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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LMN CO-OPERATIVE, INC. et al.,

Plaintiffs and Appellants,

v.

COUNTY OF KERN et al.,

Defendants and Respondents.

F061786

(Super. Ct. No. S-1500-CV-269025)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Ganong Law, Philip W. Ganong and Alisyn J. Palla for Plaintiffs and Appellants.

Theresa A. Goldner, County Counsel, Andrew C. Thomson, Deputy County Counsel for Defendants and Respondents.

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This is an appeal of a trial court's order denying class certification. Appellant Michelle Myers is a member of a medical marijuana cooperative located in Bakersfield. She sued the Kern County Sheriff's Department and the County of Kern (County), asserting various civil rights claims based on the sheriff's department's allegedly

unlawful search of the cooperative. She sought to represent all members of the cooperative.

Myers filed a motion for class certification, which the trial court denied. On appeal, Myers contends that (1) a claim under the Bane Act, Civil Code section 52.1, may be brought as a class action, and (2) the trial court's denial of class certification based on the diversity of potential class members' claims was not supported by substantial evidence.

We conclude that the trial court did not abuse its discretion in determining that class certification was not appropriate in this case. The denial order is affirmed.

FACTUAL AND PROCEDURAL HISTORIES

On November 30, 2009, Myers, the LMN Co-operative, Inc. (Co-op), and Deborah Dahl filed a complaint against the County. On February 5, 2010, Myers and the Co-op filed a first-amended complaint, deleting Dahl as a plaintiff and adding the sheriff's department as a defendant. The plaintiffs alleged that the Co-op is a lawfully organized mutual benefit cooperative corporation and Myers is a qualified patient as defined in the Compassionate Use Act, Health and Safety Code section 11362.5. Myers intended to "bring this action on behalf of herself and all other members of the Co-Op."

The plaintiffs alleged that, soon after the Co-op opened, members of the sheriff's department went to "check out" the operation. Later, members of the sheriff's department in plain clothes visited the Co-op to "check out" its security measures. Shortly after doing so, the Co-op "was surrounded by approximately 6 Sheriff patrol cars with lights flashing and asked to be admitted as they were doing training." They asked to see the patient list. Sheriff's deputies outside the Co-op warned members not to go in or they would "get in trouble." On or about June 3, 2009, the sheriff arrived at the Co-op with a search warrant. Sheriff's officers would not produce the search warrant until after they had completed their search of the Co-op. No affidavits were attached to the warrant.

Subsequently, a computer and copies of business records were returned to the Co-op by order of the Kern County Superior Court, but other Co-op property has not been returned. In addition, the County allegedly seized over \$10,000 from the Co-op's sales tax account and over \$2,600 from its checking account. The plaintiffs alleged that the Co-op cannot operate under the threat of arrest or seizure of property, and as a result, the members of the Co-op are unable to obtain medical marijuana, which they have a legal right to obtain under the laws of California.

The first amended complaint asserted three causes of action: (1) violation of the plaintiffs' California constitutional right of assembly; (2) violation of the "Unruh and Bane Civil Rights Act"; and (3) violation of Government Code section 11135. The defendants filed a demurrer, which was sustained as to the first and third causes of action. The trial court also granted the defendants' motion to strike reference to the Unruh Act.

The only surviving cause of action is a claim for violation of the Bane Act, Civil Code section 52.1. This statute provides a private right of action against a person who "interferes by threats, intimidation, or coercion ... the exercise or enjoyment by an individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." (Civ. Code, § 52.1, subds. (a), (b).)

On October 7, 2010, Myers filed a motion for certification of class. Although the Co-op was named as a plaintiff, it did not join the certification motion. In support of the motion, Myers filed a declaration from former plaintiff Dahl. Dahl stated that she was the president and secretary of the Co-op, which had 502 registered members as of June 3, 2009. The medical records of all of the members, as well as information on 20 to 25 individuals whose applications for membership were pending, were seized during the sheriff's department's "raid" and had not been returned. Dahl had been informed that the sheriff's department had been in contact with members of the Co-op, apparently based on information seized during the raid.

The defendants raised many arguments in opposition to class certification. First, they argued that Myers lacked standing to sue on behalf of proposed class members because the Bane Act requires the injured party to bring an action “in his or her own name and on his or her own behalf.” (Civ. Code, § 52.1, subd. (b).) Second, they argued that Myers failed to state a violation of the Bane Act, because there were no allegations that class members were present at the allegedly illegal search of the Co-op.

As a third argument, the defendants contended there was no community of interest among proposed class members. The proposed class members did not have a commonality of damages because they had different underlying maladies and there were no allegations of unavailability or increased cost of medical marijuana. Common questions of fact would not predominate because each proposed class member would have to show whether he or she was present during the search of the Co-op since a Bane Act claim depends on a showing of interference of rights “by threats, intimidation, or coercion.” Finally, the defendants argued that the small claims of the individual proposed class members, combined with their individualized damages, made the case inappropriate for class certification.

The trial court denied the motion for class certification. At a hearing on December 20, 2010, the court explained, “I think the cases [cited by the defendants], along with the section itself ... convinces me that ... the right given by Civil Code Section 52.1 is an individual right and is not, therefore, amenable to class certification. [¶] I would also, even if I had the authority, question because of the differences in terms of the potential damages because the varying medical conditions of the putative class.” In response, the attorney for the plaintiffs told the court, “The class certification motion is not seeking varying damages. The individuals who make up the proposed class are not seeking damages for having to replace their medicine or whatever. All they’re asking for is the damages that are allowed under ... the Bane Act for the civil rights violations.”

The court continued, “All of which are clearly an individual claim which must be proven individually, according to the statute.”

A minute order filed December 27, 2010, memorializing the court’s ruling provided: “As stated on the record, ... the Court does not believe that the language of [Civil Code] § 52.1 can be properly interpreted to allow any claim for relief other than by an individual, as set forth in the language. [¶] Additionally, because of the clearly diverse claims of the potential class members, class certification does not seem appropriate. [¶] This ruling is without prejudice to other potential plaintiffs from intervening, or filing separate actions, which may well be consolidated for management and discovery purposes.” Observing that whether a Bane Act claim may be brought as a class action appeared to be an issue of first impression, the court invited appellate review.

DISCUSSION

I. The Bane Act

Civil Code section 52.1, commonly referred to as the “Tom Bane Civil Rights Act” or the “Bane Act,” “was originally enacted [in 1987] ‘to stem a tide of hate crimes.’” (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 845 (conc. opn. of Baxter, J.)). The statute, however, does not require a showing that the violator acted with discriminatory intent or animus. (*Id.* at p. 850.) It provides:

“(a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars (\$25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall

be awarded to each individual whose rights under this section are determined to have been violated.

“(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute *in his or her own name and on his or her own behalf* a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.” (Civ. Code., § 52.1, italics added.)

In addition, subdivision (g) of Civil Code section 52.1 provides, “An action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to Section 51.7.”

Interpreting the statute, the trial court found that the phrase “in his or her own name and on his or her own behalf” of Civil Code section 52.1, subdivision (b), means that a Bane Act claim cannot be brought as a class action. The parties agree that there are no published appellate decisions on the issue, and our own research has not uncovered any.

Myers points out that three federal district courts have addressed the issue in unpublished decisions and urges us to follow the two courts that held that Bane Act claims are amenable to class treatment. Respondents, on the other hand, rely on appellate cases recognizing that a Bane Act claim is personal to the individual and may not be brought as a derivative action. In the first federal case to address the question, *Taggart ex rel. Perry v. Solano County* (E.D.Cal. Dec. 6, 2005) 2005 WL 3325752 [nonpub. opn.] (*Taggart*), the district court held that the Bane Act precludes private plaintiffs from bringing claims under the statute as class actions. The court relied on the language of the statute: “[A] plain reading of the statute reveals that Section 52.1(b) does not encompass

class actions. The statute specifies that an individual may bring a civil action ‘on his or her own behalf.’” (*Id.* at p. *4.)

The next case to address the question came from the Central District of California. In *Craft v. County of San Bernardino* (C.D.Cal. Mar. 23, 2006) 2006 WL 4941829 (nonpub. opn.) (*Craft*), the district court rejected the holding of *Taggart*, explaining that the use of the phrase “on his or her own behalf” in subdivision (b) “may more simply be read as a means to distinguish itself from subsection (a), which authorized suits by the state Attorney General for statutory violations.” (*Id.* at p. *3.) The *Craft* court also observed that subdivision (g) provides that the rights created in section 52.1 are in addition to “any other action, remedy, or *procedure* that may be available to an aggrieved individual under any other provision of law.” (*Ibid.*, italics added.)

Most recently, in *Schilling v. Transcor America, LLC* (N.D.Cal. Feb. 16, 2010) 2010 WL 583972 (nonpub. opn.), the district court acknowledged the split between *Taggart* and *Craft* and found *Craft* more persuasive. “The Court agrees with the analysis of the *Craft* court, and finds that the Bane Act permits class claims because there is no language expressly prohibiting class actions, and because of the broad language of section 52(g) providing that the Bane Act remedies are in addition to other available remedies.” (*Id.* at p. *11.)

Respondents rely on *Bay Area Rapid Transit Dist. v. Superior Court* (1995) 38 Cal.App.4th 141, which dealt with derivative claims brought under the Bane Act. A young Black man was shot and killed by a White police officer, and his parents sued the officer’s employer, Bay Area Rapid Transit, asserting wrongful death and Bane Act claims. (*Bay Area Rapid Transit Dist., supra*, at p. 142.) The appellate court held that the parents could not bring a claim under the Bane Act because the statute “clearly provides for a *personal* cause of action for the victim of a hate crime.” (*Bay Area Rapid Transit Dist., supra*, at p. 144.) The court explained that the Bane Act is limited to plaintiffs who themselves have been subjected to threats, intimidation, or coercion. The

parents of the shooting victim, however, were not present at the shooting and did not witness the actionable conduct. The court concluded, “In the absence of a clear legislative intent, we cannot recognize derivative Bane Act liability as requested by the [parents].” (*Bay Area Rapid Transit Dist.*, *supra*, at p. 145.)

While the parties raise intriguing arguments, we need not decide the issue in this case. Any valid reason stated by the trial court is sufficient to uphold an order denying class certification. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.) Here, in addition to finding that the Bane Act does not allow a private plaintiff to bring a claim as a class action, the trial court found that class treatment would be inappropriate “because of the clearly diverse claims of the potential class members.” For the reasons explained below, we affirm the order denying class certification on the second basis stated by the trial court.¹ Consequently, we leave for another day the issue of whether the Bane Act precludes private plaintiffs from bringing class actions as a matter of law.

II. Class certification

“Code of Civil Procedure section 382 authorizes class action suits in California ‘when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court’” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) “The party seeking certification as a class representative must establish the existence of an ascertainable class

¹Respondents urge us to dismiss the appeal, relying on *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067. *Haro* dismissed the plaintiffs’ appeal of the denial of class certification after it concluded that the underlying claim brought under the Federal Labor Standards Act (FLSA) could not be brought as a class action as a matter of law. (*Haro, supra*, at p. 1078.) *Haro* is distinguishable because, in that case, the lower court determined that the FLSA barred class treatment as a matter of law and did not address the substantive merits of the class certification issue. (*Haro, supra*, at p. 1078.) As a result, there was no lower court decision to review other than its purely legal determination of statutory interpretation. Here, in contrast, the trial court has addressed the merits of the certification issue.

and a well-defined community of interest among the class members. [Citation.] The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]” (*Ibid.*)

“To establish the requisite community of interest, the proponent of certification must show ... that questions of law or fact common to the class predominate over the questions affecting the individual members.... [Citation.] In essence, this means ‘each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.’ [Citation.] A class action should be certified only if it will provide substantial benefits both to the courts and the litigants.” (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 913-914.)

An order denying class certification of an entire class is an appealable order. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 435.) We review the trial court’s ruling for an abuse of discretion. “Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.... [A] trial court ruling supported by substantial evidence generally will not be disturbed ‘unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]’ [citation].” (*Id.* at pp. 435-436.) As we have observed, “[a]ny valid pertinent reason stated will be sufficient to uphold the order.’ [Citation.]” (*Id.* at p. 436.)

In the present case, the trial court stated that it was denying certification in part “because of the differences in terms of the potential damages because of the varying medical conditions of the putative class.” The court observed that each potential class

member's claim "must be proven individually, according to the statute." In its minute order, the court further explained, "because of the clearly diverse claims of the potential class members, class certification does not seem appropriate." Implicitly, the trial court determined that there was an insufficient community of interest to warrant class certification since each proposed class member would be required to litigate individually his or her potential claim under the Bane Act.

Myers contends that common factual and legal issues predominate because all the potential class members' claims are based on the allegedly unlawful search and seizure at the Co-op, and they all seek similar relief in the form of injunctive relief and unspecified civil penalties. Respondents, however, point out that each class member will be required to show individually how he or she was threatened, intimidated, or coerced in order to prove a Bane Act claim. (*Bay Area Rapid Transit Dist. v. Superior Court, supra*, 38 Cal.App.4th at p. 145 [Bane Act is limited to plaintiffs who themselves have been subjected to threats, intimidation, or coercion].)

In addition, each class member will be required to present evidence of his or her right to obtain medical marijuana. The premise of the plaintiffs' Bane Act claim is that each class member had a legal right to obtain medical marijuana through a medical marijuana cooperative, and respondents interfered with the enjoyment of that right. To establish the right to obtain medical marijuana, each class member must show that he or she has a valid identification card or is a patient using marijuana for medical purposes "upon the written or oral recommendation or approval of a physician." (See, e.g., Health & Saf. Code, § 11362.71, subd. (e) [persons "in possession of a valid identification card" are not subject to arrest for marijuana possession, "unless there is reasonable cause to believe that the information contained in the card is false"]; *People v. Kelly* (2010) 47 Cal.4th 1008, 1014-1015 [Medical Marijuana Program provides protection from arrest]; Health & Saf. Code, § 11362.5, subd. (d) [patients using marijuana on recommendation of doctor not subject to criminal law against possession of marijuana].)

Myers asserts that the medical condition of potential class members is not relevant because only “qualified patients” could be members of the Co-op. However, the bald assertion that the Co-op only allowed qualified patients to be members is not proof that each potential class member had the right to use medical marijuana. While we agree that detailed inquiries into Co-op members’ medical conditions are not necessary, each potential class member will be required to prove his or her right to use medical marijuana on an individual basis.

In sum, the nature of the underlying Bane Act claim is personal, requiring individualized proof of threats, intimidation, or coercion. Further, the particular right alleged to have been interfered with is the right to possess medical marijuana. Unlike a right such as the right to be free from unreasonable search and seizure, which everyone enjoys, only qualified patients and their caregivers have the right to possess marijuana. As a result, individualized evidence will be required simply to establish that each proposed class member possessed the right at issue. This was substantial evidence supporting the trial court’s order denying class certification. We conclude there is no abuse of discretion.

III. Request for judicial notice

Myers asks us to take judicial notice of documents from a criminal case from Kern County Superior Court. She asserts that the documents are relevant to show the illegality of the search and seizure conducted by the sheriff’s department on June 3, 2009. However, “the question of certification [is] essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 439-440.) Since the merits of the underlying claim are not at issue, we decline to take judicial notice of the documents submitted by Myers.

DISPOSITION

The trial court’s order denying class certification is affirmed. The parties shall bear their own costs on appeal.

Myers's request for judicial notice is denied.

Wiseman, Acting P.J.

WE CONCUR:

Poochigian, J.

Franson, J.