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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

CITY OF AUBURN,

Plaintiff and Respondent,

v.

SIERRA PATIENT & CAREGIVER EXCHANGE,
INC. et al.,

Defendants and Appellants.

C069622

(Super. Ct. No. SCV29599)

In recent years, there has been considerable litigation over the regulation, and in some cases the outright ban, of medical marijuana dispensaries. This case concerns an outright ban. However, as we explain *post*, to resolve this case, we need not reach the issue of whether a local government may ban marijuana dispensaries, an issue currently pending before our Supreme Court.¹

¹ (See, e.g., *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.* (2011) formerly at 200 Cal.App.4th 885, review granted Jan. 18, 2012, S198638; *City of Lake Forest v. Evergreen Holistic Collective* (2012) formerly at 203 Cal.App.4th 1413, review granted May 16, 2012, S201454.)

The trial court granted the City of Auburn a preliminary injunction against Sierra Patient and Caregiver Exchange, Inc. and Richard Miller (collectively Miller), after Miller obtained a license for a flower shop, but opened a marijuana dispensary, forbidden by an Auburn ordinance. On appeal, Miller contends that Auburn’s dispensary ban is preempted by the Compassionate Use Act of 1996 (CUA) and the Medical Marijuana Program (MMP). (Health & Saf. Code, §§ 11362.5, 11362.7 et seq.)²

As we will explain, the record in this case, viewed in the light favorable to the trial court’s order, shows Miller committed a nuisance per se by *surreptitiously* opening a dispensary. Further, Miller did not establish irreparable harm. Because Miller’s business license violation independently shows a nuisance per se, we shall affirm the order granting Auburn a preliminary injunction to preserve the status quo pending trial.

FACTUAL AND PROCEDURAL BACKGROUND

Code Provisions at Issue

Auburn requires all businesses, “whether or not carried on for profit” to procure a license. (Auburn Mun. Code, §§ 33.001, 33.002(A)(1).) An applicant must furnish “a sworn statement” including, “The exact nature or kind of business for which a license is requested.” (*Id.*, § 33.002(D)(1)(a).)

Auburn also bans dispensaries. Section 159.019 of the Auburn Municipal Code, part of its zoning regulations, provides:

² The CUA *immunizes* specific persons from prosecution under two sections of the Health and Safety Code. Thus, the CUA grants only “a limited immunity from prosecution.” (*People v. Mower* (2002) 28 Cal.4th 457, 470.) The MMP “immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients.” (*People v. Mentch* (2008) 45 Cal.4th 274, 290.) But California cannot *legalize* marijuana without Congressional approval. (*Gonzales v. Raich* (2005) 545 U.S. 1 [162 L.Ed.2d 1]; see *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 741-742 (dis. opn. of Morrison, J.) (*County of Butte*).)

“The following uses are prohibited in all zones established by this chapter and may not be conducted anywhere in the city:

“(A) Medical marijuana dispensaries or any other facility or use that involves the distribution of drugs or other substances which it is illegal to distribute or possess under state or federal law.

“(1) No conduct protected from criminal liability pursuant to the Compassionate Use Act [citation] and the Medical Marijuana Program Act [citation] shall be made criminal by this code. Such conduct that violates the requirements of this code shall be subject to non-criminal remedies only.”

Although a person may apply for a “hardship” variance from zoning regulations, “no variance may be granted to permit a land use in any district where the land use is prohibited by the provisions of this chapter.” (Auburn Mun. Code, § 159.420.)

Auburn’s enforcement provisions state, “It shall be unlawful for any person to violate any provisions or to fail to comply with any of the requirements of this code[.]” (Auburn Mun. Code, § 10.99(A)(1).) “In addition to the penalties provided by this section, any condition caused or permitted to exist in violation of any of the provisions of this code . . . shall be deemed a public nuisance and may be summarily abated by the city in a civil action[.]” (*Id.*, § 10.99(A)(4).)

Miller’s License Application and Ensuing Litigation

On April 8, 2011, Miller filed a business license application to open “S&R Blooms & Blossoms,” engaged in the business of “variety store; florist shop.” Based on Miller’s signed declaration, Auburn issued him a license that week.

On July 19, 2011, Auburn sued Miller, alleging he violated its license *and* dispensary ordinances. Auburn sought abatement, and declaratory and injunctive relief.

Attached to the complaint was a letter from Miller’s counsel dated July 14, 2011, rejecting a July 12, 2011 cease-and-desist letter. Miller argued the dispensary ban was unlawful, he sold floral arrangements, and his failure to mention the dispensary in his

application was irrelevant because the ban was invalid. Miller's letter attached unauthenticated information about his "collective."³

On July 22, 2011, Auburn obtained a temporary restraining order (TRO) and an order to show cause for a preliminary injunction, based on Miller's misleading license application and his operation of a dispensary.

Detective Rick Hardesty supplied Auburn's key evidence; he had conducted an undercover operation on June 29, 2011. The store's windows were blacked out. After Miller's employee asked for an undercover agent's "medical marijuana card and identification[,]," she offered the agent a free "marijuana-laced chocolate-chip cookie" normally sold for \$8, and said, "'Richard' makes all of their edible products." The agent bought one-eighth of an ounce of marijuana for \$43.30 (with tax), packaged in a "prescription" bag, and was given a copy of the collective's rules. Prices for marijuana products were posted on jars and on a board behind the sales counter, and hashish was also available.

Miller's opposition argued he was likely to succeed on his preemption claim, and that his license application was accurate because he sold floral arrangements and was negotiating to convert an adjacent lot into a community flower garden.⁴ Further, had he stated he had planned to open a dispensary, Auburn would have denied his license.

Miller claimed an injunction would cause financial harm, because his costs to improve the "non-profit" store would be lost, he would incur damages due to breach of his lease, and his employees would lose their jobs. He also claimed "500+" members would be forced "to travel great distances" to get marijuana and would suffer. However, as we explain, Miller's evidence did not back up his claims.

³ Miller's counsel also asserted he was a member of the collective.

⁴ The parties disputed the distance between the store and the local Boys & Girls Club, but this appeal does not turn on any purported harm to children.

Miller provided no evidence of financial harm, nor any evidence showing his dispensary was a non-profit operation.

Miller did try to show harm to his customers. He provided 15 declarations, each from a person claiming to “suffer from a serious medical condition for which my physician has recommended the use of medicinal cannabis,” and claiming that closing the dispensary would cause “great difficulty obtaining safe and lawful access” to marijuana. But there was no evidence presented as to whether these customers lived in Auburn, how far the nearest other dispensary was, whether they could grow their own marijuana, whether they could arrange for a caregiver to get marijuana for them, or verification of their recommendations. Miller attached an exhibit purporting to be the application and recommendation of another customer, but he provided no declarations to authenticate the documents.

Trial Court’s Order

The trial court issued a written order after hearing, finding that Miller “arrived in [Auburn] and opened up shop without getting a use permit or seeking declaratory relief from the court. While [Miller] did obtain a business license, the license application stated that the type of business to be operated as a florist shop. . . . It is difficult for the court to find that a false status quo needs to be preserved. If that was the case then anyone could start an illegal business and if they [went] unnoticed for even a brief period of time argue that the court needs to preserve the status quo and allow them to operate. [Miller knew] in advance of the [dispensary ban] and could have sought declaratory relief rather than resort to the camel’s nose approach.” The trial court also found the dispensary ban was not preempted by state law, and Miller failed to show irreparable harm.⁵

⁵ The trial court did not issue a statement of decision, nor was one required. (*City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1198.) The trial court’s written reasons are not a statement of decision, and cannot impeach the order. (See *In re Marriage of Ditto*

The trial court issued a preliminary injunction precluding all defendants from operating a dispensary pending trial. The preliminary injunction did not prevent Miller from operating the flower business for which he had a license.

Miller timely filed this appeal. The appeal lies. (Code Civ. Proc., § 904.1, subd. (a)(6).)

DISCUSSION

I

Standard of Review

A preliminary injunction merely preserves the status quo pending trial. A trial court considers whether the plaintiff will likely succeed on the merits, and whether either party will suffer irreparable harm pending trial. The trial court's ruling on these issues is reviewed for an abuse of discretion. (See *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1470-1471 (*Tahoe Keys*).)

“The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court.’ . . . An abuse of discretion will be found only where the trial court’s decision exceeds the bounds of reason or contravenes the uncontradicted evidence. . . .

“In determining whether or not to issue a preliminary injunction, a trial court must evaluate two interrelated factors. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted.” (*Tahoe Keys, supra*, 23 Cal.App.4th at pp. 1470-1471; see *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136-1137 [facts “subject to review under the substantial evidence standard”].)

(1988) 206 Cal.App.3d 643, 646-648; *Tyler v. Children’s Home Society* (1994) 29 Cal.App.4th 511, 551-552.)

As stated by our Supreme Court, “‘*The ultimate goal . . . is to minimize the harm which an erroneous interim decision may cause.*’” (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

Throughout his briefs, Miller refers to facts not presented to the trial court, and we disregard all facts stated without record citations. (See *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) His flagrant disregard of appellate norms--characterized by viewing all of the facts in his favor--prompts us to paraphrase one of our prior cases:

“[L]egal issues arise out of facts, and a party cannot ignore the facts in order to raise an academic legal argument. ‘Appellate counsel should be vigilant in providing us with effective assistance in ferreting out all of the operative facts that affect the resolution of issues tendered on appeal.’ [Citation.]

“[Miller] has not waived the legal issues [he] raises. But in addressing [Miller’s] issues we will not be drawn onto inaccurate factual ground.” (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.)

II

Validity of the Injunction

Miller principally contends the medical marijuana laws (the CUA and MMP) forbid a local entity from banning dispensaries. However, as we shall explain, we can and do uphold the preliminary injunction on an alternate ground.

A. Alternative Bases for the Preliminary Injunction

Auburn’s complaint pleaded two causes of action, although it confused separate *remedies* with separate *causes of action*. A cause of action exists for interference with a primary right. (See *Miranda v. Shell Oil Co.* (1993) 17 Cal.App.4th 1651, 1658; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 34-41, pp. 98-107.) Different legal theories may be pursued in aid of a single, primary right, but that does not create different causes of action. (See *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795-796; *Uhrich v. State Farm Fire Casualty Co.* (2003) 109 Cal.App.4th 598, 605.) Nor does the pursuit of

different remedies create different causes of action. (See *Walton v. Walton* (1995) 31 Cal.App.4th 277, 291; *Verdier v. Verdier* (1962) 203 Cal.App.2d 724, 738.)

The complaint pleaded that Miller violated two ordinances, the business license ordinance and the dispensary ban, and therefore pleaded two separate causes of action.

Contrary to Miller's repeated claims, the trial court found Miller violated *both* the dispensary ban and exceeded the scope of its business license.

B. Probability of Success

Unlike in ordinary nuisance cases, where a balancing of interests may be required, "where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance *per se*." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1207 (*Beck*); *City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 382-383 (*Costa Mesa*)). "Cities are constitutionally authorized to make and enforce within their limits all local, police and sanitary ordinances and other such regulations not in conflict with the general laws. (Cal. Const., art. XI, § 7.) Government Code section 38771 provides, 'By ordinance the city legislative body may declare what constitutes a nuisance.'" (*Costa Mesa, supra*, 11 Cal.App.4th at pp. 382-383.)

Miller does not claim Auburn's business license ordinance is itself invalid, and fails to head and argue an attack on the trial court's finding as to his violation of the business license ordinance, thereby forfeiting any such claim. (See *Loranger v. Jones* (2010) 184 Cal.App.4th 847, 858, fn. 9.)

Therefore, the finding that Auburn had a probability of success as to this claim stands un rebutted.

Moreover, even in his reply brief, Miller fails to make any persuasive attack on the trial court's conclusion as to Auburn's ability to prevail on its claim of a business license violation.

Miller faults Auburn for choosing to ban, rather than regulate, dispensaries. Miller uses Auburn's failure to regulate dispensaries as an invitation to open a dispensary by *subterfuge*, reasoning it would have been futile for Miller to have been honest in his sworn statement.

We disagree that the dispensary ban forgives dishonesty in the license application. Like the trial court, we do not endorse subterfuge.

Bad faith by a party is a relevant factor for the trial court to consider in deciding whether to issue a preliminary injunction, as in other equitable cases. (See 6 Witkin, *supra*, Provisional Remedies, § 348, p. 291.) Moreover, "No one can take advantage of his own wrong." (Civ. Code, § 3517; see *Estates of Collins and Flowers* (2012) 205 Cal.App.4th 1238, 1253-1255 [assuming unclean hands doctrine could bar defendants from relief in equitable action].)

As the trial court found, Miller could have challenged Auburn's dispensary ban through lawful means. (See, e.g., *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1317 [dispensary brought mandamus and declaratory relief action challenging ordinance]; *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 742 [declaratory relief action to challenge dispensary ban].)

Instead, Miller violated a facially valid ordinance requiring accurate business license applications. His apparent belief that the dispensary ban is unlawful did not give him leave to violate *other* ordinances. The fact that Miller questions the legality of Auburn's dispensary ban has no effect on Auburn's business license ordinance and does not excuse Miller's act of signing a misleading license application. (See *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 427 [Naulls "failed to indicate that he intended to operate a medical marijuana dispensary, instead describing the business as 'miscellaneous retail'"; held, nuisance per se, even though the application would have been denied had Naulls been truthful]; see *City of Claremont v. Kruse* (2009) 177

Cal.App.4th 1153, 1165-1166 [“Kruse’s operation of a medical marijuana dispensary without the City’s approval constituted a nuisance per se”].)

Auburn established a clear probability that it would prevail on its cause of action for exceeding the scope of the business license.

C. Irreparable Harm

Auburn was not required to show irreparable harm after establishing a nuisance per se. (See *Beck, supra*, 44 Cal.App.4th at pp. 1206-1207; *Costa Mesa, supra*, 11 Cal.App.4th at pp. 382-383.)

Although Miller’s pleadings claimed he would suffer financial harm, and claimed his dispensary complied with state law, he did not provide evidence establishing these facts.

As we have said before, “except for stipulations or admissions contained therein, the unsworn pleadings of counsel do not constitute evidence.” (*Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090-1091.) Further, the trial court was free to reject the evidence Miller did produce, specifically the customer declarations.

First, the trial court was free to disregard all of the customer declarations. “A factual contest based on written evidence is treated like other factual contests.” (*California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002) 96 Cal.App.4th 824, 832.) “Provided the trier of the facts does not act arbitrarily, [it] may reject *in toto* the testimony of a witness, even though the witness is uncontradicted.” (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660.) The vague information in those declarations made them suspect and it would not have been irrational for the trial court to disbelieve them, both individually and collectively.

Second, even if the trial court credited the declarations, they did not compel a finding of irreparable harm. As we explained, none of the declarations stated how far the next dispensary was, or showed that any customer was unable to designate a caregiver or grow marijuana at home.

The trial court could properly find Miller failed to show irreparable harm from the preliminary injunction requiring him to operate within the scope of his license pending trial.

D. Conclusion

The record supports a preliminary injunction pending trial based on Miller’s business license violation. We agree with the trial court that Miller cannot manufacture a status quo by obtaining a business license application for a different kind of business and then surreptitiously opening a dispensary.

The trial court’s order may be upheld on any correct theory. (See *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.) As we have repeatedly held, “Ordinarily, when an appellate court concludes that affirmance of the judgment is proper on certain grounds it will rest its decision on those grounds and not consider alternative grounds which may be available.” (*Filipino Accountants’ Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1029; see *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 513.) Because Auburn is entitled to a preliminary injunction whether or not the dispensary ban is lawful, we need not and do not address the validity of that ban at this time.⁶

II

Due Process

Miller separately contends that Auburn violated his due process rights. We disagree.

“[T]he strictures of due process apply only to the threatened deprivation of liberty and property interests deserving the protection of the federal [or] state Constitutions.”

⁶ A California Supreme Court decision invalidating local bans would not cure Miller’s license violation.

(*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1059 (*Ryan*.)

Miller had no *federal* due process right to operate a dispensary, because marijuana is contraband *per se* under federal law. (See *County of Butte, supra*, 175 Cal.App.4th at pp. 739-740 (maj. opn.), 741-745 (dis. opn.).)

As for the broader “dignity” interest in fair procedure protected by *state* due process principles, Miller was given notice, filed an opposition through counsel, and participated with counsel at a hearing before a neutral judge. That fully satisfied state due process. (See *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 563-565; *People v. Ramirez* (1979) 25 Cal.3d 260, 265-269; *Ryan, supra*, 94 Cal.App.4th at pp. 1069-1072.)

Miller points to Health and Safety Code section 11362.775, which partly states that persons “who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section . . . 11570.” The referenced section partly states a place “used for the purpose of unlawfully selling, serving . . . or giving away any controlled substance . . . is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.” (Health & Saf. Code, § 11570.)

Reading these statutes together, Miller claims he was immune from a *civil* nuisance suit. Assuming for the sake of argument that Miller’s statutory interpretation is correct--a point Auburn contests--Miller provides no authority for the proposition that filing a nonmeritorious suit violates due process, or for his claim that Auburn had a duty to conduct an administrative hearing to address his claims. (See *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3 [failure to provide authority forfeits claim].)

Miller also claims Auburn manipulated events to obtain the TRO while his counsel was on vacation. Even assuming Auburn knew counsel’s vacation plans--a disputed

point we need not resolve--Auburn's knowledge did not require it to delay seeking relief. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 824-825.) More importantly, Miller's counsel opposed the *preliminary injunction*, which is the subject of this appeal: Miller did not appeal from the TRO (see *McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 357), which in any event evaporated when the trial court issued the preliminary injunction (see *Landmark Holding Group, Inc. v. Superior Court* (1987) 193 Cal.App.3d 525, 529).

In short, Miller has not demonstrated how Auburn violated his due process rights in this proceeding.

DISPOSITION

The judgment is affirmed. Miller shall pay Auburn's costs of this appeal. (Cal. Rules of Court, rule 8.278.)⁷

DUARTE, J.

We concur:

BUTZ, Acting P. J.

MAURO, J.

⁷ We deny all pending judicial notice requests, because they tender facts not presented to the trial court or reflect matters not relevant herein. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.)