Filed 8/15/13 Andy's BP v. City of San Jose CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANDY'S BP, INC., et al., Plaintiffs and Appellants, v. CITY OF SAN JOSE, Defendant and Respondent; AMIR SHIRAZI, Real Party in Interest and Respondent.	No. H038358 (Santa Clara County Super. Ct. No. CV176412)

Appellants Andy's BP, Inc. and Andy Saberi appeal from an order discharging a peremptory writ of mandate entered against respondent City of San Jose (City). Appellants contend that they were deprived of their due process rights when the trial court issued an order discharging the peremptory writ of mandate without conducting a hearing. Since appellants have failed to establish prejudice, we affirm the order.

I. Factual and Procedural Background

Real Party in Interest Amir Shirazi owns the gas station, Moe's Stop, which is located at the corner of North 33rd Street and McKee Road in San Jose.[1] The project underlying the present litigation involves the expansion of Moe's Stop and consists of demolition of a house on the property, replacement of the house with three gasoline tanks, and construction of a canopy over the tanks. The City approved a negative declaration for the project and upheld the planning commission's approval of the conditional use permit for the project. Appellants own a gas station, Gas and Shop, on another corner of the same intersection.

In July 2010, appellants filed a petition for writ of mandate in which they challenged the City's approval of the project. Appellants alleged that the City had failed to comply with the California Environmental Quality Act (CEQA) by ignoring evidence regarding traffic and leaking gasoline tanks.

On March 11, 2011, the trial court issued an order granting the petition for writ of mandate on the first cause of action (noncompliance with CEQA). The order discussed the issue of potential traffic impacts extensively, but did not refer to the gasoline leak claim. The order also directed appellants to prepare and submit to the City and Shirazi an appropriate form of judgment granting the writ and a peremptory writ of mandate that would be consistent with the order.

Appellants' counsel prepared a judgment and a peremptory writ of mandate which required the City to prepare an environmental impact report (EIR) that complied with CEQA. Appellants' counsel then prepared a judgment granting the peremptory writ and a peremptory writ of mandate directing the City to set aside its approval of the project

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[1] Shirazi has not filed a respondent's brief.

and prepare an EIR pursuant to Public Resources Code section 21080, subdivision (d).[2] Neither the judgment nor the writ specified the grounds for noncompliance with CEQA. The trial court signed the judgment and writ on March 29, 2011.[3] The trial court retained jurisdiction over enforcement of the order by way of a return to the peremptory writ of mandate "until the Court has determined that Respondent ha[d] complied with the provisions of CEQA."

On December 21, 2011, the City filed a return to the peremptory writ of mandate. The following day, appellants filed their objection to the return to the peremptory writ of mandate and requested a hearing.

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[2] Public Resources Code section 21080, subdivision (d) provides: "If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared."

[3] On March 21, 2011, Shirazi's counsel sent a letter to appellants' counsel in which he objected to the proposed judgment and writ. He pointed out that "Judge Murphy's decision does not address your claim that some documents in the record required an EIR concerning a former underground leak of gasoline. If Judge Murphy requires an EIR which addresses a former leak, we need something in writing that so states. While I have no doubt that your clients would like the EIR to fail to address an issue so that they can keep complaining and undermining a competitor, the City and my client should be told what is required." (Boldface omitted.) Two days later, Shirazi's counsel also filed a declaration in which he stated that Shirazi wanted "to know whether the Court implicitly rejected or simply declined to rule on the issue raised in the Petition that a decades-old or 'historic' leak of gasoline underground at the site (and not just the prospect of more traffic) requires" an EIR. Public Resources Code section 21005, subdivision (c) provides: "It is further the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division [CEQA], shall specifically address each of the alleged grounds for noncompliance." Despite this clear legislative intent, appellants' counsel prepared and the trial court signed a judgment that did not address each of the grounds for noncompliance with CEQA. By failing to do so, a reviewing court would be unable to determine whether the trial court found that there was no merit to appellants' claim regarding the leaking gasoline tanks or that it failed to reach a determination on that issue.

On January 3, 2012, appellants filed a supplemental petition for writ of mandate based on alleged noncompliance with CEQA and for declaratory and injunctive relief. On the same day, appellants filed an ex parte application for a temporary restraining order and order to show cause. The City opposed the application. The trial court denied the requested relief.

On January 5, 2012, the trial court entered an order discharging the peremptory writ of mandate. However, a January 9, 2012 minute order states that "[t]he Court has conducted a telephonic conference with all counsel," including counsel for appellants, the City, and Shirazi. The conference was not reported. The trial court ordered that the January 5, 2012 order discharging the peremptory writ of mandate be set aside.

On April 13, 2012, the trial court issued an order discharging the peremptory writ of mandate based on the City's compliance with the writ.

Appellants filed a timely appeal.

II. Discussion

Appellants contend that the trial court erred in failing to hold a hearing before discharging the peremptory writ of mandate.

City of Carmel-by-the-Sea v. Board of Supervisors (1982) 137 Cal.App.3d 964 outlines the procedure to be followed when a petitioner challenges the respondent's claim that it has complied with a writ. "It is well settled that the court which issues a writ of mandate retains continuing jurisdiction to make any order necessary to its enforcement. [Citations.] Where, as here, the writ remands the matter to the administrative body with directions to proceed in a certain manner, and the return states that the court's mandate has been carried out, the petitioner may challenge the validity of that claim in *one* of several ways. Petitioner may proceed by a new petition under Code of Civil Procedure section 1094.5, or by supplemental petition (using the original action number). [Citations.] But the petitioner is not required to proceed by writ; if it or the court is not

satisfied with the return, the court may, on its own motion or on that of the petitioner, either oral or written, order the respondent to reconsider further. [Citations.]" (*Id.* at p. 971, italics added.)

Here, appellants filed objections to the City's return on December 22, 2011, and sought a determination that the City's EIR failed to comply with CEQA. On January 3, 2012, before the writ was discharged, appellants filed a supplemental writ petition under the same docket number and alleged that the City's EIR did not comply with CEQA. It is not clear why appellants chose to proceed in this manner. In any event, assuming that appellants were entitled to a hearing on their objections to the City's return, they have failed to demonstrate prejudice. The parties have already submitted briefing on the supplemental petition on the same issues that were raised in their objections, and there will be a hearing on these issues.[4] Thus, appellants will have a hearing on their claim that the EIR fails to meet the requirements of CEQA.

Appellants argue that the City or Shirazi could "assert that Appellants are barred by some aspect of res judicata, such as collateral estoppel, in relation to the supplemental petition." We disagree.

"Res judicata or claim preclusion precludes the relitigation of a cause of action that previously was adjudicated in another proceeding between the same parties or parties in privity with them. [Citation.] Res judicata applies if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding. [Citation.] Res judicata bars the litigation not only of issues that were actually litigated but also issues that could have

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[4] A hearing on the supplemental writ petition, which was scheduled for September 14, 2012, was ordered off calendar. The parties agreed to submit a copy of the administrative record "as soon as possible." After the trial court received the record, the hearing was to be rescheduled.

been litigated. [Citation.]" (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.)

"[I]n a new action on a different cause of action the former judgment is a collateral estoppel, being conclusive on issues actually litigated in the former action." (*Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851.) "Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) Here, the threshold requirements have not been met, since appellants were deprived of a hearing on the issues raised in their objections to the return.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Grover, J.