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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GENE HAZZARD,

Plaintiff and Appellant,

v.

CITY OF OAKLAND, et al.,

Defendants and Respondents.

A138354

(Alameda County
Super. Ct. No. RG12642082)

Upset with how the City of Oakland (City) was handling redevelopment of the former Oakland Army Base (Army Base), plaintiff and appellant Gene Hazzard, in August 2012, sued the City, all members of the City’s council, the mayor, and various other City officials, as well as the private developers involved, Phil Tagami, Dan Letter, and their affiliated entities. The trial court sustained defendants’ demurrers to Hazzard’s First Amended Complaint without leave to amend and denied Hazzard leave to file a proposed Second Amended Complaint, and subsequently dismissed the case with prejudice. We agree Hazzard has not and cannot state a claim for a relief and affirm.

BACKGROUND

Hazzard is a long-time City resident and “taxpayer,” but apparently is unable to allege he has paid or been assessed ad valorem property taxes assessed by the City, as opposed to having paid City sales or income tax.

According to the allegations of Hazzard’s First Amended Complaint, the City wished to redevelop a portion of the Army Base it acquired from the Federal government and issued a Request for Qualifications (RFQ) seeking candidates to do the work. The

RFQ identified selection criteria, such as prior experience and financial capacity. Despite the RFQ, the City “utilized ‘waivers’ provided for in the Oakland Municipal Code and selected” Tagami, Letter, and their firms as the developers.

The City and its chosen developers entered an Exclusive Negotiating Agreement, which stated the developers would secure private funds to match public financing of the project, locate a “Guarantor ‘with significant assets to guarantee . . . project completion,’ ” and not “request for Agency funding” unless they first matched the City’s \$27 million investment to date.

At one point during the negotiating process, the City concluded the “joint venture structure” of two of the developer firms did not support the financial needs of the project.

As the negotiations continued, the project “effectively changed . . . from a private-public venture into an entirely city-funded project.” Costs initially to be borne by the private sector, such as environmental compliance, would be covered by the City.

The City and developers finally executed a Lease Disposition Development Agreement (Lease) in October 2012. This was done, claims Hazzard, without “satisfying the qualifications set out in the RFQ process” and without securing the private sector investment once sought. Hazzard further asserts the award of the Lease to the developers was improperly done without an adequate competitive bidding process. Hazzard additionally asserts the City should have been wary of working with Tagami, because in a previous project with him, the City had allowed Tagami to approve certain change orders up to \$50,000 such that Tagami bore some responsibility for that project, renovation of the Fox Theatre, swelling many times beyond its original budget. Indeed, the City’s Performance Audit following the Fox Theatre renovation implored the City to, in the future, reevaluate project scopes only when funding is secured, develop contingency plans for underfunding, and guard against other financial risks.

Based on these factual allegations, Hazzard’s First Amended Complaint asserts five causes of action.

The first cause of action, labeled “declaratory and injunctive relief,” seeks court “intervention” because defendants lack sufficient private investment capital to support

redevelopment of the Army Base, the Lease lacks appropriate checks and balances, and the City contracted without employing reasonable discretion—in an “arbitrary” and “fraudulent” manner. “Even if the required procedural steps were lawfully followed, these steps were not fairly and honestly followed” Hazzard clarifies he “does not claim” the City council lacked statutory authority “to utilize waivers and execute agreements,” but claims they did so with “fraudulent intent.”

The second cause of action is for breach of fiduciary duty against the City defendants and the developers, acting as agents of the City. Hazzard asserts defendants endangered the public fisc by not exercising reasonable discretion in the coming to terms on the Lease, eschewing the competitive bidding process, and leaving the City open to overruns similar to those encountered in the Fox Theatre project. The third cause of action, for negligence, and the fourth cause of action, for fraud, are based on the same conduct.

The fifth cause of action is titled “Violation of Contract Codes.” Hazzard alleges defendants violated a variety of state statutes, City municipal codes, and Federal regulations.

The developer defendants and the City interposed demurrers. Meanwhile, Hazzard filed a motion seeking leave to file a Second Amended Complaint. He previewed three successive versions during the course of briefing on the motion. The final version sought to add a new plaintiff, Queen Thurston, who was allegedly an Oakland property owner. It also sought to add, as defendants, Mark Hansen, who was affiliated with the developers, and another related developer entity. Finally, it would have deleted the negligence claim and sought to add claims for unfair competition, fraudulent conveyance, and conspiracy to commit fraud.

The trial court sustained the demurrers without leave to amend, concluding “[n]one of the purported causes of action . . . allege facts sufficient to state a cause of action.” It also denied leave to file a Second Amended Complaint, as that complaint also did not state any cause of action.

Hazzard, the next day, filed a request for dismissal without prejudice. The trial court struck the request, then entered a judgment of dismissal and Hazzard appealed.

DISCUSSION

Demurrers and Motion for Leave to Amend

“We review an order sustaining a demurrer de novo. [Citation.] ‘When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] And when it 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’” (See *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 871 (*Reynolds*)). We review the denial of a motion for leave to amend for abuse of discretion. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) If a “proposed amendment fails to state a cause of action, it is proper to deny leave to amend.” (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280.)

The City and developers contend, as they did repeatedly in the trial court, that Hazzard lacks standing to challenge the City’s contracting choices because Hazzard has not sufficiently alleged he has paid a qualifying tax under the taxpayer-suit statute, Code of Civil Procedure section 526a.¹ Hazzard may well lack taxpayer standing. (See *Reynolds, supra*, 223 Cal.App.4th at pp. 871–872 [discussing taxpayer standing].)² However, for purposes of this appeal, we shall assume Hazzard could cure this defect by substituting in Queen Thurston, a City property owner who presumably has been assessed ad valorem real estate taxes.³ Yet even assuming taxpayer standing, we nonetheless

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

² The Supreme Court has recently accepted review of a case addressing the requirements of taxpayer standing. (*Weatherford v. City of San Rafael* (2014) 226 Cal.App.4th 460 [171 Cal.Rptr.3d 912], review granted Sept. 10, 2014, S219567.)

³ We do not mean to suggest this approach would work. Queen Thurston has not appeared in any way in this appeal.

affirm, as Hazzard’s First Amended Complaint and his proposed Second Amended Complaint have not pleaded the sort of harm a citizen or taxpayer action may remedy.

Citizens do not ordinarily have the right to challenge a city’s conduct they find objectionable or ill advised. (*Gilbane Building Co. v. Superior Court* (2014) 223 Cal.App.4th 1527, 1532–1533 [“ ‘ “[T]here would be utter confusion in such matters if every citizen and taxpayer had the general right to control the judgment of [a municipality’s governing body] [T]he general rule is that then neither by *mandamus*, *quo warranto*, or other judicial proceeding, can either the state or a private citizen question the action or nonaction of such body ’ ”]; see also *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1233, disapproved on other ground by *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170 (*Save the Plastic Bag*) [under ordinary principles of standing, a plaintiff’s interest must be “direct” and “generally must be special in the sense that it is over and above the interest held in common by the public at large”].)

Yet there are exceptions. First, a citizen may seek a writ of mandate to enforce a public duty. (*Save the Plastic Bag, supra*, 52 Cal.4th at p. 166 [“This ‘ “public right/public duty” exception to the requirement of beneficial interest for a writ of mandate’ ‘promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.’ ”].)

Second, California has enacted a statute authorizing lawsuits by certain taxpayers to enjoin illegal government expenditures. (§ 526a.) It permits “[a]n action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a . . . city.” (*Ibid.*) The action must be “against any officer thereof, or any agent, or other person, acting in its behalf” and must be brought “by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.” (*Ibid.*)

“The purpose of this statute . . . is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of” ordinary rules of standing. (*Humane Soc. of U.S. v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 355 (*Humane Soc.*)) The “essence” of an action under section 526a “remains an illegal or wasteful expenditure of public funds or damage to public property.” (*Humane Soc.*, at p. 355.) Indeed, “[t]he term “waste” as used in section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or discretion. [Citations.] Appellants must cite specific facts and reasons supporting a belief that the state may be guilty of illegally spending public funds.” (*Id.* at p. 356.) Otherwise, “public officials performing their duties would be harassed constantly,” our “representative form of government” could be hampered, and courts would “risk trespassing into the domain of legislative or executive discretion.” (*Id.* at pp. 356–358 [“Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer’s approval.”].)

Central to both citizen and taxpayer suits is violation of a mandatory, legally-imposed duty. (See *Save the Plastic Bag, supra*, 52 Cal.4th at p. 166; *Humane Soc., supra*, 152 Cal.App.4th at p. 358 [“A cause of action under Code of Civil Procedure section 526a will not lie where the challenged governmental conduct is legal.”]; *Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557 [“Taxpayer suits are authorized only if the government body has a duty to act and has refused to do so.”]; *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1448 (*Great West*) [“where a statute requires a public entity to award a contract to the lowest responsible bidder, the courts have been vigilant in not excusing attempts by public entities to circumvent that requirement. . . . ¶] By contrast, where a statute or city charter specifically contemplated discretion on the part of the public entity to look at factors in addition to the monetary benefit of the bid, awards to other than the best monetary bidders have been upheld.”].)

Hazzard initially asserts a “mandatory duty” to safeguard public funds that correlates not with legal principles, but with Hazzard’s view of what would have been reasonable and fiscally responsible action by the City. He claims the “fix was in.” (See *Great West, supra*, 187 Cal.App.4th at p. 1446.) But there is no legal duty to accommodate even the most reasonable desires of a taxpayer. (*Id.* at p. 1448 [legal duty required, exercise of discretion without statutory framework not actionable].) Otherwise, the courts would constantly be called upon to second guess the reasonableness of legal contracts made by government entities, a task courts cannot take on. (See *Humane Soc., supra*, 152 Cal.App.4th at pp. 356–358; *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1026–1027 [rejecting suit under section 526a challenging an employment agreement between airport district and its general manager: “the contract at issue here is legal” and even if the employee may have said he did not require a contract, “the District may have decided that it was in the best interests of the District and the public to retain him under a contract providing good benefits and a severance pay provision”].)

We next turn to the specific legal obligations Hazzard invokes. Despite conceding in his complaint that “defendants may have complied with each procedural step required by law,” Hazzard asserts the City failed to comply with City auditor recommendations and a variety of statutes and ordinances governing the contracting process. He also asserts the City acted illegally by engaging in fraud. Yet none of these sources of law establishes a sufficient duty.

First, the City’s Performance Audit recommendations imposed no legal obligations on the City and so cannot support a taxpayer claim. (*Posey v. State of California* (1986) 180 Cal.App.3d 836, 849 [“recommended procedures” or “guides” are not legislative enactments and do not impose a mandatory duty]; see also Oakland Municipal Code, § 2.04.021 [auditor authorized to issue reports “where recommendations for compliance” with accounting principles “have not been implemented”].) The same goes for any initial determinations the City may have made regarding the developers’ financial capacity before a final agreement was reached—any such determination did not

legally bind the city. Hazzard can, at most, say, in his view, the repeated selection of the developer defendants was “unreasonable,” but that simply does not give rise to a claim.

Hazzard next cites Oakland Municipal Code section 2.04.140, which defines malfeasance to include when a City officer “aid[s] or assist[s] a bidder in securing a contract to furnish labor, material or supplies at a higher price than that proposed by any other bidder, or . . . favor[s] one bidder over another by giving or withholding information.” Yet Hazzard has not alleged any aid or assistance to a bidder to assure them of a higher price than proposed by other bidders, nor has he alleged the giving or withholding of any particular information to any bidder. Rather, he broadly asserts “favoritism” in repeatedly awarding projects to the developer defendants when, in his view, choosing other developers would have been more sensible and fiscally responsible. This is not, itself, a violation of the municipal code provision.⁴

Finally, Hazzard invokes common law fraud. Assuming Hazzard may bring a taxpayer suit in response to waste amounting to fraud (see *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 482 [waste under section 526a includes “outright fraud”]), his allegations of fraud are woefully insufficient.

“The elements of a fraud cause of action are (1) misrepresentation, (2) knowledge of the falsity or scienter, (3) intent to defraud—that is, induce reliance, (4) justifiable reliance, and (5) resulting damages.” (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1090 (*Glaski*)). “Fraud must be pled specifically—that is, a plaintiff must plead *facts* that show with particularity the elements of the cause of action.” (*Ibid.*; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184 (*Small*)). The policy of liberally construing pleadings does not apply and a plaintiff must plead “*facts*” showing “ ‘how,

⁴ We have addressed the assertions Hazzard discusses on appeal. To the extent he may have invoked other provisions of law in the trial court but has not discussed them on appeal, he has abandoned arguments related to them. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948 [“When a brief fails to contain a legal argument with citation of authorities on the points made, we may ‘treat any claimed error in the decision of the court sustaining the demurrer as waived or abandoned,’ ” thus “our review is limited to only those causes of action briefed on appeal.”].)

when, where, to whom, and by what means’ ” the alleged fraudulent representations were made. (*Small, supra*, 30 Cal.4th at p. 184.)

This heightened pleading requirement applies for allegations of fraud giving rise to a taxpayer action, and Hazzard’s assertion that he “need only allege that fraud has occurred in an arbitrary and fraudulent manner” is not correct. (*Peckham v. City of Watsonville* (1902) 138 Cal. 242, 244 [“The allegation of fraud on the part of the board of trustees does not set forth any facts constituting the fraud, and is to be disregarded. The fact that the contract was not awarded to the lowest bidder does not of itself indicate fraud. By the act of 1889 the board was authorized to reject any bid, and there may have been a sufficient showing before it that none of the other bidders than the one to whom the contract was awarded was a responsible bidder.”]; *Silver v. City of Los Angeles* (1963) 217 Cal.App.2d 134, 142 [“The conclusionary allegation that the ordinance was intended for the financial benefit of a private corporation is inadequate to state a cause of action for fraud as the basis of a taxpayer’s suit, the facts constituting the fraud being required to be specifically alleged.”]; *Lavine v. Jessup* (1958) 161 Cal.App.2d 59, 69 [in a taxpayer suit, “the accuser must place his finger squarely and directly upon whatever dereliction is relied upon. Fraud and conspiracy are actionable, but the mere use of such terms is not enough. The facts constituting bad faith or fraud must be specifically alleged.”]; *Hodgeman v. City of San Diego* (1942) 53 Cal.App.2d 610, 619 [fraud cannot be alleged by “innuendo and legal conclusion” so demurrer properly sustained]; cf. *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 932, 947–948 [Attorney General could not bring a fraud claim for City official preparing a publicly-available memorandum under-reporting City employee salaries and depriving members of the chance to challenge the salaries; the Attorney General did not specifically identify “(1) the individuals to whom the memorandum was provided; (2) when the memorandum was provided to them; (3) the acts the individuals took, or failed to take, in reliance on the memorandum; and (4) how the City was damaged by the individuals’ reliance on the misleading memorandum”]; *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629,

649 [“Nor are conclusory allegations of corruption or malice sufficient to bring a fraud action within the exception of Government Code section 822.2.”].)

Hazzard has not identified on appeal any specific misrepresentation or omission asserted in the First Amended Complaint that would constitute fraud. In fact, it appears Hazzard had ample access to information about the contracting process; rather, he does not like the information he received. The repeated use of a single contractor is not “fraudulent” activity.

Moving on to the proposed Second Amended Complaint, it contains no better allegations regarding breach of a mandatory duty or fraud. Accordingly, the trial court did not abuse its discretion in denying leave to amend. (*Glaski, supra*, 218 Cal.App.4th at pp. 1091–1092.) The allegations in paragraphs 157–158 of the final proposed Second Amended Complaint purport to allege fraud, but simply charge the City with “continuing to negotiate” with developer defendants when they had not yet demonstrated their fiscal capacity. Hazzard offers no reasoned explanation for how this is fraud, and we see none. Also, that the city entered a contract with a different, but related, corporate entity from the one it initially negotiated with does not amount to fraud. Quite plainly, Hazzard was able to learn of the negotiations and the final contract. We do not see the misrepresentation, reliance, or harm. Nor does Hazzard point to any other specific legal duty at issue. Finally, the proposed addition of new defendants and new “causes of action” did nothing to address Hazzard’s fundamental failure to allege conduct sufficient to give rise to a taxpayer suit—that is, neither the new parties nor new causes of action bolstered Hazzard’s assertion the City had breached a mandatory duty or engaged in fraud.

Bias

Hazzard also asserts the trial judge exhibited bias by (1) denying his motion to amend after initially issuing a tentative ruling in Hazzard’s favor, and (2) expressing increased agitation with Hazzard at successive court appearances and asking questions like “ ‘why shouldn’t this just be dismissed?’ ” He asserts the court was giving undue deference to the views of the City and developers and was “fed up with the case.”

Hazzard waived any bias argument by not raising one before the trial court. (See *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1339 [rejecting a “wait and see” approach to attempts to disqualify an allegedly biased judge]; *People v. Fuiava* (2012) 53 Cal.4th 622, 732 [bias claim forfeited].) Additionally, bias is not demonstrated by a series of rulings against a party, especially when they are subject to review. (*People v. Fuiava, supra*, 53 Cal.4th at p. 732.) Nor did the trial judge’s statements evidence any bias against Hazzard, rather they reflected normal questioning during argument. And certainly, there was no bias in rejecting a tentative decision after argument. (See *Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1378 [“A tentative ruling is just that, tentative.”].) In any event, we review the result reached based on pleadings and the arguments on appeal, we have not, and do not, review the trial court’s reasons or statements. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1037, fn. 9 [stating this principle in connection with reviewing a demurrer ruling].)

Rejection of Request for Dismissal Without Prejudice

Hazzard also asserts he had a right to a dismissal without prejudice, even after the demurrer and denial of his motion for leave to amend. At the end of the hearing on the demurrer and motion for leave to amend, the trial court was no longer committed to its tentative ruling—to allow amendment—and instead was seriously considering dismissing Hazzard’s lawsuit. On March 13, 2013, the trial court issued an order in favor of defendants sustaining the demurrer and denying leave to amend. On March 14, the next day, Hazzard filed and served a request for dismissal *without prejudice* and a letter to the trial judge, telling the judge Hazzard was filing the request in light of having “received your ruling denying plaintiff leave to file a Second Amended Complaint.” On appeal, Hazzard adopts the concession in his letter: the request was filed “in conceding defeat on the motion to amend.”

The trial court did not err in striking the request for dismissal. Although a plaintiff may, in general, dismiss an action with or without prejudice before commencement of trial (Code Civ. Proc., § 581, subd. (b)(1)), that right terminates once it becomes clear

plaintiff has lost on the merits (*Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1210 (*Bank of America*)). In *Bank of America*, the plaintiff bank sought dismissal under section 581 after the trial court sustained defendant's demurrer without leave to amend, but before entry of judgment. At that point, the plaintiff bank no longer had a right to voluntary dismissal. (*Bank of America*, at p. 1210.) There was a "dispositive ruling against" it. (*Id.* at p. 1212.) To allow otherwise would "permit procedural gamesmanship inconsistent with the trial court's authority to provide for the orderly conduct of proceedings before it." (*Ibid.*)

This case is indistinguishable from *Bank of America*. Where the order sustaining the demurrer and denying leave to amend preceded the request for dismissal, and where Hazzard concedes his awareness of the order, the trial court correctly struck the request for dismissal. Hazzard, having lost on the merits, was not free to dismiss his lawsuit and try again.

Motion to Dismiss

Respondents Mark Hansen and certain developer entities filed a motion to dismiss the appeal claiming a lack of personal jurisdiction and incomplete service of process. In light of our resolution of the appeal, the motion is denied as moot.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.