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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CITY OF OAKLAND,
Plaintiff and Respondent,
v.
PAUL JURICH,
Defendant and Appellant.

A134506
(Alameda County Super. Ct.
No. RG-03-132111)

After years of litigation with the City of Oakland in different actions involving his legal responsibility for an advertising sign, Paul Jurich appeals an order denying a postjudgment motion by which he sought to “reconcile, clarify, or resolve” earlier, “conflicting” rulings. As explained below, we conclude there was no error and affirm the order.

BACKGROUND

In November 2001, Jurich entered into a lease agreement with Desert Outdoor Advertising, Inc. (Desert), through the corporation’s president, Jeffry Herson. The agreement described Jurich as the owner of property at 3350 East 9th Street in the City of Oakland (City), “located about 50’ feet East of Interstate 880.” For an annual rent of \$12,000, Jurich authorized Desert “to use [his] property to erect, maintain, [and] service . . . an outdoor advertising structure . . . on the property for such use as permitted by law.” He expressly authorized “without limitation” Desert’s entitlement to “construct[] the advertising structure at [that] location.”

In January 2002, Herson submitted an application for a work permit to construct the advertising structure. The application was made in Jurich's name, and Jurich later agreed he gave Herson permission to submit the application. The application stated the proposed structure would display an "onsite" sign—that is, an advertisement relating to a business located on the property—and further, that the sign would not be visible from the adjacent freeway. Herson admitted later that both these representations were knowingly false.

Desert then erected a structure on the property that displayed a sign—12 feet by 36 feet and visible from the freeway—which read: "Coming Soon Smog Busters." There was not, and never had been, a business known as "Smog Busters" occupying the premises.

Section 14.04.270 of the Oakland Municipal Code (OMC) sets out "section 1501"—an ordinance that prohibits most billboards when "maintained primarily to be viewed from a freeway." (OMC § 14.04.270.) Exceptions to the ban primarily involve "onsite" signs, small signs advertising the sale or lease of the premises, or time/temperature displays. (See *Desert Outdoor Advertising, Inc. v. City of Oakland* (9th Cir. 2007) 506 F.3d 798, 800 (*Desert Outdoor Advertising*).)

The City concluded the advertising structure was in violation of section 1501. In January 2003 and again the following March, the City sent Desert and Jurich notices to abate the sign for violation of section 1501. Desert responded by initiating an action against the City in federal district court, alleging primarily that section 1501 was unconstitutional on its face.¹ The main components of this challenge were that section 1501 unconstitutionally favored commercial speech over noncommercial speech, and constituted an impermissible content-based restriction on speech. On April 21, 2004, Judge Martin J. Jenkins ruled that section 1501 did not favor commercial speech over noncommercial speech, but did find that the time/temperature display exemption was an

¹ In subsequent state court proceedings, Herson admitted that this challenge in federal court was the underlying purpose of his display of the "made [] up" sign for "Smog Busters."

unconstitutional content-based restriction. Concluding the time/temperature exemption could be severed from section 1501, Judge Jenkins did so, and ruled the remainder of section 1501 to be constitutionally valid on its face.²

Meanwhile, the City initiated these state court proceedings against Desert and Jurich on December 16, 2003. On March 25, 2004, the City filed a first amended complaint alleging three causes of action: (1) fraud and intentional misrepresentation; (2) “Public Nuisance-Injunctive Relief”; and (3) unlawful business practices alleged against Desert only (see Bus. & Prof. Code, § 17200 et seq.). The prayer for relief included a request that the East 9th Street advertising structure be declared a public nuisance and that defendants be ordered to remove it, or alternately that the City be permitted to remove the structure at defendants’ expense.

In May 2005, the City filed a motion for summary judgment or summary adjudication as to all three causes of action in the amended complaint. With regard to the second cause of action for public nuisance, the City argued the billboard violated section 1501 and, thus, was a nuisance per se. On October 5, 2005, the trial court granted summary adjudication as to the City’s second cause of action for public nuisance, otherwise denying the City’s motion (the October 2005 order). The court ruled the billboard violated section 1501 and as such was a nuisance per se.³ The court ordered defendants to remove the sign, in effect issuing a mandatory injunction.

Desert and Jurich did not remove the sign. The City obtained an order of contempt against them, and in March 2006 Desert and Jurich sought review by petition for extraordinary writ, claiming the trial court had no jurisdiction to issue the contempt order in the absence of the issuance of the prerequisite order to show cause. We agreed and issued an alternative writ directing the trial court to vacate the contempt order. (No. A113283.) The following month, May 2006, Desert and Jurich filed a notice of appeal

² In October 2007 the Ninth Circuit Court of Appeals filed its decision in *Desert Outdoor Advertising, supra*, 506 F.3d 798, upholding Judge Jenkins’s ruling.

³ The City’s Municipal Code provides that “a public nuisance shall exist whenever a condition on a property is maintained in violation of codes and ordinances identified in this chapter.” (OMC § 1.08.030, subd. (B).)

from the October 2005 order granting summary adjudication on the public nuisance cause of action. In February 2007 we dismissed this appeal as untimely. (No. A113708.)

Since 2003, Desert began using the advertising structure—erected on Jurich’s property on his authorization—to display commercial advertisements for clients such as Cingular, River Rock Casino, Oaks Card Club, and Toyota of Alameda.

In the face of Desert’s and Jurich’s continued refusal to remove the advertising structure, the City moved to modify the mandatory injunction included in the October 2005 order. On May 1, 2007, the trial court granted the motion, finding the defendants “have not complied and do not intend to comply with” the injunction to remove the sign. The court modified the injunction in the October 2005 order to permit the City to remove the billboard at defendants’ expense, including storage costs, if any (the May 2007 injunction modification order). Desert and Jurich appealed from this order. (No. A117870.)

The City’s first amended complaint proceeded to a bench trial held in May 2007, limited to the first and third causes of action. At the outset of trial, the City requested, and the court granted, dismissal of the first cause of action for fraud and intentional misrepresentation. The matter was, thus, tried only as to the third cause of action against Desert for unlawful business practices. On this cause of action, the court filed a statement of decision on September 25, 2007 (the September 2007 statement of decision), and the following November it entered judgment against Desert in the City’s favor. Desert appealed from this judgment. (No. A120152.) We consolidated this appeal with the appeal in case No. A117870. Ultimately, we affirmed both the May 2007 injunction modification order and the November 2007 judgment against Desert for unlawful business practices. (See *City of Oakland v. Jurich* (Nov. 25, 2008, A117870 & A120152) [nonpub. opn].)

While matters progressed in the state court action, Jurich initiated an administrative appeal with the City on August 31, 2006 seeking to challenge an administrative ruling issued earlier that month entitled “Declaration of Public Nuisance.” Some two years later, in September 2008, a hearing officer issued a final order after

hearing. The officer found Jurich had “*allowed or caused* a sign to be erected, constructed, and maintained on his property” since January 2003, when the structure was first inspected by the City. The officer concluded the advertising structure violated section 1501 and, thus, was a public nuisance. The officer denied Jurich’s administrative appeal, and imposed fines until “all advertising” was removed from the billboard structure that Desert was maintaining on his property.

It appears Jurich initiated another administrative appeal to contest the City’s subsequent imposition of liens on his property for assessed fees in the amount of \$43,064.40. In a letter dated May 9, 2011, the City informed Jurich that his “Billing Appeal” had been denied because the City Attorney’s Office “advised that[,] although the Business and Professions Code claims against you were dismissed [t]he public nuisance claims against you were resolved in favor of the City . . . on summary judgment, which you have unsuccessfully appealed.”

Thereafter, on August 22, 2011, Jurich filed in the state court action a “motion to reconcile, clarify, or resolve conflicting court findings and orders.” He claimed the October 2005 order—which granted the City’s summary adjudication motion as to its second cause of action for public nuisance—was “in apparent conflict” with the September 2007 statement of decision issued after the bench trial on the first and third causes of actions.⁴ Given this “conflict,” Jurich questioned, in effect, whether the October 2005 order could properly support the City’s efforts to assess fees against his property, because the September 2007 statement of decision had found Jurich “did not

⁴ The “apparent conflict,” specifically, is that the October 2005 order found, with respect to the *second* cause of action for public nuisance, that “undisputed evidence show[ed] Defendants [had] constructed an advertising sign” on Jurich’s property, and their “construction and maintenance of [the] sign in violation of [section 1501] constitute[d] a nuisance per se.” On the other hand, the September 2007 statement of decision found, with respect to the *first and third* causes of action for fraud and intentional misrepresentation and unlawful business practices, that the “uncontroverted testimony of [Jurich and Herson] indicate[d] that . . . Jurich did not erect nor operate the sign,” and that these defendants both believed the sign was “controlled” by Herson and Desert.

erect nor operate” the advertising structure that was determined to be a public nuisance in the October 2005 order. (See fn. 4, *ante.*)

Jurich’s “motion to reconcile, clarify, or resolve conflicting court findings and orders” was heard by Judge Gordon S. Baranco, who had conducted the bench trial and had issued the September 2007 statement of decision. In an order dated January 13, 2012, Judge Baranco found, essentially, that he had tried only the City’s first and third causes of action for fraud and intentional misrepresentation and unlawful business practices. The findings in his September 2007 statement of decision—to the effect that Jurich “did not erect nor operate” the sign, and that the sign was “controlled” by Desert—were findings that “pertained only” to the first and third causes of action. The earlier October 2005 order, issued by then Judge James A. Richman, granted summary adjudication only as to the City’s second cause of action for public nuisance. Judge Richman’s findings—to the effect that both Desert and Jurich “constructed” and “maint[ained]” the advertising structure in violation of section 1501—“pertained only” to the second cause of action. Judge Baranco determined there was “no conflict” between the October 2005 order and the September 2007 statement of decision. In denying Jurich’s motion, he expressly declined to render any decision with respect to “matters raised [by Jurich] in support of his [m]otion regarding the propriety or the manner in which [the City] reportedly has sought to enforce [the October 2005 order] through property liens and assessments,” and declined, as well, to render any decision regarding “the existence or legal sufficiency of a factual basis for Judge Richman’s [October 2005 order] as to . . . Jurich.”

This appeal followed.

DISCUSSION

Jurich continues to maintain, as he did in his motion to “reconcile, clarify, or resolve,” that a conflict exists between the findings made in the October 2005 order and the September 2007 statement of decision. (See fn. 4, *ante.*) He claims he is not seeking reversal of the October 2005 order. Yet, nevertheless, he describes the finding in that order “erroneous,” as to him, because there was no evidence submitted with the summary

judgment motions—much less the “undisputed evidence” to which Judge Richman adverted—which showed that *Jurich*, as distinguished from *Desert*, ever “erected, constructed, relocated or maintained” a nonconforming sign, as was required to be shown to establish *his* violation of section 1501. *Jurich* suggests we may simply treat Judge Richman’s reference to “defendants” as an “inadvertent” usage, since the evidence only supports a reference to a “defendant” in the singular. He suggests, too, we might properly regard the conflicting finding in the September 2007 statement of decision—the finding that *Jurich* had *not* erected nor operated the sign—as one that supersedes the conflicting finding in the October 2005 order because the 2005 finding was made on the basis of documentary evidence, while the later 2007 finding was made with the benefit of a more complete presentation of evidence at a bench trial.

Jurich misconstrues the scope of our review in this matter. As we have noted, *Desert* and *Jurich* appealed the October 2005 order, and we dismissed the appeal as untimely. That order and the findings included in it have long since become final and are no longer subject to direct review. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674–675.)

To the extent *Jurich* asks us to review the order of January 13, 2012, and, in particular, Judge Baranco’s construction of the October 2005 order, we find no error. The second cause of action, for public nuisance, was alleged against both *Desert* and *Jurich*. When Judge Richman referred in his October 2005 order, to “undisputed evidence” that both defendants had “constructed” a sign on *Jurich*’s property in violation of section 1501, he cited to facts in the City’s statement of material facts that included two which were undisputed by *Desert* and *Jurich* in their own statement of material facts. That is: (1) *Desert* and *Jurich* entered into an agreement in November 2001, “for the construction of an advertising sign” on *Jurich*’s property; and (2) the agreement “was for construction of an outdoor advertising structure . . . that was intended to be viewed from the freeway.” The fact that *Desert* alone engaged in the actual construction and maintenance does not, in our view, preclude the finding that *Jurich*, as well as *Desert*, was maintaining a public nuisance. Without the November 2001 lease agreement, by

which Jurich provided Desert with access to property adjacent to the freeway, Desert could never have accomplished the construction or maintenance of the offending structure. By the authorization Jurich expressly conferred in that agreement, we have no hesitation in concluding, as Judge Richman clearly did, that Jurich provided material—even indispensable—assistance to Desert’s intended construction and maintenance of the sign, to an extent sufficient to establish that *Jurich*, as well as Desert, erected and maintained the sign in violation of section 1501. This finding, in turn, is by no means inconsistent with the finding in the September 2007 statement of decision, that Jurich had not engaged in any *actual* construction and maintenance, particularly when Judge Baranco made that finding *only* in connection with his conclusion that Jurich was not liable for fraud and intentional misrepresentation or for Desert’s unlawful business practices, and not in connection with his liability for maintaining a public nuisance. Accordingly, we conclude there was no error in the order of January 13, 2012, in ruling that “no conflict” existed between the October 2005 order and the September 2007 statement of decision.

Finally, Jurich argues a miscarriage of justice is being perpetuated and exploited by the City, because its enforcement actions are “contrary to lawful post-judgment enforcement procedures,” and are also “contrary to the City’s own acknowledgements,” made in the state court proceedings that it was Desert alone that *actually* constructed and maintained the offending advertising structure. He suggests that, as a matter of equity, we should not “defer” to such enforcement actions.

We note only that the City’s actions in assessing fees and imposing liens are not properly before us. Whether the City took such actions pursuant to the administrative appeal order issued in September 2008, or pursuant to the October 2005 order and the May 2007 injunction modification order, or both, these remain, nonetheless, administrative decisions as to which Jurich has evidently not sought judicial review in the lower court, other than the motion to “reconcile, clarify, or resolve,” which we have concluded the trial court properly denied.

DISPOSITION

The order of January 13, 2012, is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Dondero, J.