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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN RIZZO et al., Plaintiffs and Appellants, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B265442 (Los Angeles County Super. Ct. No. BC518435)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Law Offices of Jason D. Ahdoot, Jason D. Ahdoot, for Plaintiffs and Appellants.

Mary C. Wickham, County Counsel, Elaine M. Lemke, Acting Assistant County Counsel, Scott Kuhn, Deputy County Counsel, for Defendants and Respondents County of Los Angeles; Board of Supervisors of Los Angeles County, Don Knabe, Zev Yaroslavsky, Mark Ridley-Thomas, and Gloria Molina.

Cox, Castle & Nicholson, Edward C. Dygert for Respondent Real Party in Interest Esprit One, LLC.

The Ralph M. Brown Act (Gov. Code, § 54950 et seq.; Brown Act)[1] requires that most meetings of a public agency's legislative body be open to the public. The Brown Act provides that any interested person may commence an action to obtain a judicial determination that a public action taken in violation of the act is null and void.

John Rizzo and The Marina Tenants Association (collectively Rizzo) sought declaratory and injunctive relief against the Los Angeles County Board of Supervisors (the Board) on the ground that it violated the Brown Act by approving a real property transaction in a closed session. Rizzo appeals from the judgment entered after the trial court granted defendants' motion for summary judgment. He contends the judgment should be reversed because defendants admitted they violated the Brown Act by permitting board staff to negotiate the property transaction away from public view. We disagree and thus affirm.

BACKGROUND

Marina del Rey is a public recreational facility owned by the County of Los Angeles (the County) and managed by the County's Department of Beaches and Harbors. The marina comprises parcels of real property, many of which are leased to private concessionaires to be operated in the public interest. In 2003, the County entered into a lease agreement (the 2003 lease) with Esprit One, LLC regarding Marina del Rey parcel 12R

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[1] Undesignated statutory references will be to the Government Code.

(parcel 12R). The 2003 lease requires that the County approve any assignment and transfer of the leasehold.

In 2013, Esprit One proposed to assign and transfer its leasehold interest in parcel 12R to Gateway KW-Esprit I Owner, LLC (Gateway KW). The Department of Beaches and Harbors thereafter conducted several meetings to discuss and negotiate requirements for County approval of the transfer. The meetings were attended by Esprit One; Gateway KW; and Don Geisinger, a Department of Beaches and Harbors staff member, with the assistance of Jeffry A. Heintz, of the law firm Munger, Tolles & Olson, the County's outside counsel. After Geisinger, Heintz, and the Los Angeles County Counsel approved the terms of the proposed transfer, Geisinger submitted a Board letter to the County's Chief Executive Officer recommending that the transfer be approved.

The matter was placed on the Board's June 18, 2013 meeting agenda, and was unanimously approved on that date in open session.

Eight days later, on June 26, 2013, Rizzo requested that the Department of Beaches and Harbors disclose records relating to parcel 12R pursuant to the Public Records Act, section 6250 et seq. In response to the request, Geisinger provided some documents in paper and CD form, made others available for inspection, and informed Rizzo that others were available online or as part of the June 26 Board meeting materials that he acknowledged he already possessed. Geisinger invited Rizzo to contact him if he had any questions about the production, but Rizzo never did.

On August 15, 2013, Rizzo filed the instant lawsuit against the County, the Board, and four County supervisors, and named

Esprit One and Gateway KW as real parties in interest. In the first amended complaint, which is operative, Rizzo alleged the County violated the Brown Act by (1) approving transfer of the 2003 lease from Esprit One to Gateway KW in a secret session, and (2) failing to make required documents public. Rizzo sought declaratory relief, mandamus to set aside the transfer, and an injunction compelling the County to comply with the Brown Act.

In 2014, plaintiffs requested that defendants produce documents pertaining to the 2013 transfer from Esprit One to Gateway KW of the 2003 lease. In response, defendants represented that Rizzo already possessed most of the documents he sought—as they had been produced in response to his Public Records Act in 2013—but all responsive, non-privileged documents not already provided would be made available to him for review at a mutually agreeable time. Defendants ultimately produced 5,271 pages of documents, some of which contained redactions to protect attorney-client communications.

Defendants moved for summary judgment on the ground that the County approved the 2013 transfer of the 2003 lease in a regular public meeting, not in a secret meeting that violated the Brown Act. The trial court denied defendants' first summary judgment motion on the ground that it was unaccompanied by declarations from the County supervisors attesting they did not negotiate the 2013 transfer in secret.

On February 13, 2015, defendants filed a second motion to which they attached the required declarations. In them, Knabe, Yaroslavsky, Ridley-Thomas, and Molina each declared that outside of the regular public meeting held on June 18, 2013, he or she had no personal knowledge of the 2013 property transaction and provided no direction to any county employee regarding

negotiations leading up to it. Geisinger declared all documents provided to the Board were made available to the public. Defendants also offered the deposition testimony of Rizzo himself, in which he admitted he had no evidence of any secret meeting.

On March 11, 2015, one month after defendants filed their second motion for summary judgment, Rizzo filed a motion to compel further responses to his 2014 request for production of documents. In it, he complained that more than 10 percent of the documents defendants produced in 2014 were redacted without explanation. The trial court denied Rizzo's motion to compel "without prejudice to [Rizzo] later appro[a]ching with a factual justification for [his] request."

The record on appeal does not contain Rizzo's opposition to defendants' second summary judgment motion.

The trial court granted summary judgment and entered judgment in favor of defendants.

Rizzo thereafter filed a memorandum of costs, arguing he was the prevailing party because the instant litigation prompted defendants to comply with the Public Records Act, and was thus the catalyst in motivating them to provide the primary relief sought. The trial court granted defendants' motion to tax Rizzo's costs, finding he "was not the prevailing party" and the "action was in fact essentially frivolous." Rizzo then filed a motion for attorney fees, which the trial court denied.

Rizzo appealed from the judgment and the order denying his motion for attorney fees. We consolidated the appeals.

DISCUSSION

Rizzo contends the trial court erred in granting summary judgment and in denying his motion for attorney fees. We disagree with both contentions.

I. Summary Judgment

In ruling on a defense motion for summary judgment, the trial court must determine whether the motion presents material facts sufficient to establish that one or more of the elements of the claim cannot be proved, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (c), (o)(1) & (o)(2).) If the defendant's motion makes such a prima facie showing, the plaintiff's opposition must demonstrate the existence of one or more disputed issues of material fact as to the cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Unless triable issues of material fact exist, no trial is required and the defendant is entitled to judgment on that claim as a matter of law.

On appeal, we apply an independent standard of review to determine whether a trial is required—whether the evidence favoring and opposing the summary judgment motion would support a reasonable trier of fact's determination in the plaintiff's favor on the cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In doing so we view the evidence in the light most favorable to the party opposing summary judgment. (*Id.* at p. 843; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.) We accept as true the facts shown by the evidence offered in opposition to summary judgment and the reasonable inferences that can be drawn from them. (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385-1386.)

"'The Brown Act requires that most meetings of a local agency's legislative body be open to the public for attendance by all.' [Citation.] Its objectives include facilitating public participation in local government decisions and curbing misuse of

the democratic process by secret legislation." (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1075.) In enacting the Brown Act, the Legislature found and declared "that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

To implement the Legislature's intent, "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953, subd. (a).) In addition, "[n]o legislative body shall take action by secret ballot, whether preliminary or final." (§ 54953, subd. (c).) "Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body . . . ." (§ 54954.3, subd. (a).)

In the case of a violation of the Brown Act, "any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of [certain provisions of the Brown Act] is null and void." (§

54960.1, subd. (a).) A challenged action shall not be determined null and void if the legislative body has substantially complied with the specified statutory provision. (§ 54960.1, subd. (d)(1).) Further, "a violation of the Brown Act will not automatically invalidate an action taken by a local agency or legislative body. The facts must show, in addition, that there was *prejudice* caused by the alleged violation." (*Galbiso v. Orosi Public Utility Dist.*, *supra*, 182 Cal.App.4th at p. 670.)

As pertinent here, subdivision (b) of section 54952.2 of the Brown Act prohibits "members of a legislative body" from using "a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."

Section 54953 prohibits secret meetings.

Section 54956.8 permits a legislative body to hold closed sessions with its negotiator prior to the purchase or sale of real property, but "prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate."

Section 54957.5 requires that documents distributed to a legislative body be made available without delay to the public. (§ 54957.5, subd. (a).)

Here, Rizzo alleged defendants violated the Brown Act by communicating through intermediaries to discuss and deliberate transfer of the 2003 leasehold, failing to identify its negotiators during its secret meetings with Esprit One and Gateway KW, and failing to make documents available to the public, in

violation of sections 54952.2, 54953, 54956.8, and 54957.5, respectively.

In support of defendants' motion for summary judgment, members of the Board declared they took no part in negotiating or approving the 2013 transfer of the 2003 leasehold from Esprit One to Gateway KW, other than to approve the transfer after an open public hearing. Geisinger declared all documents provided to the Board concerning the transaction were made available to the public. And defendants offered Rizzo's deposition testimony in which he admitted he had no evidence of any secret meeting.

This evidence established that defendants did not violate the Brown Act as Rizzo alleged, and thus obligated Rizzo to offer countervailing evidence that defendants did violate the act. Because Rizzo neglected to designate his opposition to defendants' summary judgment motion as part of the clerk's transcript, we have no basis upon which to determine that he carried his burden in opposing the motion. Therefore, we conclude summary judgment was properly granted.

Rizzo argues he has "numerous factual allegations concerning" the Board's secret meetings concerning the transfer of parcel 12R, "precise evidence" of which "can be produced should this Court order a remand" to the superior court to inquire behind redactions in the documents defendants produced in 2014 or 2015. As discussed, it was Rizzo's burden to produce any such evidence in opposition to defendants' motion for summary judgment. It is too late to adduce such evidence for the first time on appeal.

Rizzo argues the redactions in the documents defendants produced below were improper, and the material redacted could evidence secret negotiations by the Board. But in his motion to

compel further responses to his production requests, Rizzo attached only 13 pages of redacted material, none of which appears to relate to the transfer of parcel 12R. Speculation about redacted material produced in discovery will not carry a party's burden in opposing summary judgment.

II. Attorney Fees

Because Rizzo did not prevail, he is not entitled to attorney fees. (Cf. *Vasquez v. State of California* (2008) 45 Cal.4th 243, 250-251 [to be entitled to attorney fees, a party must prevail].)

Rizzo argues he is entitled to attorney fees under the Public Records Act because this litigation prompted defendants to produce 5,000 pages in documents that it failed to produce in response to his Public Records Act request. The argument is without merit. First, Rizzo did not sue under the Public Records Act; he sued only for violation of the Brown Act. Second, he made no showing below, and makes none here, that the documents produced by defendants in this litigation should have been produced in response to his Public Records Act request, and were not.

DISPOSITION

The judgment and order are affirmed. Defendants are to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J. JOHNSON, J.