Filed 11/29/12 Thoreen v. City of Pasadena CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BO THOREEN et al., Plaintiffs and Appellants, v. CITY OF PASADENA, Defendant and Appellant; SERGIO RAMIREZ et al., Real Parties in Interest and Respondents.	B230335 (Los Angeles County Super. Ct. No. BS122357)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, David P. Yaffe and Ann Jones, Judges. Reversed and remanded.

Bo Thoreen, in pro. per., for Plaintiff and Appellant.

Law Offices of Bo Thoreen and Bo Thoreen for Plaintiff and Appellant Vivian Lee Thoreen.

Michele Beal Bagneris, City Attorney, Frank L. Rhemrev, Assistant City Attorney, for Defendant and Appellant.

Plotkin, Marutani & Kaufman and Warren W. Kaufman for Real Parties in Interest and Respondents.

INTRODUCTION

The City of Pasadena (the City) received a complaint that a sleeping quarters above the garage of homeowners and real parties in interest Sergio Ramirez[1] was a residential unit and hence an illegal nonconforming use and subject to immediate abatement. Ramirez complied with the City's order to remove the kitchens from the garage's first and second floors. At the request of petitioners Bo and Vivian Thoreen (the Thoreens), who are Ramirez's neighbors, the Zoning Administrator interpreted provisions of the Pasadena Zoning Code applicable to the garage. The Zoning Administrator's interpretation was in favor of Ramirez and was upheld by the Board of Zoning Appeals and so the Thoreens commenced this action seeking (1) a writ directing the Board of Zoning Appeals to reverse the Zoning Administrator, (2) declaratory relief, and (3) nuisance damages. After overruling the City's demurrer to the writ petition, the trial court issued a peremptory writ of mandate commanding the City to set aside that portion of the Board of Zoning Appeals' decision allowing continuation of the garage's use as a sleeping quarters, but otherwise upholding the Board of Zoning Appeals' decision. The City appeals from the issuance of the peremptory writ and the Thoreens filed a protective cross-appeal from that portion of the trial court's ruling upholding the Board of Zoning Appeals' decision that the Pasadena Zoning Code does not require Ramirez to demolish the garage's second story.

We hold the Thoreens are not entitled to writ review of the City's interpretation of its Zoning Code (Code Civ. Proc., §§ 1085 & 1094.5). Accordingly, we reverse the trial court's order overruling the demurrer to the writ petition along with the judgment

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[1] Real parties in interest are Sergio Ramirez, Craig Kinsling, and Elfego Bautista. We refer to them collectively as Ramirez for simplicity.

appealed from, which includes the issuance of the peremptory writ of mandate and the order dismissing the declaratory relief cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

1. *factual predicate*

The parties do not dispute the following facts: The garage at issue was legally permitted in 1945 as a detached two-story structure, the lower floor as a garage and the upper floor as a sleeping room with a bathroom.

A variance application was submitted in 1947 by the then-owner to add a kitchen to the sleeping room. This application was denied because, with the addition of the kitchen, the accessory structure would have become a second dwelling or multi-family use in a single-family zone, in violation of the Zoning Code.

Some time thereafter (the exact time is unknown) unpermitted kitchens were added to the first and second floors of the garage.

The City responded to a complaint in early 2008 that the garage had been illegally converted. The property is zoned Single Family Residential, Bungalow Heaven Landmark District, and so a second or third residential unit is not currently permitted by the Zoning Code. Ramirez complied with the City's order to return the garage to what was allowed in 1945 by removing the first and second floor kitchens and returning the first floor to a garage. The City was satisfied.

The Thoreens however, requested the City deem the second-floor sleeping room a nonconforming use and subject to immediate abatement and termination. In a letter to the City's Code Compliance Section, which letter they asserted should not be provided to Ramirez, the Thoreens asked for comment on the status of the property. They argued the garage had been transformed from a sleeping room into a permanent residential dwelling with an array of code violations. They also argued that when the garage was converted to a dwelling, it lost all protection as a permitted structure. (Pasadena Zoning Code, § 17.71.060, subd. (a)(2).)[2]

[2] All further references are to the Pasadena Zoning Code.

The City's Zoning Administrator issued a letter interpreting the Zoning Code and determining that, as restored, the garage was no longer a nonconforming *use* and the garage *structure* was a legal nonconforming structure, not subject to demolition. The Zoning Administrator rejected the Thoreens' contention that the property lost its protection as a nonconforming use. He also concluded that the building could be legally used as it was originally permitted, namely as a sleeping quarters.

The Thoreens appealed to the Board of Zoning Appeals. The Board upheld the Zoning Administrator's decision. The City Council did not take up the Thoreens' appeal and so the ruling of the Board of Zoning Appeals became final by operation of law. (§ 17.72.070, subd. (B)(5).)

2. *procedure in the trial court*

The Thoreens filed this action seeking a writ of ordinary mandate or administrative mandamus (Code Civ. Proc., §§ 1085 & 1094.5) directing the City to set aside the decision of the Board of Zoning Appeals and ordering Ramirez to cease the residential, rental, and/or sleeping use of the garage, and further ordering the removal of the second floor from the garage or requiring the recordation of a restrictive covenant. Next, the Thoreens sought a declaration that the garage structure was not entitled to nonconforming protection and the garage's use must comply with the Zoning Code provisions prohibiting the residential use of a garage. Finally, the Thoreens alleged a cause of action for nuisance damages against Ramirez only.

The City demurred to the first amended writ petition arguing that the allegations did not give rise to a writ of either ordinary mandate (Code Civ. Proc., § 1085) or administrative mandamus (Code Civ. Proc., § 1094.5). The trial court overruled the demurrer.

Addressing the substance of the writ petition, the trial court disagreed with the Zoning Administrator's interpretation of the Zoning Code that the nonconforming *use* of the garage as sleeping quarters was legal and could continue. However, the court found no error in the City's refusal to order removal of the garage. The court then ruled that the

declaratory relief cause of action was rendered moot by the court's adjudication of the writ petition as the two causes of action were based on the same allegations.

Where the trial court did not address any nuisance-related issues, it determined its "order does not resolve all of Petitioners' causes of action." Thus, the court made its order granting the petition for writ of mandate *interlocutory* and remanded the matter to the trial department to try the nuisance cause of action and "issue a final judgment."

Based on this ruling, the trial court issued a peremptory writ of mandate commanding the City to set aside the Zoning Administrator's interpretation that there is no nonconforming use or accessory structure on the property, and to take further action consistent with the court's decision. The court commanded the City to file its return by March 18, 2011, setting forth the actions it took to comply with the writ. The City filed its timely appeal and the Thoreens filed their timely cross-appeal.

CONTENTIONS

The City contends (1) the trial court abused its discretion in overruling the demurrer because neither ordinary nor administrative mandamus applies here; and (2) the trial court's interpretation of the Zoning Code is error.

DISCUSSION

1. *Appealability*

As a threshold matter, we must address the question of appealability.[3] The ruling at issue here included the issuance of a peremptory writ of mandate commanding the City to act and to file a return by March 18, 2011, setting forth the actions taken in response to the writ. "Petitions for extraordinary writs, such as petitions for writs of mandate, are special proceedings. [Citations.] Accordingly, an order granting or denying a petition for an extraordinary writ constitutes a final judgment for purposes of an appeal . . . ."

[3] While this appeal was in the nascent stages, this court ordered both parties to show cause why we should not dismiss the appeal as taken from an interlocutory judgment. After briefing, this court concluded that the issue of appealability of the order granting the writ petition was not suitable for administrative disposition, and deferred the question of this court's jurisdiction to hear the appeal and cross-appeal for determination at the time the appeal was prepared.

(*Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409.)

Here, the Thoreens petitioned for a writ seeking to overturn the Board of Zoning Appeals' decision, and sought declaratory relief as against the City and Ramirez. Their third and final cause of action sought nuisance damages from Ramirez only. The ruling under review here adjudicated the writ petition and dismissed the declaratory relief cause of action as moot. However, because the court scrupulously avoided resolving the nuisance cause of action, it purposefully made its ruling granting the writ petition *interlocutory*. Notwithstanding the trial court's characterization of its ruling as interlocutory, we are satisfied that the peremptory writ is a final judgment as between the City and the Thoreens and is hence appealable.

"Generally, only judgments may be appealed. (Code Civ. Proc., § 904.1, subd. (a)(1).) 'A judgment is the final determination of the rights of the parties in an action or proceeding.' (*Id*., § 577.)" (*Public Defenders' Organization v. County of Riverside*, *supra*, 106 Cal.App.4th at p. 1409.) To determine whether an adjudication is final and appealable, we look to the substance and effect of the adjudication, not the form of the decree. (*Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1074.) A judgment that completes disposition of all the causes of action between the parties is appealable. (*Nerhan v. Stinson Beach County Water Dist*. (1994) 27 Cal.App.4th 536, 539, citing *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 742-743.) When no issue is left for further consideration and no further judicial action is necessary to a final determination of the rights of the parties, the decree is final. (*Public Defenders' Organization v. County of Riverside, supra,* 106 Cal.App.4th at p. 1410.)

More specifically, where " 'there is a judgment resolving *all* issues between a plaintiff and one defendant, then either party may appeal from an adverse judgment, even though the action remains pending between the plaintiff and other defendants.' " (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 577-578;

Code Civ. Proc., § 579.)[4] "There may be, in some circumstances, judgments for or against one or more of several plaintiffs or defendants in a single case ([Code Civ. Proc.,] § 578), but there is always one judgment that determines the rights of any one particular party or parties . . . vis à vis another party on the other side of the pleadings." (*Lucky United Properties Investments, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 136.)

Here, the trial court's ruling completely disposed of all the causes of action between the Thoreens and the City. As the result of the ruling on the writ, the sole cause of action remaining to be adjudicated here, the nuisance claim, is between the Thoreens and Ramirez only. As the judgment determines all of the rights of the Thoreens vis à vis the City, this appeal does not violate the single judgment rule (*Lucky United Properties Investments, Inc. v. Lee*, *supra*, 185 Cal.App.4th at p. 136) and is appealable.

2. *Writ review of the Board of Zoning Appeals' ruling is not available in this case*.

Addressing the appeal, the trial court overruled the City's demurrer to the Thoreens' cause of action for writ review. "We independently review the petition to determine whether the [petitioner] has stated a viable cause of action for mandamus relief. [Citation.]" (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700 (*AIDS Healthcare Foundation*).) We conclude the Thoreens are not entitled to review of the Board of Zoning Appeals' decision by writ and so the trial court abused its discretion in overruling the City's demurrer to the Thoreens' first cause of action.

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[4] Code of Civil Procedure section 579 reads: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

a. *Administrative mandamus (Code Civ. Proc., § 1094.5) is unavailable because no hearing was required by law.*

"The writ of administrative mandamus authorized by section 1094.5 applies only to claims challenging administrative orders or decisions 'made as the result of a proceeding *in which by law a hearing is required to be given*, evidence is required to be taken, and discretion in the determination of facts is vested in the [administrative] tribunal . . . .' (§ 1094.5, subd. (a).) In order for section 1094.5 to apply, the hearing must be required by law. [Citation.]" (*300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1250 (*300 DeHaro Street*), italics added; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1268-1269.)

Pasadena's Zoning Code does not require the Board of Zoning Appeals to hold a hearing on an appeal from the Zoning Administrator's interpretation. The Zoning Code specifies, "An appeal or call for review hearing shall be a public hearing if the original decision required a public hearing." (§ 17.72.070, subd. (A).) The original decision was that of the Zoning Administrator who has the authority to interpret the meaning and applicability of the Zoning Code (§ 17.12.020, subd. (A)) and whose determination takes the form of a written interpretation that constitutes precedent for all future interpretation of that provision. (§ 17.12.020, subd. (D)(1).)[5] However, the Zoning Code does not

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[5] Section 17.12.020 governing the "Rules of Interpretation" vests in the Zoning Administrator "the responsibility and authority to interpret the meaning and applicability of all provisions and requirements of this Zoning Code." (§ 17.12.020, subd. (A).) "Where uncertainty exists regarding the interpretation of any provision of this Zoning Code or its application to a specific site, the Zoning Administrator shall determine the intent of the provision. The determination shall take the form of a written zoning administration interpretation which shall constitute the precedent for all future interpretation of the subject section." (§ 17.12.20, subd. (D)(1).)

Section 17.12.030 concerning "Procedures for Interpretations" reads: "Whenever the Zoning Administrator determines that the meaning or applicability of any of the requirements of this Zoning Code are subject to interpretation generally, or as applied to a specific case, the Zoning Administrator may issue an official interpretation or refer the question to the Board of Zoning Appeals for determination. [¶] A. Request for interpretation. The request for an interpretation or determination shall be filed with the Department and shall identify each specific provision in question, and any other

require the Zoning Administrator hold a hearing when interpreting the Code's provisions (§ 17.72.070, subd. (A)). Therefore, the Zoning Code does not require the Board of Zoning Appeals to hold a hearing on the Thoreens' appeal. (§ 17.72.070, subd. (A).) The Thoreens cannot bring their case within the Code of Civil Procedure section 1094.5 based on provisions of the Zoning Code.

Other law might require a hearing at which evidence is taken, such as Government Code section 65900 et seq., which empower local agencies to regulate land use through zoning ordinances. (See *Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 573.) Government Code section 65901 directs zoning administrators to hear *applications* for and revocation of *permits and variances*. (Gov. Code, §§ 65901, subd. (a) & 65905.)[6] Consequently, Pasadena's Zoning Code requires hearings on land use *permit applications* (§ 17.21.030, subd. (A)(4)), concept design review *applications* (§ 17.61.030, subds. (E)(3) & (J)), conditional use *permit applications* (§ 17.61.050, subd. (G)) and *variance applications* (§§ 17.61.080, subd. (F)) [minor variances] & 17.61.080, subd. (F)(2) [variances]). No such application was filed in this case and so this portion of Government Code section 65901 does not mandate that a hearing be held here.

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information necessary to assist the Department in their review. [¶] B. Appeals. Any interpretation of this Zoning Code by the Zoning Administrator or the Board of Zoning Appeals may be appealed in compliance with Chapter 17.72 (Appeals)." (Bold & underlining omitted.)

[6] Government Code section 65901, subdivision (a) reads: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance. The board of zoning adjustment or the zoning administrator may also exercise any other powers granted by local ordinance, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business."

Government Code section 65905, subdivision (a) reads: "Except as otherwise provided by this article, a public hearing shall be held on an application for a variance from the requirements of a zoning ordinance, an application for a conditional use permit or equivalent development permit, a proposed revocation or modification of a variance or use permit or equivalent development permit, or an appeal from the action taken on any of those applications."

Accordingly, *City and County of San Francisco v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099 does not aid the Thoreens as, unlike here, it involved a *permit application.* (*Id*. at pp. 1102-1103.)

Government Code section 65901, subdivision (a) goes on to authorize zoning administrators to "exercise any other powers granted by local ordinance, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business." It is presumably under this authority that Pasadena's Zoning Code empowers its Zoning Administrator to interpret the meaning and application of the Zoning Code *without holding a hearing* (§ 17.12.020). In sum, as no hearing was "required by law" in this case, the Board of Zoning Appeals' decision was not reviewable by administrative mandamus. (Code Civ. Proc., § 1094.5.)

The Thoreens argue that the Board of Zoning Appeals actually held a hearing with the result that administrative mandamus proceeding does lie. However, the Board of Zoning Appeals' de facto hearing does not trigger administrative mandamus review. Code of Civil Procedure section 1094.5 review does not apply "unless the hearing was *required by law* [citation], which was not the case here." (*300 DeHaro Street, supra*, 161 Cal.App.4th at p. 1251, italics added; *Shelden v. Marin County Employees' Retirement Assn*. (2010) 189 Cal.App.4th 458, 463 [administrative mandamus not applicable if agency holds hearing when not required by law].)

Because no law required the Zoning Administrator to hold a hearing to interpret the meaning and application of the Zoning Code, section 1094.5 of the Code of Civil Procedure does not provide the Thoreens an avenue for review of the Board of Zoning Appeals' decision.

b. *Traditional mandate (Code Civ. Proc., § 1085) is unavailable as a method to review the ruling of the Board of Zoning Appeals.*

"A writ of mandate may be issued by any court . . . to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) "The petitioner must demonstrate the public official or entity had a ministerial duty to perform, and the petitioner had a clear

and beneficial right to performance. [Citations.]" (*AIDS Healthcare Foundation, supra,* 197 Cal.App.4th at p. 700.)

"Generally, mandamus is available to compel a public agency's performance or to correct an agency's abuse of discretion when the action being compelled or corrected is ministerial. [Citation.] '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 [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion . . . is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citation.]' [Citations.] Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner. [Citation.]" (*AIDS Healthcare Foundation, supra,* 197 Cal.App.4th at pp. 700-701.)

Here, the Zoning Administrator and Board of Zoning Appeals performed their duties by exercising their judgment on the facts and the Zoning Code. Thus, their conduct was not ministerial. (*AIDS Healthcare Foundation, supra,* 197 Cal.App.4th at pp. 700-701.) Had the Zoning Administrator or the Board of Zoning Appeals declined to act on the Thoreens' inquiry, a writ of mandate would unquestionably lie to compel them to act. But, they acted; they reviewed the facts and the law, and the Board reviewed the Zoning Administrator's determination. (§§ 17.72.020, subd. (A); 17.72.040, subd. (A)(1); 17.72.050, subd. (A)(3)(a); & 17.72.070.) While the Thoreens do not like the conclusion the Board of Zoning Appeals reached, "a court will not 'substitute its discretion for the discretion properly vested in the administrative agency.' [Citation.]" (*Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 241; *AIDS Healthcare Foundation, supra,* at pp. 700-701.)[7]

[7] The Thoreens argued to the trial court that it could compel the ministerial act of ordering the City to file a restrictive covenant preventing the use of the garage's second floor as a sleeping quarters. However, before such an act can become ministerial, a final

Observing that "[q]uasi-legislative acts are ordinarily reviewed by traditional mandate, and quasi-judicial acts are reviewed by administrative mandate" (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1389, citing *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567), the parties argue at length about whether the act of the Board of Zoning Appeals was quasi-legislative or quasi-judicial. Resolution of this argument has no effect on our conclusion because, even were the Board's decision quasi-judicial, administrative mandamus does not lie because a hearing was not "required by law" (Code Civ. Proc., § 1094.5, subd. (a)), and even were the Board's acts quasi-legislative, traditional mandate does not lie to compel it to exercise its discretion in any particular manner (*AIDS Healthcare Foundation*, *supra*, 197 Cal.App.4th at pp. 700-701). Given neither form of writ review was available here, the trial court abused its discretion in overruling the City's demurrer to the Thoreens' writ petition.

As the result of our conclusion that the trial court should have sustained the City's demurrer to the Thoreens' first cause of action for writ review, the trial court had no authority to rule thereafter on the Thoreens' writ petition. Consequently, the judgment appealed from, which includes the issuance of the peremptory writ of mandate and the ruling dismissing the declaratory relief cause of action, must be reversed. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 869-870, pp. 928-929, citing *Lewis v. Upton* (1984) 151 Cal.App.3d 232, 236 [effect of unqualified reversal is to " 'leave the case at large for further proceedings as though it had never been tried' "].)

We wish to clarify that the Thoreens' second cause of action for declaratory relief is not before us; we hold only that the Thoreens cannot state a cause of action for relief under either Code of Civil Procedure section 1094.5 or Code of Civil Procedure section 1085. As the result of our holding, we do not address the substantive issues of the interpretation and application of the Zoning Code in this case.

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determination must be made that the sleeping quarters are an illegal, nonconforming use. Obviously, the trial court has not yet made that determination.

DISPOSITION

The judgment issuing the peremptory writ of mandate and the order overruling the City's demurrer to the first amended writ petition are reversed and the case is remanded to the trial court to enter a new order sustaining the demurrer without leave to amend. The City to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.