFER: DEFECTIVE – CITY's counsel declares that Plaintiff's Counsel didn't respond to MP's efforts to meet & confer

BACKGROUND: Action for declaratory relief; violation of the Brown Act –
TIMELINE:

"For several decades" Plaintiff De La Torre has allegedly "advocated for the implementation of district-based elections, both in Santa Monica and throughout California." He has taken the position that Defendant CITY's "at-large system" of electing its city council "dilutes Latino votes, and has caused Defendant's city council to be unresponsive, even hostile, to Latino voters and the Pico Neighborhood where they are most concentrated."

Beginning around 2015: De La Torre and others, including Plaintiff Elias Serna, allegedly "focused their efforts on changing the at-large election system employed by Defendant City of Santa Monica"; however, the CITY was allegedly non-responsive

April 2016: the Pico Neighborhood Association and Maria Loya allegedly filed suit to compel Defendant CITY "to comply with the California Voting Rights Act"; that case [Pico Neighborhood Association, et al. v. City of Santa Monica, LASC Case No. BC616804] went to trial in August 2018, and a judgment was entered in favor of the plaintiffs; Defendant appealed, and the intermediate appellate court reversed; the California Supreme Court granted review and, on its own motion, depublished the intermediate appellate court's decision. The "Voting Rights Case" is currently pending in the California Supreme Court.

November 2020: Plaintiff De La Torre sought election to Defendant's city council; Plaintiff alleges that "the system of election employed by Defendant, and relatedly the Voting Rights Case, was a significant issue in the campaign," and that all of the incumbents "opposed any change to the at-large election system, while De La Torre and his "Change Slate" all professed their support for district elections and an end to Defendant's wasteful fight against the Voting Rights Case"; Plaintiff and two of his

colleagues were elected, and were sworn into office in December 2020. Plaintiff alleges that before he took his seat on the Santa Monica City Council, he resigned from the Pico Neighborhood Association board.

November 25, 2020: the interim city attorney, who had allegedly actively participated in the defense of the Voting Rights Case, allegedly sought advice from the FPPC "on whether Councilmember de la Torre had a conflict of interest that prevented him from lawfully participating in council deliberations and decisions regarding the Voting Rights Case."

January 26, 2021: the interim city attorney allegedly placed an item on the City Council's next meeting agenda, for a council vote to declare that De La Torre has a conflict of interest and exclude him from all council meetings concerning the Voting Rights Case. Plaintiff claims that, "presented with only the interim city attorney's one-sided report, and though some members of Defendant's city council expressed a desire to obtain legal advice from the FPPC, they ultimately did not wait for guidance from the FPPC or any court. Instead, a bare majority (4 of 7) voted to declare that De La Torre has a conflict of interest and to exclude Plaintiff from all discussions, meetings and decisions concerning the Voting Rights Case.…," and that "later that same evening, Defendant excluded De La Torre from a closed session meeting,"" out of which no actions were reported

February 4, 2021: the FPPC allegedly "responded to Defendant's inquiry whether De La Torre has a conflict of interest," and "definitively concluded that Plaintiff does not have a conflict of interest that would prohibit him from participating in meetings and decisions concerning the Voting Rights Case." De La Torre then allegedly "requested that, in light of the FPPC's determination, Defendant reverse its previous action excluding him from meetings and decisions concerning the Voting Rights Case," but Defendant refused.

3/4/21: Plaintiff filed the verified Complaint herein

3/12/21: the case was re-assigned to D15

5/25/21: Plaintiff filed the verified FAC, asserting 2 C/As v. all defs:

1. declaratory relief
2. violation of the Ralph M. Brown Act [GC 54950]

6/24/21: Moving defendant filed these general demurrers to C/As 1-2

TENTATIVE RULING: RE THE GENERAL DEMURRERS OF DEFENDANT CITY OF SANTA MONICA TO CAUSES OF ACTION 1-2 OF PLAINTIFF'S FAC, THE COURT RULES AS FOLLOWS:

A) RE C/A 1 [DECLARATORY RELIEF]: SUSTAINED WITH 20 DAYS' LEAVE TO AMEND. While it is true that an action for declaratory relief requires that

there be an "actual controversy" between the parties [see CCP 1060], and the parties here clearly have opposing positions in regard to whether Plaintiff can and/or should be disqualified from taking part in City Council discussions involving the "Voting Rights Case" ["CVRA"], that doesn't end the inquiry here. In order for there to be an "actual controversy" here, the Court would have to find that the CITY acted outside of its authority in disqualifying Plaintiff from participating in Council meetings where the CVRA was the subject of discussion.

It is undisputed that the Council acted to disqualify Plaintiff based on a finding that he had a conflict of interest under the common law. The demurrer, and the opposition thereto, ask the Court to resolve two issues: first, whether the Council had the authority to disqualify Plaintiff; and second, whether the Council properly found that Plaintiff has a disqualifying conflict of interest. The Court agrees with the CITY on both of these issues.

Preliminarily, the Court finds that the common-law conflict of interest doctrine remains viable. See, e.g., Clark v. City of Hermosa Beach (1996) 48 CA4th 1152 [cited by CITY for the proposition that common-law conflicts "are separate and distinct from financial conflicts under the Political Reform Act and extend to nonfinancial interests"]. Also, the Court finds merit in Defendant's argument to the effect that the common-law conflict of interest doctrine has been the subject of opinion letters issued by the Office of the Attorney General. One of those opinion letters included a statement that the "temptation to act for personal or private reasons" presents a potential conflict of interest. See 92 Ops, Cal. Atty. Gen. 19, 2009 WL 129874, *5. While not directly on point, these authorities support the position that the common-law doctrine is still in force, and Plaintiff cites no authority to the contrary.

In fact, citing the Clark case [supra], Plaintiff concedes that "some courts have acknowledged a common-law doctrine" which "prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." Plaintiff then attempts to limit application of the common-law doctrine in two ways. First, Plaintiff submits that "courts are reluctant to find a conflict of interest under the common law where no conflict exists under the PRA or Section 1090," citing Breakzone Billiards v. City of Torrance (2000) 81 CA4th 1205 and All Towing Services LLC v. City of Orange (2013) 220 CA4th 946. That there may be judicial "reluctance," however, is far from saying that the Court lacks the power to make findings as to whether a disqualifying common-law conflict exists.

Second, Plaintiff argues that while common-law conflicts may arise in the absence of a financial interest, "there must still be some personal advantage or disadvantage at stake for the public officer" [citing 88 Ops. Cal. Atty. Gen. 32 (2005), at p.8]. Plaintiff goes on to argue that he has no personal stake, financial or otherwise, in the Voting Rights Case. He posits that if the plaintiffs in that case prevail, he will simply gain the benefit of an "undiluted vote," like "thousands of other Latino residents of Santa Monica." His argument, however, glosses over some important facts, which are undisputed here, e.g.: Plaintiff's parents founded the Pico Neighborhood Association [PNA], which is one of the plaintiffs in the CVRA case, and he served as its chair until shortly after his election as a Councilmember; Plaintiff's wife is the other named plaintiff in the CVRA Action; Plaintiff was involved with developing the claims and litigation strategy for the plaintiffs in the CVRA case; Plaintiff testified on the plaintiffs' behalf in deposition and in the CVRA trial; and Plaintiff continued to be involved in the case until at least 6/11/21, when he filed an amicus brief in support of the plaintiffs. As the Reply points out, these facts raise questions as to whether Plaintiff can "exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." See Noble v. City of Palo Alto (1928) 89 Cal.App. 47, 50.

As to whether the City Council had the authority to disqualify Plaintiff, the CITY cites Simons v. City of Los Angeles (1976) 63 CA3d 455, 468, for the propositions that a charter city's power over municipal affairs is "all embracing… and limited only by the city's charter," and that a charter city "has plenary powers with respect to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter." In opposition, Plaintiff first cites Lockyer v. City and County of San Francisco (2004) 33 C4th 1055 for the rule that "a local administrative agency has no authority under the California Constitution to exercise judicial power." Even if the Court were to agree that the City Council qualifies as a "local administrative agency," there is nothing before the Court to demonstrate that, by disqualifying Plaintiff, the Council is exercising "judicial power." More importantly, however, the argument ignores that CITY's charter gives the Council plenary powers re "municipal affairs not expressly forbidden to it…"

Plaintiff next argues that the authority to disqualify "has been expressly conferred on the courts and the FPPC…." In support, Plaintiff cites Gov't Code 91003, which allows any person residing in the jurisdiction to "sue for injunctive relief to enjoin violations or to compel compliance with the

provisions of the Political Reform Act…," and which states that the court has discretion to require any plaintiff other than the FPPC "to file a complaint with the FPPC prior to seeking injunctive relief," etc. Plaintiff complains that CITY didn't sue for injunctive relief, and didn't wait for the FPPC to respond to its inquiry before it excluded Plaintiff from a Council meeting; therefore, Plaintiff argues, Defendant has usurped the role of the Court. Further, Plaintiff submits that the Simons case doesn't help CITY, because "any charter city authority must yield to the California Constitution, which… vests the interpretation of the law in the judicial branch," and that city charters must yield on issues such as "the right to vote and the integrity of the judicial process" [citing Jauregui v. City of Palmdale (2014) 226 CA4th 781].

The Reply addresses Plaintiff's arguments persuasively, pointing out that a fundamental principle underlying the separation of powers doctrine is that all "'questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts.'" See People ex rel. Harris v. Rizzo (2013) 214 Cal.App.4th 921, 940. The Reply points out that Plaintiff's reliance on PRA provisions is misplaced, as such provisions "have no application to the common-law doctrine." Further, the Reply rightly notes that Plaintiff's argument that he has no personal interest in the CVRA Action "is further undermined by his Brown Act claim arguments, in which he contends that he has a 'personal stake in the outcome of the relief sought'—participation in discussions on the CVRA Action." [While the Reply doesn't address Jauregui, that case is inapposite, as the gravamen of the instant case isn't "the right to vote and the integrity of the judicial process." Rather, this case is about the CITY's authority to control its own internal processes.]

To summarize, the Court agrees with Defendant's arguments that: 1) the decision whether to disqualify Plaintiff "was a determination properly made by the City Council in the first instance, subject to potential court review"; and 2) the decision made by the Council- that Plaintiff had a disqualifying conflict of interest- was correct, and Plaintiff was properly excluded from participating in meetings in which the CVRA litigation was discussed. Therefore, there is no "actual controversy" remaining for judicial determination, and the demurrer to cause of action 1 must be sustained.

C/A 2 [VIOLATION OF THE RALPH M. BROWN ACT – GOV'T CODE 54950]: OVERRULED. Plaintiff's 2AC asserts that the Brown Act [Government Code § 54953] requires, with only specified exceptions, that "all persons shall

be permitted to attend" meetings of all or a majority of any city council, and that by excluding him from future Council meetings, defendant CITY threatens to violate the Act. Plaintiff cites Gov. Code, § 54960, subdivision (a), for the proposition that "any interested person may commence an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of [the Brown Act] by members of the legislative body...."; and §54960.1, subdivision (a), for the proposition that "any interested person" may "commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of [specified sections of the Brown Act] is null and void under this section."

Defendant raises two arguments in support of its general demurrer: a) Plaintiff lacks standing to assert this cause of action; and b) Plaintiff "failed to exhaust all remedies" before bringing his claim.

Re lack of standing to sue: Defendant cites Holbrook v. City of Santa Monica (2006) 144 CA4th 1242 for the proposition that public officials, including councilpersons, don't qualify as "interested persons" under Gov't Code 54960(a). Plaintiff, however, is persuasive in arguing that the Holbrook case is both limited in its holding and distinguishable on its facts. The court in Holbrook recognized that councilmembers would have standing to sue under the Brown Act if they were "barred from participating in council business... [or] deprived of the ability to participate in the proceedings of the city council..." Also, in Galbiso v. Orosi Pub. Util. Dist. (2010) 182 CA4th 652, the court allowed a Brown Act claim to proceed where the plaintiff sued not only as a Board member, but also on her own behalf because she had a personal stake in the outcome of the relief sought. Here, Plaintiff DeLaTORRE alleges that he has a personal stake in the relief sought because the Council's action in threatening closed meetings is directed at Plaintiff DeLaTORRE. While not argued here, it cannot be said that the Council's action doesn't impact Mr. DeLaTORRE's ability to perform his function on the Council.

Re the "failure to exhaust all remedies" argument: Defendant contends that Plaintiff's "request for a determination that the past action of the Counsel at the Jan. 26 meeting violated the Brown Act would be subject to either Gov't Code sec. 54960.2 or 54960.1, both of which set out either demand or cease and desist prerequisites that Plaintiff never satisfied..." Plaintiff does not dispute that he didn't submit any cease & desist letter to the CITY, and he didn't allege compliance with any such "requirement." Instead, he argues that there is no such pre-lawsuit presentation

requirement where, as here, Plaintiff contends that the prospect of future closed session meetings of a majority, but not all, of the CITY council is a threatened violation of the Brown Act by members of the legislative body. Plaintiff submits that Gov't Code secs. 54960.1 and 54960.2 authorize retrospective relief – a determination that an action already taken by a legislative body of a local agency is null and void; and that while the 1/26/21 closed session meeting of the Council was a violation of the Act, there was no action reported out of that session, and therefore there is nothing to declare "null and void." He argues that Plaintiffs aren't seeking a judgment that the 1/26/21 meeting violated the Act, but instead that the 2nd cause of action is only directed to future meetings and that no notice and opportunity to cure is required where Plaintiff seeks only "prospective relief," consistent with Gov't Code sec. 54960. See the FAC, p.16:para.5.

MP is to serve notice of ruling. This TR shall be the order of the Court, unless changed at the hearing, and shall by this reference be incorporated into the Minute Order. TR E-MAILED TO COUNSEL ON 7/23/21 AT 8:30 a.m.