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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

KATHRYN COKE,

Plaintiff and Appellant,

v.

CITY OF SACRAMENTO,

Defendant and Respondent.

C072866

(Super. Ct. No. 34-2012-  
80001066-CU-WM-GDS)

Plaintiff Kathryn Coke appeals from a postjudgment order denying her request for attorney fees pursuant to Code of Civil Procedure section 1021.5, the private attorney general statute. The underlying proceeding, in which she prevailed, was a complaint for declaratory relief and writ of mandate against defendant City of Sacramento (City). She filed the writ and complaint in response to City's imposition of a total of \$300 in fines against her as a penalty for violating a City ordinance prohibiting the public from remaining in a public park after sunset.

Before imposing the fines, City had prosecuted Coke's violation of its ordinance as a misdemeanor. However, City ultimately voluntarily dismissed the criminal action before notifying Coke of the administrative fines. In the underlying declaratory relief and

writ proceeding, the trial court entered judgment in Coke's favor and ordered City to vacate the administrative penalties on the ground Penal Code section 1387 prohibited a second prosecution for the same offense.

Coke then brought a motion for attorney fees pursuant to Code of Civil Procedure section 1021.5, the private attorney general statute. The trial court denied the motion, reasoning that Coke's action had neither enforced an important public right, nor conferred a significant benefit on the public or a large class of persons, as required by the statute. Coke argues the trial court erred in determining she did not vindicate an important right and did not confer a significant benefit on the general public or a large class of persons.

We shall conclude Coke has not sufficiently demonstrated that her action enforced an important public right. Having made that determination, we need not address whether the benefit was conferred on a sufficiently large class of persons.

#### FACTUAL AND PROCEDURAL BACKGROUND

Coke, who was a part of the Occupy Sacramento movement, was arrested three times in October 2011, while taking part in protests in Cesar Chavez Park in Sacramento. The sole violation charged with respect to these incidents was violation of Sacramento City Code section 12.72.090(A), which provides in pertinent part, "No person shall remain or loiter in any public park before sunrise or after sunset . . . ."

The Sacramento County District Attorney declined to prosecute the charges, but the Sacramento City Attorney did file and prosecute three criminal misdemeanor cases against Coke. The day before trial on the criminal cases, the city attorney dismissed the criminal charges against Coke and eight other protesters, stating the City's intention to "go through the administrative penalty process instead of the criminal court system . . . ."

City thereafter issued three orders imposing an administrative penalty in the amount of \$100.00 each. Each order contained a paragraph entitled "Your Right to Appeal." It stated:

“You may appeal the imposition of this administrative penalty within 20 calendar days after the date this order is served by filing with the Office of the City Clerk a written notice of appeal and paying an appeal fee in the amount of \$50.00. If you fail to appeal, this order shall be final. Any responsible party who files any appeal may seek review of any order entered as a result of the appeal pursuant to California Code of Civil Procedure Sections 1094.5 and 1094.6.”

Coke appealed the imposition of the three administrative penalties. The hearing on Coke’s appeal was set for March 14, 2012. On February 21, 2012, before the administrative hearing, Coke filed the underlying action here for declaratory relief, contending that the imposition of administrative penalties without a prior determination of guilt violated her legal and constitutional rights, for a writ of prohibition on grounds set forth below, and for a stay of the administrative appeal hearing. Coke also requested attorney fees pursuant to Code of Civil Procedure section 1021.5, the private attorney general statute. That statute provides for an award of attorney fees to a successful party in an action resulting in the enforcement of an important right affecting the public interest.

In her opening brief on the merits of the underlying proceeding, Coke argued, *inter alia*, that Penal Code section 1387 prohibited the administrative fine. Penal Code section 1387 provides that an order terminating a criminal prosecution is a bar to any other prosecution for the same offense. The other arguments Coke made in her opening brief were: (1) misdemeanor charges could not be dismissed and replaced with a lesser charge if doing so deprived a defendant of certain rights (i.e., to a jury trial); (2) Government Code section 36900 barred the administrative penalty; and (3) the administrative penalty appeal procedures violated Cokes due process rights.<sup>1</sup>

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<sup>1</sup> Government Code section 36900, subdivision (a) states: “Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action.”

The trial court issued its ruling after hearing argument. It found that Penal Code section 1387 barred City from proceeding against Coke. The trial court did not address Coke's other theories. Coke subsequently moved for an award of attorney fees pursuant to Code of Civil Procedure section 1021.5. That section provides generally that a court may award attorney fees to a successful party in an action that has resulted in the enforcement of an important right affecting the public interest if a significant benefit has been conferred on the general public or a large class of persons.

Coke argued the action resulted in the enforcement of an important right because the case focused on important questions of constitutional law and because the claim for declaratory relief alleged that City's actions amounted to an unlawful infringement on her legal and constitutional rights. The trial court disagreed.

The trial court recognized that a prevailing party may recover attorney fees pursuant to Code of Civil Procedure section 1021.5 if: (1) the action resulted in the enforcement of an important right affecting the public interest, (2) the action conferred a significant benefit on the general public or a large class or persons, and (3) an award is appropriate given the necessity and financial burden of private enforcement. The trial court found Coke had not satisfied the first two of the three conditions.

“Contrary to petitioner’s contention that this action addressed significant constitutional issues, the Court’s ruling in this matter addressed only the limited issue of whether the City could impose administrative penalties after dismissing misdemeanor criminal charges based on the same conduct. The Court concluded that Penal Code section 1387 barred the City from doing so. The ruling therefore addressed a technical, procedural issue of limited scope. It did not address, or resolve, the broader constitutional issues of free speech arising from petitioner’s conduct. Specifically, it did not find that the City was precluded from imposing administrative penalties on petitioner for her conduct under any circumstances, or that petitioner’s conduct was privileged and thus immune from either criminal or administrative sanctions as protected free speech activities. Petitioner therefore did not prevail on an issue of broad public significance.

“Additionally, there was no evidence that the imposition of administrative penalties after the dismissal of criminal charges is, or has been, a widespread practice, either by the City of Sacramento or by other governmental entities. Indeed, the evidence submitted to the Court in connection with the present motion shows that only a small number of persons were affected by the City’s actions.”

Coke appeals from the trial court order denying an award of attorney fees.

#### DISCUSSION

Code of Civil Procedure section 1021.5 provides that a court may award attorney fees “in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.” To be entitled to recover fees, the successful party bears the burden of showing that the litigation: “ ‘(1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter.’ [Citation.]” (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 569; *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2010) 187 Cal.App.4th 376, 381.)

Turning to the first factor Coke was required to show, although Coke asserts that the writ and declaratory relief action enforced an important right affecting the public interest, she does not identify the important right for us. Instead, she quotes a portion of the trial court’s tentative ruling on City’s demurrer to the writ petition and complaint. The tentative ruling rejected City’s contention that the declaratory relief claim was barred for failure to exhaust administrative remedies. The court stated that the exhaustion doctrine does not apply “where important questions of constitutional law or public policy

governing agency authority are involved.” The ruling stated: “This case involves important questions of that nature: plaintiff’s claim for declaratory relief specifically alleges that the City’s actions amount to an unlawful infringement upon her legal and constitutional rights.”

This statement from the trial court in its ruling on demurrer in the underlying proceeding shows nothing of relevance to Coke’s fee motion. At the pleading stage of the proceedings, which is the stage at which the trial court made the above statement, it could not have known yet whether Coke’s important legal and constitutional rights would be enforced by the action, as is required by Code of Civil Procedure section 1021.5. It knew only that Coke had *alleged* such rights. The trial court’s ruling in this preliminary matter is not a determination that Coke’s important constitutional and statutory rights were enforced, or even predominated in the action. It was nothing more than a determination that such rights had been alleged by Coke.

Coke asserts that “broader Constitutional issues . . . were implicated, and ultimately vindicated, in the lawsuit.” Again, she does not explain what constitutional issues were vindicated in the writ proceeding and declaratory relief action. The resolution of the action did not vindicate any First Amendment free speech right. As a matter of fact, although Coke’s writ petition and complaint alleged that City was punishing her for exercising her First Amendment rights of free speech and free association, Coke did not argue below that the administrative action should be dismissed because the ordinance violated her First Amendment free speech rights. Instead, she argued the administrative proceeding robbed her of the right to assert her First Amendment rights as a defense to the fines. The trial court could not have determined whether, in fact, City’s ordinance violated Coke’s First Amendment rights because that issue was not argued. Because that issue was not argued or considered by the trial court, its ruling necessarily did not vindicate that right.

Coke argues that the trial court erred when it focused only on the issue that it resolved, rather than the broader issues she raised. In support of this proposition, she cites *Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917 (*Woodland Hills*). In that case, the plaintiffs challenged the approval of a proposed subdivision map on several grounds, including that the subdivision was inconsistent with the general plan and that the approval had not contained a specific finding that the subdivision was consistent with the general plan. (*Id.* at p. 926.) The trial court found in the plaintiffs' favor on the narrow ground that the approval of the subdivision map did not contain a specific finding that the subdivision was consistent with the general plan, and having so concluded, the trial court found it unnecessary to resolve whether the subdivision map was in fact consistent with the general plan. (*Id.* at pp. 926-927.)

The Supreme Court held that “the fact that a plaintiff is able to win his case on a ‘preliminary’ issue, thereby obviating the adjudication of a theoretically more ‘important’ right, should not necessarily foreclose the plaintiff from obtaining attorney fees under a statutory provision. When a defendant’s action is invalid on a number of grounds, it would be both unfair and contrary to the legislative purpose of [Code of Civil Procedure] section 1021.5 to deprive a plaintiff of attorney fees simply because the court decides the case in plaintiff’s favor on a ‘simpler’ or less ‘important’ theory. [Citations.] On the other hand, of course, the fact that a plaintiff prevails on a ‘technical’ preliminary issue does not necessarily demonstrate that his additional claims have sufficient merit to warrant the conclusion that the action served to vindicate an important right. [¶] Under such circumstances, the trial court, utilizing its traditional equitable discretion (now codified in [Code Civ. Proc.,] § 1021.5), 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 a private attorney general theory.” (*Woodland Hills, supra*, 23 Cal.3d at p. 938.)

Thus, the question to be resolved in this case is whether Coke's additional claims that were left unresolved by the trial court, were sufficiently meritorious to warrant the conclusion that the action served to vindicate an important right. Coke's unidentified important right is a constitutional right, because she claims that "the trial court applied an incorrect legal standard by basing its decision to deny recovery of fees solely on the scope of its ruling rather than broader Constitutional issues that were implicated, and ultimately vindicated, in the lawsuit."

As indicated, the important right cannot be Coke's First Amendment right to free speech. The only other constitutional issue raised below was that City's administrative penalty appeal procedures violated her fundamental right to due process. Coke makes no attempt whatsoever to argue the merits of the due process claim left unresolved by the trial court. We will not make her arguments for her by holding that the appeal procedure does or does not violate due process when she has failed to brief the argument.

" 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . . ' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As Coke has failed to demonstrate the merits of the constitutional argument she claims was enforced below, we will presume the trial court correctly decided the argument was not sufficiently meritorious to warrant an award of attorney fees.

Coke also states she does not concede that her victory on the basis of Penal Code section 1387 was not an important right for purposes of Code of Civil Procedure section 1021.5. We conclude the right enforced was not sufficiently important under the circumstances of this case to justify an award of attorney fees.

Code of Civil Procedure section 1021.5 does not authorize attorney fees in all cases involving violation of a statute. (*Woodland Hills, supra*, 23 Cal.3d at p. 939.) "[R]ather . . . the Legislature contemplated that in adjudicating a motion for attorney fees

under section 1021.5, a trial court would determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case.” (*Id.* at pp. 939-940.) The plaintiff has the burden of proving she is entitled to an award of fees, and whether the plaintiff has proved, inter alia, that the action resulted in the enforcement of an important right affecting the public interest is best decided by the trial court, whose judgment will not be disturbed on appeal absent an abuse of discretion. (*Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection, supra*, 187 Cal.App.4th at p. 381; *Family Planning Specialists Medical Group, Inc. v. Powers* (1995) 39 Cal.App.4th 1561, 1567.)

“The pertinent question is whether the grounds given by the court for its denial of an award are consistent with the substantive law of [Code of Civil Procedure] section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section [Code of Civil Procedure] 1021.5, read in light of the purposes and policy of the statute.” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1298.)

In this case, the trial court stated the following grounds for its denial:

“Certainly, the public always has a significant interest in seeing that laws are enforced, and always derives some benefit when illegal public conduct is rectified. Nevertheless, as the appellate courts have pointed out, the Legislature did not intend to authorize an award of fees under [Code of Civil Procedure] Section 1021.5 in every lawsuit enforcing a constitutional or statutory right. The court must determine the significance of the benefit and the size of the class receiving that benefit by realistically assessing the gains that have resulted in the case. The possibility that the lawsuit conveyed a cautionary message to the defendant about its conduct is insufficient to satisfy the significant public benefit requirement. [Citation.] Here, based on a realistic assessment of the results of this case, the Court concludes that petitioner’s action did not result in a significant benefit to the general public or a large class of persons. At most, it conveyed a cautionary message to the City about its conduct, which is not sufficient to support an award of fees.”

The grounds given by the court for its denial of the award were consistent with the substantive law of Code of Civil Procedure section 1021.5. The trial court set forth the three conditions to be satisfied for an award of attorney fees, and determined that Coke had shown neither that she had enforced an important right affecting the public interest, nor that she had conferred a significant benefit on the general public or a large class of persons. The trial court also indicated it understood that Code of Civil Procedure section 1021.5 does not authorize attorney fees in every case involving a statutory violation. (See *Woodland Hills*, *supra*, 23 Cal.3d at p. 939.)

The trial court understood that its ruling addressed “only the limited issue of whether the City could impose administrative penalties after dismissing misdemeanor criminal charges based on the same conduct.” In considering whether the enforcement of Penal Code section 1387 had the effect under the circumstances presented in this case of enforcing an important right affecting the public interest, the trial court correctly noted that while “the public always has a significant interest in seeing that laws are enforced,” that alone is insufficient to show a fee award is merited.

The court found the right enforced here had not been shown to be an important right affecting a public interest because there was no evidence that City or any other governmental entity had been engaged in the widespread practice of imposing administrative penalties after the dismissal of criminal charges, and the ruling did not resolve Coke’s broader constitutional issues of free speech arising from her conduct.

We conclude that the grounds given by the court for its denial of an award are consistent with the substantive law of Code of Civil Procedure section 1021.5, and their application to the facts of this case is within the range of discretion conferred upon the trial courts under Code of Civil Procedure section 1021.5, read in light of the purposes and policy of the statute.

Because we conclude the trial court did not err in determining the lawsuit did not enforce an important right affecting the public interest, we need not consider whether the

other elements of Code of Civil Procedure section 1021.5 were satisfied. Each element of the statute must be satisfied justify an award of attorney fees. (*County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 648.) Conversely, we will not reverse the order denying the motion if any one of the elements is not satisfied.

DISPOSITION

The judgment (order) is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(5).)

BLEASE, J.

We concur:

RAYE, P. J.

MURRAY, J.