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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

GERTRUDE PLATT et al.,
Petitioners and Appellants,
v.
EDWIN M. LEE, MAYOR OF THE CITY
AND COUNTY OF SAN FRANCISCO
et al.,
Defendants and Respondents.

A133076

(San Francisco City & County
Super. Ct. No. CPF-11-511064)

In the election of November 2008, San Francisco voters approved Proposition J, which established the San Francisco Historic Preservation Commission (Commission). This case involves the proper procedure to question the right of an appointee to that Commission to hold his office.

Former San Francisco Mayor Gavin Newsom appointed Richard S.E. Johns (Johns) to the Commission. Petitioners Gertrude Platt and the Proposition J Committee filed a petition for writ of mandate claiming Johns was not qualified to occupy the seat on the Commission to which he was appointed. Respondents, San Francisco Mayor Edwin M. Lee and David Chiu, President of the Board of Supervisors of the City and County of San Francisco, demurred to the petition on the ground that petitioners' sole remedy is by way of statutory quo warranto in Code of Civil Procedure section 803. The trial court sustained the demurrer without leave to amend and dismissed petitioners' mandate proceeding. They appeal, claiming they are entitled to maintain an action in mandate.

We disagree and affirm. We decide only that the statutory procedure of quo warranto is petitioners' sole remedy, and a petition for writ of mandamus will not lie.

I. FACTS

In reviewing the sufficiency of a complaint challenged by demurrer, we must provisionally accept as true all properly pleaded material facts alleged in the complaint. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1125; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*)). When a demurrer is sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]” (*Blank, supra*, at p. 318.) The burden of showing a reasonable possibility of curing the defect “is squarely on the plaintiff. [Citation.]” (*Ibid.*)

As a reviewing court viewing a complaint at the demurrer stage, we are obligated to give the complaint “a reasonable interpretation, reading it as a whole and its parts in context.” (*Blank, supra*, 39 Cal.3d at p. 318.) We must examine the complaint’s factual allegations to determine whether they state a cause of action *on any available legal theory*—even if that theory was not explicitly advanced or properly labeled in the pleading. (See, e.g., *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103; *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.)

In light of the above authorities, we take the operative facts from petitioners’ first amended petition for writ of mandate.

Proposition J created the Commission by amendment to the City Charter, and vested in the Mayor of San Francisco the right to make appointments to fill Commission vacancies. The Charter amendment also specified that the Commission would be made up of seven commissioners: Seats 1 and 2 would be held by licensed architects; Seat 3 by an architectural historian; Seat 4 by “an historian meeting the Secretary of the Interior’s Professional Qualifications Standards for history with specialized training and/or demonstrable experience in North American or Bay Area history”; Seat 5 by an historic preservation professional or a professional in other specified fields who has specialized

training or experience in historic preservation or historic preservation planning; Seat 6 by a professional qualified in specified fields, including archaeology, real estate, or structural engineering; and Seat 7 by someone sitting at large.

James Buckley held Seat 4, the Historian Seat, until his term expired December 31, 2010. To fill that vacancy, then-Mayor Gavin Newsom nominated Johns on November 29, 2010, for appointment to the Historian Seat, for a four-year term expiring December 31, 2014.

In January 2011, after a full public hearing regarding Johns' qualifications, the San Francisco Board of Supervisors approved Johns' nomination by a vote of 6–5.

Petitioners allege Mayor Newsom violated the City Charter by appointing Johns, who they claim does not meet the qualifications required for the Historian Seat on the Commission. Although we need not go into the matter in detail, petitioners claim Johns is not an historian, but an English major with a law degree. Petitioners claim Johns does not have a degree in history or the necessary academic historical experience.

Petitioners sought a writ of mandate ordering Mayor Lee and President Chiu to nominate a qualified candidate to fill the Historian Seat on the Commission for the term currently occupied by Johns. Respondents demurred to the mandate petition on the ground that petitioners' sole remedy to remove Johns from his appointed office was the procedure known as quo warranto. (Code Civ. Proc., § 803.) The trial court agreed and sustained the demurrer without leave to amend: "Petitioners have not shown quo warranto . . . to be an inadequate alternative remedy; as such, a writ of mandamus is an inappropriate remedy per CCP section 1086." The court then dismissed the mandamus petition.

II. DISCUSSION

Petitioners contend that quo warranto is not an adequate remedy at law and they are entitled to proceed in mandamus. We disagree for the following reasons.

We need not discuss the history of the remedy of quo warranto in detail.¹ It is briefly set forth in 8 Witkin, California Procedure (5th ed. 2008) Extraordinary Writs, section 27, pages 907–908 (Witkin). The remedy of quo warranto is currently embodied in Code of Civil Procedure section 803. An action for quo warranto lies “against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.” (Code Civ. Proc., § 803; see 8 Witkin, *supra*, § 27 at p. 908.)

The key to the remedy of quo warranto is that it can only be brought by the Attorney General, on his or her own information or by the request of a private party. (See *International Assn. Of Firefighters, Local 55 v. Oakland* (1985) 174 Cal.App.3d 687, 694–698.) The Attorney General enjoys considerable discretion whether to bring any particular quo warranto action. (8 Witkin, *supra*, § 28 at pp. 909–910; see *City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 650–651.)

In many cases, the remedy of quo warranto supplants that of mandamus. “The courts have almost uniformly stated that mandamus cannot be used to try title to office. . . .” (*Klose v. Superior Court* (1950) 96 Cal.App.2d 913, 918.) In particular, “[w]here the office is occupied by a de facto incumbent, mandate will not lie at the request of an outsider seeking some incident of the office or outright admission to the office. [Citations.]” (*Id.* at p. 919.) Johns occupies the seat by virtue of his nomination by the Mayor and approval by the Board of Supervisors after reviewing issues raised about Proposition J requirements.

Thus, petitioners’ remedy is to seek a quo warranto action by the Attorney General. They complain that the remedy is not theirs, since they have no control over the Attorney General’s discretion to bring the action. But their remedy is to seek, not

¹ Quo warranto was a common law writ literally meaning “by what authority” or “warrant” was a public office held or claimed. The crown instituted a formal inquiry into whether a subject was exercising a privilege illegally or had the right to occupy a public office. (Black’s Law Dict. (8th ed. 2004) p. 1285, col. 2.)

necessarily to find. Title to public office is generally litigated by a public officer, the Attorney General of this State, and not by private parties. From history and by statute the prerogative lies with the governing authority.

Petitioners rely on *Independence League v. Taylor* (1908) 154 Cal. 179 (*Independence League*). That case is distinguishable. There, the Mayor of San Francisco had an “imperative duty” under the City Charter to appoint members of the Independence League, a political party, to the board of election commissioners. (*Id.* at pp. 180–183.) The Supreme Court held the mayor had violated his duty under the City Charter to appoint the members of the Independence League—because of the number of votes cast in a recent election—and thus mandamus would apply to enforce that duty. (*Id.* at pp. 180–184.) But in the present case, petitioners are not suing in mandate to enforce a statutory or charter duty to appoint someone because of his political party affiliation and the number of votes cast in an election, but are simply trying to use mandate to challenge the substantive qualifications for office of an incumbent. The remedy for such a challenge to someone who may be unlawfully occupying an office is not mandate, but by quo warranto.²

We have taken judicial notice that the Attorney General has declined to go forward with a quo warranto proceeding in this case because “reasonable minds may differ on the issues.” Because quo warranto is the accepted means for a challenge to an incumbent of public office, petitioners are left with the remedy of seeking mandamus not against Mayor Lee, but *against the Attorney General* for abuse of discretion in failing to bring a quo warranto action. (See, e.g., *Nicolopoulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1229.)

Finally, we conclude petitioners cannot complain they were denied leave to amend their mandamus petition. There is no amendment that could possibly alter the clear fact

² Interestingly, two concurring Justices in *Independence League* recognized that fact and concluded the majority was in error. (*Independence League, supra*, 154 Cal. at pp. 184–185 (conc. opn. of Sloss, J., & Angellotti, J.))

petitioners' sole remedy here is quo warranto and not by a petition for a writ of mandamus.

III. DISPOSITION

The judgment of dismissal is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Dondero, J.