

1. HITCHCOCK, ET AL. v. CITY OF SOUTH LAKE TAHOE, ET AL., 22CV1691¹**Real Party In Interest Lukins Brothers Water Company's Demurrer to Petition**

On November 4, 2022, Greg and Jessica Hitchcock filed a verified petition for a writ of traditional mandate (Code Civ. Proc. ("CCP"), § 1085) or, alternatively, a petition for writ of administrative mandate (CCP § 1094.5) directed to Respondent City of South Lake Tahoe ("City") concerning Real Party In Interest Lukins Brothers Water Company's ("Lukins") use of its property at 843 Hazel Drive as an industrial storage facility. On February 24, 2023, Lukins filed a complaint against the City for declaratory and injunctive relief (Case No. 23CV0296). On April 25, 2023, the court entered an order consolidating the two actions.

Pending is Lukins's renewed demurrer to the Hitchcock's petition. The City filed a joinder, in part, to the demurrer.

A. STANDARD OF REVIEW

"At the outset it is settled that the sufficiency of a petition in a mandamus proceeding can be tested by demurrer." (Hilton v. Bd. of Supervisors (1970) 7 Cal.App.3d 708, 713, citing Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 106–107.) "[A] demurrer challenges only the legal sufficiency of the [pleading], not the truth or the accuracy of its factual allegations or the [petitioner's] ability to prove those allegations." (Amarel v. Connell (1988) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the [pleading] and to matters subject to judicial notice. (CCP § 430.30, subd. (a).) All properly pleaded allegations of fact in the [pleading] are accepted as true, however improbable they may be, but not the contentions, deductions or conclusions of fact or law. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318; Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.) A judge gives "the [pleading] a reasonable

¹ **DISCLOSURE:** The judicial officer currently assigned to Department 4, Judge Mayberry, is a customer of Lukins Brothers Water Company.

interpretation, reading it as a whole and its parts in their context.” (Blank, supra, 39 Cal.App.3d at p. 318.)

B. PRELIMINARY MATTERS

Lukins’s request for judicial notice of Exhibits 1–5 is granted. (Evid. Code, § 452, subds. (a), (b), (c), (h).)

C. DISCUSSION

Lukins demurs on the grounds that both of petitioners’ causes of action fail to allege facts sufficient to state valid causes of action because the City does not have the authority to take the actions that petitioners demand, traditional mandate is not available to petitioners as the City’s enforcement of its land use laws is not ministerial, and administrative mandate is not available as this action does not arise from a final administrative order.

1. Demurrer to the 1st C/A for Traditional Mandate (CCP § 1085)

The demurrer to the 1st C/A on the basis that traditional mandate is not available to petitioners is sustained. A writ of traditional mandate “may be issued by any court ... to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station” (CCP § 1085, subd. (a).) To be entitled to relief, petitioners must show that the City has a clear, present, and ministerial duty to enforce its land use ordinances in a prescribed manner against Lukins, and petitioners have a clear, present, and beneficial right to the City’s performance of that duty.

“A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment.” (Rodriguez v. Solis (1991) 1 Cal.App.4th 495, 501–502.) “Thus, ‘[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that

course of conduct becomes mandatory and eliminates any element of discretion.’ [Citation.]” (Carrancho v. Cal. Air Resources Bd. (2003) 111 Cal.App.4th 1255, 1267.)

The court takes judicial notice of the City’s land use regulations. South Lake Tahoe City Code section 6.55.070, et seq., which is cited in the petition, does not prescribe the required manner in which the City must enforce its land use regulations. Moreover, the City did take action against Lukins. Indeed, because of the City’s actions Lukins filed a complaint against the City for declaratory and injunctive relief.

Because there does not appear to be a reasonable possibility that the 1st C/A can be amended to cure the defect, leave to amend is denied. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.)

2. Demurrer to 2nd C/A for Administrative Mandate (CCP § 1094.5)

The demurrer to the 2nd C/A on the basis that administrative mandate is unavailable given the allegations of the petition is sustained. Administrative mandate challenges the validity of a final administrative order made as a result of a proceeding in which by law a hearing is required, evidence is required to be taken, and the discretion to determine facts is vested in a lower tribunal; i.e., a quasi-judicial proceeding. The petition does not assert any allegations that this action stems from such a proceeding.

Because there does not appear to be a reasonable possibility that the 2nd C/A can be amended to cure the defect, leave to amend is denied. (See Roman, supra, 85 Cal.App.4th at p. 322.)

3. Demurrer to Entire Petition on Basis of Preemption

Lukins asserts that the City does not have the authority to take the actions that petitioners demand because the California Public Utility Commission (“CPUC”) has exclusive jurisdiction over Lukins, including its use and location of its facilities.

The CPUC is constitutionally vested with the authority to regulate public utilities. (Cal. Const., art. XII, §§ 1–6.) As set forth in Public Utilities Code section 216, the definition

of “public utility” encompasses entities that are “water corporation[s].” As such, Lukins is considered a public utility under state law. (*Id.*, subd. (a).)

“A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission....” (Cal. Const., art. XII, § 8.) “The California Constitution ... also provides that ‘[t]he Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission’ [Citation.] As our Supreme Court has recognized, citing the Legislature’s plenary power to confer additional jurisdiction on the [CPUC], “[t]he commission’s powers ... are not restricted to those expressly mentioned in the Constitution.’ [Citation.]” (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1197 [italics omitted].)

CPUC General Order 103-A states that “Local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities (including the location of such facilities) constructed or installed by water or wastewater utilities subject to the Commission’s jurisdiction. However, in locating such projects, the utility should consult with local agencies regarding land use matters.” (*Id.*, sec. I, ¶ 9.) However, “local agencies ... may regulate those matters otherwise within their authority that do not conflict with general laws or matters of statewide concern.” (Application of Cal.-Am. Water Co. (U210W) (Cal.P.U.C. July 25, 2013) 2012 WL 5448407.)

As such, the City is not necessarily preempted from enforcing its land use regulations against Lukins. However, having reviewed the petition and the parties’ papers, the court finds that there are factual issues concerning Lukins’s use of the subject property and whether that use is essential to Lukins’s water operations that render the preemption issue unsuitable for determination on demurrer. Accordingly, the demurrer to the petition on the basis of preemption is overruled.

In summary, while the court finds that traditional and administrative mandate are not the proper vehicles for petitioners' claims, the Hitchcocks are granted leave to file an amended pleading so they may attempt to state valid claims under other possible legal theories or remedies.

TENTATIVE RULING # 1: LUKINS'S DEMURRER TO THE PETITION IS SUSTAINED IN PART AND OVERRULED IN PART. PETITIONERS MAY FILE AND SERVE AN AMENDED PLEADING NO LATER THAN 30 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

2. JOHNSON v. McCALL, 21CV0173**Referee's Petition for Instructions**

Petitioner and court-appointed Referee, Marissa Fox, petitions for instructions pursuant to Code of Civil Procedure section 873.070 as to the following questions:

- i. Whether the orders and authorizations set forth in the Ex Parte Minute Order entered by this court on February 2, 2023, apply to the Referee;
- ii. Whether, in evaluating offers to purchase the Property, the Referee should prioritize both the sale price and the expediency of the transaction;
- iii. Whether the Referee is bound by the terms of the partial settlement reached by the parties on March 28, 2023, or by any future written agreement between the parties relating to the method and terms of the sale that has not been confirmed by court order;
- iv. Whether the Referee is authorized to proceed with the selection and engagement of a real estate broker to effect the sale of the Property pursuant to Code of Civil Procedure section 873.160, and whether the Referee may select a representative that the Referee believes is best equipped to handle the sale of the Property; and
- v. Whether a purchase and sale agreement may be executed or ordered by the court prior to July 27, 2023.

The court responds as follows:

(i) Yes, the orders and authorizations set forth in the Ex Parte Minute Order entered by this court on February 2, 2023, apply to the Referee. The orders were made pursuant to statutory authority given to court-appointed referees; i.e., Code of Civil Procedure sections 873.010–873.160. Because the Referee's authority is pursuant to statute, it was not necessary for the order appointing Ms. Fox to specifically set forth all of her powers and duties.

(ii) The answer depends upon the circumstances and needs of the parties and the peculiar attributes of the Property to be partitioned, which the court does not have sufficient information about to answer the Referee's question. That said, the court interprets the parties' engagement of Century 21 Select and real estate agent Patrick O'Hare to market the Property in three different manners during the specified period of time as the parties' desire, at least in part, to test the market, rather than an expectation or requirement that a sale proceed as soon as possible, regardless of the amount of any offers received.

(iii) The partial settlement merely stipulates that any offers received between March 28, 2023, and July 27, 2023, would be presented to the Referee for consideration, not necessarily for acceptance. The parties agreed that neither one of them would request that the court approve or order a sale during that period. Further, that the Referee may also consider whether to agree to terminate the current Motel 6 lease. In other words, the agreement simply gives the Referee discretion to act, but she is not compelled to take any particular action. Further, the Referee was not a party to the partial settlement.

(iv) Yes, pursuant to Code of Civil Procedure section 873.160, the Referee is authorized to proceed with the selection and engagement of a real estate broker to effect the sale of the Property, which would necessarily include the Referee's assessment of the broker's qualifications.

(v) Hypothetically, if the parties or the Referee timely file and serve a request for the court to order or execute a purchase and sale agreement, the court could hear the matter prior to July 27, 2023. That said, the partial settlement states that the parties agreed that neither one of them would request that the court approve or order a sale during the period of March 28, 2023, and July 27, 2023.

TENTATIVE RULING # 2: THE PARTIES ARE REFERRED TO THE FULL TEXT OF THE TENTATIVE RULING. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR

COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

3. MATTER OF DUNN, 22CV1640

OSC Re: Name Change

This matter was continued from January 27, 2023, March 10, 2023, and May 19, 2023. To date, Proof of Publication still is not in the court's file.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, MAY 19, 2023, IN DEPARTMENT FOUR.

4. MATTER OF KELLY, 23CV0354

OSC Re: Name Change

TENTATIVE RULING # 4: PETITION IS GRANTED. NO APPEARANCE IS REQUIRED.

5. MATTER OF CERVANTES-SOTO, 23CV0364

OSC Re: Name Change

TENTATIVE RULING # 5: PETITION IS GRANTED. NO APPEARANCE IS REQUIRED.

6. ZICK, ET AL. v. CITY OF SOUTH LAKE TAHOE, ET AL., SC20080057**Petition for Withdrawal of Funds From Blocked Account**

An order approving a minor's compromise was entered in this action in 2011. Pending is a petition filed by the minor's mother, Kimberly Atangan, to withdraw \$15,000 from a blocked account set up for the minor's benefit. The balance of the account is \$25,727.

Under California law, a court may order "[t]hat the remaining balance of any money paid or to be paid be deposited in an insured account in a financial institution in this state ... subject to withdrawal only upon authorization of the court, and that the remaining balance of any other property delivered or to be delivered be held on conditions the court determines to be in the best interests of the minor" (Prob. Code, § 3611, subd. (b). "Under a blocked account, the proceeds are ordered deposited with a bank ... or like financial institution, with any withdrawals subject to prior court approval during the child's minority." (Haning, Flahavan, Cheng & Wright, Cal. Prac. Guide: Pers. Inj. Ch.4-G, § 4:1532 (Sept. 2019 update), citing Prob. Code, §§ 3413, subd. (a), 3611, subd. (b); Cal. Rules of Ct. ("CRC"), rule 3.1384, subd. (b) ["An order for the ... petition for the withdrawal of ... [a minor's] funds ... must comply with rules 7.953 and 7.954."]; cf. Christensen v. Superior Court (1987) 193 Cal.App.3d 139, 144 ["Certainly the court has a duty to protect the minor's property from wrongful dissipation by a parent. But the need for doing so should be evaluated in each case and the method of safeguarding should be tailored to the circumstances."].)

For the withdrawal of funds deposited for a minor, the CRC require that the petition "must be verified and must include the identity of the depository, a showing of the amounts previously withdrawn, a statement of the balance on deposit at the time of the filing of the petition, and a justification for the withdrawal." (CRC, rule 7.954, subd. (a).) CRC, rule 7.954 further provides that a "petition for the withdrawal of funds may be considered ex parte or set for a hearing at the discretion of the court." (Id., subd. (b).)

Here, Ms. Atangan verified the petition, identified the depository, stated that no amounts were previously withdrawn, and she indicated the balance on deposit. As such, the court finds that Ms. Atangan complied with CRC, rule 7.954, subdivision (a).

The court finds adequate justification for the withdrawal of funds for braces, to purchase a computer for the minor, and to attend camps and trips as doing so would be in her best interests. (See Prob. Code, § 611, subd. (b); CRC, rule 7.954, subd. (a).)

The court will allow Ms. Atangan to withdraw up to \$1,500 of funds from the blocked account to purchase a computer. Before the court authorizes the release of the funds, Ms. Atangan is directed to submit documentation identifying the computer the minor wishes to purchase, the price of the computer, and the company from which she plans to purchase the computer.

The court also requires documentation from the orthodontist providing an estimate for the cost of braces, and documentation identifying the camps the minor wishes to attend and the trips she wishes to take as well as the estimated cost of the camps and trips.

Before the court can determine whether there is adequate justification to allow the withdrawal of funds for a car, the court needs information as to whether the minor currently has a valid driver's license, an explanation concerning why she needs a car, and the minor's plan for paying the ongoing costs of a car, including insurance, gas, and maintenance.

TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, MAY 19, 2023, IN DEPARTMENT FOUR.

7. DUO v. VAIL RESORTS, INC., ET AL., 22CV0091

OSC Re: Plaintiff's Failure to Appear at CMC on 4/11/23

TENTATIVE RULING # 7: PLAINTIFF'S APPEARANCE IS REQUIRED AT 1:30 P.M., FRIDAY, MAY 19, 2023, IN DEPARTMENT FOUR TO EXPLAIN WHY HE FAILED TO APPEAR AT THE CASE MANAGEMENT CONFERENCE ON APRIL 11, 2023, DESPITE HAVING BEEN ORDERED TO APPEAR.