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

DONALD MERRILL,
Plaintiff and Appellant,

v.

COUNTY OF LAKE,
Defendant and Respondent.

A140744

(Lake County
Super. Ct. No. CV411363)

Donald Merrill obtained a preliminary injunction that temporarily circumscribed Lake County's (the County) power to enforce an interim ordinance regulating medical marijuana cultivation, but his legal challenge to the ordinance ultimately failed on demurrer. Merrill then unsuccessfully moved for an award of attorneys' fees under Code of Civil Procedure section 1021.5.¹ He contends his preliminary success entitled him to fees under the private attorney general doctrine codified in section 1021.5, because the preliminary injunction prevented the County from interfering with the 2012 medical marijuana harvest. The trial court reasonably disagreed, so we affirm.

BACKGROUND

On June 26, 2012, the County adopted Ordinance 2977 (the Ordinance) as an urgency measure to prohibit the commercial cultivation of medical marijuana and impose limits on personal outdoor marijuana cultivation pending its consideration of zoning proposals for regulating medical marijuana cultivation. The ordinance incorporated the

¹Unless otherwise noted, further statutory references are to the Code of Civil Procedure.

Board of Supervisors' (the Board) findings that existing and potential medical marijuana cultivation sites, and excessive cultivation by individuals, posed a current and increasing threat to the public health, safety and welfare and to the environment. The Board found that allowing significant medical marijuana cultivation to proceed without appropriate review of location and operational criteria and standards could result in increasingly adverse secondary effects including "significant irreversible change in the character of the community and the neighborhood surrounding any commercial and/or large marijuana cultivation site or cultivation on vacant properties and in residential zones," environmental damage related to stormwater pollution, groundwater contamination and loss of wildlife habitat, increased potential for catastrophic wildland fires due to the practices of growers on undeveloped properties, blight and decreased property values for nearby residents, and increased criminal activity.

The County adopted the Ordinance as an urgency measure effective for 45 days, subject to amendment and extension, and pending further study by County staff and the development of draft regulations by its Medical Marijuana Advisory Committee. As relevant here, the measure prohibited the cultivation of medical marijuana by individuals or collectives on vacant lots and limited the number of plants that could legally be grown on parcels "accessory to an approved residential use" of sizes ranging from less than half an acre (maximum six plants) to over 40 acres (maximum 48 plants). The Ordinance declared any existing medical marijuana grow sites in excess of these limits to be public nuisances punishable as misdemeanors.

Merrill and three Doe plaintiffs sued the County to stop it from enforcing the Ordinance. The complaint alleged the Ordinance violated California's medical marijuana laws by prohibiting Merrill and other qualified patients from cultivating the marijuana needed for their personal medical use. The first and second causes of action alleged the Ordinance unconstitutionally amended the voter-approved Compassionate Use Act (Health & Saf. Code, § 11362.5, CUA) and was preempted by the CUA and Medical

Marijuana Program Act (Health & Saf. Code, § 11362.775, MMP).² The third cause of action alleged the Ordinance unconstitutionally violated plaintiffs' vested property rights to cultivate medical marijuana as permitted under California law "after they expended considerable resources cultivating this marijuana." The complaint sought declaratory relief, preliminary and permanent injunctions prohibiting the County from enforcing or threatening to enforce the Ordinance except on unoccupied parcels zoned for residential use, and attorneys' fees.

On July 31 the trial court granted a temporary restraining order prohibiting the County from enforcing or threatening to enforce the Ordinance against Merrill and the three Doe plaintiffs pending a ruling on their application for a preliminary injunction. On August 17, the court granted that application in part and denied it in part. The court found plaintiffs' facial challenges to the constitutionality of the ordinance were unlikely to succeed. It explained: "The County Ordinance's numerical limits on plants appear to be reasonable in the same way that the set backs and screening requirements in the ordinance appear to be reasonable. The ordinance does not appear to be an unconstitutional usurpation of the Compassionate Use Act or the State's Medical Marijuana Program. Nor does the court find that the numerical limits on plants to be an unconstitutional amendment of the Compassionate Use Act. Furthermore, with regard to the County's ability to propagate and enforce the subject ordinance, the court finds that dangers that do not ripen into injury can be abated, and as such there can be summary abatements of the types of nuisances defined in the ordinance."

Plaintiffs fared better with their claim that the Ordinance unconstitutionally interfered with vested rights because it was enacted after the marijuana cultivation season had begun and medical marijuana patients had expended "significant resources, economic and otherwise, to cultivate the medicine they need[ed]" in reliance on the CUA and

²After the events at issue here, the Supreme Court held in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 (*City of Riverside*) that the CUA and MMP do not preempt the exercise of local police powers to ban marijuana distribution facilities.

MMP. The court found those challenges were likely to succeed in a trial for a permanent injunction and that the balance of hardships favored the plaintiffs. Accordingly, it ruled that outdoor marijuana cultivation activities commenced before the County adopted the Ordinance and that complied with the CUA and MMP were not subject to the Ordinance until January 1, 2013. “Specifically, I’m going to grant a preliminary injunction that permits essentially what amounts to this year’s outdoor grows that conform to state law under the CUA and the MMP to be protected from abatement. And from everything I know, that means that this part of the marijuana being grown in this county is—will be protected until this crop, this year’s crop, has been harvested.” While the temporary restraining order applied only to the four plaintiffs, the preliminary injunction protected all qualified medical marijuana patients and collectives from the confiscation of plants cultivated in compliance with the CUA and MMP until January 1, 2013.

On September 24, the court sustained the County’s demurrer to plaintiffs’ causes of action for unconstitutionally amending a voter-approved initiative and restricting medical marijuana cultivation in conflict with state law, without leave to amend. The court overruled the demurrer to the remaining third cause of action, for violation of plaintiffs’ “vested rights to cultivate the marijuana that is necessary to alleviate their suffering under California law after they expended considerable resources cultivating this marijuana,” and continued the preliminary injunction in effect.

Plaintiffs dismissed their third cause of action after the 2012 cultivation season ended, apparently because it was moot. They subsequently moved for an award of attorneys’ fees under the private attorney general statute (§ 1021.5), which the court denied with a one-sentence ruling that the case did not meet the criteria of section 1021.5. This timely appeal followed.

DISCUSSION

I. Legal Principles

“Section 1021.5 codifies the private attorney general doctrine, which provides an exception to the ‘American rule’ that each party bears its own attorney fees. [Citation.] The fundamental objective of the private attorney general doctrine is to encourage suits

enforcing important public policies by providing substantial attorney fees to successful litigants in such cases. [Citation.] Under section 1021.5, the court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest (3) if a significant benefit has been conferred on the general public or a large class of persons, and (4) the necessity and financial burden of private enforcement are such as to make the award appropriate. [Citation.] The burden is on the claimant to establish each prerequisite to an award of attorney fees under section 1021.5.” (*Ebbetts Pass Forest Watch v. California Department of Forestry & Fire Protection* (2010) 187 Cal. App. 4th 376, 381 (*Ebbetts Pass*).

“ “The trial court is to assess the litigation realistically and determine from a practical perspective whether [the statutory] criteria have been met.” [Citation.] Rulings under section 1021.5 are reviewed for abuse of discretion. [Citation.] The questions are whether the court applied the proper legal standards under section 1021.5 and, if so, whether the result was within the range of the court’s discretion [citation], i.e., whether there was a reasonable basis for the decision.’ ” (*Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1344.) A reviewing court will reverse the trial court’s ruling “ ‘only if the resultant injury is sufficiently grave to amount to a manifest miscarriage of justice, and no reasonable basis for the action is shown.’ ” (*Angelheart v. City of Burbank* (1991) 232 Cal.App.3d 460, 467.)

II. Analysis

This case presents a reasonable basis for the court’s denial of fees. “The award for attorneys’ fees is for a decision which results in the enforcement of an important right affecting the public interest.” (*Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 1000, italics omitted.) Although plaintiffs succeeded in obtaining temporary relief against the County’s enforcement of its Ordinance during the 2012 growing season based on their vested rights theory, they failed to establish that the Ordinance violated any rights they possessed under the CUA or MMP and, therefore, to obtain any permanent relief from the Ordinance. Fee awards may be justified where the plaintiff’s legal action does not result in a favorable final judgment, but “ ‘[t]he trial court in its discretion “must

realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award” under section 1021.5.’ ” (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 566.) Here, plaintiffs failed to vindicate their claim that the Ordinance contravened state medical marijuana law.

Plaintiffs argue the litigation nonetheless entitles them to attorneys’ fees because the preliminary relief they obtained protected qualified medical marijuana patients from the confiscation and destruction of their 2012 crops in denigration of their constitutional property rights. (See generally *Edmonds v. Los Angeles County* (1953) 40 Cal.2d 642, 651 [noting “doubtful constitutionality” of zoning ordinances that compel immediate discontinuance of nonconforming uses].) The County, citing *City of Riverside, supra*, 56 Cal.4th 729, disputes plaintiffs’ premise that they or other members of the public had a vested property right in their 2012 marijuana crops or that any such right was constitutionally immune from its zoning powers. We need not resolve this dispute, as there was a reasonable basis here to find plaintiffs were not entitled to fees in any case. As we noted previously, an award of fees under section 1021.5 is appropriate only if the plaintiff shows the litigation resulted in “the enforcement of an important right affecting the public interest” and conferred “a significant benefit . . . on the general public or a large class of persons.” (*Ebbetts Pass, supra*, 187 Cal.App.4th at p. 381.) “The determination that the public policy vindicated is one of constitutional stature will not, of course, be in itself sufficient to support an award of fees Such a determination simply establishes the first of the three elements requisite to the award (i.e., the relative social importance of the public policy vindicated) *Only if it is also shown . . . that the benefits flowing from such enforcement are to be widely enjoyed among the state’s citizens—only then will an award on the ‘private attorney general’ theory be justified.*” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 46 fn. 18, italics added; see *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 319–320, fn. 7; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635.)

Here, the court could reasonably find plaintiffs failed to show the preliminary injunction satisfied the latter element, i.e., that it significantly benefitted the public or a large class of people. (See *Ebbetts Pass*, *supra*, 187 Cal.App.4th at p. 381.) Plaintiffs speculate that “countless” qualified medical marijuana patients who were cultivating marijuana in compliance with the MMP and CUA “were [spared] the expense and indignity of having their vested rights violated by the aggressive enforcement” of the Ordinance, that “numerous” such individuals benefitted from the preliminary injunction, and that the action “redounded to the benefit of hundreds, if not thousands, of medical marijuana patients and the public in general.” But they adduced no evidence to support these claims. The record contains no evidence of the number of qualified medical marijuana patients who stood to benefit from the injunction because they were growing more marijuana outdoors in compliance with state marijuana laws than would be allowed under the Ordinance. Nor is there evidence of the quantity of marijuana being grown in compliance with the CUA and MMP between August 27, 2012 and January 1, 2013, that the County would or could have destroyed but for the preliminary injunction. Nor does the record contain any other evidence of the number of qualified patients whose source of state-law-compliant marijuana was protected from County destruction during the preliminary injunction’s four-month window. While evidence of the size of the benefited population is not always necessary under section 1021.5 (see, e.g., *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9), on these facts it was well within the trial court’s discretion to find plaintiffs’ showing was insufficient.

We do not agree with plaintiffs’ suggestion that an August 1, 2012 memorandum from Community Development Director Richard Coel to the Board proves the injunction benefitted a large class of people. The memo reports the County had removed approximately 2,000 marijuana plants under the Ordinance before the preliminary injunction issued, but it provides no evidence of changes, if any, in the County’s eradication efforts *after* the preliminary injunction issued. The injunction did not require the County to stop eradicating outdoor marijuana grows that did not comply with the

CUA and MMP, and plaintiffs do no more than speculate that the County “seemingly curbed [its] eradication efforts” after the August 17, 2012 ruling.

The fee motion could also have been denied on the basis that Merrill made no showing that the “financial burden of private enforcement” outweighed the monetary value of benefits that could be obtained in pursuing this litigation. (§ 1021.5) The declaration in support of an award of fees recites the difficulty that Merrill had in securing counsel, but says nothing about the expense of the litigation in comparison to the economic value of the marijuana plants he and the Doe plaintiffs were seeking to harvest in 2012 or what it would cost them to replace them. We know that Merrill incurred lodestar attorney fees and costs of approximately \$74,000. But it would be speculative on this record for the trial court to conclude that the cost of Merrill's victory greatly transcended his personal stake in the litigation. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214–1216.)

In short, nothing in this record compels a finding that the short-lived preliminary injunction significantly benefited the general public or a large class of individuals. The trial court’s denial of attorneys’ fees was not an abuse of its discretion.

DISPOSITION

The order is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.