

Eric Ratinoff Law Corp v. Neil McKeown, et al.

21CV45212

RULING ON MOTION FOR AN ORDER SEVERING TRIAL OF THE CROSS-COMPLAINT FROM THE INTERPLEADER COMPLAINT; REQUEST FOR TRIAL PREFERENCE

Defendants and Cross-Defendants Neil and Kathinka McKeown (McKeowns) move for an order severing trial of the Cross-Complaint filed by Defendant Kieran Brennan (Brennan) from the Interpleader Complaint filed by Plaintiff Eric Ratinoff Law Corp. McKeowns further request that the trial on the Interpleader Complaint be set with preference.

Code of Civil Procedure Section 1048 governs severance of trial based on causes of action.¹ “The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.” (§ 1048, subd. (b).) The policy underlying the statute is promotion of judicial economy, fairness, and accuracy. (See *Foreman v. Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 888, at fn. 8.) The discretion granted to the Court under section 1048 “must necessarily be broad and will not be interfered with on appeal, except for an abuse thereof.” (*National Electric Supply Co. v. Mt. Diablo Unified School Dist.* (1960) 187 Cal.App.2d 418.)

The Complaint is one for interpleader. Plaintiff alleges that it is in possession of funds to which McKeowns and Brennan have conflicting claims (Funds), and prays the Court compel the defendants to litigate their respective claims to the Funds amongst themselves. (See Complaint at ¶¶ 9-11, Prayer for Relief at ¶ 1.) It appears undisputed that McKeowns and Brennan are co-owners of certain real property that was damaged in the 2015 Butte Fire (Property). (See Support Memo at 2:2-12; Opposition at 6:23-7:6.) Defendants collectively retained the services of Plaintiff to file suit against PG&E to obtain compensation for those damages. (See Opposition at 7:14-16, Support Memo at 2:13-14.) The parties to that suit settled. (See Complaint at ¶ 5.) The Funds are the proceeds of that settlement. (See Complaint at ¶ 6.)

Defendants’ conflicting claims to the Funds arise out of a writing, signed by both parties while their suit against PG&E was pending (Disputed Writing). McKeowns contend that the

¹ All subsequent statutory references herein are to the Code of Civil Procedure unless otherwise noted.

writing is an enforceable agreement to allocate the Funds as between Defendants in proportions other than their respective ownership percentages in the Property. (See Support Memo at 2:18-22.) Brennan concedes that he signed the writing, but argues that, for various reasons, it is unenforceable and that the Funds should be distributed to Defendants proportionate to their ownership interests in the Property.

The first cause of action Brennan asserts in the Cross-Complaint is for declaratory relief regarding his rights concerning the Funds. (See Cross-Complaint at ¶ 27, *et seq.*) He asserts that the Disputed Writing is unenforceable on five separately enumerated grounds. (See *id.* at ¶ 29.) Brennan asserts a second cause of action against McKeowns for conversion and a third cause of action for breach of fiduciary duty. These claims are based not on Brennan's rights as an owner of the Property, but from rights he alleges he enjoys in other real and personal property, and ownership rights in and to a commercial cannabis enterprise that he undertook with the McKeowns.

The Court agrees with McKeown that, at a minimum, the second and third causes of action are independent of the questions at issue in the Interpleader action in that they "assert the right to different things, debts or duties owed from different obligors." (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1123.) The Interpleader action involves Defendants' respective claims against Plaintiff for the disputed portion of the Funds. In contrast, the debt claimed by Brennan through his second and third causes of action is compensation based on claims against McKeown arising out of events other than the Butte Fire damage to the Property. As such, they may, if appropriate, be severed. (See *id.* at 1124-25.)

The standard, however, is that set out in the statute; whether severance will further convenience or avoid prejudice, or whether separate trials will be conducive to expedition and economy. (See § 1048.)

Of note, McKeowns do not, through their Support Memo, appear to advance a clear argument that severance will further convenience, or be conducive to judicial economy. The closest they come to presenting such an argument is the following: "The issue before the Court with regard to an Interpleader Complaint is relatively simple, i.e. are the terms of the Allocation Agreement binding and if not how is the PG&E Settlement Proceeds to be divided pursuant to each party's ownership interest. On the other hand, the Cross-Complaint involves legal issues with rights to jury involving complex fact pattern relating to Partnership disputes and ultimately dissolution of the partnership that has no bearing on the enforcement of the Allocation Agreement." (Support Memo at 8:4-9.)

The Court agrees with these arguments. However, the Court finds that, *at best*, they suggest only that severance would be conducive to expedition of the issues in the Interpleader action. The arguments do not support a finding that severance would further judicial economy or be conducive to expeditious resolution of all of the issues raised through the litigation.

Brennan argues that "the critical consideration is whether the same witnesses will have to testify multiple times, and whether the same evidence will have to be presented multiple times, if

issues or claims are severed.”² (Opposition at 11:23-25.) The Court agrees that this consideration is important but disagrees that it is necessarily critical. (See *Downey Sav. & Loan Ass’n v. Ohio Cas. Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.) Brennan argues that severance would not serve convenience because several of the grounds upon which he claims the Disputed Writing is unenforceable rely on the same questions of fact that support his other causes of action. As a result, severance would require the parties to introduce the same evidence, including witness testimony, regarding the same issues in multiple trials. He further claims that McKeowns have not articulated the manner in which they would suffer prejudice if the matters were tried together.

As to the former, McKeowns argue that “there is simply no causal nexus or link between the PG&E Settlement, which was to compensate the parties for damages that they personally incurred as a result of the fire, and partnership disputes between Brennan and the McKeowns.” (Reply at 9-12.) Perhaps. But this distinction between the claims is insufficient to move the Court to exercise its discretion and order the claims, asserted by and between the same parties at least arguably involving some common questions of fact, litigated in separate trials.

McKeowns assert that “failure to sever the Cross-Complaint and offset issues would be extremely prejudicial to the McKeowns and would essentially allow Brennan a prejudgment lien/attachment on the McKeowns share on the PG&E Settlement Proceeds. (Support Memo at 7:226-8:1.) They fail, through their Support Memo, to provide any further explanation. They expound on the assertion somewhat through their Reply. “Severance will allow the allocation of the PG&E Settlement funds be resolved in short, expeditious court trial which will allow or at least make possible for the McKeowns and their children to move forward and recover from the fire.” (Reply at 4:20-23.)

The Court is sympathetic that the McKeowns are anxious to collect the share of the Funds to which they lay claim as soon as possible. However, the Court does not find that any delay in their ability to do so causes sufficient prejudice to justify ordering separate trials.

Because the claims asserted, on the one hand, through the Interpleader Complaint and the Answers thereto, and, on the other hand, the claims asserted by Brennan through the Cross-Complaint are by and among the same parties, and further because it appears that at least some questions of fact will be common as between those two sets of claims, the Court finds that McKeowns have failed to show that ordering separate trials of the matter would promote judicial economy, fairness, or accuracy. (See *Foreman v. Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at 888, at fn. 8.) Based on the foregoing, the Court declines to exercise its discretion and sever the matter. The motion is therefore DENIED.

The clerk shall provide notice of this ruling to the parties forthwith. Brennan to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.

² Outside of this assertion, Brennan’s opposition brief cites almost exclusively to Federal caselaw applying and interpreting the Federal Rules of Civil Procedure. (See, e.g. Opposition at 11:9-16, 13:9-14:16.) The present motion involves application of the California Code of Civil Procedure. Federal caselaw is therefore not binding authority. Moreover, because Federal courts operate under a different procedural code and rules, the cited caselaw is of questionable persuasive value.

Thomas Tryon v. County of Calaveras, et al.

19CV44275

RULING ON PETITION FOR WRIT OF MANDATE

Petitioner Thomas Tryon prays the Court issue a peremptory writ of mandate ordering respondent County of Calaveras (County) and its Board of Supervisors (Board, and collectively Respondents) to: “(a) vacate and set aside its denial of the administrative appeal of the Planning Director’s determination that the [Real Party in Interest] Angels Gun Club’s [hereinafter “Real Party”] use constitutes a legal non-conforming use; [and] (b) direct the [Board] to grant the appeal on the grounds that the Angels Gun Club’s activities on [the subject parcels of real property] have expanded and [therefore] no longer constitute a legal non-conforming use....” (Second Amended Petition (SAP) at 8:22-27.)

“Administrative mandamus under section 1094.5 is appropriate to inquire ‘into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal. . . .’ (Code Civ. Proc., § 1094.5, subd. (a).) “In regard to a petition for writ of [administrative] mandate, we determine ‘whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.’ [Citation.] ‘Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.’” (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1072 (*Doe v. Regents of U.C.*), quoting Code Civ. Proc. §1094.5, subd. (b).)

Petitioner does not expressly assert which branch of the doctrine he claims Respondent violated. However, Petitioner’s arguments appear consistent exclusively to a contention that the Board abused its discretion because its findings were not supported by the evidence. (See, e.g., SAP at 1:23-28; see also Support Memo at 6:11-16, 15:14-18.)

The Court does not find allegations in the SAP that would support a finding that a fundamental vested right of Petitioner’s is at issue. (See *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 111 [“[t]he courts have rarely upheld the application of the independent judgment test to land use decisions”].) For this reason, the Court reviews whether the Board’s determination is supported by substantial evidence in the light of the entire record. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32.) Petitioner bears the burden of proving that substantial evidence does not support the Board’s evidentiary findings. (See *Young v. City of Coronado* (2017) 10 Cal.App.5th 408, 419 [“[t]he petitioner in an administrative mandamus proceeding has the burden of proving that the agency’s

decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty”].)

The parties appear to agree that the manner in which Real Party uses its real property does not conform with the County’s current zoning regulations. However, in response to a request by Petitioner, the County’s Planning Director (Director) reviewed the matter, and on or about December 19, 2018, based on specific findings, determined that Real Party was engaged in a “legal non-conforming use pursuant to Sections 17.04.010 and 17.92.010 [of the Calaveras County, California Municipal Code]...” based on historic use of the property. (See Administrative Record at 0001-5 (AR).) Following appeal by Petitioner, the County’s Planning Commission upheld the Director’s determination. (AR 0302-307.) Following a subsequent appeal by Petitioner, the Board upheld the Director’s determination. (AR 0909-910.)

Through the SAP, Petitioner contends that the Board’s determination is not supported by the evidence and that, rather, Real Party’s non-conforming use has been rendered *illegal* because Real Party has: (1) constructed improvements and/or expanded structures and/or buildings associated with the historic use; and (2) Real Party has expanded the use itself beyond historic levels. (See, *e.g.*, FAVP at 1:23-26, 5:27-6:6, 7:22-26, 8:8-13.)

As to the former, as stated in the Planning Commission Staff Report prepared in preparation for hearing on Petitioner’s appeal, the Director found that while certain improvements had been made to the property, they did not constitute an impermissible expansion of Real Party’s use, such that the use had become illegal in its non-conformance. (See AR 0026, *et seq.*):

The critical provisions are 17.04.0208 and 17.92.020. The first provision clearly states that no use shall be altered or enlarged unless it is clearly consistent with the requirements of the zone in which it is located. The latter provision, however, describes what is considered enlargement. It states that ‘any existing building’ shall not be ‘enlarged, extended, reconstructed, structurally altered or reoccupied’ without approval by the Planning Commission. The Planning Director determined that none of those actions occurred to any building. Additionally, although not expressly stated in the code, those same standards should apply to uses that occur outside of building. The Planning Director found that the same applied to the use. Improvements were made to the facility over time, but it did not increase the use beyond what was occurring or could occur under the pre-existing facilities. In viewing the totality of the improvements that were made and maintenance done on the site, it was not considered to be an expansion. The aerial imagery provided in Attachment shows the progression from 1998 to 2018 of the gun club property. The 1998 image is the earliest to which the Planning Department has access.

An increase in activity or participation constitutes an expansion

The second argument presented by the appellant is that an increase in days and participants should be considered an expansion of the use. Staff disagrees. There was no previous limitation on the gun club and although the club chose to operate only

on certain days previously, the right to utilize the facility was not limited to those days. Similarly, the fact that participation in team completion increased between 2011 and 2012 did not constitute an expansion. There was, again, no limit under the prior code to the number of shooters, events, or teams that could use the facility. An analogy would be that legal, nonconforming business would have to limit the number of customers it serves to that number that it served when it became nonconforming. (AR 0027-28, emphasis in original.)

Respondent and Real Party provide the Court with additional details regarding the analysis conducted by the Director and presented to and relied upon by the Board in upholding his determinations. (See Real Party's Opposition at 11:3-12:9 (RP Opposition), Respondent's Opposition at 8:26-10:10, 11:14-12:12 (Resp. Opposition), and portions of the administrative record cited therein.) In light of this evidence, the Court finds that Petitioner fails to carry his burden of showing that the Board's determination is not supported by substantial evidence.

Again, it does not appear, from either the allegations in the SAP or the arguments presented in Petitioner's Support Memorandum, that Petition asserts that the Board's determination is not supported by the findings. However, Petitioner's Reply Memorandum contains a significant discussion on point. The Court notes that Petitioner's failure to clearly raise the issue through his Petition or his opening brief may violate Respondent and Real Party's due process rights to notice. "[T]he court may disregard arguments or grounds for demurrer first raised in a reply brief." (Weil & Brown, *et al.*, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2020) §7:122.9, p. 7(I)-54; see also *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 ["[t]he salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before"].)

However, even if Petitioner has properly advanced the argument, the Court finds that the Board's determination is supported by the findings, based on Respondent's analysis of the relevant provisions of the Calaveras County Municipal Code, and its application of that Code to the factual findings based on the presented evidence. (See RP's Opposition at 11:3-12:9, Resp.'s Opposition at 8:26-10:10, 11:14-12:12, and portions of the administrative record cited therein; see also *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021 ["there is a strong policy reason for allowing the governmental body which passed legislation to be given a chance to interpret or clarify its intention concerning that legislation"].)

Finally, the Court feels compelled to note the discussion in Petitioner's Reply brief regarding his assertion that the Director's determination on the issues here before the Court was a consequence of a complaint that Petitioner made to the Calaveras County Sheriff. (See Reply at 2:20-3:6.) Petitioner presents this discussion as though it has some relevance to the issues before the Court. The Court is unable, however, to find any (such relevance) in the context of the allegations of the Petition and arguments asserted through Petitioner's moving papers.

Based on the foregoing, the Petition is DENIED.

The clerk shall provide notice of this ruling to the parties forthwith. Respondent is to prepare a formal Judgment pursuant to Rule of Court 3.1312 in conformity with this ruling.