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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY OF CARSON, Plaintiff and Respondent, v. CITY OF LA MIRADA et al., Defendants and Appellants.	B235315 (Los Angeles County Super. Ct. No. BS129248)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

James L. Markman, City Attorney; Richards, Watson & Gershon, Gregory M. Kunert and Jennifer L. Petrusis for Defendants and Appellants.

Aleshire & Wynder, William W. Wynder and June S. Ailin for Plaintiff and Respondent.

INTRODUCTION

Commonly known as AB 178, Health and Safety Code section 33426.7 and Government Code section 53084 (Stats. 1999, ch. 462, §§ 3 & 2, respectively), prohibit a redevelopment agency from providing financial assistance to a "big box retailer" to relocate from one community to another within the same market area. At the time of the events giving rise to this lawsuit, AB 178 allowed such financial assistance only if the receiving agency shared the sales tax generated by the retailer with the losing community. AB 178 penalized those redevelopment agencies bestowing prohibited financial assistance by requiring them to share for a period of 10 years the retailer's sales tax revenue with the community that lost the retailer. (Health & Saf. Code, § 33426.7, former subd. (c); Gov. Code, § 53084, former subd. (c).)[1]

In 2007, petitioner City of Carson (Carson) obtained a judgment directing defendant City of La Mirada, City Council of La Mirada, and the La Mirada Redevelopment Agency (together, La Mirada) to comply with AB 178 and share, for a period of 10 years, a portion of the sales tax revenue La Mirada received from Corporate Express, Inc., a big box retailer that La Mirada had induced to relocate from Carson. Less than two years later, La Mirada ceased paying the sales tax to Carson on the ground that Corporate Express had merged with a direct competitor, Staples Inc. The trial court granted Carson's ensuing petition for writ of mandate and ordered La Mirada to comply with the 2007 judgment to pay Carson a share of the sales tax through the 2012-2013 fiscal year. La Mirada appeals. We conclude that the 2007 judgment is final and controlling, and neither that judgment nor AB 178 authorized the cessation of payments before fiscal year 2012/2013. Accordingly, we affirm the judgment issuing the writ of mandate.

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[1] AB 178 has since been amended to prohibit all such financial incentives to lure big box retailers and vehicle dealers from one community to another. (Stats. 2003, ch. 781, § 1.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The earlier litigation resulting in the 2007 judgment*

In December 2000, La Mirada and Corporate Express Office Products, Inc. (Corporate Express) entered into a participation agreement to induce the retailer to relocate from Carson to La Mirada. Under that agreement, La Mirada would share with Corporate Express a portion of the sales tax revenue the retailer generated for a period of 15 years. Determining that Corporate Express was not a big box retailer as defined by AB 178, La Mirada did not offer to share revenue with Carson. The participation agreement provided for an alternate division of tax revenue inc case Carson prevailed in a lawsuit under AB 178. (Gov. Code, § 53084, former subd. (c) & Health & Saf. Code, § 33426.7, former subd. (c).) Corporate Express relocated from Carson to La Mirada in the fourth quarter of 2002.

Carson filed a validation action (Code Civ. Proc., § 860 et seq.) and a petition for writ of mandate challenging the participation agreement as a violation of AB 178. The trial court ruled that Corporate Express's La Mirada facility was not a "big box retailer" under AB 178.

We reversed the judgment and held that Corporate Express was a "big box retailer" as defined by AB 178. (*City of Carson v. City of La Mirada* (2004) 125 Cal.App.4th 532, 540 & 545 (*Carson v. La Mirada*).) We construed AB 178 and determined that Corporate Express was not a warehouse. (*Id*. at p. 542.) We observed that Corporate Express' "competitors are Staples, Office Depot, and others who are in the business of retail sale of office supplies." (*Id*. at p. 542.)

Returning to the trial court, Carson and La Mirada litigated the question of the duration of La Mirada's AB 178 obligation to share sales tax revenue with Carson. Based on AB 178, *La Mirada* argued that Carson was only entitled to share sales tax revenue for a period of 10 years,[2] and not the 15 years provided for in the participation

[2] At the time, AB 178 provided that the agency offering financial assistance, La Mirada in this case, shall apportion the sales tax generated from the big box retailer after relocation in the following manner. (A) the annual amount of assistance offered to

agreement. (Gov. Code, § 53084, former subd. (c)(1); Health & Saf. Code, § 33426.7, former subd. (c)(1).) La Mirada argued: "*Carson is entitled to share sales tax revenue for 10 years – no more and no less*." (Italics added.)

The trial court granted Carson's petition and entered judgment in April 2007 issuing a writ of mandate that tracked the statutes' language and directed "La Mirada [to] make payment to Carson pursuant to the provisions of AB 178, net of sharing percentages outlined in the Participation Agreement between . . . La Mirada . . . and Corporate Express . . . dated December 12, 2000, *for 10 years* (i.e., up through and including fiscal year 2012/13) from and after which time La Mirada shall have no further obligations to share sales tax revenue with Carson." (Italics added.) The writ directed that the payments, plus any interest and an accounting, be made on a quarterly basis, within 120 days after each calendar quarter. No appeal was filed.

2. *La Mirada ceases making payments*.

In late 2008, La Mirada learned, in the words of its assistant city manager, "that Corporate Express had been acquired by Staples, Inc." The assistant city manager referred to Staples' "acquisition of Corporate Express" and the "acquisition and merger." Staples wrote to La Mirada in September 2009 that "Staples' acquisition of Corporate Express in July 2008 combined two of the world's best office products companies, *resulting in a global organization with a full suite of product and service offerings*. Since the time of the acquisition, we have been working to *integrate the companies into one business* from a functional and operational perspective." (Italics added.) Staples wanted "to continue the Participation Agreement as it was original[ly] executed." Apparently,

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Corporate Express as inducement to move to La Mirada is subtracted from the annual sales tax. "(B) The difference shall be divided equally between the two local agencies [La Mirada and Carson] for the first 10 fiscal years following the relocation. . . . [¶] (C) After the first 10 fiscal years following the relocation, the contract shall terminate and the apportionment shall end unless the contract is extended by both local agencies." (Gov. Code, § 53084, former subd. (c)(1)(A)-(C); Health & Saf. Code, § 33426.7, former subd. (c)(1)(A)-(C).)

that agreement was the "only incentive obtained by the former Corporate Express that *ha*[*d*] *not been continued*." (Italics added.)

Instead, La Mirada terminated the participation agreement and ceased making its sales-tax payments to Carson. La Mirada wrote to Carson that Staples had acquired Corporate Express and so Corporate Express "no longer conduct[ed] operations at the La Mirada site." This rendered the participation agreement invalid, La Mirada stated, with the result it would no longer share sales tax payments with Carson. The last payment Carson received covered the third quarter sales for 2008. In fact, La Mirada believed it had overpaid Carson by $146,263 and demanded repayment of that amount.

3. *The instant litigation*

Carson filed a petition for writ of mandate seeking to compel La Mirada to comply with the 2007 judgment and continue making sales tax revenue payments. The trial court granted the petition and issued a writ of mandate directing La Mirada to make payments of sales tax revenue owed pursuant to the 2007 judgment from the fourth quarter of 2008 through the 2012-2013 fiscal year with interest at 10 percent per annum. La Mirada filed its timely appeal.

CONTENTIONS

La Mirada contends the trial court erred in (1) requiring it to make sales tax payments under the 2007 judgment because Corporate Express has ceased operations in La Mirada, and (2) denying La Mirada the opportunity to present evidence that Staples was not a continuation of Corporate Express.

DISCUSSION

No appeal was taken from the 2007 judgment (Code Civ. Proc., § 904.1; Cal. Rules of Court, rule 8.104) and so it is final. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1018; *McKee v. National Union Fire Ins. Co*. (1993) 15 Cal.App.4th 282, 287.) La Mirada cannot now attack that judgment, directly or collaterally, and is bound by it. The 2007 judgment directs La Mirada to share sales tax revenues with Carson through the 2012-2013 fiscal year. Therefore, the trial court's ruling was not error.

Seeking to avoid the effect of a final judgment, La Mirada focuses on AB 178 to argue it is only required to share sales taxes paid by Corporate Express. It reasons that AB 178 "only requires apportionment of sales tax revenue generated from 'the' big box retailer that was induced to relocate with assistance." Corporate Express is "the" big box retailer and has ceased to exist. Thus, La Mirada argues it is no longer obligated to make sales tax revenue payments.

The 2007 judgment is only limited in terms of the duration of the sharing obligation. The 2007 judgment does not provide that La Mirada's obligation to share tax revenue would terminate in the event of a change in Corporate Express' ownership or corporate identity.[3] Also, while the 2007 judgment is based on AB 178, neither it nor the statute turns on the *corporate identity* of the big box retailer. AB 178 defines big box retailer based on two criteria only, physical size and ability to generate sales tax (*Carson v. La Mirada*, *supra*, 125 Cal.App.4th at p. 541), and says nothing to indicate that a change in ownership of the relocated big box retailer affects the obligation to share sales tax. As La Mirada's own attorneys asserted to the trial court in 2007, "*Carson is entitled to share sales tax revenue for 10 years – no more and no less*." (Italics added.) La Mirada remains subject to the 2007 judgment.

La Mirada contends it is no longer required to make payments to Carson based on the sales tax paid by *Staples* because Staples is a different company than Corporate Express. La Mirada' argues it would be anomalous to require it to share tax revenues generated from Staples, a business enterprise that never had any relationship with Carson and never relocated from Carson to La Mirada. La Mirada is wrong for two reasons.

First, had La Mirada not lured Corporate Express away from Carson, the latter city would be receiving the sales tax revenue being generated after the merger with Staples. Second, and more important, La Mirada's contention is grounded in the notion that

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[3] Nor does the judgment indicate that La Mirada's obligation is coextensive with the participation agreement. Thus, the termination of that agreement does not affect the enforceability of the 2007 judgment.

Corporate Express and Staples are two completely unrelated companies.[4] Yet, La Mirada has repeatedly acknowledged, both in this court and below, that Corporate Express and Staples *merged*. As we observed in our earlier opinion, Staples was a direct competitor of Corporate Express and so they engage in the same business, namely retail sales of office products. (*Carson v. La Mirada*, *supra*, 125 Cal.App.4th at p. 542.) Furthermore, Staples explained it is continuing the same business, in the same location, as Corporate Express had. And, Staples sought to continue Corporate Express' participation agreement with La Mirada. We need not speculate on the effect on this case if Corporate Express had merged with a wholly different enterprise, for example Bed Bath and Beyond. That is not the situation presented here. The merger between Corporate Express and Staples does not alter the fact that tax revenue from the sales of office products was lost to Carson because of the incentives La Mirada gave to Corporate Express while ignoring its obligation to Carson, and La Mirada continues to receive tax revenue from the sale of office products. Stated otherwise, AB 178 entitled Carson to a share of the revenue La Mirada collects as the result of Corporate Express' subsidized relocation from Carson to La Mirada in 2002, regardless of whether the tax-generating business is now Corporate Express, or some combination of Corporate Express and Staples.

La Mirada next contends that requiring it to continue to make sales tax payments based on the tax it receives from Staples does not serve the purpose of AB 178. To the contrary, the 2007 judgment fully advances the goals of AB 178. As we explained in our earlier opinion, AB 178 was passed in response to fierce competition between local governments over businesses that generate large sales tax revenue. Big box retailers and vehicle dealers held bidding wars between local governments to extract the greatest subsidy for the business' location. The Legislature declared that this competition is very damaging to both municipalities as bidding wars cause the loss of public funds available

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[4] La Mirada asserts that "Corporate Express ceased operations in La Mirada. A different company, Staples, took over the facility." This characterization of events suggests a temporal gap in the use of the building and creates the misleading impression that the two companies had nothing to do with each other.

for public purposes, impede implementation of good planning, encourage unfair competition between local agencies, and do not result in a public benefit to the people of California. (*Carson v. La Mirada*, *supra*, 125 Cal.App.4th at p. 544.) The Legislature found that limiting this competition for sales tax revenue was an issue of statewide concern and enacted AB 178 as a disincentive to such bidding wars. The harm AB 178 was designed to prevent was La Mirada's participation agreement luring Corporate Express from Carson in 2002 without offering to share the sales tax revenue with Carson. The remedy AB 178 created was the requirement that La Mirada share with Carson the sales tax "generated from the . . . big box retailer after the relocation" for 10 years. (Gov. Code, § 53084, former subd. (c)(1) & Health & Saf. Code, § 33426.7, former subd. (c)(1).) A construction of AB 178, as La Mirada advocates, that terminates the obligation to share the sales tax revenue simply because Corporate Express merged with Staples, would enable La Mirada to avoid the consequences of luring Corporate Express away from Carson and undermine the very objectives of AB 178, namely to deter raiding large retailers and remedying communities for the loss of the sales tax. The deleterious fiscal impact on Carson from losing Corporate Express was not ameliorated by Corporate Express' merger with Staples.

Finally, La Mirada contends that the trial court abused its discretion when it denied La Mirada's request for a continuance to present evidence that Corporate Express and Staples were different corporate identities, and that Staples had discontinued all Corporate Express operations. It argues that Carson's writ petition was premised on the view that the merger was irrelevant, and Carson did not contend "that the operations of Staples following the merger were essentially a continuation of the Corporate Express operations" until Carson's reply brief below.

"Continuances are granted only on an affirmative showing of good cause requiring a continuance. [Citations.] Reviewing courts must uphold a trial court's choice not to grant a continuance unless the court has abused its discretion in so doing. [Citation.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) Good cause might be found when "a party has been surprised by unexpected testimony and requires a

postponement to enable him to meet it. [Citations.]" (*In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1169.) But, La Mirada cannot seriously claim it was presented with new and unexpected evidence. La Mirada filed the declaration of its city manager in opposition to Carson's petition for writ of mandate, that raised and discussed the fact that "Corporate Express had been acquired by Staples, Inc." and presented the evidence for its view that Staples was not "the" big box retailer that had relocated from Carson. La Mirada was not surprised. The trial court did not abuse its discretion in denying a continuance to present yet more evidence on the question of merger.

DISPOSITION

The judgment is affirmed. Carson to recover costs of appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.