SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/24/2014 TIME: 09:03:00 AM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Andrea Taylor
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2011-00085714-CU-WM-CTL** CASE INIT.DATE: 02/10/2011
CASE TITLE: **Taxpayers for Accountable School Bond Spending vs. San Diego Unified School District**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 3/21/14 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Ruling on Motion for Further Post-Judgment Relief

Taxpayers for Accountable School Bond Spending v. SDUSD, Case No. 2011-085714

March 21, 2014, 1:30 p.m., Dept. 72

1. **Overview and Procedural Posture.**

In its learned opinion filed March 26, 2013 and ordered published about a month later, the Court of Appeal, Fourth Appellate District, Division One reversed the judgment of this court as to counts 1 and 2 of the amended complaint/petition, and affirmed this court as to counts 3 and 4. The court accepts and adopts the Court of Appeal's overview of the facts and circumstances of this case, published at 215 Cal. App. 4th 1013. The SDUSD sought review in the Supreme Court, but that petition (and a depublication request) were denied on August 30, 2013. This is true even though the 4th DCA declined to follow the *SFUPD* case, 102 Cal. App. 4th 656 (2002)(which this court expressly followed in its original decision, as it was required to do under *stare decisis*), and even though the decision not to take the case up leaves a split among the district courts of appeal on an important and recurring issue under CEQA.

Following remand, and following retransfer of the case from Judge Dato following an improvident

challenge under CCP §170.6 (ROA 115, 117), this matter was heard in Dept. 72 on the morning of September 12, 2013. Both sides appeared through counsel. The purpose of the hearing was to spread the mandate of the Court of Appeal. ROA 61, 75.

The parties disputed the form of Judgment and the Writ of Mandate, and also disputed the extent of the injunctive relief required by the Court of Appeal. The court heard argument, and then took the matter under submission so it could study the parties' competing submissions. Following that review, the court found that neither sides' proposed Judgment and Writ (*e.g.* ROA 102, 103, 131-133) was entirely satisfactory. The court therefore prepared its own. They were thereafter filed and entered. ROA 122-123. The court also concluded that, based on the Court of Appeal's learned opinion, plaintiff was entitled to some immediate injunctive relief. The court signed an order to that effect. ROA 124.

Plaintiff/petitioner sought additional injunctive relief while the EIR ordered by the Court of Appeal was being prepared. This court was initially uncertain whether this additional injunctive relief is within the ambit of the declaratory relief sought in the first and second causes of action of the operative pleading (which is the FAC filed 7/7/11 – ROA 27). The court treated the *ex parte* application filed Sept. 4, 2013 (ROA 106) as the moving papers, and treated the response filed Sept. 5, 2013 as the opposition. The court permitted plaintiff/petitioner to file reply not later than Sept. 17, 2013 at noon, and set a further hearing on the further injunctive relief sought by plaintiff/petitioner for Sept. 20, 2013. ROA 125.

At the September 20 hearing, the court reluctantly enjoined further use of the stadium lights after Sept. 21, 2013, finding that this disruption of the Hoover home football schedule was required under the Court of Appeal's decision. The court, having ordered the lights turned off as required by the Court of Appeal, declined to order them removed (as requested by plaintiff). ROA 137. In addition, the court ordered the SDUSD to supply an accounting of all Proposition S funds used for field lighting, and pending receipt of the accounting denied (for the time being) petitioners' request for "restitution of unauthorized expenditures." ROA 137.

The accounting ordered by the court has been supplied, in the form of the Declaration of Gary Stanford and supporting schedules filed 10/21/13. ROA 141. A renewed request for what amounts to disgorgement is now before the court. ROA 144, 159.

In the meanwhile, there were several developments. First, petitioner filed its motion for attorneys' fees and costs under CCP section 1021.5. The moving papers were first filed on September 10 (ROA 139), and then twice re-noticed for December 20 in Dept. 72. In the most recent amended notice, filed October 18, 2013, plaintiff/petitioner sought additional fees and cost incurred following the filing of the original moving papers. Plaintiff sought, inclusive of a multiplier, well in excess of $1.1 million – which is more than twice the cost of the field lighting at Hoover High. Following a hearing on December 20, 2013 (ROA 149) and the submission of additional papers, this court awarded costs of $6330.95 and attorneys' fees of $637,321.00 to plaintiff. ROA 153.

Second, the respondent completed the EIR required by the Court of Appeal. ROA 157. As a result, the writ of mandate was discharged. ROA 158.

Respondent filed opposition to the renewed motion on March 10. Petitioner filed reply on March 14. ROA 162. The court reviewed the papers, published a tentative ruling on March 18, and then entertained oral argument on March 21, 2014. The court took the matter under submission, and now

decides the submitted issues.

2. Applicable Standards.

As noted above, this case has been to the Court of Appeal, and thus the law of the case doctrine applies. "Under the law-of-the-case doctrine, the determination *by an appellate court* of an issue of law is conclusive in subsequent proceedings in the same case. [Citation.] The doctrine *applies only if* the issue was actually presented to and determined *by the appellate court*. [Citation.] The doctrine is one of procedure that prevents parties from seeking reconsideration of an issue already decided absent some significant change in circumstances." (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273 (*Yokely*), *italics* added.) Furthermore, "the law-of-the-case doctrine governs only the *principles of law* laid down by an appellate court, as applicable to a retrial of fact . . . ." (*People v. Boyer* (2006) 38 Cal.4th 412, 442.) "[T]he doctrine applies only to *an appellate court's decision on a question of law*; it does not apply to questions of fact." (*People v. Barragan* (2004) 32 Cal.4th 236, 246, italics added.)

A trial court may not exceed the specific directions of a court of review in remanding a cause after a reversal of the judgment on appeal and add thereto conditions which it assumes the reviewing court should have included. *Hampton v. Superior Court,* 38 Cal. 2d 652, 656 (1952). The *Hampton* court also held: "(w)hen there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. (Citations.)" *Id.* at 655. A more recent expression of the principle is found in *Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 998: "(w)here a reviewing court has remanded a matter to the trial court with directions '. . . the trial court . . . is bound to specifically carry out the instructions of the reviewing court. . . . (A)ny material variance from the explicit directions of the reviewing court is unauthorized and void.' See also *Frankel v. Four Star Int'l, Inc.,* 104 Cal. App. 3d 897, 902 (1980)(same).

3. Discussion and Ruling.

This matter was remanded to this court with the following instructions:

"The matter is remanded with directions that the superior court grant the petition for writ of mandate and issue the injunctive and declaratory relief sought in the first and second causes of action of the first amended complaint and petition, to the extent consistent with this opinion, including, but not limited to, (1) ordering District to vacate its approval of the Project and the mitigated negative declaration (MND) and to cause an EIR to be prepared, and (2) enjoining District from using Proposition S bond proceeds to pay for field lighting at Hoover's stadium and any other high school stadium for which Proposition S did not specifically list field lighting as part of their projects."
Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist., 215 Cal. App. 4th 1013, 1066-67 (2013).

Thus, the first question is whether either the first or second causes of action of the first amended complaint and petition (FAC) seek the remedy requested in the current motion. This is true for two reasons: first, the specific instructions of the Court of Appeal were based on the stated counts of the FAC; and second, it has many times been held that the issues of an action are framed by the pleadings. *See, e.g. Nieto v. Blue Shield*, 181 Cal. App. 4th 60, 73 (2010); *Hutton v. Fidelity Nat'l Title*, 213 Cal. App. 4th 486, 493 (2013).

The court's independent review of the operative pleading reveals that "restitution" was nowhere mentioned in the FAC. Further, strictly speaking, "restitution" is not what plaintiff seeks by this motion. Restitution is a payment to someone who has suffered economic loss as result of a defendant's conduct. See *People v. Blankenship* (1989) 213 Cal.App.3d 992, 999; *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 631 (2010). Thus, restitution is designed to restore something of value to its rightful owner. The plaintiff in this case has not suffered out of pocket loss, and certainly did not prove same during the first round of proceedings in this court or since remand. If anyone, it is the actual taxpayers who would be entitled to restitution, not the Taxpayers entity that is the plaintiff in this case (and did not purport to sue in any representative capacity beyond its own members). Perhaps more apt in describing what plaintiff seeks by this motion is the word "disgorgement." An order that a defendant disgorge money may include a restitutionary element, but is not so limited. Such orders "may compel a defendant to surrender all money obtained ... even though not all is to be restored to the persons from whom it was obtained or those claiming under those persons." *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 127 (2000), superseded by statute as stated in *Arias v. Superior Court*, 46 Cal. 4th 969, 982 (2009). But placing the correct label on the relief sought does not change the court's observation: like *restitution*, disgorgement is nowhere mentioned in the FAC. And it bears noting that plaintiff did not seek leave to amend the FAC at any time until after the court pointed out the absence of such a motion in the March 18 tentative ruling. The oral motion to amend to conform to proof made at the March 21 hearing is denied, because it was so tardy as to deny due process to the District (and because, as noted above, there was no "proof" to conform to).

Conceding the absence of a prayer for either disgorgement or restitution, the moving papers focus on the "including, but not limited to" language of the Court of Appeal's order (quoted fully above), as well as the "general prayer" in the FAC ("for such other and further relief as the Court deems just and proper").

The court concludes it would be neither just nor proper to award the further relief now sought by plaintiff. There are several reasons for this.

First, granting the motion would result in the denial of due process to the District. The District had the right to expect that plaintiff would put all its cards on the table in its amended complaint, and give the District fair notice of all the relief it was seeking. Plaintiff did not request a preliminary injunction at any time before the Court of Appeal's decision in this case. In the meanwhile, the District, relying on this court's ruling (part of which was affirmed and part of which was based on published precedent which this court was required to follow [the *SFUPD* case, 102 Cal. App. 4th 656 (2002)], spent the money which is the subject of this motion in good faith. The District had the right to know, when it did so, that it did so with the risk that it might have to reverse the financial transactions (in what would amount to a bookkeeping transaction). Any review of the FAC would not have given the District fair notice of this risk. By contrast, a review of the FAC would have clearly placed the District on notice that completion of the lighting project while the litigation remained ongoing placed the continued use of the lights at risk – which is exactly what happened. *Compare Kriebel v. City of San Diego*, 112 Cal. App. 3d 693, 704 (1980).

Second, this court has faithfully carried out all aspects of the remand order, as follows:

a. The court was directed to "grant the petition for writ of mandate and issue the injunctive and declaratory relief sought in the first and second causes of action of the first amended complaint and petition." The court did so. ROA 122, 123, 124.

b. The court was directed to order the District "to vacate its approval of the Project and the mitigated negative declaration (MND) and to cause an EIR to be prepared." The court has done so. ROA 122-124. The court was thereafter advised that the EIR has in fact been prepared. ROA 157.

c. The court was directed to enjoin the District "from using Proposition S bond proceeds to pay for field lighting at Hoover's stadium and any other high school stadium for which Proposition S did not specifically list field lighting as part of their projects." The court has done so, even going so far as to specifically enjoin the use of Prop S funds to pay the attorneys' fee award. ROA 123, 153.

Third, the court has not ignored the "including but not limited to" language of the remand order, which itself is delimited by the phrase which immediately precedes it: "to the extent consistent with this opinion." Consistent with the learned opinion, and over the District's vigorous objection, the court enjoined night games for the remainder of the 2013 Hoover home football schedule, even though the Court of Appeal did not explicitly direct this. And, as relief ancillary to that which the Court of Appeal ordered, the court ordered the accounting (again, over the District's objection). This had the effect of shedding light on the District's actions, which is entirely consistent with one of the key underlying purposes of CEQA: "to provide public agencies and the public in general with detailed information about the effect [of] a ... project" (Pub. Res. Code section 21061).

The relief now sought is not ancillary to that ordered by the Court of Appeal. Instead, it is of a completely different character and legal effect, requiring different proof (which was not offered). As the District points out in its opposition, injunctive relief is designed to stop ongoing conduct (here, the expenditure of funds). Injunctive relief does not lie to overturn or reverse acts which have been completed. There has been no showing that the District has been unjustly enriched, typically a precursor to disgorgement. Further, even if the relief now sought could be characterized as mandatory injunctive relief, granting it would carry with it the danger of involving the court in the increasingly difficult and arcane world of public school finance, and might even threaten (according to the unrebutted declaration of the District's CFO) the tax exempt status of the bonds. The court is loathe to do any of these things. For all these reasons, the motion is denied.

Inasmuch as the court has denied the main relief sought by this motion, the court also denies the request for additional attorneys' fees.

IT IS SO ORDERED.

Judge Timothy Taylor

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Taxpayers for Accountable School Bond Spending vs. San Diego Unified School District

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2011-00085714-CU-WM-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 03/24/2014.

Clerk of the Court, by: Andrea Taylor A. Taylor, Deputy

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