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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOANNE STATHOULIS et al., Plaintiffs and Appellants, v. CITY OF DOWNEY et al., Defendants and Respondents.	B237821 (Los Angeles County Super. Ct. No. BC422656)

APPEAL from an order of the Superior Court of Los Angeles County. Kevin C. Brazile, Judge. Affirmed.

Law Offices of James A. Rainbolt and James A. Rainbolt for Plaintiffs and Appellants.

McCune & Harber and Louis E. Marino, Jr. for Defendants and Respondents.

Plaintiffs and appellants Joanne Stathoulis (Stathoulis), Charles Gianfisco (Gianfisco), and Frisco's Downey, Inc. (Frisco's) (collectively, plaintiffs) appeal from the order dismissing with prejudice their action against defendants and respondents City of Downey (the City), Gilbert A. Livas (Livas), and David Blumethal (Blumenthal) (collectively, defendants) after the trial court sustained, without leave to amend, defendants' demurrer to the third amended complaint (TAC). We affirm the trial court's order.

BACKGROUND

The parties

Frisco's was the owner of a restaurant named "Frisco's Carhop Drive In," which was located on Woodruff Avenue in the City of Downey from 1983 until 2008. Stathoulis owned the real property on which Frisco's operated the restaurant. She leased both the real property and the operation of the restaurant to her son, Gianfisco, in April 2008.

Livas was an assistant city manager and Blumenthal was a senior planner employed by the City.

Third amended complaint

Plaintiffs commenced the instant action in September 2009 against defendants and against the owner and operator of a Bob's Big Boy restaurant (Big Boy restaurant) located approximately three miles from the Frisco's restaurant. After successful demurrers by defendants to the initial complaint and to two subsequent amendments thereto, plaintiffs filed the TAC, asserting causes of action for due process and equal protection violations under the California Constitution, inverse condemnation, intentional interference with prospective economic advantage, and intentional and negligent infliction of emotional distress.

The TAC sets forth the following factual allegations: plaintiffs operated the Frisco's restaurant at the same location for approximately 25 years and obtained and maintained all licenses and permits and paid all fees required to do so. Frisco's was a 50's-style diner that featured singing and roller skating carhops and live music and

entertainment, including amplified music in the outdoor parking and patio areas of the restaurant. The restaurant also hosted promotional gatherings for car and motorcycle clubs and "cruise night" events. These events typically involved large numbers of people walking about the parking area while eating, viewing cars, and listening to live music. Frisco's hosted such events on a regular basis for approximately 25 years, with the City's knowledge and tacit approval.

In August 2008, the City entered into a redevelopment agreement with an individual named Jim Louder (Louder) and an entity named JKBBD, Inc. (JKBBD) to redevelop property located approximately three miles from Frisco's for the purpose of operating a Big Boy restaurant. The Big Boy restaurant would compete directly with Frisco's by catering to diners desiring a 50's-style dining experience, including carhops, music, and entertainment.

Approximately two weeks after the City entered into the redevelopment agreement with Louder and JKBBD, the City notified plaintiffs that they were in violation of the City's municipal code by hosting weekly events without first procuring the necessary City approvals, permits, or licenses.

Plaintiffs met with Blumenthal and other City representatives on September 4, 2008, to discuss the purported violations. At that meeting, plaintiffs explained that Frisco's had operated in the same manner without incident or complaint for 25 years and that it had paid for and been issued the necessary approvals, permits, and licenses. Plaintiffs also pointed out that Frisco's entertainment events were often attended by City police and other City officials and that Frisco's had in the past hosted car shows and other fund raising events on behalf of the City.

After plaintiffs' meeting with Blumenthal, City police officers prevented plaintiffs from continuing to host car club, motorcycle club, and cruise night events and prevented Frisco's from using amplified music in the restaurant's parking and patio areas. Officers also stopped or cited Frisco's patrons for minor offenses.

On October 21, 2008, plaintiffs asked Blumenthal and the City's planning division about obtaining a zoning variance that would allow Frisco's to operate with an entertainment license. That request was denied.

In late October 2008, Stathoulis met with Livas and asked him to explain why the City was now denying Frisco's the ability to provide entertainment and to host car club and cruise night events when Frisco's had done so without objection by the City for the past 25 years. Livas claimed to have no knowledge concerning the matter.

The City's newly imposed restrictions and harassment of Frisco's patrons made operation of Frisco's unprofitable. Plaintiffs ceased operation of the restaurant in November 2008, and Stathoulis sold the underlying real property in February 2009.

The Big Boy restaurant operated by JKBBD and Louder regularly hosts events identical to those previously hosted by Frisco's. These events are attended by the same clubs, organizations, and individuals that were formerly Frisco's patrons. The City has allowed Louder and JKBBD to have entertainment and to host car club, motorcycle club, and cruise night events at the Big Boy restaurant.

Defendants' demurrer

Defendants demurred to the TAC on the grounds that plaintiffs failed to exhaust their administrative remedies, failed to state facts sufficient to constitute any cause of action, and failed to set forth any statutory basis for imposing liability on the City, as required by Government Code section 815. The trial court sustained the demurrer, without leave to amend, as to each of the causes of action asserted against defendants, and thereafter issued an order dismissing the action with prejudice. This appeal followed.

DISCUSSION

I. Standard of Review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be

affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. Inverse Condemnation

Plaintiffs challenge the dismissal of their third cause of action[1] asserted against the City for inverse condemnation. "Inverse condemnation occurs when there is a public taking of (or interference with) land without formal eminent domain proceedings. [Citation.]" (*Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 669 (*Serra*).) A regulatory taking occurs "where the regulation deprives the owner of all economically viable use" of its property. (*Charles A. Pratt Construction Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1080.)

"Special procedural requirements apply where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency." (*Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607 (*Patrick Media*).) Specifically, the property owner must obtain a final administrative decision from the public agency regarding the regulation's application to the owner's property. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10-11.) The owner must also seek judicial review of that administrative decision by a petition for writ of administrative mandamus. (*Id.* at pp. 13-14.) Only after exhausting

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[1] Plaintiffs' first cause of action, for conspiracy to violate civil rights pursuant to title 42 of the United States Code, sections 1982 and 1983, was asserted against only JKBBD and Louder, who are not parties to this appeal. That cause of action is therefore not a subject of this appeal. Plaintiffs do not challenge the dismissal of their second cause of action for alleged violations of the California Constitution.

these administrative and judicial remedies may a property owner seek compensation through an inverse condemnation claim. (*Id.* at pp. 10-14.)

Compliance with the procedural writ requirements is a prerequisite to instituting inverse condemnation proceedings. (*Serra, supra,* 120 Cal.App.4th at p. 669.) "'Regardless of whether [the plaintiff] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by petition for writ of administrative mandate. . . .' [Citation.]" (*Ibid.*) "Failure to obtain judicial review of a discretionary administrative action by a petition for a writ of administrative mandate renders the administrative action immune from collateral attack, either by inverse condemnation action or by any other action. [Citations.]" (*Patrick Media, supra*, 9 Cal.App.4th at p. 608.)

Plaintiffs do not allege in the TAC that they exhausted their administrative and judicial remedies. Rather, they allege that they were excused from pursuing further administrative relief because to do so would be futile. It is true that "[f]ailure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile. [Citation.]" (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936.) The futility exception does not apply, however, to excuse plaintiffs' failure to pursue their available judicial remedies by seeking a petition for writ of mandate. (*Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1063-1064.) Plaintiffs' failure to seek judicial review of the City's actions by a petition for writ of mandate barred their cause of action for inverse condemnation. (*Serra, supra,* 120 Cal.App.4th at p. 669; *Patrick Media, supra*, 9 Cal.App.4th at p. 608.) The trial court accordingly did not err by sustaining defendants' demurrer as to that cause of action.

III. Intentional Interference with Prospective Economic Advantage

Plaintiffs challenge the dismissal of their fourth cause of action for intentional interference with prospective economic advantage. The elements of the tort of intentional interference with prospective economic advantage are "'"(1) an economic relationship between the plaintiff and some third party, with the probability of future

economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 (*Korea Supply*).)

A. Livas and Blumenthal

The trial court sustained defendants' demurrer to the intentional interference with prospective economic advantage cause of action as to Livas and Blumenthal because the TAC alleges no facts demonstrating any intentional acts on the part of these individual defendants. A plaintiff may satisfy the intent requirement of the tort of interference with prospective economic advantage either "by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage," or by "plead[ing] that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1154.) Plaintiffs allege neither specific intent nor knowledge on the part of Livas and Blumenthal. The trial court accordingly did not err by sustaining the demurrer to the fourth cause of action for intentional interference with prospective economic advantage as to these two defendants.

B. The City

Plaintiffs concede that the City's liability for the various causes of action asserted in the TAC is derivative, and therefore necessarily premised on the liability of its employees, Livas and Blumenthal.[2] (Gov. Code, § 815.2.) Because the TAC fails to state a cause of action for intentional interference with economic advantage against Livas and Blumenthal, it also fails to state a cause of action for that tort against the City. The trial court did not err by sustaining the demurrer to the fourth cause of action against the City.

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[2] Notwithstanding this concession, plaintiffs also argue for the first time on appeal that Civil Code section 3479 provides an independent statutory basis for imposing nuisance liability on the City. We address this argument *ante*, in section VI.

IV. Intentional Infliction of Emotional Distress

Plaintiffs contend the trial court erred by dismissing their fifth cause of action for intentional infliction of emotional distress. "The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries actually and proximately caused by the defendant's outrageous conduct. [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) In order to meet the first element, the alleged conduct "'". . . must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." [Citation.]'" (*Ibid.*) "[T]he tort does not extend to 'mere insults, indignities, *threats*, annoyances, petty oppressions, or other trivialities . . . .' [Citations.]" (*Id.* at p. 496, quoting Rest.2d Torts, § 46, com. d, p. 73, original italics.)

A. Livas and Blumenthal

Plaintiffs allege no conduct by Livas or Blumenthal that meets the foregoing standard. Plaintiffs' claims for intentional infliction of mental distress are premised on Blumenthal's denial of plaintiffs' request for a zoning variance, and Blumenthal's and Livas's conduct during two separate meetings with Stathoulis in October 2008. At the first meeting, when Stathoulis asked why they could no longer provide entertainment at Frisco's, Blumenthal claimed he was simply taking direction from Livas, and Livas denied having any knowledge of the matter. At the second meeting, when asked why the City was restricting Frisco's operations, Livas again told Stathoulis that he did not know anything about the matter. None of these statements or actions constitutes extreme and outrageous conduct exceeding the bounds of reason.

B. The City

To the extent that plaintiffs' claim against the City for intentional infliction of emotional distress is premised on the liability of Livas and Blumenthal, that claim fails for the same reasons that plaintiffs fail to state a cause of action against those individual defendants. The TAC alleges no extreme and outrageous conduct by Livas or

Blumenthal that would give rise to any vicarious liability on the part of the City. (Gov. Code, § 815.2.)

The claim against the City for intentional infliction of emotional distress also fails if it is based on the conduct of the City's police officers. Plaintiffs' allegations that police officers prevented Frisco's from hosting car club, motorcycle club, and cruise night events, and from using amplified music in the restaurant's parking and patio areas after the City notified plaintiffs that these activities violated the City municipal code, establish no extreme or outrageous conduct by the officers. The allegations establish only that the officers were enforcing the City's municipal code. The trial court did not err by sustaining the demurrer as to the cause of action against the City for intentional infliction of emotional distress.

V. Negligent Infliction of Emotional Distress

Plaintiffs also challenge the dismissal of their claim for negligent infliction of emotional distress. "Negligent infliction of emotional distress is not an independent tort; it is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. [Citation.]" (*Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 126.) "[T]here is no duty to avoid negligently causing emotional distress to another . . . ." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) Thus, "unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty. . . ." (*Id.* at p. 985.)

Plaintiffs have not alleged any duty or breach of duty owed to them by the individual defendants or by the City. The trial court accordingly did not err by sustaining defendants' demurrer to the cause of action for negligent infliction of emotional distress.

VI. Civil Code Section 3479

Plaintiffs argue for the first time on appeal that the allegations of the TAC state a cause of action against the City for nuisance under Civil Code section 3479. Plaintiffs may advance a new legal theory for the first time on appeal only if they can show that the

allegations state a cause of action. (*20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139, fn. 3.)

A plaintiff capable of stating a nuisance claim against a public entity is not barred by the Tort Claims Act from pursuing that claim against the public entity. The California Supreme Court has held that the Tort Claims Act "does not bar nuisance actions against public entities to the extent such actions are founded on section 3479 of the Civil Code or other statutory provision that may be applicable." (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 937.)

Civil Code section 3479 defines a nuisance as follows: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. (Civ. Code, § 3479.)

Plaintiffs contend the facts alleged in the TAC "support a nuisance claim against the City on the basis of the police presence designed to unlawfully frustrate Plaintiffs' business and deter their patrons." The problem with this contention is that all of the alleged police activity involves enforcing the City's determination that plaintiffs' use of their property violated local zoning ordinances. The gravamen of plaintiffs' claim against the City is thus the allegedly wrongful revocation of the privileges conferred by Frisco's entertainment permit, and not the creation or maintenance of a nuisance under Civil Code section 3479. For example, paragraphs 14 and 17 of the TAC allege that after the City notified plaintiffs that they were operating Frisco's in violation of the municipal code, the City, "through the actions of its police department did in fact, deny FRISCO'S the right to host car club, biker events and cruise night events as those events had been hosted for approximately 25 years and denied Plaintiffs the right to have amplified music in their parking area and or patio area." Paragraph 25 alleges that "the City . . . had the Downey Police in draconian fashion threaten Plaintiffs and their patrons with fines and

arrest if they participated in the entertainment activities which were permitted under the entertainment permit issued by CITY to FRISCO'S." Paragraph 40h of the TAC alleges that the City "imposed a pervasive menacing police presence in order to prevent Plaintiffs from offering live music, hosting car and motorcycle clubs and hosting events in their parking area," and paragraph 44 alleges that the City denied plaintiffs the use of their permits and licenses "by having Downey Police and other CITY officials on the property to prevent Plaintiffs from engaging the very entertainment which the CITY had since 1983 expressly or impliedly approved." These allegations demonstrate that plaintiffs' claims against the City are predicated on the City's denial of rights and benefits purportedly granted to plaintiffs under the terms of their entertainment permit, and not on section 3479 of the Civil Code. The allegations of the TAC do not state a cause of action under a nuisance theory.

VII. Denial of Leave to Amend

Plaintiffs fail to suggest how they would amend the TAC to correct the defects noted above. The burden of proving a reasonable possibility of amending the complaint to state a cause of action "is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court therefore did not abuse its discretion by sustaining the demurrer without leave to amend.

DISPOSITION

The order dismissing with prejudice plaintiffs' action against defendants is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST