Filed 1/26/17 Ngo v. City of Long Beach CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KHIEN NGO et al., Plaintiffs and Appellants, v. CITY OF LONG BEACH, Defendant and Respondent.	B267407 (Los Angeles County Super. Ct. No. BC452763)

APPEAL from judgments of the Superior Court for the County of Los Angeles. John Shepard Wiley, Jr., Judge. Affirmed.

Rallo Law Firm, Arthur J. Travieso and Tin Westen for Plaintiffs and Appellants.

Charles Parkin, City Attorney, and Theodore B. Zinger, Deputy City Attorney, for Defendant and Respondent.

SUMMARY

At issue in this case are two of the many lawsuits filed against the City of Long Beach challenging the city's passage and enforcement of a municipal ordinance prohibiting the operation of medical marijuana dispensaries within the city's borders. (Long Beach Mun. Code, ch. 5.89 (chapter 5.89).) Plaintiffs Khien C. Ngo, Alan Castro, and NatureCann, Inc., appeal from judgments dismissing their first amended complaints (the complaints) after the trial court sustained the city's demurrers without leave to amend.

Plaintiff Ngo is a landlord who leased property to a medical cannabis "collective dispensary" (plaintiff NatureCann, Inc.), and plaintiff Castro is NatureCann's chief executive officer. Mr. Ngo is the only remaining plaintiff in one of the lawsuits (the Ngo complaint), and in the other suit all three plaintiffs remain as parties (the NatureCann complaint). Both complaints allege that chapter 5.89 violates the California Constitution and other state laws, as well as the city charter, and is "invalid and void" as a consequence. The NatureCann complaint also alleges causes of action for malicious abuse of judicial process and violation of the Bane Act (Civ. Code, § 52.1).

We affirm the judgments dismissing the complaints.

FACTS AND LEGAL BACKGROUND

Before we turn to the allegations in the complaints, we briefly note several principles relevant to medical marijuana dispensaries or collectives and to the resolution of plaintiffs' claims.

Federal law prohibits the possession, distribution and manufacture of marijuana. (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729,

738-739 (*Riverside*).) California law also imposes sanctions on marijuana possession, cultivation, and related activities.[1] In California, however, two statutes provide limited exceptions to those sanctions where marijuana is possessed, cultivated, distributed and transported for medical purposes. (*Id.* at p. 739.)

The California statutes are the Compassionate Use Act (CUA; Health & Saf. Code, § 11362.5), adopted by the voters in 1996, and the Medical Marijuana Program (MMP; § 11362.7 et seq.), enacted in 2004. "Among other things, these statutes exempt the 'collective[] or cooperative[] . . . cultiva[tion]' of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities." (*Riverside, supra*, 56 Cal.4th at p. 737.) The CUA and the MMP "have no effect on the federal enforceability of the [Controlled Substances Act (21 U.S.C. § 801 et seq.)] in California." (*Riverside,* at p. 740.)

"[T]he CUA and the MMP do not expressly or impliedly preempt [a city's] zoning provisions declaring a medical marijuana dispensary . . . to be a prohibited use, and a public nuisance, anywhere within the city limits." (*Riverside, supra,* 56

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[1] In November 2016, the voters approved Proposition 64, the Adult Use of Marijuana Act, establishing a comprehensive system to legalize, control and regulate nonmedical marijuana. (Prop. 64, § 3.) The Act also "safeguards local control" of nonmedical marijuana businesses (*id.*, § 2.E.), allowing local governments "to ban nonmedical marijuana businesses as set forth in this Act" (*id.*, § 3(d)). The parties have not sought leave to brief any issue involving Proposition 64, and we find it has no application to the resolution of this appeal.

Cal.4th at p. 752; *id.* at p. 754, fn. 8 ["the CUA and the MMP, by their substantive terms, grant limited exemptions from certain *state* criminal and nuisance laws, but they do not expressly or impliedly *restrict* the authority of local jurisdictions to decide whether local land may be used to operate medical marijuana facilities"].)

With this legal background in mind, we turn to the complaints, first noting one preliminary point:

Chapter 5.89 repealed an earlier March 2010 ordinance that regulated medical marijuana patient collectives, among other things requiring a permit to operate a medical marijuana collective (Long Beach Mun. Code, former ch. 5.87). The NatureCann complaint alleged that the city "dedicated one person to the sole task of writing administrative citations each and every day, fining landlords as well as medical marijuana collective dispensary operators $500.00 per day" for failure to obtain permits to operate the collectives.

At the hearing on the city's demurrers, the city represented to the court that any citations previously issued and any liens entered against Mr. Ngo's property under former chapter 5.87 "will be forthwith released." The deputy city attorney said: "The city is not enforcing liens that were issued pursuant to chapter 5.87," and the court replied, "Nor may it from this point forward." Plaintiffs' counsel stated: "I would agree with the court that based on that representation, the mootness of those causes of action as they concern 5.87 would apply." Accordingly, we need not consider allegations relating to former chapter 5.87.

1. The Complaints

The facts alleged in the complaints are few. The allegations in both complaints consist mostly of contentions and

conclusions of law that we do not, under principles of appellate review, assume to be true. We consider those allegations in our legal discussion, *post*.

a. The NatureCann complaint

Plaintiff NatureCann operated a collective dispensary at 4332 Atlantic Boulevard in Long Beach. Plaintiff Castro is NatureCann's chief operating officer, and plaintiff Ngo is the owner of the premises located at 4332 through 4336 Atlantic Boulevard. Mr. Ngo operated a bakery at 4334 Atlantic Boulevard.

Immediately after the enactment of chapter 5.89 (in February 2012), the city "began to impose administrative liens upon the properties owned by" Mr. Ngo, "regardless of whether a medical marijuana collective dispensary is being operated on such real property which is the subject of the lien imposed, as well as took steps to withdraw their business license regardless of whether or not Plaintiff Khien C. Ngo had an ownership or managerial interest in a medical marijuana collective dispensary." The city "failed and refused to give [Mr. Ngo] a reasonable amount of time to correct and abate the conditions on the property as required by the laws of California."

The NatureCann complaint alleged the city "has badged [*sic*] and interfered with the rights of Plaintiffs through intimidation and/or coercion, and interfered with the right of Plaintiffs to use and make use of medical marijuana and to access to medical marijuana as secured by" the federal and state Constitutions and the laws of California.

Based on these facts, the NatureCann complaint alleged four causes of action for declaratory relief, contending chapter 5.89 is void, invalid or otherwise violates multiple provisions of

state law, the rule against ex post facto laws, the city charter, and the rights to procedural due process, substantive due process, and equal protection. The complaint also alleged a cause of action for violation of statutory and constitutional provisions prohibiting municipal laws that conflict with state laws, as well as causes of action for malicious abuse of judicial process and violation of the Bane Act, and sought damages "according to proof" as well as punitive damages.

b. The Ngo complaint

The Ngo complaint similarly alleged Mr. Ngo's status as the owner of the premises at 4332 through 4336 Atlantic Boulevard, and that he "was a landlord who leased space to a tenant who was a medical marijuana patient collective . . . ." The Ngo complaint alleged that after passage of chapter 5.89, the city "issued administrative citations to Plaintiff," but "Plaintiff does not operate a medical marijuana patient collective." On March 29, 2012, the city issued an administrative order to show cause concerning revocation of Mr. Ngo's business license, based on chapter 5.89.

The Ngo complaint further alleged that on April 19, 2012, the city revoked Mr. Ngo's business license, which "is for Plaintiff's commercial rental business," and has failed to re-issue the license.

Based on these facts, the Ngo complaint alleged five causes of action, one for violation of the statutory and constitutional prohibitions on municipal laws conflicting with state laws, and the others for declaratory and injunctive relief. As in the NatureCann complaint, Mr. Ngo alleges chapter 5.89 is void, invalid or otherwise violates multiple provisions of state law and the city charter, and violates California law because it "operates

retroactively and divests a permittee of vested rights . . . ." Mr. Ngo sought an injunction prohibiting enforcement of chapter 5.89 and reissuance of his business license, as well as damages according to proof and punitive damages.

2. The Trial Court's Ruling

The trial court sustained the city's demurrers to both complaints without leave to amend, and entered judgments in favor of the city in both cases on August 27, 2015.

Plaintiffs filed timely notices of appeal.

3. Requests for Judicial Notice

Defendant filed two requests for judicial notice with this court. On July 27, 2016, defendant requested judicial notice of multiple documents, most of them noticed by the trial court. The documents consist of various pleadings and previous rulings in the trial court; provisions of the Long Beach Municipal Code and the city charter; and letters from the city notifying Mr. Ngo of the hearing on revocation, and later revocation, of his business license (as alleged in his complaint). Plaintiff did not oppose defendant's request, and we grant it.

On August 9, 2016, defendant requested judicial notice of our decision in *The Kind and Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116 (*The Kind and Compassionate*). Plaintiff opposed the request on the ground that defendant "failed to actually explain how and why the matter is relevant" and because the case was "factually distinct from the case at hand." We deny the request for judicial notice as unnecessary, as we may rely on any published precedents we deem applicable.

DISCUSSION

1. Standard of Review

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

2. This Case

Plaintiffs base their claims that chapter 5.89 is invalid on article 11, section 7 of the California Constitution and Government Code sections 37100 (conflict with state law); Government Code section 65008 and Civil Code section 54 (discrimination); Government Code section 53069.4 (administrative penalties); Government Code sections 65854 and 65858, and the Long Beach City Charter (zoning-related provisions); Civil Code section 52.1 (the Bane Act); and several other constitutional principles. As noted at the outset, we conclude neither of the two complaints states any legally sufficient cause of action.

Before we turn to plaintiffs' particular claims, we again note the governing principle established in *Riverside* – a principle that plaintiffs persistently ignore. As previously stated, *Riverside* establishes that the CUA and the MMP "do not expressly or impliedly restrict the authority of local jurisdictions to decide whether local land may be used to operate medical marijuana facilities." (*Riverside, supra,* 56 Cal.4th at p. 754, fn. 8, italics omitted.) The CUA and the MMP "do not . . . grant a 'right' of convenient access to marijuana for medicinal use; or

override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries." (*Riverside, supra,* 56 Cal.4th at pp. 762-763; see also *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1048 ["[i]t is too late in the day . . . to argue that the CUA and MMP[] grant a statutory right to use and/or collectively cultivate medical marijuana"]; *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1553 (*Conejo Wellness Center*) [neither the CUA nor the MMP creates "a state right to cultivate, distribute, or otherwise obtain marijuana collectively, and thereafter to possess and use it, for medical purposes"].)

a. Alleged conflicts with state law (Cal. Const., art. XI, § 7 and Gov. Code, § 37100)

The California Constitution provides that a city may make and enforce all ordinances and regulations "not in conflict with general laws" (Cal. Const., art. XI, § 7), and Government Code section 37100 similarly permits a city's legislative body to pass ordinances "not in conflict with the Constitution and laws of the State or the United States."

Plaintiffs allege that chapter 5.89 – which declares that "[t]he establishment, maintenance, operation, facilitation, of, [*sic*] or participation in a Medical Marijuana Dispensary" is a public nuisance, "and may be abated by the City or subject to any available legal remedies" (§ 5.89.040) – conflicts with state law as stated in *Riverside*. They are plainly mistaken. *Riverside* specifically points out that the CUA and MMP grant exemptions "from certain *state* criminal and nuisance laws," and do *not* "override the zoning, licensing, and police powers of local jurisdictions . . . ." (*Riverside, supra,* 56 Cal.4th at p. 754, fn. 8 &

pp. 762-763; *id.* at p. 754, fn. 8 [the CUA and the MMP do not restrict the authority of local jurisdictions "to decide whether local land may be used to operate medical marijuana facilities"].) Accordingly, neither complaint states a legally sufficient claim for declaratory relief on the basis of conflict with state laws.

b. Government Code section 65008 and Civil Code section 54 (discrimination)

The NatureCann complaint alleged, without elaboration, that the enactment of chapter 5.89 violated Government Code section 65008 and Civil Code section 54 (the Disabled Persons Act or DPA). Section 65008 provides that a planning or land use action is invalid if it denies the enjoyment of "residence, landownership, tenancy or any other land use" because of protected characteristics including physical disability, and the DPA gives individuals with disabilities "the same right as the general public to the full and free use" of streets, highways and other public places, including medical facilities, clinics and the like (Civ. Code, § 54, subd. (a)).

We rejected similar discrimination claims in *The Kind and Compassionate, supra,* 2 Cal.App.5th 116. There, relying on *Riverside*, we held that "municipal regulation of, and bans on, medical marijuana dispensaries cannot operate to discriminate against persons with disabilities, because those persons have no right of convenient access to medicinal marijuana in the first place." (*The Kind and Compassionate,* at p. 126; see *Riverside, supra,* 56 Cal.4th at p. 762 [neither the CUA nor the MMP grant a " 'right' of convenient access to marijuana for medicinal use"].) This case is no different.

c. Government Code section 53069.4

Government Code section 53069.4 provides that an ordinance governing the enforcement and collection of administrative fines or penalties "shall provide for a reasonable period of time . . . for a person responsible for a continuing violation to correct or otherwise remedy the violation prior to the imposition of administrative fines or penalties, when the violation pertains to building, plumbing, electrical, or other similar structural or zoning issues, that do not create an immediate danger to health or safety." (*Id.* subd. (a)(2).)

The NatureCann complaint alleges that chapter 5.89 violates Government Code section 53069.4, "in that it fails to provide for a reasonable time for the persons subject [*sic*] to correct violations of the code and subjects the Plaintiffs to unreasonable and illegal forfeitures and liens."

Plaintiffs allege no facts to show when or what penalties or forfeitures have been exacted, or how plaintiffs could have corrected or remedied the violation. On that basis alone, no claim is stated. Nor does it appear that plaintiffs' violation of the city's ban on medical marijuana facilities "pertains to building, plumbing, electrical, or other similar structural or zoning issues . . . ." (Gov. Code, § 53069.4, subd. (a)(2).) There is no merit in plaintiffs' claim.

d. Government Code sections 65854 and 65858; Long Beach City Charter section 1002

NatureCann's third and fourth causes of action for declaratory relief make an elaborate argument for the invalidity of chapter 5.89 based on section 1002 of the Long Beach City Charter and Government Code sections 65850, 65854, 65858, and 65090. The gist of the allegations is that (1) the city has a

planning commission, and cannot adopt zoning regulations until it has requested a report and recommendation from the planning commission; (2) the Government Code provides that a city with a planning commission must hold a public hearing on proposed zoning ordinances, with various notice requirements, before submitting such ordinances to the city council; (3) under Government Code section 65858, the city can avoid these procedures by adopting an urgency measure, but cannot do so unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety or welfare, and approval is by a four fifths vote of the city council.

Plaintiffs allege chapter 5.89 is void because the city did not comply with points (1) and (2) above, and "cannot prove that there is a current and immediate threat to the public health, safety, or welfare . . . and [chapter] 5.89 has not passed by the required four fifths vote (seven votes of the City Council . . .[)]." These claims are both factually and legally meritless.

First, there is no legal basis for alleging chapter 5.89 was not lawfully enacted. The ordinance appears in the city's municipal code provisions regulating businesses (title 5), not among its zoning ordinances (title 21). As the city's demurrer pointed out, section 211 of the city charter allows for "emergency ordinances for the immediate preservation of the public peace, health and safety . . . ." Such ordinances are required to contain a separate section defining the emergency, and a separate roll call on the question of the emergency must be taken. (Long Beach City Charter, § 211.) The ordinance adding chapter 5.89 to the municipal code contains the required explanation of the emergency (ORD-12-0004, § 5), as well as certification of the separate roll call vote on the emergency (9-0) and the 8-1 vote on

the ordinance itself (*id.*, § 6). Plainly the ordinance passed by the required four-fifths vote.

Second, neither the city charter provision nor the Government Code provisions plaintiffs cite are applicable in the circumstances here. The city charter provision cited states that the city council "shall not adopt or amend any such ordinances or resolutions until it has first requested a report and recommendation" from the planning commission. (Long Beach City Charter, § 1002, subd. (c).) But "any such ordinances" refers to "such ordinances or resolutions . . . as are necessary to implement the General Plan, specific neighborhood plans and redevelopment area plans." (*Ibid.*) As noted above, chapter 5.89 does not appear among the city's "zoning regulations" in title 21 of the municipal code.

Similarly, Government Code section 65850 authorizes city and county legislative bodies to "[r]egulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes." (*Id.*, subd. (a).) The planning commission hearing and notice requirements in Government Code sections 65854 and 65090 have no application in the circumstances here. Nor does Government Code section 65858, which governs the adoption of interim zoning ordinances as urgency measures.

e. Other constitutional claims

The NatureCann complaint alleges that the enactment of chapter 5.89 "violates the rule against ex-post facto laws and is retroactive zoning"; "violates their right to procedural due process"; "is a denial of substantive due process"; and is "a denial of the right to equal protection in that the State of California

conferred a statutory benefit to seriously ill Californians who could benefit from the use of medical marijuana." Citing *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, both complaints allege chapter 5.89 "operates retroactively and divests a permittee of vested rights previously acquired [and] prohibits the operation of existing medical marijuana collective dispensaries which have already engaged in substantial building or incurred expenses in connection therewith."

These contentions fail. We rejected similar claims of due process violations in *The Kind and Compassionate*, where we said: "Plaintiffs never had a vested property right to operate a medical marijuana dispensary in the city." (*The Kind and Compassionate, supra,* 2 Cal.App.5th at p. 128.) Here, plaintiffs do not allege the city ever issued NatureCann a permit to operate a medical marijuana dispensary and, as the city again points out, its zoning code is drafted in a permissive fashion, so that any use not enumerated in the municipal code is presumptively prohibited. (Cf. *Conejo Wellness Center, supra,* 214 Cal.App.4th at p. 1562 [the plaintiff's operation of a collective medical marijuana dispensary "was always unlawful: first, as a use not expressly permitted by the [municipal code], and later, as a use expressly banned by the [municipal code]"; the plaintiff was "therefore not entitled to the constitutional protections afforded property owners or lessees engaged in lawful existing nonconforming uses"]; *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433 ["where a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*"].)

Here, as in *The Kind and Compassionate*, plaintiffs do not explain why this principle does not or should not apply in this

case. (Cf. *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 ["It has long been the rule in this state . . . that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance *upon a permit issued by the government*, he acquires a vested right to complete construction in accordance with the terms of the permit." (Italics added.)].)

In the absence of factual allegations that would establish a vested right, at any time, to operate a marijuana dispensary, plaintiffs cannot state a claim for deprivation of vested property rights. Nor do they allege any facts suggesting a denial of procedural due process, or of equal protection of the laws based on the "statutory benefit" conferred by the CUA and MMP. (See *Riverside, supra,* 56 Cal.4th at p. 762 [the CUA and the MMP "do not . . . grant a 'right' of convenient access to marijuana for medicinal use"].)

f. Claims for violation of the Bane Act and malicious abuse of judicial process

The Bane Act permits a civil action for damages "for 'certain misconduct that interferes with' federal or state laws, if accompanied by threats, intimidation, or coercion, and whether or not state action is involved." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843.) The NatureCann complaint alleges, as described in the facts, *ante*, that the city "badged [*sic*] and interfered with the rights of Plaintiffs through intimidation and/or coercion . . . ." The complaint, however, does not describe any such acts of intimidation or coercion directed at plaintiffs.[2]

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[2] The NatureCann complaint alleges the Long Beach Police Department, "prior to the enactment of 5.89 illegally smashed the doors down to several medical marijuana collective dispensaries

Moreover, as we stated in *The Kind and Compassionate* – where we found no error in sustaining the city's demurrer to a Bane Act cause of action – "there is no federal or state law granting plaintiffs the right to lease property to operate a marijuana collective, so defendants could not have interfered with any such right." (*The Kind and Compassionate, supra,* 2 Cal.App.5th at p. 128.)

Plaintiffs' claim of malicious abuse of judicial process likewise fails to state a legally sufficient claim. The allegations refer to the period before enactment of chapter 5.89, and the claim is therefore moot in light of the city's representation that any citations previously issued and any liens entered against Mr. Ngo's property under former chapter 5.87 "will be forthwith released," and that the city "is not enforcing liens that were issued pursuant to chapter 5.87 . . . ." And in any event, as the trial court pointed out, plaintiffs pled no specific facts to establish the city acted with malice in allegedly issuing "thousands of administrative citations," nor do plaintiffs cite any legal authority supporting this cause of action.

g. Amendment

Plaintiffs contend the trial court erred in denying leave to amend their complaints. Indeed, in their reply brief plaintiffs say this is the "central issue on this appeal," and they "demonstrated through argument that the defects were curable . . . ." Plaintiffs make the latter assertion repeatedly in their appellate briefs, but

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without warrant or probable cause," and "used a low-down heartless soulless murderer . . . as a confidential informant to break into certain medical marijuana collective dispensaries." We ignore this allegation, as it does not assert these actions were directed at plaintiffs.

nowhere in their briefing do they specify what facts they would allege, nor do they mention why they did not allege any such facts in their April 2015 first amended complaints.

At the hearing on the demurrer in the trial court, plaintiffs said they could allege facts to "parse out" the differences between Mr. Ngo, who was merely a landlord, and other plaintiffs who were involved in the operation of a collective dispensary. When Mr. Ngo learned the other plaintiffs were operating a dispensary, he evicted them. Plaintiffs argued they could allege chapter 5.89 was misapplied to Mr. Ngo. But plaintiffs have never explained how these facts might cure the defects in the complaint we have described in this opinion. Plaintiffs' claim on appeal that they "did not clearly state their argument that the application of [chapter 5.89] against a landlord is unconstitutional and that [chapter 5.89] was illegal or applied illegally" does not suffice.

DISPOSITION

The judgments are affirmed. The city shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.