Filed 8/20/13 Lavine v. State of California CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOAN C. LAVINE, Plaintiff and Appellant, v. STATE OF CALIFORNIA et al., Defendants and Respondents.	B238030 (Los Angeles County Super. Ct. No. BS128989)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

Joan C. Lavine, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Carol A. Squire, Supervising Deputy Attorney General, and Kathryn M. Megli, Deputy Attorney General, for Defendants and Respondents.

INTRODUCTION

Plaintiff Joan C. Lavine appeals from a judgment of dismissal in favor of defendants State of California and California Environmental Protection Agency (Cal/EPA) entered after the trial court sustained defendants' demurrer without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lavine has owned real property in the Malibu Civic Center area since 1971. The property is located on Malibu Road, south of the Malibu Civic Center and Pacific Coast Highway. It is zoned R-1 for single family residential use, and a single family dwelling is located on the property. Waste disposal on the property is by means of a septic system, which was legal and by permit. There is no public sewer system available for residences in the area.

On November 5, 2009 the Regional Water Quality Control Board, Los Angeles Region (Regional Board) adopted the Malibu Civic Center septic/on-site waste disposal ban (septic system ban). The California State Water Resources Control Board (State Board) approved the ban. Lavine's property is subject to the ban.

Lavine filed this action against the State Board on October 21, 2010 to challenge the septic system ban. The action was comprised of petitions for writs of traditional and administrative mandate, as well as a complaint for damages for inverse condemnation and declaratory relief.

In her first amended petition and complaint Lavine added the Regional Board and Cal/EPA in place of Doe defendants. She later amended the petition and complaint to add the State of California as a Doe defendant. She named the State of California and Cal/EPA in only the third and fourth causes of action, for inverse condemnation and declaratory relief.

With respect to the State of California and Cal/EPA, Lavine alleged that because the Malibu Civic Center area has no other option for residential sewage systems, the septic system ban "deprived [her] of substantially all the beneficial, viable economic and practical use of her R-1 zoned . . . property." She therefore claimed the septic system ban constituted a "taking" of her property under the federal and state constitutions. (See U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 19; *Penn. Central Trans. Co. v. New York* (1978) 438 U.S. 104 [98 S.Ct. 2646, 57 L.Ed.2d 631].) She sought damages in the amount of the reasonable market value of her property prior to the enactment of the septic system ban as well as a declaration of her rights.

The State of California and Cal/EPA filed a demurrer on the ground that the first amended petition and complaint did not state causes of action against them. Specifically, they argued that the actions of the State and Regional Boards could not be imputed to them, and in the absence of allegations that they engaged in any wrongful conduct Lavine could not name them in this action.

The trial court sustained the demurrers without leave to amend. Relying on *Bacich v. Board of Control* (1943) 23 Cal.2d 343, the trial court ruled that because an action against a subsidiary agency is an action against the state, and because Lavine brought this action based exclusively on the actions of subsidiary agencies, "the inclusion of the State as an additional party is duplicative." The court also rejected Lavine's claim that the State of California was liable for the State and Regional Boards' actions as their "supervisor," pursuant to *State of California v. Superior Court* (1974) 12 Cal.3d 237, 255.

As to Cal/EPA, the trial court found the fact the State Board operated under the auspices of Cal/EPA was not a sufficient factual basis on which to state a claim against Cal/EPA, under *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1383. The trial court also found that Lavine failed to meet her burden of demonstrating how she could amend her petition and complaint to state a claim against the State of California or Cal/EPA and therefore denied her leave to amend.

The court subsequently entered a judgment of dismissal in favor of the State of California and Cal/EPA.

DISCUSSION

A. *Standard of Review*

On appeal from an order dismissing an action following the sustaining of a demurrer without leave to amend, we apply the de novo standard of review. (*Gerawin Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515; *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1470.) "[W]e review the trial court's sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court's denial of leave to amend." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469.) """"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law."""" (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 432.) """"And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm."""" (*Ibid.*) """"The burden of proving such reasonable possibility is squarely on the plaintiff."""" (*Ibid.*; see *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 509 ["'burden is on [the] [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory'"]; *Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 401 ["'where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result'"].)

B. *Whether the Trial Court Properly Sustained the Demurrer*

1. Whether the State of California and Cal/EPA Are Proper Parties in an Action Against Subsidiary Agencies

The State Board and nine Regional Water Quality Control Boards, including the Regional Board, are the "principal state agencies with primary responsibility for the coordination and control of water quality." (Water Code, § 13001.) The regional boards adopt regulations governing regional water quality, and the State Board reviews and approves those regulations. Water quality in the Los Angeles Region is subject to the Water Quality Control Plan for the Los Angeles Region-Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (Basin Plan). The Regional Board and the State Board are the only two agencies with legal authority to adopt, amend, approve, or review the Basin Plan. (See *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 165-166; *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1405-1406.)

Lavine contends, as she did below, that the State of California and Cal/EPA are jointly and severally liable for the actions of their subsidiary agencies, the State and Regional Water Boards (collectively Water Boards). We disagree.

As the trial court noted, Lavine cannot maintain claims against the State of California and Cal/EPA without alleging that they engaged in any wrongful conduct. (See *State of California v. Superior Court*, *supra*, 12 Cal.3d at p. 255 [no cause of action stated against the State of California where only the California Coastal Commission and its members could set aside the challenged decision]; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at p. 1383 [dismissing claim against State Board because the plaintiff's "allegations did not articulate any improper State Board conduct"].) In other words, Lavine could sue the State of California and Cal/EPA if they had some involvement in the adoption of the water plan that she claims deprived her property of all value, but she cannot sue the State of California and Cal/EPA if the only basis for doing so is that they are hierarchically related within state government to the Water Boards that adopted or approved the plan. (See *Marina Plaza v.*

California Coastal Zone Conservation Com. (1977) 73 Cal.App.3d 311, 325 [liability for inverse condemnation requires that a governmental agency have taken action causing appropriation of property rights].)

Lavine relies on *Bacich v. Board of Control*, *supra*, 23 Cal.2d 343 for the proposition that a plaintiff may add the state as an additional defendant so long as the complaint contains all of the elements necessary to state a cause of action against the state. The trial court agreed with the State of California's position that under *Bacich* "actions brought against subsidiary departments of the state, such as state agencies, are actions against the state itself." Thus, the court stated, "the inclusion of the State as an additional party is duplicative." We agree with the trial court.

In *Bacich* the court allowed the plaintiff to *substitute* the state as a party in place of the subsidiary department, i.e., the state agency, not to *add* the state as a party, because the complaint contained all elements necessary to state a claim against the state. (*Bacich v. Board of Control, supra*, 23 Cal.2d at p. 346.) Lavine sued the Water Boards, which effectively was suing the State of California. (See *Colombo v. State of California* (1991) 3 Cal.App.4th 594, 598 ["lawsuits against state agencies are in effect suits against the state"].) She then added the State of California as a separate party, rather than substituting the State of California for the Water Boards. *Bacich* does not allow Lavine to name both the State of California and the Water Boards based on actions taken exclusively by the Water Boards. Because the Water Boards are state agencies, Lavine can sue the Water Boards, or she can sue the State of California, but not (absent alleged wrongful conduct committed by the State of California) both.

We note that had Lavine sought to substitute the State of California for the Water Boards, the trial court could have overruled the demurrer under *Bacich*. But that is not what Lavine sought to do. The State of California and Cal/EPA are not proper parties to this action based on their hierarchical position above the Water Boards, and the complaint does not contain facts sufficient to state a claim against them on that basis.

2. Whether the State of California and Cal/EPA Are Necessary Parties Under Public Resources Code Section 6308

Lavine also contends that the State of California and Cal/EPA are necessary parties under Public Resources Code section 6308. Again, we disagree.

Public Resources Code section 6308 provides: "If an action or proceeding is commenced by or against a county, city, or other political subdivision or agency of the state involving the title to or the boundaries of tidelands or submerged lands that have been or may hereafter be granted to it in trust by the Legislature, the State of California shall be joined as a necessary party. . . ." Lavine argues that this action involves "California's tidelands and the State's title to them." Lavine, however, did not allege that her property is a tideland. Lavine alleged no facts that show that this case involves the "title to or the boundaries of" the property in question, as required by Public Resources Code section 6308.[1] The State of California and Cal/EPA are not necessary parties under Public Resources Code section 6308.

C. *Whether the Trial Court Properly Denied Leave To Amend*

Lavine contends that the trial court improperly denied her an opportunity to amend her complaint. She argues that she would amend the complaint to state that there is "doubt" as to which defendant has responsibility for the alleged improper action. In support of her argument, she relies on Code of Civil Procedure sections 379 and 389,[2] as

---

[1] *Abbot Kinney Co. v. City of Los Angeles* (1959) 53 Cal.2d 52, on which Lavine also relies, is inapplicable. *Abbot Kinney Co.* was an action "to quiet title to certain property in Venice." (*Id*. at p. 54.) The State of California claimed it had title to the property because the property was originally tideland. The court held that the "action therefore clearly involves the title to and boundaries of tidelands within the meaning of [Public Resources Code] section 6308." (*Id*. at p. 56.) As noted above, this case does not involve title to and boundaries of tidelands.

[2] Code of Civil Procedure section 379, subdivision (c), provides: "Where the plaintiff is in doubt as to the person from whom he or she is entitled to redress, he or she may join two or more defendants, with the intent that the question as to which, if any, of

well as *Landau v. Salam* (1971) 4 Cal.3d 901. These authorities, however, do not support her contention.

In *Landau*, the plaintiff brought a personal injury action against two defendants, a negligent driver and the owner of the car, alleging he was "'uncertain as to which defendant caused'" his injuries. The trial court sustained the defendants' demurrer without leave to amend on the ground of misjoinder of parties. (*Landau v. Salam, supra,* 4 Cal.3d at p. 904.) The Supreme Court reversed, holding that Code of Civil Procedure section 379, subdivision (c), permitted joinder of two defendants where the plaintiff was uncertain which one was responsible for his injuries. (*Landau*, at p. 905.)

The rule in Code of Civil Procedure sections 379 and 389 and *Landau* applies where plaintiff alleges wrongdoing by each party and is in doubt as to which party caused the particular injury. (*Landau v. Salam*, *supra*, 4 Cal.3d at p. 904.) "There must be some nexus associating the defendants in an event or series of events productive of the injury complained of, under circumstances that while there is certainty as to the alleged wrong to be righted, there is uncertainty as to which of two or more individuals implicated is legally liable therefor." (*Busset v. California Builders Co.* (1932) 123 Cal.App. 657, 666.) That is not the case here.

Lavine has not alleged, and does not claim she can allege, any specific wrongdoing by either the State of California or Cal/EPA. She does not claim she can allege that the State of California or Cal/EPA acted in combination or in collaboration with the Water Boards, or that there was any nexus between these two defendants and the

---

the defendants is liable, and to what extent, may be determined between the parties." Code of Civil Procedure section 389, subdivision (a), provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

wrongful action taken by the Water Boards that harmed her property. Her only claim is that the State of California and Cal/EPA are responsible because of their supervisorial relationship with the Water Boards. As discussed above, this is not a sufficient basis for including the State of California and Cal/EPA defendants in this action. (See *State of California v. Superior Court, supra*, 12 Cal.3d at p. 255; *City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra,* 135 Cal.App.4th at p. 1386.)

Lavine also suggests the trial court abused its discretion in denying her leave to amend after only one attempt to state a cause of action against the State of California and Cal/EPA. It is generally true that "'"'[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint . . . .'"'" (*Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431, 1436.) Nevertheless, as noted above, "where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*Hoffman v. Smithwoods RV Park, LLC, supra*, 179 Cal.App.4th at p. 401; see *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 441.)

Because Lavine does not claim she can allege any improper conduct by either the State of California or Cal/EPA, Lavine has not met her burden of showing how she can amend her petition and complaint to state a cause of action against them. The trial court properly denied her leave to amend.[3]

---

[3] Lavine raises a number of other contentions on appeal, including that she was entitled to plead inconsistent remedies, the trial court erred by sustaining the demurrers for uncertainty, and the trial court exceeded its jurisdiction in ruling on demurrers by the State of California and Cal/EPA as to causes of action in which they were not named. Because the State of California and Cal/EPA are not proper parties to this action, we need not address these issues. (See *Kaiser Foundation Health Plan, Inc. v. Superior Court* (2012) 203 Cal.App.4th 696, 715 [appellate court may "decline to review an issue that will have no effect on the parties"]; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259 ["we do not see these matters as necessary to our appellate decision and we accordingly decline to resolve them"].)

DISPOSITION

The judgment is affirmed. Defendants are to recover their costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

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