Filed 10/23/14 P. v. Paramount Contractors etc. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA et al., Plaintiffs and Respondents, v. PARAMOUNT CONTRACTORS AND DEVELOPERS INC. et al., Defendants and Appellants.	B246564 (Los Angeles County Super. Ct. No. BC437023)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Loeb & Loeb, William M. Brody; Harder Mirell & Abrams, Douglas E. Mirell for Defendants and Appellants.

Michael N. Feuer, City Attorney, Tina Hess, Assistant City Attorney, Andrew K. Wong, Deputy City Attorney, for Plaintiffs and Respondents.

INTRODUCTION

The trial court sustained a demurrer to the second amended cross-complaint without leave to amend, concluding that it was barred by res judicata. We agree and affirm the judgment of dismissal.

The Instant Litigation

In May 2010, Plaintiffs the People of the State of California (hereafter People) and the City of Los Angeles (hereafter City) brought an action in the superior court against various companies and individuals for alleged violations of the Outdoor Advertising Act (hereafter OAA) (Bus. & Prof. Code, § 5200 et seq.), the Unfair Competition Law (hereafter UCL) (Bus. & Prof. Code, § 17200 et seq.), public nuisance statutes (Code Civ. Proc., §§ 3479, 3480) and Los Angeles Municipal Code (LAMC, § 11.00, subd. (1)) arising from the installation of supergraphic signs on buildings. Appellants and cross-complainants Paramount Contractors and Developers, Inc. (hereafter Paramount), Patricia High, Sunset Blvd. Properties, LP and Bradley Lawrence Folb (collectively Appellants) were among the defendants in the action.[1] Appellants own two office buildings in Los Angeles, located at 6464 and 6565 Sunset Boulevard (collectively Sunset Properties).

On March 23, 2011, Appellants filed a cross-complaint raising constitutional challenges to the regulatory scheme under free speech, equal protection and takings grounds. After a demurrer was sustained to a first amended cross-complaint (hereafter FACC) on res judicata grounds,[2] Appellants were given leave to amend and on August 22, 2012, filed their operative second amended cross-complaint (hereafter SACC) against the City. The City demurred.

On November 29, 2012, the trial court sustained the City's demurrer to the SACC in its entirety without leave to amend. The trial court ruled that res judicata barred each

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[1] Parties were previously before this Court in *People v. Vanguard Outdoor, LLC* (May 30, 2014, B244688) __ Cal.App.4th __.

[2] The demurrer to the FACC was sustained without leave to amend as to the People.

of the SACC's causes of action. The court stated, "Paramount may not revive claims by introducing purported new facts they admitted in previous actions, matters that were raised or could have been raised. . . . [T]hese are things that could have been raised. An examination of the individual cause of action confirms that's barred by res judicata." Appellants appealed.

On appeal, Appellants allege two errors: (1) the trial court's dismissal of the third cause of action to interpret the scope and validity of two Temporary Special Display permits it obtained in 2006; and (2) the trial court's dismissal of "any claims based on the newly discovered as-applied content discrimination."

The Statutory Scheme and Prior Litigation

1. The Original Hollywood SUD

The City prohibits all supergraphic signs that are not specifically permitted through the legislative adoption of a sign district. (LAMC, § 14.4.4(B)(9).)

In 2004, the City adopted a sign district called the Hollywood Signage Supplemental Use District (hereafter Original Hollywood SUD). (L.A. Ord. No. 176172.) The Original Hollywood SUD overlaps geographically with the boundaries of the Hollywood Redevelopment Plan area, which the Community Redevelopment Agency (hereafter CRA) administers. (L.A. Ord. No. 176172.) Paramount's Sunset Properties are located within the Original Hollywood SUD and the Hollywood Redevelopment Plan.

The Original Hollywood SUD's goal was to eliminate blight. (L.A. Ord. No. 176172, § 2(C),(E).) While the Original Hollywood SUD allowed a limited number of supergraphic signs, it conditioned approval of those signs on the removal of a specified number of legal non-conforming billboards or solid panel roof signs. (L.A. Ord. No. 176172, §§ 5(B), 9.)

In addition to City approval, CRA approval was required for projects located within the Hollywood Redevelopment Plan area. (L.A. Ord. No. 176172, § 6(D).) The CRA was authorized to approve supergraphic signs even if the applicant did not comply with all of section 9's sign reduction requirements. (L.A. Ord. No. 176172, § 9.)

2. Temporary Special Displays generally

The Original Hollywood SUD authorized Temporary Special Displays (hereafter TSD/TSD's). (L.A. Ord. No. 176172, § 7(O).) Though in some cases, TSD's were physically indistinguishable from supergraphic signs, they were distinguishable in duration. While permitted supergraphic signs are permanent, TSD's were temporary and could only be displayed for 120 days in any calendar year. (L.A. Ord. No. 176172, § 7(O)(1)(c).) This meant TSD's could be displayed for a maximum of 120 days total: "120 days continuously or a combined total of 120 days over several intervals of time." (L.A. Ord. No. 176172, § 7(O)(1)(c).)

3. Paramount's TSD permits

The City approved two TSD applications from Paramount. The first was approved on March 6, 2005, at 6464 Sunset Boulevard and the second was on December 31, 2005, at 6565 Sunset Boulevard. The approvals for both applications could only be used once, for a total of 120 days during a calendar year. The approvals would also expire if not used within two years of issuance.

Paramount used these approvals and obtained TSD permits on May 15, 2006 and June 29, 2006.

Paramount apparently erected and maintained TSD's until 2010—without obtaining additional approvals or permits from the City. (*Paramount Contrs. & Developers, Inc. v. City of Los Angeles* (2011) 805 F.Supp.2d 977, 998.)

4. The City did not approve Paramount's supergraphic sign applications

In October 2006, Paramount submitted applications for and sought approval for permanent supergraphic signs at the Sunset Properties. Paramount did not qualify for supergraphic signs because it did not have billboards to "'trade in'" nor was it able to "'secure an acceptable in-lieu fee arrangement' with the CRA." (*Paramount Contrs. & Developers, Inc. v. City of Los Angeles*, *supra*, 805 F.Supp.2d at p. 1001.)

5. *Paramount I*

On January 5, 2007, Paramount sued the City in federal district court for damages and declaratory and injunctive relief in *Paramount Contractors & Developers, Inc. v.*

City of Los Angeles, case No. CV 07-0159-ABC-JWJx (hereafter *Paramount I*). Paramount claimed the Original Hollywood SUD's supergraphic sign regulations violated the First Amendment to the United States Constitution.

On April 23, 2007, the district court granted in part the City's motion to dismiss the *Paramount I* complaint and, on June 6, 2008, it granted the City's motion for summary judgment in its entirety, upholding the Original Hollywood SUD as constitutional.

6. *World Wide Rush*

Three days after summary judgment was granted to the City in *Paramount I*, on June 9, 2008 in a different case, the district court issued a preliminary injunction barring the City from enforcing its ban on supergraphic signs. (*World Wide Rush, LLC v. City of Los Angeles* (C.D. Cal. 2008) 579 F.Supp.2d 1132.) On August 19, 2008, the district court issued a judgment and permanent injunction striking down the bans. (*Id.* at p. 1311.)

Soon thereafter, "other billboard companies got in on the action." (*World Wide Rush, LLC v. City of Los Angeles* (9th Cir. 2010) 606 F.3d 676, 684.) "As a result, well-traveled thoroughfares [in the City] that contained any sort of sizable building were soon pockmarked with Supergraphic Signs." (*Ibid.*)

7. *Paramount II*

On August 28, 2008, Paramount filed its second federal action against the City "alleging essentially the same facts and claims as in *Paramount I*." (*Paramount Contractors & Developers, Inc. v. City of Los Angeles*, case No. CV 08-5653-ABC-PLAx (hereafter *Paramount II*).)[3] This time, Paramount also alleged that on or around June 23, 2008, Paramount "'submitted applications to the City for the right to maintain supergraphics on the Sunset Properties,'" but the City "'refused to accept the applications or to process them.'" (*Paramount II*, *supra*, 805 F.Supp.2d at pp. 981-982, citation omitted.)

[3] *Paramount I* and *Paramount II* are collectively referred to as the Federal Cases.

On October 28, 2008, the district court stayed *Paramount II* until the City's appeal of *World Wide Rush* was resolved.

8. The City's Interim Control Ordinances

a. First ICO

While the *World Wide Rush* appeal was pending, the City adopted Interim Control Ordinance No. 180445 (hereafter First ICO) to stop the proliferation of unpermitted signs. The First ICO took effect on December 26, 2008, and prohibited any new supergraphic signs, except those vested under California law. (L.A. Ord. No. 180445.) The First ICO did not authorize the City to permit supergraphic signs through the adoption of sign districts. (L.A. Ord. No. 180445, § 2.)

b. Second ICO

On June 9, 2009, the City adopted Interim Control Ordinance No. 180745 (hereafter Second ICO). (L.A. Ord. No. 180745.) The Second ICO continued the moratorium on new supergraphic signs for an additional 90 days. (L.A. Ord. No. 180745, § 2.)

c. The New Sign Ordinance

On August 7, 2009, the city council adopted ordinance No. 180841, amending the Municipal Code's bans on supergraphic signs (hereafter New Sign Ordinance). (L.A. Ord. No. 180841.) Despite the City's new sign regulations, Paramount refused to take down its signs or comply with the mandates of the First ICO, Second ICO, or the New Sign Ordinance. (*Paramount II*, *supra*, 805 F.Supp.2d at p. 998.)

9. The Instant Litigation: The People and City sue

On May 4, 2010, the People and the City filed the instant litigation, suing Paramount and the other Appellants in state court seeking civil penalties and injunctive relief for maintaining signs without a permit. The complaint and the first amended and supplemental complaint do not seek relief based on the Original Hollywood SUD. Instead, the first amended and supplemental complaint seeks redress for Appellants' violations of the First ICO, Second ICO, Outdoor Advertising Act, public nuisance statutes and other Los Angeles Municipal Code provisions.

Paramount removed its supergraphic signs only after the People and City sued Paramount and the other Appellants. (*Paramount II*, *supra*, 805 F.Supp.2d at p. 998.)

10. *World Wide Rush a*ppeal

On May 26, 2010, the Ninth Circuit Court of Appeals issued its published decision in *World Wide Rush*, reversing the district court's judgment. (*World Wide Rush, LLC v. City of Los Angeles*, *supra*, 606 F.3d 676.)

11. The Amended Hollywood SUD

On September 28, 2010, the city council adopted ordinance No. 181340, amending the Original Hollywood SUD (hereafter Amended Hollywood SUD). (L.A. Ord. No. 181340.) The Amended Hollywood SUD prohibits new supergraphic signs. (L.A. Ord. No. 181340, § 5(B)(11).) The only exceptions are for projects with vested rights and for grandfathered projects. (L.A. Ord. No. 181340, § 6(K).)

12. *Paramount II*: Paramount's amended complaints

On October 26, 2010, Paramount filed its first amended complaint (hereafter FAC), adding the other Appellants -- Sunset Blvd. Properties, Bradley Folb and Patricia High -- as plaintiffs. Asserting First Amendment, equal protection and takings claims, Paramount and the other Appellants attacked "almost every aspect of the City's current and former sign regulations." (*Paramount II*, *supra*, 805 F.Supp.2d at p. 982.)

On February 7, 2011, the district court granted the City's motion to dismiss the FAC in part and denied in part. (*Paramount Contrs. & Developers, Inc. v. City of Los Angeles* (C.D.Cal., Feb. 7, 2011) 2011 U.S.Dist. Lexis 156023.)

On February 18, 2011, Paramount and the other appellants filed a second amended complaint (hereafter SAC), asserting essentially the same claims and seeking the same relief as in the FAC. The City moved to dismiss. At Appellants' request, the district court deferred ruling on the City's motion and stayed the case until the *Paramount I* appeal was resolved.

13. The Instant Litigation: Appellants file a cross-complaint

On March 23, 2011, Appellants filed their initial cross-complaint in the instant litigation.

14. *Paramount I*: The Ninth Circuit dismisses Paramount's appeal

On May 25, 2011, the Ninth Circuit dismissed Paramount's appeal in *Paramount I*. (*Paramount I*, *supra*, 434 Fed.Appx. 662.) The Ninth Circuit ruled that the City's amendment of the Original Hollywood SUD "render[ed] Paramount's claims for declaratory and injunctive relief moot." (*Id.* at p. 663.) Also, "[e]ven if the City improperly denied Paramount supergraphic permits . . . Paramount 'lacked a vested property right in its unapproved billboard permit application.'" (*Ibid.*, citing *Outdoor Media Group, Inc. v. City of Beaumont* (9th Cir. 2007) 506 F.3d 895, 903.)

The Court also ruled that "Paramount's claim for damages does not present a live controversy, because Paramount, for strategic reasons, disavowed damages before the district court." (*Paramount I*, *supra*, 434 Fed.Appx. at p. 663.) Paramount argued that it only disavowed claims for past damages, and that it remained "entitled to seek damages incurred between the district court's [summary judgment order] and the City's amendment of the Hollywood SUD on September 28, 2010." (*Ibid.*) But the Court ruled that "[t]he record belies Paramount's assertion that it limited its disavowal to 'past' damages" because Paramount already "'acknowledged that it is not seeking damages in [*Paramount II*].'" (*Ibid*.) Also, the Court ruled that "Paramount is not able to demonstrate that any alleged damages it incurred after the district court's [summary judgment] order resulted from application of the provisions of the Hollywood SUD challenged in the complaint." (*Id.* at pp. 663-664.)

15. *Paramount II*: The district court dismisses SAC with prejudice

On August 2, 2011, in *Paramount II*, the district court dismissed Paramount's SAC in its entirety, with prejudice. (*Paramount II*, *supra*, 805 F.Supp.2d at p. 1006.) The district court also denied Paramount leave to amend the SAC. (*Ibid*.)

16. The Instant Litigation: The trial court sustains demurrers to FACC and SACC

Appellants filed their FACC on October 27, 2011, and the City and the People successfully demurred. On August 22, 2012, Appellants filed the operative SACC against the City.

On November 29, 2012, the trial court sustained the City's demurrer to the SACC in its entirety without leave to amend. Appellants filed the instant appeal.

17. *Paramount II*: The Ninth Circuit affirms the district court's dismissal

On March 18, 2013, the Ninth Circuit affirmed the district court's dismissal order in *Paramount II*. (*Paramount II*, *supra*, 516 Fed.Appx. at p. 614.)

First, the Ninth Circuit held that its earlier decision in *Paramount I* foreclosed any of Paramount's challenges to the City's sign ordinances and their application before the November 17, 2010 Original Hollywood SUD amendment. (*Paramount II*, *supra*, 516 Fed.Appx. at p. 616.)

Second, the Court held the Amended Hollywood SUD was constitutional. (*Paramount II*, *supra*, 516 Fed.Appx. at p. 616.) The Amended Hollywood SUD was narrowly tailored to achieve the City's interests in aesthetics and traffic safety. (*Ibid.*) Also, the City was not bound in perpetuity to a single regulatory scheme. (*Id.* at pp. 616-617.) And the City did not violate the First Amendment in reducing the number of exceptions to the supergraphic sign ban. (*Id.* at p. 617.)

Finally, the Court held Paramount and the other Appellants' claim for damages against the Original Hollywood SUD precluded by the Ninth Circuit's decision in *Paramount I*. (*Paramount II*, *supra*, 516 Fed.Appx. at p. 617.)[4]

DISCUSSION[5]

On appeal, Appellants contend the trial court erred in sustaining the demurrer on res judicata grounds as to two claims in the SACC: (1) the third cause of action to interpret the scope and validity of two TSD permits it obtained in 2006 because the cause did not arise until May 2010 when the People and City initiated the instant lawsuit to enforce regulations and thereby disputing Appellants' rights under the TSD's; and (2)

[4] The United States Supreme Court denied certiorari in *Paramount II* on January 13, 2014. (134 S.Ct. 907 (Mem.).)

[5] On September 9, 2014, we granted the City's motion to dismiss their cross-appeal as moot.

"any claims based on the newly discovered as-applied content discrimination" because Appellants were unaware until evidence was discovered in July 2011 that the City denied its applications for permanent supergraphics based on the proposed content. Appellants also contend that the decisions in the Federal Cases have no preclusive effect because they were deemed moot before an appeal on the merits could be heard and that their claims in the SACC involve different primary rights than those litigated in the Federal Cases.

We disagree and affirm.

I. Standard of Review

We review the trial court's decision de novo. (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.)

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court "may disregard allegations that are contrary to law or to a fact of which judicial notice may be taken." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 8:136.1, p. 8–102.2; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) Furthermore, "[w]here the demurrer is to an amended complaint, the reviewing court may properly consider factual allegations in the prior complaints." (Eisenberg et al., *supra*, ¶ 8:136.1b, p. 8–102.2; *People ex rel. Gallegos v. Pacific Lumber Co*. (2008) 158 Cal.App.4th 950, 957.)

"If all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer. [Citation.] In ruling on a demurrer based on res judicata, a court may

take judicial notice of the official acts or records of any court in this state." (*Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299.)

II. Res Judicata

"The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065.) "[R]es judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.'" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.)

For res judicata to apply, it must satisfy three elements:

1. "[T]he decision in the prior proceeding is final and on the merits;"

2. "[T]he present proceeding is on the *same cause of action* as the prior proceeding; and"

3. "[T]he parties in the present proceeding or parties in privity with them were parties to the prior proceeding." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202, italics added; *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577.)

California applies the "primary rights" theory in defining the cause of action. This theory holds that the invasion of one "primary right" gives rise to a single cause of action, even though there might be several remedies available to protect that primary right. (*Frommhagen*, *supra*, 197 Cal.App.3d at pp. 1299-1300.) "'The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.' . . . In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by

the defendant which consists of a breach of the primary right. . . . '"If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. . . ."'" (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589–590, citations omitted; quoted in *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 576.)

"The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' . . . '[U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . ". . . [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. . . ."'" (*Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 181–182, citations & italics omitted; quoted in *Villacres v. ABM Industries Inc.*, *supra*, 189 Cal.App.4th at p. 576.)

"'In California the phrase "cause of action" is often used indiscriminately . . . to mean *counts* which state [according to different legal theories] the same cause of action . . . .' . . . But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. . . . '[T]he "cause of action" is based upon the harm

suffered, as opposed to the particular theory asserted by the litigant. . . . Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though [the plaintiff] presents a different *legal ground* for relief." . . .' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798, citations omitted; quoted in *Villacres v. ABM Industries Inc.*, *supra*, 189 Cal.App.4th at pp. 576-577.)

"As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. . . . It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' . . . The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681–682, citations omitted; accord, *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245–1247; quoted in *Villacres v. ABM Industries Inc.*, *supra*, 189 Cal.App.4th at p. 577.)

III. Final Judgment

Appellants contend that the "decisions in the Federal Case have no preclusive effect because they were deemed moot before an appeal on the merits could be heard." Appellants cite two cases addressing the finality and preclusive effect of a state court judgment where an appeal is dismissed as moot. (See *Minor v. Lapp* (1963) 220 Cal.App.2d 582, 584; *Chamberlin v. City of Palo Alto* (1986) 186 Cal.App.3d 181, 187.) These cases, however, are not germane to the issue before us: the finality and preclusive effect of a federal judgment.

In contrast to a California state court judgment, a district court's judgment is final for purposes of res judicata and collateral estoppel unless, and until, a higher court overturns the judgment. (*Stoll v. Gottlieb* (1938) 305 U.S. 165, 170; *Martin v. Martin* (1970) 2 Cal.3d 752, 761; *Valerio v. Boise Cascade Corp.* (1986) 177 Cal.App.3d 1212, 1223; *Swaffield v. Universal Ecsco Corp.* (1969) 271 Cal.App.2d 147, 159-160.) "The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172; *Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1674-1675.)

"A federal judgment 'has the same effect in the courts of this state as it would have in a federal court.' [Citation.]" (*Younger v. Jensen* (1980) 26 Cal.3d 397, 411.) Accordingly, federal judgment by the district court in *Paramount I*, which was never set aside or vacated, and in *Paramount II*, which was affirmed by the Ninth Circuit, were final judgments on the merits for res judicata purposes. The Ninth Circuit's dismissal of the appeal in *Paramount I* as moot does not alter this result. (*United States v. Munsingwear, Inc.* (1950) 340 U.S. 36, 39-40, 41 [noting that in the federal system a procedure exists for a party to move to vacate the judgment below and remand with directions to dismiss in order to preserve a party's rights in future litigation and characterizing a case where a party did not avail itself of this procedure as "illustrat[ing] not the hardship of *res judicata* but the need for it in providing terminal points for litigation"].)

Appellants also contend that the City "stipulated" to the Ninth Circuit at oral argument in *Paramount I* that it would not argue the "res judicata effect" if the appeal was dismissed on mootness grounds. A reading of the transcript, however, shows that this statement was made in the context of discussing the People and City's enforcement action in the instant litigation based on the Amended Hollywood SUD and the City's representation that enforcement action did not seek to enforce the original Hollywood SUD at issue in *Paramount I*. Consistent with this distinction, the Ninth Circuit in *Paramount II* discussed the merits of Paramount's challenges to the Amended Hollywood

SUD, but held that "[t]o the extent that Paramount challenges the City's sign ordinances and their application prior to the November 17, 2010 amendment of the Hollywood [SUD] [citation], those challenges are foreclosed by [the Ninth Circuit's] decision" in *Paramount I* and also stated that Paramount cannot "accomplish indirectly what Paramount cannot do directly—claim damages precluded by *Paramount I*." (*Paramount II*, 516 Fed.Appx. 614, 616-617).[6]

IV. Same Cause of Action

On appeal, Appellants contend that its third cause of action–to determine the scope and validity of Paramount's TSD permits–does not involve a primary right that was raised in the Federal Cases, arguing that the claim "could not have been raised at the time the Federal Cases were initiated" because "Paramount was not aware until, at the earliest, the time the City filed this civil enforcement action [in May 2010] that the City disputed its right to erect TSDs (i.e. *temporary* supergraphics) for 120 days in each calendar year pursuant to its already issued TSD permits." Likewise, Appellants contend that "any claims based on the newly discovered as-applied content discrimination" were not barred by res judicata because they involved different primary rights or because Appellants were unaware until evidence was discovered in July 2011 that the City denied its applications for permanent supergraphics based on the proposed content.

The record shows that the primary right seeks to vindicate in its SACC is the same as in the prior litigation. Appellants in their SACC seek to redress allegedly unconstitutional or impermissible restrictions on its right to erect supergraphics at its Sunset Properties. That the challenge is now described in terms of impermissible limitations on content, location and time or date restrictions in the TSD permits it received or unconstitutional denial of permanent supergraphic permits because they were "car ads" and not "entertainment industry" related -- as opposed to unconstitutional restrictions on permanent supergraphics generally or unconstitutional denials of

[6] In any event, any stipulation or waiver as to the preclusive effect of *Paramount I* would not have applied to limit the preclusive effect of the then-as-yet-undecided *Paramount II* which was pending in district court.

Appellants' applications for permits for permanent supergraphics -- are merely different legal grounds or theories for relief. "The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.'"[7] (*Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 181–182, citations & italics omitted; quoted in *Villacres v. ABM Industries Inc., supra,* 189 Cal.App.4th at p. 576.)

Nonetheless, Appellants argue that res judicata should not apply because they did not discover these claims until after the Federal Cases were filed. We disagree.

A. Continuing Validity of TSD Permits

We reject Appellants' suggestion that their claim based on the TSD permits could not have been raised in the Federal Cases because they were unaware that the City disputed its right to continue to erect TSD's for 120 days *every year*—with no apparent end date—under its TSD permits.[8] The approvals for the TSD's stated that the TSD's were "not to exceed 120 days"; "shall be limited to a total of 120 days in any calendar year" either "displayed for 120 days continuously or [for] a combined total of 120 days over several intervals of time"; and "shall be removed from the site 120 days from the date of their installation or, when not displayed continuously, after being displayed a combined total of 120 days over several intervals of time from the date of initial/first installation." The permits themselves listed the specific dates that the TSD's were approved for display ("7/1/06 to 7/30/06, 9/1/06 to 9/30/06, 11/1/06 to 11/30/06, & 12/1/06 to 12/30/06" and "6/1 to 7/15/2006, 9/1-9/30/2006, and 11/1 to 12/31/2006"), reiterated the 120-day limit, and noted the receipt of a "notarized letter from the owner

[7] Indeed in their reply brief, appellants argue that portions of the SACC cited by the City "support [Appellants'] argument that it is now *seeking different relief.*"

[8] At oral argument, the City argued that Appellants' TSD claims were moot as the Amended Hollywood SUD made no provision for TSD's. Because appellants contend that their TSD permits remained in effect and gave them vested rights, we address the merits of Appellants' res judicata argument.

acknowledging the 120 day limit and no extension of time to be granted for the Temporary Special Display sign." Appellants also received a notice of intent to revoke one of their TSD permits because signs "were illegally installed" before the approved display period and had been up for more than 120 days.

Moreover, the district court's July 23, 2007 order in *Paramount I* described Paramount's two 2006 TSD permits as "two valid temporary sign permits that expired after 120 days. When that time period expired, Plaintiff refused to remove its signs and refused to obtain permanent sign permits, instead maintaining its signs in violation of the sign ordinance." Later in the order, the TSD permits are described as "now-expired temporary permits." Similarly, the district court's June 6, 2008 summary judgment order in *Paramount I* notes that "[a]lthough the temporary sign provision through which Plaintiff obtained permits only allows temporary signs for 120 days, Plaintiff has refused to remove the signs or apply for permanent permits."[9] Thus, Appellants were on notice well before the May 2010 enforcement proceeding in this case that the City, as well as the district court, considered their TSD permits expired and no longer valid which is clearly at odds with Appellants' current claim that the TSD permits granted Appellants the right in perpetuity to erect TSD's for 120 days out of each and every calendar year.[10]

Res judicata bars Appellants' claims based on the alleged scope and validity of its TSD permits.

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[9] To the extent the SACC attempts to challenge content restrictions in TSD's, the record also shows that Appellants were aware of these content restrictions during the Federal Cases. In its complaint in *Paramount I*, Paramount stated that TSD's "are allowed to be maintained for only four months out of the year with significant content restrictions," "[t]here are significant content restrictions placed on temporary special displays," and further alleged that the City "has waived all of the requirements imposed on TSDs for some of Plaintiff's competitors, including all of the content limitations described above, as well as the four month duration."

[10] Appellants' argument that the "cause of action" did not accrue until it removed the signs and lost revenue is unavailing. The third cause of action asks not just for monetary relief, but declaratory and injunctive relief. "'"The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief . . . ."'" (*Villacres*, *supra*, 189 Cal.App.4th at p. 577.)

B. Content Discrimination

Appellants contend that res judicata does not apply to their as-applied content discrimination claim because it was unaware that their permit applications were being denied based on content until evidence was discovered in July 2011. We disagree.

Appellants rely on *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150 to support a newly discovered fact exception to res judicata. *Allied* is distinguishable. *Allied* concerned the vindication of two separate rights—namely the right to be paid pursuant to a contract, and the separate right to be free from tortious misrepresentations when entering an agreement. (*Id.* at p. 153.) Here, as discussed previously, this case concerns the same right.

Because the substance of a cause of action in a primary rights analysis is based on the nature of the injury to a plaintiff, and not a particular theory of liability (*Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 487) neither newly discovered evidence relating to this factual context nor a new theory of liability will allow a plaintiff to avoid the bar of claim preclusion. (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 640 [learned of new theory of negligence after previous trial]; *Quirk v. Rooney* (1900) 130 Cal. 505, 510-511 [cannot bring new probate action on new theory based on new evidence]; *Zimmerman v. Stotter* (1984) 160 Cal.App.3d 1067, 1071-1074 [may not relitigate landlord's motive based on inferences from events subsequent to prior litigation].)

Moreover, Appellants did raise the as-applied content claims in the Federal Cases. First, in *Paramount I*, the district court's June 8, 2008 summary judgment order, addressed the claim of permit approvals being based on content generally, stating "Plaintiff obliquely alleges that the City also conditions permits on the content of the proposed signs. Plaintiff has offered no evidence to suggest that the City is aware of the

content of any proposed sign, so the City cannot, as a matter of law, discriminate based on content."[11]

Moreover, Appellants sought leave from the district court in *Paramount II* to amend the SAC with the same content-based discrimination allegation now alleged in the SACC. On July 27, 2011, in a supplemental brief, Appellants requested leave to amend, but the district court denied the request and dismissed the SAC with prejudice. (*Paramount II*, *supra*, 805 F.Supp.2d at p. 1006.)[12] The court's denial of leave to amend is a final judgment on the merits with res judicata effect. (*Mpoyo v. Litton Electro-Optical Systems* (9th Cir. 2005) 430 F.3d 985, 988-989.)[13]

We conclude that res judicata bars Appellants' claims based on the alleged newly discovered evidence of content discrimination.

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[11] In its complaint in *Paramount I*, Paramount alleged that "unfettered discretion [was] given to various City agencies to approve or disapprove a sign and control its content and duration for which it is displayed."

[12] At oral argument, Appellants claimed that the district court in *Paramount II* never denied leave to amend but instead struck their supplemental pleading, and referenced docket No. 99. The district court's August 2, 2011 order in *Paramount II* notes that, after a stipulated briefing schedule for supplemental briefing on the City's motion to dismiss the SAC, "Paramount filed an unauthorized sur-reply brief on July 27, 2011, which was stricken as improper. (Docket No. 99.)" (*Paramount II*, *supra*, 805 F.Supp.2d at p. 981.) We have not located district court docket No. 99 in the record on appeal or any request for judicial notice before this Court. The district court's August 2, 2011 order, however, also states "Although Paramount requests leave to amend the SAC, many of Paramount's claims are legally deficient, rendering any amendment futile, and Paramount has already had several chances to amend. Therefore, the SAC must be dismissed WITH PREJUDICE." (*Paramount II*, *supra*, 805 F.Supp.2d at p. 1006.) Based on this express language in the district court's order and the state of the record, it appears the district court did consider Appellants' request and denied leave to amend.

[13] Although the City raises this argument for the first time on appeal, waiver does not apply "where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) Even if waived, we exercise our discretion to consider the issue.

DISPOSITION

We affirm. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.