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

MILPITAS COALITION FOR A BETTER
COMMUNITY,

Plaintiff and Appellant,

v.

CITY OF MILPITAS,

Defendant and Respondent;

DAVID M. JORDAN,

Real Party in Interest and
Respondent.

H038380
(Santa Clara County
Super. Ct. No. CV205163)

Appellant Milpitas Coalition For A Better Community (Coalition) challenges the trial court's judgment denying its petition for a writ of mandate. The trial court's judgment followed from its grant of the motions of respondent City of Milpitas (the City) and real party in interest David M. Jordan for judgment on the pleadings. The City and Jordan contended that Coalition's action could not proceed because it had failed to join Walmart as an indispensable party. Coalition contends on appeal that Walmart was neither a necessary nor an indispensable party. We conclude that the trial court did not abuse its discretion in finding that Walmart was a necessary and indispensable party. We therefore affirm the judgment.

I. Background

In 2009, Walmart applied to the City for approval of its plan to expand its existing Milpitas store. An environmental impact report (EIR) was prepared, but the City found that the EIR did not comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and refused to certify it. In February 2011, Jordan circulated an initiative petition proposing the adoption of a specific plan called the “Milpitas Commercial Specific Plan.” The specific plan proposed by the initiative, which Coalition refers to as the “Walmart Initiative,” would apply solely to the site of Walmart’s existing store and would permit the expansion of the store. After the petition was certified to have been signed by more than 15 percent of the registered voters in Milpitas, it was presented to the City. On April 19, 2011, the City chose to adopt the proposed ordinance rather than submitting it to the voters.

On July 15, 2011, Coalition filed a petition for writ of mandate challenging the City’s adoption of the ordinance. It alleged both that the adoption of the ordinance violated CEQA and that the ordinance was inconsistent with the City’s general plan.¹ Walmart was not named as a real party or a respondent in the petition. The City’s answer and Jordan’s answer both alleged as an affirmative defense that Walmart was an indispensable party and that Coalition had failed to timely name and serve Walmart as a real party in interest. The City and Jordan thereafter moved for judgment or judgment on the pleadings both on the merits and on the ground that Coalition had failed to name and serve Walmart. The court concluded that Walmart was an indispensable party as to both the CEQA and non-CEQA causes of action. It also found that the petition lacked

¹ The petition also alleged two other non-CEQA causes of action, but Coalition does not challenge the trial court’s ruling on those causes of action.

substantive merit.² The court entered judgment denying the petition. Coalition timely filed a notice of appeal.

II. Discussion

A. Claim of Procedural Error

Coalition contends that the trial court could not grant a motion for *judgment on the pleadings* based on Coalition’s failure to join an indispensable party because the failure to join an indispensable party is not a statutory ground for a motion for judgment on the pleadings. (Code Civ. Proc., § 438, subd. (c)(1)(B).) Since “[t]he objection that an indispensable party has been omitted may be raised at any time” (*Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 265; accord *In re Marriage of Ramirez* (2011) 198 Cal.App.4th 336, 345), the form of the defense motions was irrelevant. Furthermore, the defense motions were alternative motions that also sought judgment under Code of Civil Procedure section 1094. As the absence of an indispensable party was pleaded by the defendants in their answers, it could properly be resolved by the court on their motions for judgment. Coalition makes no showing that it was prejudiced by the trial court’s resolution of this matter on motions for judgment on the pleadings rather than by some other avenue.

B. Standard of Review

“Whether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs ‘factors of practical realities and other

² The trial court took judicial notice of the ordinance and of the City’s general plan, but it refused to take judicial notice of the administrative record on the ground that it was “not relevant to the material issues before the Court.”

considerations.’” (*Hayes v. State Dept. of Developmental Services* (2006) 138 Cal.App.4th 1523, 1529.)

C. Necessary Party Determination

The trial court found that it was “indisputable” based on Coalition’s “own allegations” that Walmart “was granted an ‘approval’ of its planned expansion” by the ordinance and therefore was a necessary party for both the CEQA cause of action and the non-CEQA causes of action.

Code of Civil Procedure section 389 requires that a person be joined as a party “if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.” (Code Civ. Proc., § 389, subd. (a).) A person meeting these requirements is often referred to as a “necessary party.” (*Bowles v. Superior Court* (1955) 44 Cal.2d 574, 583; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 848.)

“[Public Resources Code] section 21167.6.5(a) supplants [Code of Civil Procedure section 389, subdivision (a)] in a CEQA action. If an entity is a recipient of an approval for purposes of section 21167.6.5(a), that entity is a necessary party in a CEQA action challenging the EIR for the project that was approved, and no further showing need be made under subdivision (a) of Code of Civil Procedure section 389 to make that entity a necessary party.” (*Quantification Settlement Agreement Cases, supra*, 201 Cal.App.4th at p. 855.) Former Public Resources Code section 21167.6.5, subdivision (a) (the version that was in effect at the time of the City’s decision) provided: “The petitioner or plaintiff shall name, as a real party in interest, any *recipient of an approval* that is the subject of an

action or proceeding brought pursuant to Section 21167, 21168, or 21168.5, and shall serve the petition or complaint on that real party in interest, by personal service, mail facsimile, or any other method permitted by law, not later than 20 business days following service of the petition or complaint on the public agency.” (Former Pub. Resources Code, § 21167.6.5, subd. (a), italics added.) Subdivision (d) of that section provided: “Failure to name potential parties, other than those real parties in interest described in subdivision (a), is not grounds for dismissal pursuant to Section 389 of the Code of Civil Procedure.” (Former Pub. Resources Code, § 21167.6.5, subd. (d).)

The first issue is whether Walmart was a necessary party to the CEQA cause of action. “[R]ecipient of an approval” is not defined in the statute or illuminated by the legislative history. Former Public Resources Code section 21167.6.5 was enacted by the Legislature in response to *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092 (*Deltakeeper*) and was intended to “strengthen the indispensable party rule.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1393 (2001-2002 Reg. Sess.) as amended August 28, 2002, p. 4.)

The decision in *Deltakeeper* concerned a project that was an agreement for the sale of water from one group of agencies to another group of agencies. (*Deltakeeper*, *supra*, 94 Cal.App.4th at p. 1095.) The lead agencies, which were sellers, certified an EIR for the project. (*Deltakeeper*, at p. 1098.) The petitioner challenged the adequacy of the EIR in a petition that named the lead agencies as respondents and one of the purchasing agencies as the real party in interest. Three other purchasing agencies were not named in the petition. After the limitations period had run, the respondents moved to dismiss the petition for failure to join indispensable parties. The trial court granted the motion. (*Deltakeeper*, at pp. 1096, 1098-1099.)

The Court of Appeal reversed. It first addressed whether the three purchasing agencies unnamed in the petition were necessary parties. “[T]he pertinent question is whether their absence from the litigation would impair their ability to protect their

interests in the ‘subject of the action,’ the validity of the CEQA determination.” (*Deltakeeper, supra*, 94 Cal.App.4th at p. 1101.) “Plaintiffs timely named as defendants three parties to the Agreement, all of whom have a strong interest in upholding the EIR so as to obtain the benefits of the Agreement. A party’s ability to protect its interest is not impaired or impeded as a practical matter where a joined party has the same interest in the litigation.” (*Deltakeeper*, at p. 1102.) The Court of Appeal found that the three unnamed agencies were necessary parties, but it concluded that the trial court had abused its discretion in finding that they were indispensable parties because there was a “unity of interest” between the unjoined agencies and the named parties. (*Deltakeeper*, at p. 1109.)

Since we find no guidance in *Deltakeeper* or the legislative history as to the meaning of “recipient of an approval,” we must look elsewhere. “Approval” is defined in the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000, et seq.). “‘Approval’ means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.” (CEQA Guidelines, § 15352(a).) However, the word “recipient” is not defined anywhere in the Public Resources Code or in the CEQA Guidelines.³ In common parlance, “recipient” means “one that receives,” and “receive” means “acquire.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1993) pp. 975-976.) Thus, recipient of an approval means one who acquires an approval. Since an “approval” necessarily refers to the project intended to be carried out by a person, the approval could only be acquired by the person intending to carry out the project. “In determining who is a recipient of an approval under section

³ “Applicant” is defined as “a person who proposes to carry out a project which needs a lease, permit, license, certificate, or other entitlement for use or financial assistance from one or more public agencies when that person applies for the governmental approval or assistance.” (CEQA Guidelines, § 15351.) The fact that the statute uses “recipient” rather than “applicant” may suggest that a different meaning was intended.

21167.6.5(a), ‘we look to their status in the underlying transaction’” (*Quantification Settlement Agreement Cases, supra*, 201 Cal.App.4th at p. 855.)

Here, the project was indisputably the expansion of the Walmart store. The ordinance identified the “‘developer’” of the site affected by the specific plan as “the fee title holder” of that site—that is, Walmart. To ensure approval of the expansion, the ordinance provided that all further “approvals . . . for development [of the Walmart site] shall be ministerial, final, and not subject to appeal.” Since the ordinance therefore gave Walmart a clear path to expand its store, Walmart was the entity that acquired an approval as a result of the enactment of the ordinance.⁴ In this context, the trial court did not abuse its discretion in concluding that Walmart was a “recipient of an approval” in connection with this project (the specific plan) and therefore was a necessary party as to the CEQA cause of action.

The next question is whether the trial court abused its discretion in determining that Walmart was also a necessary party for purposes of the non-CEQA causes of action. Walmart plainly “claims an interest relating to the subject of the action” (Code Civ. Proc., § 389, subd. (a).) The subject of the action is the specific plan designed to ensure approval of Walmart’s plan to expand its existing store, a plan in which Walmart has a vested interest. The only real question is whether Walmart “is so situated that the disposition of the action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect that interest” (Code Civ. Proc., § 389, subd. (a).) The trial court found that neither the City nor Jordan would adequately represent Walmart’s interest. While Walmart was obligated under the ordinance to *pay the cost* of the City’s defense of the ordinance’s validity, it was not given the power to *control* the litigation.

⁴ The City and Jordan point out that the petition characterized the City’s action in adopting the specific plan as “effectively approving the Walmart Expansion Project”

Since Walmart's litigation interests might differ from those of the City's (particularly given that the City previously rejected Walmart's expansion project), Walmart could not rely on the City to protect Walmart's interest. And the ordinance did not obligate Walmart to fund Jordan's position in the litigation. The trial court could have reasonably concluded that Jordan's personal interest in Walmart's expansion could not be relied upon to ensure that Walmart's interest was protected. Consequently, the trial court did not abuse its discretion in concluding that Walmart was a necessary party as to the non-CEQA causes of action.

D. Indispensable Party Determination

If a necessary party cannot be joined, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code Civ. Proc., § 389, subd. (b).)

"The subdivision (b) factors are not arranged in a hierarchical order, and no factor is determinative or necessarily more important than another." (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 35.) On the other hand, "[w]hile it is just one of the four factors listed in Code of Civil Procedure section 389, subdivision (b), to be considered in determining whether an unjoined person is an indispensable party, potential prejudice to that unjoined person is of critical importance." (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1298.)

Coalition contends that the trial court prejudicially erred because it *failed to consider* all four of the relevant factors. While the trial court did not make express findings on each of the four factors, we must presume that it considered them. “The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) Here, the record does not affirmatively reflect that the court ignored any of the relevant factors. Indeed, the City explicitly argued at the hearing that the court’s exercise of its discretion should be guided by the “four” statutory factors.

The trial court concluded that Walmart was an indispensable party because the relief requested by Coalition would “injure or affect” Walmart’s interest in expanding its store and neither the City nor Jordan would adequately represent Walmart’s interest. The record supports the trial court’s reasoning. Coalition’s action sought to invalidate the ordinance. Since the ordinance paved the path for approval of Walmart’s expansion plans, which had previously been rejected by the City, the invalidation of the ordinance would clearly injure Walmart’s interest. The trial court could have concluded that, in this case, that factor was determinative. No “protective provisions” could avoid or lessen this potential prejudice to Walmart. Either the ordinance was valid or it was invalid. There was no middle ground. It is true that the other two factors did not favor an indispensable party determination. Even in Walmart’s absence, a judgment invalidating the ordinance would be valid. And dismissal of this action would deprive Coalition of any remedy as the statute of limitations had long since run on its challenges to the ordinance. Yet it was for the trial court to weigh these four factors and determine, in its discretion, whether, overall, they weighed in favor of or against an indispensable party determination.

Because the prejudice factor was the most “critical” in this case and carried great weight with the trial court, it could reasonably conclude, in its discretion, that “equity and good conscience” required an indispensable party finding in this case.

As the trial court’s indispensable party finding required dismissal of the Coalition’s CEQA and non-CEQA causes of action, we need not consider the other issues raised by the parties in this case.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Grover, J.