Filed 8/29/17 Filler v. City of Santa Monica CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AARON G. FILLER, Plaintiff and Appellant, v. CITY OF SANTA MONICA et al., Defendants and Respondents.	B271488 (Los Angeles County Super. Ct. No. SC124184)

APPEAL from an order and judgment of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Affirmed.

Aaron G. Filler, in pro. per., and Tensor Law for Plaintiff and Appellant.

Joseph Lawrence, Interim City Attorney, Karen S. Duryea, Deputy City Attorney, for Defendants and Respondents City of Santa Monica and Margaret Griffin.

Collins Collins Muir + Stewart, Brian K. Stewart, Christian E. Foy Nagy for Defendants and Respondents Margaret Griffin and John Enright.

Appellant Aaron G. Filler (Filler) appeals from an order granting respondents the City of Santa Monica (City), Margaret Griffin (Griffin), as an individual and in her official capacity as an Architectural Review Board member/commissioner, and John Enright's (Enright) (collectively, Respondents) special motions to strike the first (inverse condemnation), second (qui tam action for enforcement of Santa Monica Municipal Code, part 9.04.14.110(c)), fourth (unjust enrichment), fifth (denial of equal protection), and sixth (intrinsic fraud on the court) causes of action contained in the first amended complaint pursuant to Code of Civil Procedure section 425.16,[1] hereinafter, the anti-SLAPP statute.[2] Filler also appeals from the judgment of dismissal after the trial court sustained without leave to amend the demurrer filed by the City and Griffin, in her official capacity, to the seventh cause of action (void for vagueness challenge to land use regulation).

In May 2015, Filler filed a lawsuit against his neighbors Enright and Griffin, as an individual (Enright/Griffin), seeking to privately enforce certain Santa Monica Municipal Code (Santa Monica Mun. Code) zoning ordinances against an "accessory building" they constructed on their property adjacent to their residence. Filler alleged the accessory building should be torn down because the permit obtained was based on fraudulent measurements, illegally avoided required zoning variances and improperly allowed his neighbors to look into his property. In the same lawsuit, Filler sued the City and Griffin, in her official capacity (City/Griffin), alleging that in 2009 the

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

City erroneously denied a zoning variance for construction of an upper story to his residence.

We conclude the trial court properly granted Respondents' motions to strike the first, second, fourth, fifth, and sixth causes of action because they were based on Respondents' statements made in connection with the variance proceeding before the Santa Monica Planning Administration (SMPA), which was activity protected under the anti-SLAPP statute. We also conclude the trial court properly sustained the City/Griffin's demurrer without leave to amend to the seventh cause of action. Accordingly, we affirm.

BACKGROUND

In January 2008, Filler applied for a permit from the City to add a second story to his residence located at 1356 Sunset Avenue, Santa Monica, California. Upon review of his proposal, the SMPA determined the "basement" of his residence should be classified as a first story, and therefore the addition of an upper story would be classified as a third story, requiring a zoning variance.[3] On September 11, 2008, Filler applied for a variance, and, on February 17, 2009, the SMPA approved the variance.

On March 4, 2009, Enright/Griffin, who reside across the street from Filler, filed an appeal of the SMPA's decision approving the variance. On

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[3] Santa Monica Mun. Code, part 9.04.20.10.010 (Jun. 2013) defines "variance" as: "A variance is intended to allow variations where practical difficulties, unnecessary hardships or results inconsistent with the general purpose of [the Santa Monica Mun. Code] would occur from its strict literal interpretation and enforcement." (See *Hamilton v. Board of Supervisors* (1969) 269 Cal.App.2d 64, 65–66 [a variance "exist[s] because it is recognized that, within a 'zone,' there will be individual lots or tracts that, because of peculiar shape, unusual topography, or some similar peculiarity, cannot be put to productive use if all of the detailed requirements for that zone are to be strictly applied"].)

November 11, 2009, following a public hearing, the SMPA granted the appeal and denied the variance.

On February 8, 2010, Filler filed a petition for writ of mandamus, challenging the SMPA's decision denying the variance. On March 7, 2011, the Los Angeles Superior Court denied the petition. Filler did not appeal from this judgment.

On May 15, 2014, Filler observed a building crane and truck carrying steel beams to the Enright/Griffin residence. He discovered his neighbors were constructing an accessory building, which he believed was in violation of certain Santa Monica Mun. Code zoning ordinances. Although he contacted the City and advised it of his perceived zoning violations, the City declined to investigate.

On May 15, 2015, Filler filed a complaint against the City, Griffin, in her official capacity and as an individual, and Enright in Los Angeles Superior Court. After amendment on July 8, 2015, and corrections made on July 27, 2015, the complaint alleged causes of action for: (1) inverse condemnation, (2) qui tam action for enforcement of Santa Monica Mun. Code, part 9.04.14.110(c) (qui tam); (3) trespass to land, (4) unjust enrichment, (5) denial of equal protection, (6) intrinsic fraud on the court, and (7) a void for vagueness challenge to the land use regulation (void for vagueness). Filler's claims for inverse condemnation and denial of equal protection were alleged only against the City/Griffin, his claim for intrinsic fraud on the court was alleged only against the City, and his claims for qui tam and unjust enrichment were alleged only against Enright/Griffin.

In August 2015, the City/Griffin and Enright/Griffin filed special motions to strike the causes of actions alleged against them pursuant to the anti-SLAPP statute, arguing they were being sued for exercising their

constitutionally protected rights and that Filler could not succeed on the merits of the claims he had alleged against them. That same month, the City/Griffin filed a demurrer, arguing the first amended complaint failed to state facts sufficient to constitute a cause of action, it was time-barred by the statute of limitations, and Filler was barred from relitigating issues that had previously been adjudicated against him.

On February 2, 2016, the trial court granted the City/Griffin's motion to strike the first (inverse condemnation), fifth (denial of equal protection), and sixth (intrinsic fraud on the court) causes of action, but denied the motion as to the seventh cause of action (void for vagueness). It ruled the first, fifth and sixth causes of action were based on "protected conduct arising from defendants' statements made during the variance proceeding before the SMPA and the writ proceeding in court." It also ruled the inverse condemnation claim failed because there was "no taking," and the equal protection claim failed because there was "no showing that the defendants treated persons in like circumstances differently."

That same date, the trial court granted Enright/Griffin's motion to strike the second (qui tam) and fourth (unjust enrichment) causes of action, but denied the motion as to the third cause of action (trespass to land).[4] It ruled the second and fourth causes of action involved "defendants' petition for their own building permit or in opposing and appealing [Filler's] application for a variance," which was "protected conduct." It also ruled "no qui tam claim [was] alleged" because there were no allegations "that defendant submitted a false claim to a public entity for money, property, or services."

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[4] Filler's third cause of action (trespass to land) is not part of this appeal.

On February 4, 2016, the trial court granted the City/Griffin's demurrer to the seventh cause of action (void for vagueness). It ruled the seventh cause of action was a "declaratory relief claim which require[d] a controversy"; and, because the Santa Monica Mun. Code zoning ordinances relied on by Filler no longer exist, there was "no controversy for the [trial] court to decide." On February 25, 2016, the trial court entered judgment in favor of the City/Griffin and the action against them was dismissed with prejudice.

On April 4, 2016, Filler filed a notice of appeal.

CONTENTIONS[5]

Filler makes the following contentions on appeal: (1) the trial court erred in granting the City/Griffin's anti-SLAPP motion because he is challenging the 2009 SMPA decision itself, which is not protected activity under the anti-SLAPP statute; (2) he is "likely to prevail" on his inverse condemnation claim because the denial of his application for a variance "was a *taking* in the form of an *exaction*"; (3) he stated a valid equal protection claim because the City failed to apply the variance requirement equally since it did not require Enright/Griffin to apply for a variance for construction of their accessory building; (4) the trial court erred in granting Enright/Griffin's anti-SLAPP motion because it improperly changed his qui tam claim into one under the False Claim Act and, had the trial court considered his qui tam

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5 Filler does not present any argument concerning the trial court's ruling "SLAPPing" his sixth cause of action (intrinsic fraud on the court). "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) We decline to develop his argument for him, and therefore consider any challenge to the trial court's ruling on this claim to be waived.

claim as pled, he established he was likely to prevail based on "sufficient evidence" that Enright/Griffin "committed a gross patent violation" of the Santa Monica Mun. Code zoning ordinances by providing false information to the City in order to obtain a permit for construction of their accessory building; (5) he stated a valid unjust enrichment claim because by violating the Santa Monica zoning ordinances, Enright/Griffin gained a "valuable view" of his property for which he claims he should be compensated in an amount in excess of $1 million; and (6) the trial court erred in sustaining the City/Griffin's demurrer to his void for vagueness claim because the repealed Santa Monica Mun. Code zoning ordinances are still applicable to his lawsuit.[6]

DISCUSSION

I. Standards of Review

"We review de novo the grant or denial of an anti-SLAPP motion." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th

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[6] Filler also contends the trial court erred because it should have decided the City/Griffin's demurrer to the void for vagueness claim before ruling on their anti-SLAPP motion since "whether or not a taking occurred depend[ed] significantly on whether or not the statute relied on to interfere with the property right was valid." Filler's contention is without merit.

"Trial courts should either grant or deny [anti-SLAPP motions] in toto, i.e., without leave to amend, prior to ruling on any pending demurrers. A proper ruling on the anti-SLAPP motion would, in most cases, obviate the need to rule on the demurrer at all or, at the very least, in its entirety." (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App 4th 611, 629.) Thus, the trial court was well within its authority to decide the anti-SLAPP motion before ruling on the demurrer. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 [""It is beyond dispute that 'Courts have inherent power . . . to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.' [Citation.]""].)

1057, 1067 (*Park*).) We consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) "We do not, however, weigh the evidence, but accept the plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Park,* at p. 1067.)

"We [also] review [an order sustaining a demurrer] de novo, 'exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.]'" (*Lefebvre v. Southern California Edison* (2016) 244 Cal.App.4th 143, 151.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) "In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend . . . we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

II. The Trial Court Did Not Err in Granting Respondents' Anti-SLAPP Motions

The anti-SLAPP statute provides, inter alia, that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

In determining whether an action is subject to dismissal under the anti-SLAPP statute, we engage in a two-step process. "Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.]" (*Park*, *supra*, 2 Cal.5th at p. 1061.) "If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Id.* at p. 1061.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

A. The City/Griffin's Anti-SLAPP Motion

The City/Griffin challenged the first (inverse condemnation), fifth (denial of equal protection) and sixth (intrinsic fraud on the court) causes of action. They contend the basis of these causes of action is "rooted in City officials' conduct in processing, considering and eventually denying [Filler's] application for a variance permit," which is "First Amendment protected speech" under the anti-SLAPP statute.

1. Protected Activity

Our Supreme Court has held that "'"[t]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action."'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) "The Legislature's stated intent is best served . . . by a construction of section 425.16[7] that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues." (*Id.* at p. 1118.) The focus of the anti-SLAPP statute is not the form of plaintiff's cause of action, but the defendant's activity that gives rise to the asserted liability. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 92.) "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062.)

Relying on *Park, supra,* 2 Cal.5th at page 1064, Filler contends the anti-SLAPP statute does not apply to his claims alleged against the City/Griffin because he is challenging the 2009 SMPA decision itself, and not "any participant in that proceeding based on his or her protected communications." We disagree.

Here, the pleadings establish that the gravamen of Filler's claims alleged against the City/Griffin are based on the City/Griffin's speech and/or

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[7] Section 425.16, subdivision (e) states in relevant part: An "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ."

petitioning activity. Filler alleged the basic issues in dispute were: (1) whether the City properly advised Filler to apply for a variance for construction of his additional story ("The events leading to this Complaint include events during 2008 when Aaron Filler and his wife Annelise Shaw relied on opinions of the [SMPA] as to the required substance of a request they filed for construction of an addition to their home in September of that year."); and (2) whether the City should have considered view restrictions in denying his application for a variance ("[A]lthough the City of Santa Monica has no view ordinance, the transcript record shows that the Commission (SMPC) decided to respond to the urgent pleas of Griffin and Enright and to rely on their advocacy for view restriction as a basis to prevent the construction."). Protected activity under the anti-SLAPP statute includes "[t]he hearing, processing, and deciding of the grievances." (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1397.) The conduct alleged to support Filler's claims is within this definition. Thus, we conclude the City/Griffin satisfied their burden of showing the challenged claims arose from constitutionally protected speech.

2. Probability of Prevailing on the Claims

The trial court ruled that Filler failed to "show probable validity" because there was no taking to support an inverse condemnation claim and there was no showing that the City/Griffin treated persons in like situations differently to support an equal protection claim. We agree.

"'Property is "taken or damaged" . . . so as to give rise to a claim for inverse condemnation, when: (1) the property has been physically invaded in a tangible manner; (2) no physical *invasion* has occurred, but the property has been physically *damaged;* or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a

burden on the property that is direct, substantial, and peculiar to the property itself.' [Citation.]" (*Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212, 1218.) "As a general rule, a landowner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right." (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1152.)

Filler's inverse condemnation claim is based on the alleged "taking" of a view easement through his property by the City when: (1) it denied his application for a variance in order to preserve a view for Enright/Griffin; and (2) it granted a permit to Enright/Griffin for construction of an accessory building which allowed a view of his property. Although a right to a view may be created by local governments, Santa Monica has no law establishing a view easement. (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, *supra*, 178 Cal.App.3d at p. 1152.) Thus, Filler cannot establish a "taking" of the view of his property as a matter of law; consequently, his inverse condemnation claim fails. (*Boxer v. City of Beverly Hills*, *supra*, 246 Cal.App.4th at p. 1224 [sustaining demurrer without leave to amend inverse condemnation claim when "plaintiffs' complaint . . . [was] strictly visual"]; *Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 525 ["Since a landowner has no natural right to an unobstructed view [citation], the size and shape of an otherwise lawful structure on one side of a boundary cannot be deemed . . . to damage (for purposes of inverse condemnation) . . . that which is on the other side of the boundary."].)[8]

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[8] The City/Griffin also contend Filler's inverse condemnation claim is procedurally and statutorily time-barred. Because we conclude Filler has failed to establish a probability of prevailing on the merits, we decline to consider the other contentions related to this claim.

"The right to equal protection is guaranteed by the California Constitution. [Citations.]" (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 644.) """The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) In order to state such a claim, a plaintiff must allege: "(1) plaintiff was treated differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) there was no rational basis for the difference in treatment." (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605, fn. omitted.)

Filler contends he was treated differently by the City because he was required to apply for a variance in order to construct an additional story to his residence while Enright/Griffin had no such requirement in order to construct their accessory building. Filler overlooks that his project and that of Enright/Griffin were not similarly situated. As explained in *Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, "'If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.]'" (*Id.* at p. 434.) The Santa Monica Mun. Code zoning ordinances applicable to construction of an additional story are different than those applicable to construction of an accessory building. (Santa Monica Mun. Code, pts. 9.04.08.02.070, 9.04.14.110 (Jun. 2013).) Thus, Filler's equal protection claim fails.

Accordingly, the trial court did not err in granting the City/Griffin's anti-SLAPP motion.

B. Enright/Griffin's Anti-SLAPP Motion

Enright/Griffin challenged the second (qui tam) and fourth (unjust enrichment) causes of action. They contend Filler's claims against them arise from their "[p]articipation in public process, such as petitioning for permission to build, or appealing a governmental decision in a quasi-judicial appeals process," which is "protected activity" within the meaning of the anti-SLAPP statute.

1. Protected Activity

Filler contends his qui tam and unjust enrichment claims fall outside the scope of the anti-SLAPP statute because they arose from Enright/Griffin's (allegedly) false submission of information to the City which Filler asserts is "criminal," arguing that such violations subject them to fines and imprisonment.

An activity is not protected under the anti-SLAPP statute if "the evidence conclusively establishes[] that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.) Here, however, the process of applying for a permit was authorized by law and Filler's allegation is not supported in any manner. (Santa Monica Mun. Code, pt. 9.04.14.110 (Jun. 2013); see *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 272 [protected activity under the anti-SLAPP statute includes "submission of the High Density Tract Map to the planning commission and city council"].) Thus, there is no basis upon which to conclude other than Enright/Griffin's action in obtaining approval for the construction of their accessory building is activity protected under the anti-SLAPP statute. (E.g., *Park 100 Investment Group II v. Ryan* (2009) 180 Cal.App.4th 795, 806 ["Even if a lis pendens is not appropriate under the circumstances, it is not an illegal act forbidden by law."].)

2. Probability of Prevailing on the Claims

Filler contends he is "likely to prevail" on his "qui tam claim"[9] because: (1) he has citizen standing to require the City to enforce the Santa Monica Mun. Code zoning ordinances against Enright/Griffin; and (2) he provided "sufficient evidence" that Enright/Griffin violated Santa Monica Mun. Code, part 9.04.14.110(c)[10] by constructing their accessory building above the level of the roof of their principal building. He also contends he stated a valid unjust enrichment claim because by failing to follow the Santa Monica Mun. Code, Enright/Griffin gained a "valuable view" of his property for which Filler is entitled to be compensated.

"'Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.'" (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382.) Thus, "[b]y definition, *qui tam* rights have never existed without statutory authorization." (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661,

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[9] Filler contends "there was no basis" for the trial court to determine that his qui tam claim was brought under the False Claim Act. In support of his qui tam claim, however, Filler cited *San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, which was a qui tam action brought under the False Claim Act. Because Filler now contends that his qui tam claim is unrelated to the False Claim Act, we need not determine if he properly alleged "that defendant submitted a false claim to a public entity for money, property, or services."

[10] Santa Monica Mun. Code, part 9.04.14.110(c) (Jun. 2013) provides: "The maximum building height shall be two stories, twenty-four feet in height. However, no accessory building shall be higher than the principal building."

671.) Here, Filler's qui tam claim relies on enforcement of the Santa Monica Mun. Code zoning ordinances; however, those ordinances do not contain the elements required for a qui tam suit as set forth above.[11] (E.g., Santa Monica Mun. Code, pt. 9.04.20.30.020 (Jun. 2013) ["Zoning Administrator shall have principal responsibility for monitoring and enforcing the conditions and standards" set forth in the Santa Monica Mun. Code].) Thus, Filler's qui tam claim fails for this reason alone. (*Sanders*, at p. 678 [holding the Coastal Act is not a qui tam statute because it does not allow civil penalties to be recovered by the citizen-informer].)

Apparently recognizing the deficiency of his qui tam claim, Filler now contends he is suing Enright/Griffin under Government Code section 36900, subdivision (a).[12] This claim also fails. First, procedurally, Filler cannot change his position and adopt a new theory on appeal. "'The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. [Citation.]'" (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.) Nowhere

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[11] Filler's reliance on the current Santa Monica Mun. Code is also without merit. Although the ordinance permits suits "by any interested person," it does not provide for assessment of any monetary penalty or for a division of any penalty ultimately assessed between the private person and the City. (Santa Monica Mun. Code, pt. 9.48.010 (Jul. 2015.) Thus, it does not have the elements necessary for a qui tam action.

[12] Government Code section 36900, subdivision (a) provides in pertinent part: "The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action."

in his first amended complaint is there any mention of Government Code section 36900, subdivision (a). Second, even if properly alleged, Filler fails to provide any evidence establishing Enright/Griffin violated a city ordinance. (*Anderson v. Geist* (2015) 236 Cal.App.4th 79, 85–86 ["It is well established that 'a plaintiff opposing an anti-SLAPP motion cannot rely on allegations in the complaint, but must set forth evidence that would be admissible at trial.'"].) Instead, Filler points to his self-serving declaration which describes how he obtained measurements related to the accessory building. A self-serving declaration, however, is "insufficient to establish a prima facie showing." (*People ex rel. Fire Insurance Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 830.) Accordingly, Filler's reliance on Government Code section 36900, subdivision (a) is without merit.

Filler also failed to establish a probability of prevailing on his unjust enrichment claim. "Unjust enrichment is an equitable principle that underlies 'various legal doctrines and remedies' . . . based on the idea that 'one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated . . . .'" (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542.) Here, Filler demands payment for a "view easement" through his property even though he concedes that "California does not recognize view trespass." As there is no law establishing a view easement in Santa Monica, Filler has no claim to compensation; nor can he amend to allege one. Accordingly, the trial court did not err in granting Enright/Griffin's anti-SLAPP motion.

III. The Trial Court Properly Sustained the City/Griffin's Demurrer to the Seventh Cause of Action

To support his void for vagueness cause of action, Filler's first amended complaint alleged that certain Santa Monica Mun. Code zoning ordinances, which were in effect in 2009 when the SMPA denied Filler's application for a variance, were "so ambiguous as to render any enforcement arbitrary and capricious."[13] The City/Griffin contends the void for vagueness claim is moot because the City revised its zoning code in July 2015,[14] and the zoning ordinances at issue were repealed. The trial court agreed and sustained City/Griffin's demurrer without leave to amend, ruling "there [was] no controversy for the court to decide."

"It is well settled that . . . when an action is dependent upon a statute which is later repealed, the action cannot be maintained. [Citations.]" (*Los Angeles Unified School Dist. v. State of California* (1991) 229 Cal.App.3d 552, 556.) ""[T]he repeal of the statute destroys the right . . . unless the repealing statute contains a saving clause protecting the right in a pending litigation."" (*Cross v. Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 275.) Here, it is undisputed the Santa Monica Mun. Code zoning ordinances relied on by Filler in support of his void for vagueness claim have been repealed. However, Filler contends the repealed zoning ordinances are still applicable because Santa Monica Ordinance No. 2486 states the repeal "shall

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[13] Filler challenges Santa Monica Mun. Code, parts 9.04.02.030.115, 9.04.02.030.810, 9.04.02.030.380, 9.04.02.030.310, and 9.04.20.10.030(k)(1) (Jun. 2013).

[14] On June 23, 2015, the City adopted Santa Monica Ordinance No. 2486, which became effective July 23, 2015, and repealed the Santa Monica Mun. Code zoning ordinances at issue in this lawsuit.

not in any manner affect the prosecution for violations thereof . . . nor shall the repeal . . . affect any prosecution or action which may be pending or may hereinafter be filed in any court for the violation of any of the provisions . . . ." Filler's reliance on Santa Monica Ordinance No. 2486 is misplaced.

As the City/Griffin point out, a *void for vagueness* challenge to an ordinance is not a prosecution or action for *violation*, so reference to the ordinance is not relevant in the context of his challenge. Rather, Filler alleged a *facial challenge* to the constitutional validity of the zoning ordinances: "The fundamental problem concerns the role of the definition of a basement in the variance system as well as the adjacent terms 'floor' and 'story' which, as defined and applied render them insolubly ambiguous, indefinite and impossible to be used as a guide where reasonable investment backed planning and construction decisions are to be made."

Because the Santa Monica Mun. Code zoning ordinances have been repealed, there was no need for the trial court to interpret the definitions of "basement," "floor" or "story" since its decision would have absolutely no impact on the future rights of Filler, or of any other affected party. "'[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863, quoting from *Mills v. Green* (1895) 159 U.S. 651, 653.) Accordingly, the trial court properly sustained the City/Griffin's demurrer to the void for vagueness claim without leave to amend.

DISPOSITION

The order and judgment are affirmed. Respondents are to recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.