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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VENICE STAKEHOLDERS ASSOCIATION, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B272373 (Los Angeles County Super. Ct. No. BC562230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Alarcon, Judge. Affirmed.

Turner Friedman Morris & Cohan and Jonathan M. Deer for Plaintiff and Appellant.

Michael N. Feuer, Blithe S. Bock and Matthew A. Scherb for Defendant and Respondent City of Los Angeles.

Mary C. Wickham, County Counsel, Elaine M. Lemke, Assistant County Counsel, and Starr Coleman, Deputy County Counsel, for Defendant and Respondent County of Los Angeles.

Venice Stakeholders Association (appellant) filed a complaint against the City of Los Angeles (City) and County of Los Angeles (County) (collectively respondents) alleging nuisance in the Venice neighborhood of the City. Appellant sought injunctive relief to require respondents to abate health and safety hazards in the neighborhood. The trial court granted summary judgment in respondents' favor. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is a corporation composed of residents and property owners in Venice, a beachside neighborhood in the City. In October 2014, appellant and five individuals filed a complaint against the City and County seeking injunctive relief to require respondents to abate nuisances on property owned and maintained by respondents at the Venice Beach Recreation Area (VBRA) and the Venice Boardwalk.[1] The complaint asserted causes of action for public nuisance under Civil Code section 3480 and private nuisance under Civil Code section 3479. The complaint alleged that respondents failed to clean up health and safety hazards left in public spaces by transient and homeless people, such as tents, sleeping bags, drugs, trash, human waste, and vermin. The complaint also alleged that respondents failed to address "unreasonable loud noise from yelling and music on the VBRA, Venice Boardwalk and

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[1] Although Venice is part of the City, the complaint alleged that "the County owned, leased, occupied, controlled and/or maintained portions of land" along the VBRA.

adjoining streets at all hours of the night." The complaint asserted that the City failed to enforce Los Angeles Municipal Code (LAMC) sections 56.11, prohibiting storage of personal property on a parkway or sidewalk, and 63.44.D, prohibiting camping in the park. Appellant and the individual plaintiffs alleged that City and County officials had ignored repeated requests to control and maintain the public walkways and abate the conditions.

Respondents demurred to the complaint. The trial court overruled both demurrers, stating that "[t]he pleading at least partly alleges statutory nuisances not subject to immunities, such as the failure to maintain public property free of garbage, which could involve simply picking up litter, and not require any law enforcement activities, or any infringing upon homeless rights."

Respondents filed motions for summary judgment, which the trial court denied. The court found disputed issues of material fact, stating that declarations submitted in opposition to the summary judgment motions indicated that respondents "do not really clean up as frequently and thoroughly as they claim, but instead rarely do, and leave some objects on the sidewalks and streets." The court further reasoned that the pleading did not solely raise issues subject to immunity analysis because it was "sufficiently broad in scope, to include simple issues such as trash cleanup, other than more concerning issues of law enforcement or homeless rights."

After the trial court denied respondents' motions for summary judgment, we issued an alternative writ staying the proceedings and ordering the superior court either to grant respondents' summary

judgment motions or show cause why a peremptory writ should not issue. The superior court subsequently granted respondents' summary judgment motions and entered judgment in favor of respondents and against appellant and the other plaintiffs. Appellant timely appealed.[2]

DISCUSSION

"A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. [Citation.] The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. [Citation.] [¶] We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. [Citation.]" (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 180–181.)

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[2] The individual plaintiffs are not party to this appeal.

"The first step in analyzing any motion for summary judgment is to identify the elements of the challenged cause of action or defense in order to isolate those targeted by the motion." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757 (*Cole*).) Appellant's complaint alleged public nuisance and private nuisance.

Civil Code section 3479 defines 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."

Thus, the elements of a cause of action for private nuisance are: (1) "the plaintiff must prove an interference with his use and enjoyment of his property"; (2) "'the invasion of the plaintiff's interest in the use and enjoyment of the land [must be] substantial, i.e., . . . it cause[s] the plaintiff to suffer "substantial actual damage"'"; and (3) "'"[t]he interference with the protected interest must not only be substantial, but it must also be unreasonable" [citation], i.e., it must be "of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land."' [Citation.]" (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 262–263.)

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons,

although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right. [Citation.]" (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79.) In order to establish a public nuisance claim, "[a] plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm. [Citations.]" (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359 (*Citizens*).)

The complaint alleged that respondents failed to maintain and control their property by allowing transients and other people to leave personal property, such as sleeping bags, tents, furniture, and cars, in the VBRA, along the Venice Boardwalk, and adjoining streets and sidewalks. This failure allegedly violated sections 63.44.D and 56.11 of the LAMC and led to substantial and unreasonable interference with the plaintiffs' and the public's safety and use of their properties. The allegations of this interference included transients entering and leaving trash and human waste on individual plaintiffs' properties, exposure to harassment and violent behavior by people camping outside, decreased property values, and noises such as screaming and loud fighting at night.

We conclude that respondents are entitled to summary judgment because public entity immunity under the Government Claims Act

(Gov. Code, § 810 et seq.)[3] ("the Act"), provides "'a complete defense'" to appellant's causes of action. (*Cole*, *supra*, 205 Cal.App.4th at p. 758.) "The immunity principle is rooted in the separation of powers doctrine, that the judicial branch should not interfere in the discretionary decisions of the Legislature or the executive branch." (*Fuller v. Department of Transportation* (2001) 89 Cal.App.4th 1109, 1117; see *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 165 ["under the separation of powers doctrine, courts lack power to interfere with legislative action at either the state or local level"].)

"Except as otherwise provided by statute: [¶] [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (§ 815, subd. (a).) The Act "generally affords a public employee personal immunity from suit when the act or omission for which recovery is sought resulted from 'the exercise of the discretion vested in him.' (§ 820.2.) This 'discretionary act' immunity extends to 'basic' governmental policy decisions entrusted to broad official judgment." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 976 (*Caldwell*); see Cal. Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 2018) § 10.6 ["The discretionary immunity of public employees under [section] 820.2 is made applicable to public entities by . . . 815.2(b)."].)

"[S]ection 815 of the Government Code does not bar nuisance actions against public entities to the extent such actions are founded on

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[3] Unspecified statutory references will be to the Government Code.

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 (*Nestle*).)[4] Nonetheless, appellant's nuisance actions are barred under the discretionary immunity provided by section 820.2 of the Act.

"Immunity is reserved for those '*basic policy decisions* [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' [Citation.] Such 'areas of quasi-legislative policy-making . . . are sufficiently sensitive' [citation] to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process' [citation]." (*Caldwell*, *supra*, 10 Cal.4th at p. 981.) Discretionary immunity does not apply to "lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated. [Citation.]" (*Ibid.*)

"Courts have found the following to constitute discretionary decisions for which police officers are immune under section 820.2:

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[4] We disagree with the City's argument that *Nestle* has been overruled by *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175 (*Eastburn*).) *Eastburn* held that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714," which provides for liability based on willful or negligent acts. (*Id.* at p. 1183.) *Eastburn* did not address *Nestle* or public entity liability under Civil Code section 3479 or 3480, which do create "some specific duty of care." (*Eastburn*, *supra*, 31 Cal.4th at p. 1183.) (See *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1349 [relying on *Nestle* to hold that "[g]overnment liability under Government Code section 815 et seq. may be based upon public nuisances per se"].)

(1) the decision to pursue a fleeing vehicle [citations]; (2) the decision to investigate or not investigate a vehicle accident [citation]; (3) the failure to make an arrest or to take some protective action less drastic than arrest [citation]; (4) the decision whether to use official authority to resolve a dispute [citation]; and (5) the decision whether to remove a stranded vehicle [citations]." (*Conway v. County of Tuolumne* (2014) 231 Cal.App.4th 1005, 1015.) Section 820.2 also has been relied upon to grant immunity to social workers "for their child removal and placement decisions in dependency proceedings" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1381 (*Christina C.*)), to a county treasurer who exercised discretion involving "crucial investment policy decisions that assessed the risks and advantages of competing investment opportunities" (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 434), and to "votes by members of a school district's governing board whether to renew the superintendent's employment contract" (*Caldwell*, *supra*, 10 Cal.4th at p. 982).

Examples of lower-level decisions not entitled to immunity include "a bus driver's decision not to intervene in one passenger's violent assault against another [citation], a college district's failure to warn of known crime dangers in a student parking lot [citation], a county clerk's libelous statements during a newspaper interview about official matters [citation], university therapists' failure to warn a patient's homicide victim of the patient's prior threats to kill her [citation], and a police

officer's negligent conduct of a traffic investigation once undertaken [citation]." (*Caldwell*, *supra*, 10 Cal.4th at pp. 981–982.)

Respondents contend that decisions regarding sanitation and homelessness services are discretionary decisions immune from liability under section 820.2, citing *Taylor v. Buff* (1985) 172 Cal.App.3d 384 (*Taylor*). We agree. Decisions regarding the enforcement of the municipal code, law enforcement, and sanitation services are basic policy decisions "[a]t the core of this immunity" under section 820.2. (*Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1341 (*Freeny*).)

In *Taylor*, the court affirmed on immunity grounds the grant of summary judgment in favor of county officials who had made budgetary decisions not to repair locks on cell doors in the county jail, resulting in attacks on inmates by other inmates. The court explained that "[a] decision involving the allocation of limited funds is a purely discretionary one. 'A governmental decision involving essentially political considerations is regarded as "discretionary" and thus immune from liability. The category of political decisionmaking includes questions of budgetary and fiscal policy, personnel administration standards, allocation of available resources according to variable priorities of need, and choices between competing plans for accomplishing approved objectives. [Citations.]' [Citation.]" (*Taylor*, *supra*, 172 Cal.App.3d at p. 390.)

The declarations submitted by respondents in support of summary judgment indicate that respondents have made budgetary and policy

decisions regarding how to deal with the conditions of which appellant complains. For example, Gonzalo Barriga, an environmental compliance inspector for the City's Bureau of Sanitation, stated that the City implemented a program in the Venice Beach area called Operation Healthy Streets in January 2014. Pursuant to this program, beginning in May 2015, the City cleaned the Venice Boardwalk and adjacent areas every Friday. On June 19, 2015, the Operation Healthy Streets program collected one ton of solid waste and 220 pounds of hazardous waste from the Venice Boardwalk and a similar amount from a homeless encampment at 3rd Avenue and Rose Avenue.

Steven S. Pedersen, chief environmental compliance inspector in the City's Bureau of Sanitation, stated that Operation Healthy Streets took place every Friday and covered the Venice Boardwalk, adjacent grassy and recreation areas, the intersection of 3rd Avenue and Rose Avenue, the library, and "the beach sand up to the water line."

Stefanie Smith, a park maintenance supervisor for the City's Department of Recreation and Parks, stated that she directed approximately 50 employees to pick up litter from the VBRA daily from 6:00 a.m. to 10:00 p.m. and to clean six restroom facilities. In addition to cleaning activities that included sweeping, mopping, graffiti removal, and pressure washing, some employees of the Department of Recreation and Parks participated in the Operation Healthy Streets program.

Los Angeles Police Department Sergeant Theresa Skinner stated in a declaration that the police department enforced several City ordinances at its discretion. These ordinances included the following: LAMC section 41.18, prohibiting sleeping on a street or sidewalk;

LAMC section 42.15, restricting commercial vending and regulating noise levels on the boardwalk; LAMC section 56.11, prohibiting people from leaving personal property on a sidewalk; and LAMC section 63.44, prohibiting loitering in a public area between midnight and 5:00 a.m. and camping in a City park.

It is clear from these declarations that the City has made discretionary decisions regarding law enforcement and cleaning and maintenance schedules. In addition to these declarations describing respondents' efforts to address the conditions created by the number of transient and homeless people in the area, it was undisputed that "Council District 11, which includes Venice, sought to enter into a personal services contract with People Assisting the Homeless . . . in order to facilitate finding permanent housing for chronically homeless individuals in Venice." It was further undisputed that the City Council adopted a motion to provide $500,000 to fund Operation Healthy Streets in Venice in its 2014-2015 budget.

As to the County, it is undisputed that the City, not the County, has law enforcement jurisdiction in Venice and provides street cleaning and trash collection services. The County provides some funding and resources for homeless and mental health services in the area. Like law enforcement and sanitation services, and like child removal and placement decisions in dependency proceedings (*Christina C.*, *supra*, 220 Cal.App.4th at p. 1381), these services constitute basic policy decisions at the core of the immunity provided by section 820.2. (*Freeny*, *supra*, 216 Cal.App.4th at p. 1341.)

Appellant's declarations in opposition to summary judgment are not sufficient to withstand summary judgment. Arthur D. Kraus stated that he had lived in Venice for 12 years and that he took weekly morning walks on the Venice Boardwalk. Kraus asserted that, beginning in May 2015, he saw employees of the Department of Recreation and Parks picking up trash along the VBRA on Friday mornings but that trash and human waste remained in the area the rest of the week.

Matt Shaw stated that he had lived near the intersection of 3rd Avenue and Rose Avenue for five years and that transients and homeless individuals congregated in many areas of the Venice Boardwalk and VBRA. He rarely saw Los Angeles Police Department officers try to awaken people sleeping on the sidewalks near his home, and officers did not check to see whether people ever left.

Doug Himmel stated that he had lived in Venice since 2009 and took walks twice daily. He stated that, in six years, he had never seen four to six officers trying to awaken people sleeping on the sidewalks at 6:30 a.m. He stated that, beginning in May 2015, he saw Department of Recreation and Parks employees picking up trash and litter on Friday mornings but that City employees often did not remove shopping carts, tents, tarps, and other items, and that unreasonable amounts of trash remained during the rest of the week.

Mark Ryavec declared that, during his daily walks near his home in Venice, over six years he had witnessed only one occasion in which officers awakened people sleeping on the sidewalk at 6:30 a.m. He saw City employees pick up trash and litter on a weekly basis beginning in

May 2015 but stated that unreasonable amounts of trash remained during the rest of the week.

Appellant's evidence is not sufficient to overcome the immunity defense. The fact that these individuals have not personally witnessed police officers awaken and remove people sleeping on the sidewalk does not mean that the City never enforces LAMC section 41.18 or that respondents are required to increase law enforcement patrols. (See *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 432 ["speculation or conjecture" not sufficient to defeat a summary judgment motion].) Nor does the accumulation of trash during the rest of the week after the weekly cleaning mean that respondents are required to clean more often.

The frequency of law enforcement patrols and cleaning services are classic discretionary matters of "'budgetary and fiscal policy'" and "'allocation of available resources according to variable priorities of need'" subject to immunity under section 820.2. (*Taylor*, *supra*, 172 Cal.App.3d at p. 390.) "'The budgetary process entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands. It involves interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.' [Citations.]" (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1788.)

In addition to immunity under section 820.2 for discretionary acts, the Act provides a specific immunity regarding police protection services in section 845, which states: "Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." "[S]ection 845 was designed to protect from judicial review in tort litigation the political and budgetary decisions of policymakers, who must determine whether to provide police officers or their functional equivalents. [Citations.]" (*Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1463.)

Appellant contends that respondents mischaracterize its claims as "an attack on the homeless" and that appellant is not seeking additional police enforcement. However, appellant's allegations consist entirely of conduct and situations caused by the large transient population in the area and by the alleged failure to enforce LAMC sections designed to prevent camping and storage of personal property in public spaces, ordinances which would be enforced by increased law enforcement. The abatement of appellant's complaints regarding noise also would require increased law enforcement of applicable ordinances. Similarly, the remedy for appellants' complaint that waste returns after the weekly trash pickup would be to increase the frequency of cleaning and trash pickup. (See *Citizens*, *supra*, 8 Cal.App.5th at p. 364 [affirming summary judgment in nuisance action, noting that the trial court "properly declined to compel the City to use its discretion in a particular manner"].) Respondents' decisions regarding how to deal with the

conditions created by the homeless population are discretionary acts entitled to immunity under section 820.2.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.