Filed 11/2/11 McKee v. Tulare Cty. Bd. of Supervisors CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD P. MC KEE et al.,

Petitioners and Appellants,

v.

TULARE COUNTY BOARD OF SUPERVISORS,

Defendant and Respondent.

F061146

(Super. Ct. No. VCU236639)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

Law Offices of Kelly A. Aviles and Kelly A. Aviles; Dennis A. Winston, a Professional Corporation and Dennis A. Winston; Dietrich, Glasrud, Mallek & Aune and Bruce A. Owdom for Petitioners and Appellants.

Kathleen Bales-Lange, County Counsel, Julia Langley, Deputy County Counsel; Jennifer B. Henning for California State Association of Counties as Amici Curiae on behalf of Defendant and Respondent.

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Appellants filed this action pursuant to Government Code section 54960, a section of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) (the Brown Act). Appellants' "Verified Second Amended Petition for Writ of Mandate and Declaratory Relief"

(hereinafter SAP), alleged that respondent, Tulare County Board of Supervisors (the Board), violated the Brown Act "by holding unnoticed lunch meetings, attended by a majority of its members, where business within its subject matter jurisdiction was heard, discussed, deliberated on, and/or taken action on." It alleged that the practice of the Board lunching together dated back to the early 1980's, and was done to foster a collegial relationship among the Board's members. The pleading further alleged that on March 9, 2010, the Board passed a resolution stating "[u]ntil such time as a formal policy is presented and adopted, the members of the Board of Supervisors will suspend its practice of eating together as a group of 3 or more members, unless they are doing so at a ceremonial occasion, or as otherwise permitted under the Brown Act."

The superior court sustained, without leave to amend, the Board's demurrer to the SAP and dismissed the action. Appellants contend that the superior court erred and that the SAP states facts sufficient to constitute a cause of action. As we shall explain, we affirm the judgment.

FACTS

The allegations of the SAP include the following. A division of appellant Visalia Newspapers, Inc., the Visalia Times-Delta (the Newspaper) has published and distributed a newspaper in Tulare County for over 150 years. An examination of public records the Newspaper received from the County showed that over the first seven months of 2009 a majority of the five-member Board was present at 30 meals, paid for by the County. On 11 of these occasions a majority of the Board met on a Monday, the day before a regular Tuesday Board meeting. Three times a Board majority lunched together on a day when the regular Board meeting had been cancelled. On February 1, 2010, the Newspaper published an article entitled "'What do the Tulare County Board of Supervisors talk about at lunch?'" The article quoted one supervisor as having said "'I think these meetings are important to build collegiality.'" On February 17, 2010, appellant McKee wrote to the Board and demanded that the Board "'publicly acknowledge ... that it will no

longer hold such dining meetings where a majority of supervisors are present together, or in serial, wherein business within the Board's jurisdiction is discussed.'" The Board Chairman, J. Steven Worthley, responded on March 5, 2010, with a letter stating:

> "'Members of the Board frequently engage in work related activities, which may occur before, during, or after meal time, apart from the regular or special public meetings of the board.… Meals in connection with such activities are 'work-related,' but do not constitute a meeting for purposes of the Brown Act.… [¶] … In addition, we believe that taking meals together in connection with work-related activities of Board members serves the important purpose of fostering collegial relationships between Board members. This helps insure that the Board operates most effectively and efficiently at public meetings.… [¶] … Board members may have discussions during meals concerning job issues of common interest that are outside the subject matter jurisdiction of the Board as a whole. These would include such matters as the official activities of individual supervisors, travel planning, and management of the individual Supervisors' offices. These are work-related matters, but not within the scope of the Brown Act.… [¶] … No member of the Board of Supervisors has committed a violation of the Brown Act.'"

On March 9, 2010, the Board approved a resolution stating in pertinent part: "Until such time as a formal policy is presented and adopted, the members of the Board of Supervisors will suspend its practice of eating together as a group of three or more members, unless they are doing so at a ceremonial occasion, or as otherwise permitted under the Brown Act."

Appellants' first cause of action for declaratory relief sought a declaration that the Board "violated the Brown Act by holding unnoticed lunch meetings where business within its subject-matter jurisdiction was considered." Appellants' second cause of action seeking a writ of mandate sought a "peremptory writ of mandate ordering [the Board] to perform as required by the Brown Act whenever a majority of the Board congregates at the same time and location to hear, discuss, deliberate, or take action on any item that is within its subject matter jurisdiction."

STANDARD OF REVIEW

Our standard of review of an order sustaining a demurrer on the ground that the complaint, here the July 20, 2010 SAP, fails to state facts sufficient to constitute a cause of action is well settled. We review the sufficiency of the complaint de novo. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "We also consider matters that may be judicially noticed." (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1083, disapproved on another ground in *Martinez v. Combs* (2010) 49 Cal.4th 35, 50, fn. 12.)

When a demurrer is properly sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action, and leave to amend the pleading is denied and judgment is entered in favor of the demurring defendant, "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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

THE BROWN ACT

This court provided an overview of the Brown Act in *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063 (*Galbiso*), where we stated:

> "'The Brown Act requires that most meetings of a local agency's legislative body be open to the public for attendance by all.' (*Los Angeles Times Communications v. Los Angeles County Bd. Of Supervisors* (2003) 112 Cal.App.4th 1313, 1321 [].) Its objectives include facilitating public

> participation in local government decisions and curbing misuse of the democratic process by secret legislation. (*Fischer v. Los Angeles Unified School Dist*. (1999) 70 Cal.App.4th 87, 95 [].) The Legislature declared its intent in enacting the Brown Act as follows: 'In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.' (§ 54950.)
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> "To implement these important legislative purposes, section 54953 provides that '[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.' (§ 54953, subd. (a).)…. [¶] … [¶]
>
> "Finally, recourse to the courts for judicial relief is authorized in the event a legislative body violates the Brown Act. Section 54960, subdivision (a), provides that any interested person may commence 'an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency.…'" (*Galbiso*, *supra*, 167 Cal.App.4th at pp. 1075-1077.)

Government Code section 54952.2, subdivision (a) defines a "meeting" as "any congregation of a majority of the members of a legislative body at the same time and location … to hear, discuss, deliberate or take action on any item that is within the subject matter of the legislative body." Subdivision (b)(1) prohibits any such meetings or activities unless they comply with the Brown Act, which includes notice, disclosure, opportunity to participate and other requirements. The Brown Act is to be construed liberally in favor of openness. (*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc*. (1999) 69 Cal.App.4th 287, 294.)

GOVERNMENT CODE SECTION 54960, Subdivision (a)

This action was brought pursuant to Government Code section 54960, subdivision (a), which provides that "any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body …."

In *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509 (*Regents*), the court construed Government Code section 11130, subdivision (a), a section of the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.) which at that time contained language identical to the language found in section 54960, subdivision (a) of the Brown Act.[1] The court concluded that "the provision's right of action extends only to present and future actions and violations and not past ones." (*Regents, supra*, 20 Cal.4th at p. 526.) "[T]hat provision grants an interested person a right of action that extends only to present and future actions and violations and not past ones. Specifically, it grants a right of action: (1) to stop or prevent a present or future violation of the act – but *not* to reach back to a past one; and (2) to determine whether the act is applicable to a present or future action, but *not* a past one." (*Regents, supra*, 20 Cal.4th at p. 536.)[2] In footnote 6 of *Regents*, the court stated:

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[1] The Bagley-Keene Open Meeting Act, enacted in 1967, prescribes open meeting requirements for state bodies (see Gov. Code, § 11121) comparable to those applicable to local agencies (see Gov. Code, § 54951) under the Brown Act. (See, generally, 9 Witkin, Cal. Procedure (2008) Administrative Proceedings, § 10, et seq.)

[2] Government Code section 11130, subdivision (a), of the Bagley-Keene Open Meeting Act has been subsequently amended to permit declaratory relief pertaining to past actions of a state body. (See Stats. 1999, § 393 (A.B. 1234), §6.) No comparable

> "In subdivision (a) of section 54960 (hereinafter section 54960(a)), the Brown Act states that 'any interested person may commence an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of' the act 'by members of the legislative body of a local agency or to determine the applicability of' the act 'to actions or threatened future action of the legislative body ….' Some Court of Appeal decisions assume or assert that the provision extends to past actions and violations as well as present and future ones – albeit, apparently, only as to past actions and violations that are related to present or future ones. (See, e.g., *California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1029, 1030, 1031 []; *Frazer v. Dixon Unified School Dist*. (1993) 18 Cal.App.4th 781, 784-785, 798 []; *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99-100 []; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 520-521 []; *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 823-82 & 823, fn. 6 []; *Common Cause v.* Stirling (19810 119 Cal.App.3d 658, 661-662, 665 []; *Torres v. Board of Commissioners* (1979) 89 Cal.App.3d 545, 547-551 [] [not citing section 54960 or section 54960(a)].) None, however, actually considers whether it does so. 'A decision, of course, is not authority for what it does not consider.' (*Mercury Ins. Group v. Superior Court* (19989) 19 Cal.4th 332, 348 [].) (*Regents*, *supra*, 20 Cal.4th at p. 526, fn. 6; in accord, see also *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 914-917 (*Shapiro*).)

In the case presently before us, the SAP alleges that the Board has passed a resolution suspending its practice of eating together as a group. It also includes, attached as "Exhibit H" to the second amended petition, a copy of that resolution. The resolution expressly acknowledges that "there is no formal policy to provide members of the Board of Supervisors with guidance in eating meals and traveling together consistent with the requirements of the Brown Act" and states that "[u]ntil such time as a formal policy is presented and adopted, the members of the Board of Supervisors will suspend its practice of eating together as a group of 3 or more members, unless they are doing so at a ceremonial occasion, or as otherwise permitted under the Brown Act."

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amendment was made to Government Code section 54960, subdivision (a), of the Brown Act.

Much of appellants' argument is an attempt to persuade us that past lunch meetings of a majority (here, three or more) members of the Board to foster "collegiality" and "team building" violated Government Code section 54952.2 of the Brown Act, essentially because the meal receipts and credit card statements said the expenses were for "work related meals" for "official business only," and that the lunch activities outlined by the Board Chairman in his March 5, 2010 letter qualify as Brown Act activities. The superior court addressed this issue and concluded that no past violation of the Brown Act was alleged, because the activities were "not items of importance concerning collective decision making related to the public's business."

More importantly, however, the SAP affirmatively alleges that the practice of lunching together has been suspended. In light of this allegation, it is not clear what meaningful relief this court could grant. The Board is of course obligated to adhere to the Brown Act, but the Board cannot violate the Brown Act at lunch meetings if it is no longer having lunch meetings. Based on the record before the trial court, with the lunch meetings suspended, there is no "present" violation of the Brown Act alleged (*Regents*, *supra*, 20 Cal.4th at p. 516; *Shapiro*, *supra*, 96 Cal.App.4th at pp. 915-916), and the speculative allegations of past violations in the SAP cannot reasonably be read to allege any "threatened future" violations of the Brown Act (Gov. Code, § 54960, subd. (a)). Based on the limited allegations contained in the SAP, the amended petition thus fails to state facts sufficient to constitute a cause of action under Government Code section 54960, subdivision (a).

Appellants argue that *Shapiro* confirms that even after *Regents* a court may deem past acts of a local legislative body as "past actions and violations that are related to present or future ones" (*Regents*, supra, 20 Cal.4th at p. 526, fn. 6; *Shapiro*, supra, 96 Cal.App.4th at p. 915), and thus these past actions, and a local legislative body's continuing refusal to admit the alleged violations, may provide a basis for relief under Government Code section 54960, subdivision (a) of the Brown Act. We agree with

appellants as to this general proposition of law, but in *Shapiro* the city council gave no indication that it would change its practices of (1) posting agendas for closed session that failed to give a brief general description of each item of business to be transacted or discussed (see Gov. Code, §§ 54954.2, subd. (a) and 54954.5, subd. (b)), (2) discussing topics in closed sessions which went beyond instructions to its negotiators regarding purchase or sale price and terms of payment of real property (see Gov. Code, § 54956.8), and (3) discussing topics in a closed session that were not contained as a separate items of business in the posted agenda for the session (see Gov. Code, § 54954.2, subd. (b)). (*Shapiro, supra,* 96 Cal.App.4th at p. 913.) "Accordingly," the court stated, "this dispute is not moot, and issues remain as to the degree of compliance required under the Brown Act." (*Ibid*.) In contrast to this, the case presently before us includes an express allegation that the Board has approved a resolution stating that the Board will suspend its practice of eating together as a group of three or more members. This past practice is the very activity appellants allege was unlawful. We thus view *Shapiro* as easily distinguishable from the matter presently before us.

Our resolution of this case – that any past violation allegations are moot because of the suspension of the challenged lunches and that the allegations are insufficient to state a claim for threatened future violations – obviates any need to address the issue decided by the trial court – whether the allegations of appellants' second amended petition, if assumed to be true, include facts sufficient to demonstrate a past violation or violations of the Brown Act. If the Board should ultimately reinstitute a practice of eating together as a group of 3 or more members, that practice would qualify as "present and future actions." (*Regents*, supra, 20 Cal.4th at p. 526.) If appellants determine that the conduct of Board members at those future meetings violates the Brown Act, appellants can challenge that conduct with an action under Government Code section 54960, subdivision (a) and/or section 54960.1. Because such an action would involve conduct which occurred later in time than the conduct alleged in the present action, and

because we affirm the trial court's order of dismissal only insofar as it orders dismissal of the action, and not for the reasons expressed in the trial court's order of dismissal, we see no res judicata or collateral estoppel bar to any such future action.

VERIFICATION

The parties and amici have much to say about whether a petition for writ of mandate may or may not be verified on information and belief. (See *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201 and *Murrieta Valley Unified School Dist. v. County of Riverside* (1991) 228 Cal.App.3d 1212.) We deem it sufficient for purposes of this case to say the following. The pleading at issue here was not only a petition for writ of mandate but also a complaint for declaratory relief. Both are authorized by Government Code section 54960, subdivision (a), to challenge alleged violations of the Brown Act. The Board's demurrer was a general demurrer to the entire pleading. (See *Warren v. Atchison, T. & S. F. Ry. Co.* (1971) 19 Cal.App.3d 24, 29, and 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 954.) We are aware of no requirement that allegations of complaint for declaratory relief cannot be verified on information and belief. "In all cases of a verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true." (Code Civ. Proc., § 446, subd. (a).) The trial court sustained the demurrer to the first amended petition with leave to amend, conditioned on appellants' amended petition being verified on personal knowledge, and not on information or belief. The SAP allegations were therefore limited to that information within the appellants' personal knowledge. In appropriate circumstances, this court could reverse the trial court order and allow appellants an opportunity to amend, and include additional allegation based on information and belief. However, appellants' counsel both stated there were no additional facts they could allege if given that opportunity.

DISPOSITION

Judgment is affirmed. Costs on appeal awarded to respondents.[3]

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Franson, J.

WE CONCUR:

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Cornell, Acting P.J.

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Gomes, J.

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[3] The Amici Curiae Press Organizations have filed with this court a request that we take judicial notice of various documents pertaining to the legislative history of a 2008 amendment to Government Code section 54952.2 (Stats. 2008, ch. 63 (S.B. 1732), § 3) and to the legislative history of Assembly Bill 1636, introduced in 2003, to support their contention that a "working lunch" of a legislative body of a local agency is a "meeting" within the meaning of Government Code section 54952.2, subdivision (a). The request for judicial notice is unopposed, and because courts routinely take judicial notice of legislative histories in construing statutes (see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 306, fn. 2, and *Watkins v. County of Alameda* (2009) 177 Cal.App.4th 320, 332, fn. 12), the request for judicial notice is granted. Because, however, we resolve this case as not stating facts sufficient to constitute a cause of action authorized by Government Code section 54960, subdivision (a), we need not and do not reach the Amici Curiae Press Organizations' contentions regarding whether the allegations of the second amended petition allege a "meeting" within the meaning of Government Code section 54952.2, subdivision (a).