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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NORTH PACIFICA, LLC,
Plaintiff and Appellant,

v.

CALIFORNIA COASTAL
COMMISSION,
Defendant and Respondent.

A130140

(San Mateo County
Super. Ct. No. CIV-462046)

This appeal is the most recent chapter in the protracted litigation pursued by North Pacifica, LLC (NP) to see its proposed coastal development project in the City of Pacifica (City) come to fruition. We affirm.

I. BACKGROUND

In an earlier case, we held that NP had to exhaust its administrative remedies by proceeding through a regulatory hearing of the California Coastal Commission (Commission) to resolve whether the Commission or the City had authority over NP's coastal development project. (*North Pacifica, LLC v. California Coastal Commission* (Dec. 22, 2004, A101434 [nonpub. opn.] (*NP I*)).) When last before us, we affirmed a trial court's ruling sustaining a demurrer to NP's petition. (*North Pacifica, LLC v. California Coastal Commission* (Mar. 19, 2008, A112590 [nonpub. opn.] (*NP II*)).) We held that the previous judgment finding NP failed to exhaust its administrative remedies barred any further challenge to the Commission's authority over NP's development project.

Undeterred, NP filed two additional rounds of litigation, this time choosing Los Angeles for its venue instead of San Mateo County.¹ The most recent challenge concerns NP's second Los Angeles action against the Commission, which was subsequently transferred to San Mateo Superior Court. The Commission filed a motion for judgment on the pleadings, arguing that the action was barred by res judicata. In granting the motion for judgment on the pleadings, the trial court rejected NP's claims as being matters NP previously raised or could have raised in earlier proceedings, explaining as follows: "In regard to the authority of the [Commission] to conduct an appealability review of the City's decision, [NP] has beaten this jurisdictional and procedural horse to death. Prior courts, including appellate courts' decisions rejecting all of [NP's] multiple procedural objections and jurisdictional arguments barred re-adjudication of all procedural and jurisdictional arguments in this latest case."

The trial court entered judgment and the instant appeal followed.

II. DISCUSSION

A. *Standard of Review and Burden of Appeal*

The most fundamental rule of appellate review is that an appealed judgment or order is presumed to be correct. " 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) Further, error alone does not warrant reversal. A judgment " 'will not be reversed unless it can be shown that a trial court error in the case affected the result.' [Citation.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.) The burden is on

¹ In the first Los Angeles action, Division Five of the Second District affirmed a trial court ruling denying NP's writ of mandate and claims for declaratory relief. (*North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1421, 1437.) In affirming the judgment, the Second District rejected NP's claims that the Commission was divested of its jurisdiction by failing to substantially comply with statutory and regulatory notice requirements. (*Ibid.*)

the appellant not just to show error, but to show injury from it by demonstrating that absent the error, a different result would have obtained. (*Ibid.*)

In addition to providing an adequate record to demonstrate error, an appellant's burden includes the obligation to present argument and legal authority on each point raised. This requires more than merely stating that the judgment or some part of it is erroneous, leaving the reviewing court to figure out why. It is not the appellate court's function to construct theories or arguments that would call the validity of the judgment into question and defeat the presumption of correctness. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 [“ ‘This court is not inclined to act as counsel for . . . any appellant and furnish a legal argument as to how the trial court's rulings . . . constituted an abuse of discretion’ ”].) Moreover, rule 8.204 of the California Rules of Court² requires that each brief “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority” and “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (Rule 8.204(a)(1)(B) & (C); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4 [appellant must clearly state each argument under separate heading and develop such arguments in a coherent fashion that the court can readily identify and evaluate].)

Accordingly, when an appellant asserts a point but fails to support it with reasoned argument and legal authority, the court may treat it as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 775 [issue deemed waived where appellant failed to support claim with argument, discussion, analysis, or citation to the record]; *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 [error not discussed in body of opening brief is waived as there is no serious effort to raise the issue on appeal].)

² All further references to rules are to the California Rules of Court.

B. NP Has Failed to Meet its Burden on Appeal

In its opening brief, NP has failed to present any cogent legal argument or citation to applicable legal authority in support of its claim that the trial court erred in granting the Commission's motion for judgment on the pleadings. Rather, the opening brief is a rambling recitation of procedural history that is bereft of proper citation to the record.

In this case, the record on appeal was prepared under rule 8.128, "which permits parties in courts of appeal to stipulate to the use of the original superior court file in lieu of the standard clerk's transcript created from photocopies of the file documents. Since the purpose of the procedure is to reduce the time and expense of preparing a clerk's transcript, the parties receive from the superior court only a chronological index indicating the beginning page of each named document. Each party then composes its own working copy of a clerk's transcript using the copies of the documents it already possesses, arranging them in the order set out in the index." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1204-1205 (*Bernard*).

Rule 8.128(b)(3) states that "[t]he clerk must send copies of the index to all attorneys of record . . . *for their use in paginating their copies of the file to conform to the index.*" (Italics added.) "Unless the parties add pagination to their working copies, as the rule clearly intends that they do, their versions of the clerk's transcript will not be sequentially numbered, although the file of original documents transmitted to this court will be." (*Bernard, supra*, 226 Cal.App.3d at p. 1205 [discussing former rule 5.2].)

Here, the parties do not even remotely attempt to paginate their file copies to conform with the index. Instead, they refer to each document separately without referencing the index at all. It is not the duty of this court to conform the parties' file copies with the index prepared by the clerk. (See *Bernard, supra*, 226 Cal.App.3d at p. 1205.) Rather, it is the duty of the parties to support the arguments in their briefs by appropriate reference to the record, which includes providing the exact volume and page number of where the cited matters appear. (Rule 8.204 (a)(1)(C); *People v. Woods* (1968) 260 Cal.App.2d 728, 731.) Proceeding under rule 8.128 does not relieve either party of this obligation. (*Bernard, supra*, 226 Cal.App.3d at p. 1205.)

As a practical matter, when, as here, the appeal has a voluminous record and a convoluted procedural history, the failure to comply with the rules of court is particularly problematic. In addition to failing to adequately cite to the record on appeal, NP repeatedly cites to matters that are outside of the appellate record. NP appears to rely extensively on the administrative record to support its position. However, given the stage of the proceeding, the administrative record was not lodged in the superior court, and, thus, is not part of the record on appeal.

Regarding the propriety of granting the motion for judgment on the pleadings, NP has failed to address to any meaningful extent the purported errors by the trial court. To the extent NP proffers a legal discussion of its claims, it does so, for the first time, in its reply brief. NP's efforts are too little and too late. “ ‘Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.’ [Citation.] . . . ‘ “Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.” [Citation.]’ ” (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Good reason has not been shown here.

In sum, NP has failed to meet its burden as appellant; therefore, we affirm the judgment below.

III. DISPOSITION

The judgment is affirmed.

Sepulveda, J.*

I concur:

Reardon, Acting P.J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

I concur in the result.

Unquestionably, appellant North Pacifica, LLC's (NP) briefing and record fail to comply with the California Rules of Court and make this appeal almost impossible to adjudicate. I would conclude, in addition, that NP has failed to demonstrate error.

The essential facts are these: respondent California Coastal Commission (Commission) held three hearings with respect to NP's coastal development permit: in December 2005, January 2006, and May 2006. In March 2006, prior to the May hearing, NP filed a petition for writ of mandate (traditional) asserting various claims relating to the January hearing, including that the Commission failed to comply with the notice requirements of the Bagley-Keene Act.¹ On June 26, 2006, NP filed an amended petition, adding allegations pertaining to the Commission's May 2006 hearing and decision. *Only seven days later*, on July 3, 2006, NP filed the current petition for writ of mandate, repeating some of the allegations and one of the prayers for relief contained in the prior petition and adding claims challenging the procedural fairness of the December and May hearings. The current petition was held in abeyance, pending final adjudication on the prior petition. After the denial of the prior petition was affirmed on appeal (*North Pacifica LLC v. Coastal Commission* (2008) 166 Cal.App.4th 1416 (*NP III*)), the trial court dismissed the present petition on the ground of res judicata.

In all of its voluminous briefing, NP never addresses the core issue underlying the trial court's decision, which is whether NP's petitions violate the primary right theory of code pleading in California. The trial court concluded that NP's petitions constituted impermissible claim splitting of jurisdictional and procedural attacks on the Commission's actions. (See *Crowley v. Katleman*, (1994) 8 Cal.4th 666, 681-682 [a primary right is indivisible; violation of a primary right gives rise to a single right of action].) NP does not challenge that conclusion. Instead, NP focuses on a different

¹ Government Code section 11120 et seq.

aspect of res judicata, that is, whether the claims in the current petition could have been litigated in the prior petition. (*Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 402 [all claims that could have been brought in prior action are barred under res judicata].)

NP's argument can be summarized as follows: in its March 2006 petition NP sought to vacate the Commission's January 2006 decision on the ground, inter alia, that it failed to comply with the Bagley-Keene Act notice requirements; under that Act, the petition had to be brought within 90 days of the January hearing; but NP's "right to file [the current] administrative writ and its causes of action therein did not commence until May 2006 . . . [¶] . . . [and therefore] NP could not have litigated its administrative writ claims at any time within the statute of limitations for filing its [prior action]."

NP's argument ignores the fact that in June 2006, six weeks *after* the May hearing, NP chose to file an amended petition in the prior action, adding allegations challenging the Commission's jurisdiction to act at the May hearing and challenging certain due process aspects of the Commission's actions. Therefore, although it is true that NP could not have *filed* its administrative writ challenging the May 2006 action within the statute of limitations for the prior petition, it is not accurate to state, as NP does, that it could not have *pleaded and litigated* its administrative writ claims in the prior action. As noted, NP chose to file an amended petition six weeks after the May hearing, only one week before it filed the current petition alleging its administrative mandamus claims. NP received the administrative record of the Commission's proceedings on October 12, 2006, three months before the hearing on the prior petition, which took place on

January 12, 2007. Under these circumstances, NP cannot credibly assert that its administrative claims could not have been litigated in the prior action.²

NP cites *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150 (*Allied*) for the proposition that, “[w]here a litigant had the option to amend its complaint to include an after acquired cause of action but has chosen not to do so, there is *no res judicata* bar and he is free to litigate such after acquired cause of action in a subsequent proceeding.” Thus, NP portrays *Allied* as holding that a litigant has the option of amending its petition to add some, but not all, of its later-acquired claims, and may litigate the claims thus reserved in a separate action. In fact, in *Allied*, the court held that “rights [that arise after the complaint is filed] may be asserted in a supplemental pleading, but if such a pleading *is not filed* a plaintiff is not foreclosed from asserting the rights in a subsequent action.” (*Allied, supra*, at p. 155, italics added.) Here, however, NP chose to file an amended petition to assert claims that arose out of, and after, the May hearing. Accordingly, *Allied* is inapplicable.³

NP also contends that the question of whether a claim could have been litigated is determined “*as of the date the first complaint is filed*” (italics original, boldface and underlining omitted), and, therefore, the challenges to the May hearing could not have been included in the prior petition, originally filed in March 2006 (citing *Allied, supra*,

² NP tacitly admits it could have litigated the administrative mandamus claims in the prior action, but chose not to do so because (1) it believed it had no legal obligation to add those claims and (2) it had no “economic or practical incentive to have amended its [prior] [a]ction to encompass the cumbersome, expensive and time-consuming administrative writ”

³ NP cites other cases in support of its claim that *res judicata* is not a bar to claims that arise after the initial complaint is filed, but none of these cases involves the filing of an amended complaint that includes some, but not all, of the plaintiff’s later-arising claims. (*Dillard v. Security Pacific Brokers, Inc.* (5th Cir. 1988) 835 F.2d 607, 609; *Los Angeles Branch NAACP v. L.A. Unified Sch. Dist.*, (9th Cir. 1984) 750 F.2d 731, 739; *Yager v. Yager* (1936) 7 Cal.2d 213, 217; *Kettelle v. Kettelle* (1930) 110 Cal.App. 310, 312.)

127 Cal.App.4th at p. 155). Again, this contention ignores NP’s decision to file an amended complaint in June 2006, challenging some, but not all, aspects of the Commission’s actions on NP’s permit. *Allied*, and the cases it relies upon, all involve circumstances where no amended or supplemental pleading was filed to incorporate later-arising claims. (See cases cited in fn. 3.) The applicable rule here is that “ ‘an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading.’ ” (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054.) Thus, the amended pleading would be the benchmark for determining whether a claim could have been litigated in a prior proceeding.

Finally, NP characterizes the appellate decision in *NP III* as holding that NP was under no obligation to bring its administrative writ claims in the prior action. That is not the holding of *NP III*. In that case the Commission made the procedural argument that NP was required to seek an administrative writ of mandate rather than a traditional writ of mandate to challenge the Commission’s actions. The court of appeal concluded that traditional mandamus was appropriate because NP’s action “did not challenge the substance of the Commission’s findings at either the January 11, 2006, or May 11, 2006 hearings by, for example, contending that those findings were not supported by substantial evidence. Instead, North Pacifica’s action sought to nullify the administrative proceedings at which those findings were made by making a direct challenge to the Commission’s jurisdiction to hold such hearings [Accordingly,] North Pacifica was not required to proceed by way of administrative mandamus.” (*NP III, supra*, 166 Cal.App.4th at pp. 1427-1429.) The court, however, did not purport to decide the very different question—which was not before it—of whether a subsequent challenge to

the substance of the Commission's findings would be barred if not raised in the prior action, when NP had the opportunity to do so.⁴

I would therefore conclude that NP has not demonstrated that the trial court erred in ruling that its petition was barred because NP impermissibly split its jurisdictional and procedural attacks on the Commission's action.⁵ On this additional ground I would affirm the judgment.

Rivera, J.

⁴ With respect to NP's allegations relating to the December 2005 hearing, NP erroneously claims that its jurisdictional challenges were not heard on the merits. In a prior decision we rejected NP's substantive claim, raised in its 2002 petition, that the Commission was without jurisdiction to move forward with the initial hearing (i.e., the December hearing) with respect to the appeal of the permit. (*North Pacifica LLC v. California Coastal Commission* (Dec. 22, 2004, A101434) [nonpub. opn.] at pp. 7-8.) Any other challenges to the Commission's jurisdiction to hold the December hearing could and should have been raised in the earlier petitions alleging jurisdictional challenges. Any later-occurring challenges to the Commission's actions could have been raised in the June 2006 amended petition which challenged the Commission's jurisdiction and alleged procedural irregularities.

⁵ Because NP does not provide any argument on this question I express no opinion on the issue.