Supreme Court Copy

No. S180365
Court of Appeal No. G042878
Superior Court No. 30-2009-00298200

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ENFORCEMENT AGAINST
DANA POINT SAFE HARBOR COLLECTIVE
OF CITY OF DANA POINT CITY COUNCIL SUBPOENA

CITY OF DANA POINT, Petitioner

v.

DANA POINT SAFE HARBOR COLLECTIVE, Respondent

RESPONDENT'S OPENING BRIEF

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STATUTES

To the Honorable Chief Justice of the California Supreme Court, and the Associate Justices of the Supreme Court of California:

Dana Point Safe Harbor Collective, Defendant and Respondent, respectfully submits its Opening Brief pursuant to the March 10, 2010 Order of this Court granting its Petition for Review.

ISSUE PRESENTED FOR REVIEW

This case presents the following issue for review:

On March 10, 2010, the California Supreme Court granted Respondent's Petition for Review. The Court ordered the following issue to be briefed:

Is an order compelling compliance with a legislative subpoena issued under Government Code section 37104 appealable as a final judgment?

SUMMARY OF ARGUMENT

Respondent and other similarly situated parties filed Petitions for Review before this Court to resolve inconsistent present opinions by the First, Second, Third, Fourth and Sixth District Courts of Appeal regarding appealability of underlying Superior Court orders compelling compliance with legislative subpoenas. It is respectfully asserted that the order is appealable, because the trial court's order compelling compliance with a

legislative subpoena constitutes a final determination of the parties' rights notwithstanding the possibility that further proceedings might be required to ensure compliance with the order. The fact that Respondent may be subject to a future contempt order for non-compliance with the legislative subpoena does not mean the court order from which the appeal was taken is not final for appellate purposes. Indeed, any potential future contempt judgment would not be appealable but reviewed, if at all, by writ and therefore review of the underlying order in this action can reliably be had only if that order is appealable. State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd., 165 Cal.App.4th 841, 851, 81 Cal.Rptr.3d 486 (Third District 2008).

As such, the trial court's order constitutes an appealable final judgment pursuant to Code of Civil Procedure §904.1, subdivision (a)(1). City of Santa Cruz v. Patel, 155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824 (6th Dist. 2007).

STATEMENT OF THE CASE

On or about July 2, 2009, City of Dana Point (hereinafter Dana Point or Petitioner) served a subpoena on Dana Point Safe Harbor Collective (hereinafter Safe Harbor or Respondent) and other unrelated entities directing the production of 44 categories of documents on or before July 27, 2009. The subpoena was issued in the absence of any pending litigation or

administrative proceedings between Dana Point and Safe Harbor or any of the other unrelated entities which also participated in the Superior Court proceedings. The subpoena, among other things, requested all records which identify members of the collectives and the amounts and costs of all medical marijuana supplied to the members by the Dana Point Safe Harbor Collective. On July 22, 2009, Richard C. Brizendine, counsel for Safe Harbor, wrote to legal counsel for Dana Point and served written objections to the subpoena duces tecum raising appropriate legal objections including the members' rights to medical privacy.

Dana Point then moved for an order in the Superior Court compelling compliance with the subpoena duces tecum [C.T. 10[1]]. On August 28, 2009, counsel for Dana Point and counsel for all entities including Safe Harbor appeared in court and stipulated that the hearings on the related Orders to Show Cause would be heard on October 2, 2009, before the Honorable Glenda Sanders, Judge.

On November 2, 2009, the trial court issued its final Order which directed Safe Harbor and other parties in related proceedings before the court, to obey the legislative subpoena [C.T. 199].

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All references except as otherwise noted are to the Clerk's Transcript on Appeal (C.T.) Which has been lodged with this Court.

A timely appeal was filed by Safe Harbor on November 10, 2009, pursuant to California Code of Civil Procedure §904.1 [C.T. 196]. The trial court, on December 3, 2009, stayed enforcement of its order during the pendency of the appeal and Safe Harbor timely designated the Record on Appeal which was filed on December 28, 2009.

On January 29, 2010, Safe Harbor received an order from the Fourth District Court of Appeal declaring that the Court on its own motion found the appeal was not from an appealable order and deeming the appeal to be a petition for extraordinary writ. A true copy of said order was attached as Exhibit 2 to Safe Harbor's Petition for Review filed before this Court on February 19, 2010. The Court of Appeal also vacated the previously established briefing schedule on appeal and denied Safe Harbor's motion to consolidate the related cases on appeal.

On February 8, 2010, Safe Harbor filed its Motion to Vacate Order and to Reinstate Appeal whereby it requested the Court of Appeal to vacate its Order of January 29, 2010, and to reinstate the appeal with a new briefing schedule. On February 11, 2010, the Court of Appeal summarily denied the Motion to Vacate. A true copy of the order was attached as Exhibit 3 to Safe Harbor's Petition for Review filed before this Court on February 19, 2010.

On February 19, 2010, Safe Harbor filed its Petition for Review before this Court. The Petition was granted per the Supreme Court of California Order dated March 10, 2010.

ARGUMENT

I. AN ORDER COMPELLING COMPLIANCE WITH ADMINISTRATIVE AND LEGISLATIVE SUBPOENAS IS APPEALABLE

The California Supreme Court, on at least two prior occasions, has addressed whether trial court orders not issued as formal judgments are appealable. On each occasion, the Court has used a "finality" test to determine appealability and found such orders to be appealable pursuant to California Code of Civil Procedure §904.1(a)(1). It is respectfully submitted that the trial court order of November 2, 2009, requiring compliance with the legislative subpoena issued by Dana Point is a final order, because it resolved all issues between the litigants except possible further proceedings to compel compliance, if necessary, via contempt proceedings against Safe Harbor.

The finality test was used by this Court to determine that challenged orders were, in fact, appealable in Griset v. Fair Political Practices Com'n., 25 Cal 4th 688 (2001) and Sullivan v. Delta Air Lines, 15 Cal. 4th 288

(1997). It should also be noted that the Fourth District Court of Appeal from which these proceedings arise has also used the finality test to determine the appealability of court orders not reduced to formal judgments on at least two prior occasions in Public Defenders' Organization v. County of Riverside, 106 Cal.App.4th 1403, 132 Cal.Rptr.2d 81 (4th Dist. 2003) and Millan v. Restaurant Enterprises Group, Inc., 14 Cal.App.4th 477, 18 Cal.Rptr.2d 198 (4th Dist. 1993).

All of the cases cited hereinabove have used a practical and straightforward analysis to determine whether the challenged orders were appealable as "final judgments" within the meaning of Code of Civil Procedure §904.1.

> . . .[I]t has long been recognized that "No hard-and-fast definition of 'final' judgment applicable to all situations can be given, since its finality depends somewhat upon the purpose for which and the standpoint from which it is being considered, and it may be final for one purpose and not for another. This is so manifest that it would be idle to attempt any exhaustive examination into the different cases in which the word 'final' is employed. One of those other meanings, however, is relevant here.
>
> In its most fundamental sense, "finality" is an attribute of every judgment at the moment it is rendered; indeed, if a judicial determination is not immediately "final" in this sense it is not a judgment, no mater what it is denominated. The Legislature has incorporated this meaning of finality into the very definition of a judgment: "A judgment is the final determination of

> the rights of the parties in an action or proceeding." And we have explained the meaning as follows: "A judgment is final 'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'"
>
> Finality in this sense not only makes a judicial determination a judgment, it also makes that judgment appealable. As we recently observed, "A judgment that leaves no issue to be determined except the fact of compliance with its terms is appealable." Indeed, recognizing that this meaning of finality is so fundamental that it is essentially redundant to speak of a "final judgment" in this sense, the Legislature no longer provides in the basic statute authorizing appeals from the superior court that such an appeal may be taken "From a final judgment entered in an action, or special proceeding"; the statute now provides simply that an appeal may be taken "From a judgment" (Code Civ. Proc., §904.1, subd. (a)(1)). The meaning in the same." Sullivan, supra, at 303–304 (*internal citations omitted*).

It is undisputed that Dana Point's action in the Superior Court to compel enforcement with its previously issued legislative subpoena is a special proceeding as defined by California Code of Civil Procedure §22. The above language from Sullivan establishes the appealability of the trial court order of November 2, 2009.

The Sullivan test was also utilized by this Court in Griset v. Fair Political Practices Com'n., 25 Cal. 4th 688 (2001). The Griset court addressed the appealability of a court order disposing of all causes of action between the parties even though there was no formal entry of judgment in

the Superior Court.

> As we observed earlier, a judgment is a final determination of the rights of the parties. . . . we articulated the following standard to determine whether an adjudication is final and appealable: "It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." Griset, supra at 698 (*internal citations omitted*).

It appears there is a present split of authority on the appealability on Superior Court orders enforcing administrative and analogous legislative subpoenas issued pursuant to California Government Code §37104 *et seq*. Some courts have held such orders are non-appealable and may only be reviewed by writ. See, Bishop v. Merging Capital, Inc., 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556 (Second District1996) and Pacific-Union Club v. Superior Court, 232 Cal.App.3d 60, 68-69, 283 CalRptr. 287, fn. 3 (First District 1991).

The Sixth District Court of Appeal has expressly found that an order to compel compliance with a legislative subpoena pursuant to Government Code §37104 is appealable as a final judgment. City of Santa Cruz v. Patel, 155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824 (6th Dist. 2007). The

Patel court cited extensively from Millan v. Restaurant Enterprises Group, Inc., 14 Cal.App.4th 477, 18 Cal.Rptr.2d 198 (Fourth Dist. 1993), in support of its ruling and a contrary line of cases from the Second District Court of Appeal was discussed and rejected in favor of the "better view" of the Fourth District Court of Appeal.

> The orders before us compel compliance with legislative subpoenas pursuant to Government Code section 37104 *et seq*. As to these, we believe the better view is that the orders are appealable as final judgments. A judgment is the "final determination of the rights of the parties in an action or proceeding." The statutory scheme at hand provides for an original proceeding in the superior court, initiated by the mayor's report to the judge, which results in an order directing the respondent to comply with a city's subpoena. Indeed, the compliance order is tantamount to a superior court judgment in mandamus, which, with limited statutory exceptions, is appealable. Whether the matter is properly characterized as an "action" or a "special proceeding", it is a final determination of the rights of the parties. It is final because it leaves nothing for further determination between the parties except the fact of compliance or noncompliance with its terms. The fact that an intransigent witness may be subject to a contempt order does not mean that the order compelling compliance is not final. The normal rule is that "injunctions and final judgments which form the basis for contempt sanctions are appealable. . . . The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. As we have noted, this fact does not render such an order 'nonfinal,' and thus nonappealable." It must be reviewed, if at all, by writ. Therefore, review of the underlying order can reliably be had only if that order is appealable. The superior court's order determined all of the parties' rights and liabilities at issue in the

> proceedings; the only determination left was the question of future compliance, which is present. We conclude that the orders herein must be deemed final judgments and are, therefore, appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1). Patel supra at 242-243, *internal citations.* omitted

The Third District has recently ruled that an order compelling compliance with an administrative subpoena is appealable and expressed its disappointment due to the California Supreme Court's prior "deflection" of the jurisdictional question of appealability. State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd., 165 Cal.App.4th 841, 81 Cal.Rptr.3d 486 (Third District 2008). The Dept. of Pesticide opinion also quotes extensively from Patel, supra, and the Fourth District decision in Millan, supra.

The Fourth District has previously stated and found that the "better view" is that such orders are appealable as final judgments in special proceedings. Millan, supra at 484-85.

> Moreover, the better view is that "orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings. . . Numerous cases, including cases from our Supreme Court, have decided appeals taken from similar orders on the merits without discussion of the appealability issue. Inasmuch as the Supreme Court is among those courts which have assumed the appealability of such orders, we conclude such an order is appealable . . . The issue on this appeal, whether the subpoena meets constitutional standards for enforcement, is a matter of law and is reviewed *de novo*. Millan, supra [internal citations

omitted].

Millan was, in fact, followed by the Fourth District in Public Defenders' Organization v. County of Riverside, 106 Cal.App. 4th 1403 (Fourth District 2003) and People ex rel. DuFauchard v. U. S. Financial Management, Inc., 169 Cal.App.4th 1502, 87 Cal.Rptr.3d 615 (Fourth District 2009). The Fourth District Court of Appeal in DuFauchard, supra, cited Dept. of Pesticide, supra, and Millan, supra, in ruling that an order compelling compliance with an administrative subpoena is appealable.

> We agree with the court's analysis in State ex rel. Dept. of Pesticide Regulation. In this case, the trial court's order compelling compliance with the Commissioner's administrative subpoena constituted a final determination of the parties' rights, notwithstanding the possibility that further proceedings might be required to gain U.S. Financial Management's compliance with that order. (See State ex rel. Dept. of Pesticide Regulation, supra, 165 Cal.App.4th at p. 852, 81 Cal.Rptr.3d 486.) As such, the order constitutes an appealable final judgment pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1). (See State ex rel. Dept. of Pesticide Regulation, supra, 165 Cal. App.4th at p. 849, 81 Cal.Rptr.3d 486.)

The Fourth District Court of Appeal then took a contrary position in the present action by finding the trial court's order of November 2, 2009 non-appealable, thereby requiring review and assistance by this Court.

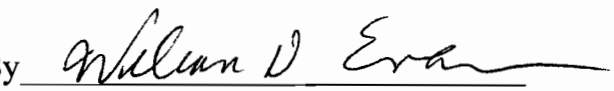
II. CONCLUSION

In view of the foregoing, it is respectfully submitted that the Superior

Court Order of November 2, 2009, is an appealable order and the matter should be remanded to the Fourth District Court of Appeal with instructions to reinstate Safe Harbor's appeal.

DATED: April 6, 2010

EVANS, BRIZENDINE & SILVER

By 

WILLIAM D. EVANS,
Attorneys for Dana Point
Safe Harbor Collective

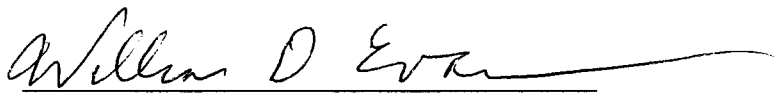
CERTIFICATE OF COMPLIANCE

California Rules of Court, Rule 8.204

The foregoing brief is proportionately spaced, using 13-point Times New Roman Regular. The word count of 3,294 is based on information provided by Corel WordPerfect word processing program and therefore does not exceed the limits provided by Rule 8.204, California Rules of Court.

I certify that the foregoing is true and correct.

Executed this 6th day of April, 2010, at Long Beach, California.



WILLIAM D. EVANS

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 5826 East Naples Plaza, Long Beach, California.

On April 6, 2010, I served the foregoing RESPONDENT'S OPENING BRIEF by placing a true copy thereof enclosed in a sealed envelope, as follows:

Rutan & Tucker
A. Patrick Munoz
Noam I. Duzman
Jennifer J. Farrell
611 Anton Blvd., 14th Floor
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Clerk of the Court of Appeal
Fourth District, Division Three
601 West Santa Ana Boulevard
Santa Ana, CA 92701

Clerk of the Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

I caused such envelopes to be deposited in the mail at Long Beach, California or placed for collection and mailing on the date and at the place shown above following our ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing affidavit. The envelopes were mailed with postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April, 2010, at Long Beach, California.

_____
LINDA BEWLEY