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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CENTRAL COAST  
DEVELOPMENT COMPANY,

Plaintiff and Respondent,

v.

SAN LUIS OBISPO LOCAL  
AGENCY FORMATION  
COMMISSION,

Defendant and Appellant.

2d Civil No. B279000  
(Super. Ct. No. CV120279B)  
(San Luis Obispo County)

A landowner petitioned for a writ of administrative mandate against a public agency alleging the agency improperly denied a land use application. The agency prevailed and moved for attorney fees based on an indemnity agreement contained in the application. The landowner raised numerous defenses to the indemnity agreement, some of which involve questions of fact. There is a separate pending lawsuit involving all interested parties, including the landowner and the agency, in which the

validity of the same indemnity agreement is being litigated. The trial court denied the agency's motion without prejudice to its pursuit of the fees in the separate action. The agency appeals. We affirm.

## FACTS

Central Coast Development Company (Central Coast) owns 154 acres of undeveloped land overlooking Pismo Beach. The land is not within the boundaries of the City of Pismo Beach (City), but it is within the City's sphere of influence. (See Gov. Code, § 56076 [defining sphere of influence].) The San Luis Obispo Local Agency Formation Commission (LAFCO) is a state agency charged with considering changes to local government boundaries and with the creation, merger and expansion of cities and special districts.

In 2001, Central Coast applied to the City for approval of a 312-unit residential development. A dispute over the project resulted in Central Coast suing the City. The lawsuit was settled by a stipulated judgment requiring the City to cooperate with Central Coast in applying to LAFCO for annexation of the site to the City.

In August 2011, Central Coast and the City applied to LAFCO for annexation. As part of the application, Central Coast signed an agreement to release and indemnify LAFCO for claims arising out of or in connection with the application. The agreement provided in part:

“As part of this application, Applicant agrees to defend, indemnify, hold harmless and release the San Luis Obispo Local Agency Formation Commission (LAFCO), its officers, employees, attorneys, or agents from any claim, action or proceeding brought against any of them, the purpose of which is to attack, set aside,

void, or annul, in whole or in part, LAFCO's action on the proposal or on the environmental documents submitted to or prepared by LAFCO in connection with the proposal. This indemnification obligation shall include, but not be limited to, damages, costs, expenses, attorneys' fees, and expert witness fees that may be asserted by any person or entity, including the Applicant, arising out of or in connection with the application. In the event of such indemnification, LAFCO expressly reserves the right to provide its own defense at the reasonable expense of the Applicant." The application was signed by a Central Coast representative, but not by the City.

For some unexplained reason, the City decided to submit a second application for the annexation. Unlike the original application, which identified both the City and Central Coast as the applicant, the second application identified only the City as the applicant. Central Coast was identified as an interested party. The second application was signed by the City's manager on behalf of the City. It was not signed by Central Coast. It contained the same release and indemnity agreement as the original application. After LAFCO denied the application, Central Coast brought the instant action against LAFCO challenging the denial.

Approximately one year later, the City filed a separate suit against Central Coast and LAFCO. (*Pismo Beach v. Pacific Harbor Homes, Inc.* (Super. Ct. San Luis Obispo County, 2012, No. CV13-0383) (City's action). City's action is for indemnity from Central Coast based on the demand LAFCO made against the City for payment of costs incurred in the instant action. LAFCO cross-complained against the City and Central Coast.

The validity of the indemnity agreement contained in the annexation application to LAFCO is at issue in the City's action.

Eventually, LAFCO prevailed against Central Coast in the trial court in the instant action. As the prevailing party, LAFCO made a motion for attorney fees based on the release and indemnity agreement contained in the original annexation application.

Central Coast opposed the motion on the grounds that it is not a signatory to the City's annexation application, and duress, lack of consideration, and violations of public policy.

The trial court concluded that in indemnification proceedings, attorney fees are awarded as an element of damages. Fees sought as damages may not be asserted in a post-trial motion; they must be pled and proved to the trier of fact. (Citing 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 299.) The court found that there is a pending related case involving the same parties and the same indemnity agreement. The court stated:

“All of the interested parties . . . are involved in CV13-0383 [City's action] and all alternative theories of liability can be addressed in that action with a final determination as to all parties. There are controverted factual issues that cannot be easily resolved by way of motion in this writ case. For example, [Central Coast] claims it is not bound to the September 2011 indemnity agreement because it is not a signatory. Other contractual defenses to the motion include duress, lack of consideration, and violations of public policy. These and other factual and legal issues are better suited for resolution in the pending lawsuit, CV13-0383.”

The trial court denied LAFCO's motion for attorney fees without prejudice to LAFCO's pursuit of recovery in the City's action.

### DISCUSSION

LAFCO contends that as the prevailing party it has the right to an award of attorney fees.

LAFCO cites Code of Civil Procedure section 1032, subdivision (b): "[A] prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Recoverable costs include attorney fees when authorized by contract, statute or law. (Code Civ. Proc. § 1033.5, subd. (a)(10)(A)-(C).)

Here, although the trial court denied LAFCO's motion for attorney fees, it did not deny LAFCO whatever right it might have to an award of attorney fees. Instead, it denied the motion without prejudice to pursuing that right in a pending action involving the same issue and the same parties, the City's action.

The trial court's order is eminently reasonable. Central Coast raised a number of defenses to LAFCO's motion. Some of the defenses, such as duress, involve questions of fact. The City is not a party to the motion, but it is concerned with the validity of the indemnity agreement. The matter is best resolved at a trial of the City's action where all interested parties are involved, and not by motion.

Both parties have briefed the merits of an award of fees. But the trial court never reached the merits. Because the case involves questions of fact, the matter must be submitted to the trial court. The parties will have that opportunity in the City's action. Nothing herein should be construed to indicate how the trial court should rule in the City's action.

The judgment is affirmed. The order denying LAFCO's motion for attorney fees is affirmed without prejudice. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Charles S. Crandall, Martin J. Tangeman, Judges

Superior Court County of San Luis Obispo

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Colantuono, Highsmith & Whatley, PC, Michael G.  
Colantuono, David J. Ruderman, Eduardo Jansen, Nikhil S.  
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