

DEPARTMENT 58 LAW AND MOTION RULINGS

If oral argument is desired, kindly refer to CRC 324(a)(1).

This Tentative Ruling is not an invitation nor an opportunity to file further documents relative to the hearing in question. No such filing will be considered by the Court in the absence of permission first obtained following ex parte application therefore.

Case Number: BC351646 **Hearing Date:** July 27, 2006 **Dept:** 58

LAW & MOTION
DEPARTMENT 58
HEARING DATE: July 27, 2006
CALENDAR: 8
CASE NAME: Harold P. Sturgeon v. William J.
Bratton, et al.
CASE NO: BC 351646

LAW & MOTION: Motion to Admit Counsel Pro Hac Vice
MOVING PARTY: Plaintiff, Harold P. Sturgeon
RESPONDING PARTY: None
TENTATIVE RULING: GRANT

LAW&MOTION: Demurrers
Motion to Strike
DEMURRING AND
MOVING PARTIES: Defendants(1)William J.
Bratton, (2)John Mack, (3)Shelley Freeman,(4) Alan
Skobin,5) Andrea Ordin, and
(6) Anthony Pacheco.
[in their official capacities]
RESPONDING PARTY: Plaintiff – Harold P. Sturgeon
TENTATIVE RULING: OVERULE DEMURRERS
GRANT MOTION TO STRIKE

1. Plaintiff's Motion to Admit Counsel Pro Hac Vice

DISCUSSION
Cal. Rules of Court (CRC), rule 983 governs counsel pro hac vice. CRC 983(a) indicates the eligibility requirements for pro hac vice counsel are: (1) person is not a member of the State Bar of California; (2) person is a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any U.S. state or possession; and (3) person has been retained to appear in a particular cause pending in a court of this state. If a person meets these requirements, the Court has discretion to allow that person to appear pro hac vice upon that person's written application as long as an active member of the State Bar of California is associated as attorney of record on the case. (CRC 983(a).) A person is not eligible to appear pro hac vice if (1) the person is a resident of the State of California, or (2) the person is regularly employed in the State of California, or (3) the person is regularly engaged in substantial business, professional, or other activities in the State of California. CRC 983(a).

The person must file a verified application – stating the applicant's residence and office

addresses, the courts to which the applicant has been admitted to practice and the dates of admission, that the applicant is a member in good standing in those courts, that the applicant is not currently suspended or disbarred in any court, the title of the court and any causes of action in which the applicant has filed a pro hac vice application in this state in the last two years (and dates, if applicable), and the name, address, and phone number of the active member of the State Bar of California who is attorney of record in the case – along with proper notice of the hearing on the application, and the proof of service. (CRC 983(b).) The applicant must also pay a reasonable fee not exceeding \$50 to the State Bar of California along with serving a copy of the application and notice of hearing. (CRC 983(c).)

Here, Counsel has filed a verified application containing all the required information. (See Orfanedes Decl., 2-11.) Counsel declares he is not in any category that would disqualify him from appearing pro hac vice. (Orfanedes Decl., 2-3.) The application was served on all parties and on the State Bar in compliance with CCP § 1005, along with a \$50 application fee to the State Bar. (Orfanedes Decl., 11 and proof of service).

For the foregoing reasons, Counsel has qualified for the Court to allow him to appear pro hac vice. No party has opposed this application. Plaintiff's Motion to Admit Counsel pro hac vice is GRANTED.

2. Defendants' Demurrers

DISCUSSION

Request for Judicial Notice

A demurrer may be supported by matter of which the court must or may take judicial notice. (CCP § 430.30(a); Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) Evidence Code § 452 provides that judicial notice may be taken of: "(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States" and "(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code §§ 452, (b) and (h).) "Public entity" is broadly defined and includes "a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation" (Evid. Code § 200.)

Evid. Code § 453 provides that the "trial court SHALL take judicial notice of any matter specified in Section 452" if a party: (a) requests judicial notice, (b) gives each adverse party sufficient notice to prepare a response, and (c) gives the court sufficient information for taking judicial notice. (Cal. Evid. Code § 453, emphasis added.) In addition, the court and each party must be provided with a copy of the material, and, if the matter is part of a file in the court where the motion is being heard, the requesting party must specify in writing the part of the file sought to be judicially noticed, and arrange with the clerk to have the file in the courtroom when the hearing is held. (Cal. Rules of Court, rule 323(b).)

Here, Exhibit A is Special Order 40, the basis of this suit. Exhibits B and C are excerpts of the LAPD Manual. Exhibit D is The Report of the Rampart Independent Review Panel on Special Order 40. Exhibit A is a regulation of the Los Angeles Police Department (LAPD), and therefore falls under Evid. Code § 452 (b), since the LAPD is a public entity of the City of Los Angeles. Exhibits B and C are excerpts from the LAPD Manual,

and are argued to fall under the same category. No authority is given for this argument, but none is necessary, since all four exhibits fall under Evid. Code, subd. (h), for facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Here, there is no opposition to the Request for Judicial Notice. Deputy City Attorney Winnemore attests in his declaration that all four exhibits are true and correct copies of what they purport to be. (Request for Judicial Notice, p. 5.) And the content of the Exhibits are capable of accurate determination by consulting the Los Angeles Police Department. Moreover, Defendant has complied with the requirements of Evid. Code § 453 because the Request was timely made on June 5, 2006 for this hearing calendared for July 27th, affording Plaintiff sufficient time to prepare to meet the request. Additionally, sufficient information was provided in the form of the Exhibits attached to the Motion. Accordingly, the Defendant's Request that the Court take Judicial Notice of Exhibits A-D is GRANTED.

Merits

The parties have expended a great deal of energy arguing their substantive claims here on demurrer. However, in a demurrer, the sole issue is whether the facts pleaded, if true, state a valid cause of action (*Garcetti v. Superior Court* (1996) 49 Cal.App.4th 1533, 1547; *Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 339), and the question of Plaintiff's ability to prove the allegations of the complaint or the possible difficulty in doing so does not concern the reviewing Court (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47). The Court will assume all the facts alleged in the complaint are true, along with all facts that may be implied or inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

A Claim under CCP § 526a is Adequately Pleaded (CCP § 430.10(e)) Plaintiff brings this action under Code of Civil Procedure § 526a seeking injunctive and declaratory relief. (Complaint at 2, 37-41.) CCP § 526a provides, in pertinent part, that:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.

(CCP § 526a.) Here, the Complaint alleges that Plaintiff is a resident and taxpayer of the City of Los Angeles, and that he has paid taxes to the City of Los Angeles in the one-year period prior to commencement of this action. (Complaint 5.) The defendants are named individuals that serve in an official capacity of the city of Los Angeles, specifically: (1) William J. Bratton, Chief of Police (of LAPD); (2) John Mack, President of the Board of Police Commissioners; (3) Alan Skobin, the Vice President of the Board of Police Commissioners; and three members of the Board of Police Commissioners [(4) Shelley Freeman, (5) Andrea Ordin, and (6) Anthony Pacheco]. (Complaint, 5-11.)

"[I]n order to obtain injunctive relief in an action brought under Code of Civil Procedure section 526a, the taxpayer must establish that the expenditure of public funds which he seeks to enjoin is illegal." (*Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 23-24, citing *National Organization for Reform of Marijuana Laws v. Gain* (1979) 100 Cal.App.3d 586, 598-599.) The complaint alleges that: [o]n or about November 27, 1979, Los Angeles Chief of Police Daryl F. Gates issued Special Order 40 to incorporate the Board of Police Commissioners' new policy into the Manual of the Los Angeles Police Department ("LAPD Manual"). As articulated by Chief of Police Gates, Special Order 40 states, in pertinent part: "Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest nor book persons for violation of Title 8, Section 1323 of the United

States Immigration Code (illegal Entry)."

(Complaint 16.) The Complaint further alleges that Special Order 40 has since been codified, published, and republished in successive versions of the LAPD Manual at Volume 1, Section 390 and Volume 4, Section 264.50, and has remained in effect at all times relevant to this action. Specifically, the LAPD Manual states that "[u]ndocumented alien status in itself is not a matter for police action." (Complaint 17.) The LAPD Manual also states: "Officers shall not initiate police action where the objective is to discover the alien status of a person. Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (illegal Entry)." (Complaint 17, citing LAPD Manual, Vol. 4, § 264.50.) In 2000, the Board of Police Commissioners asked the Rampart Independent Review Panel to review the LAPD's compliance with Special Order 40. (Complaint 20.) The panel found that the LAPD's policies, procedures, and practices implementing Special Order 40 are not fully set forth in the LAPD Manual and, in practice, are more restrictive than as set forth in the manual. (Complaint 21.) The report found that "the Department's policies and procedures resulting from Special Order 40 are more restrictive than as written in the Department's Manual," and that the "policies and procedures articulated by the Department preclude officers from asking a person about his or her alien status and from notify the INS about a person's undocumented status unless the person has been arrested." (Complaint 21.) The report also found, inter alia, that First, LAPD officers are not supposed to ask individuals suspected of criminal offenses, crime victims, or witnesses, about their immigration status. Second in practice, LAPD officers do not notify the INS of the arrest of an illegal alien. Only after a person has been arrested, arraigned, and held in the county jail pending prosecution will his or her alien status be investigated by the INS, and that is in cooperation with the Los Angeles County Sheriff; not the LAPD.

(Complaint 21.)

Here, the Complaint alleges that the result of these policies and regulations is a "don't ask" policy regarding immigration contravenes the Supremacy Clause, 8 U.S.C. 1373, and Cal. Pen. Code § 834b. (Complaint 1, 27-36, 38, 41.) The Complaint also alleges since 1979, the LAPD has expended taxpayer funds and taxpayer-financed resources to enforce, maintain, and otherwise carry out the provisions of Special Order 40. (Complaint, 18.) An action which meets the requirements of CCP § 526a, permitting taxpayer to obtain judgment restraining and preventing illegal expenditure of public funds, presents a true case or controversy. (*Arrieta v Mahon* (1982) 31 Cal.3d 381.) The Complaint sufficiently alleges a cause of action under CCP § 526a to withstand demurrer. The demurrer is therefore OVERRULED.

First Cause of Action for Declaratory Relief is Adequately Pleaded (CCP § 430.10(e)) There is merit in the position that a demurrer should lie if the complaint shows on its face that the plaintiff is not entitled to a favorable declaration. (See *Moss v. Moss* (1942) 20 Cal.2d 640 [trial court does not commit reversible error when in ruling on demurrer it exercises its discretion and refuses declaratory relief to a party of equal fault in an illegal transaction, citing doctrine of in pari delicto (*id.* at p. 643)].) Indeed, "where the issue is purely one of law, if the reviewing court agreed with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal rights and duties of the parties concerning the matter in controversy." (*Taschner v. City Council* (1973) 31 Cal. App. 3d 48, 57, overruled on another ground in *Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596, fn. 14; ; accord, *Bach v. McNelis* (1989) 207 Cal. App. 3d 852, 872-873; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 832 (b), pp. 291-292.)

The foregoing notwithstanding, "...a general demurrer is not an appropriate means of testing the merits of the controversy in a declaratory relief action because plaintiff is

entitled to a declaration of his rights even if it be adverse." (Taschner v. City Council, supra. 57 accord, Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal.2d 719, 728.) Additionally, to sustain a demurrer leaves the parties where they were, with no binding determination of their rights, to await an actual breach and ensuing litigation; this defeats a fundamental purpose of declaratory relief: to remove uncertainties as to legal rights and duties before breach. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 831(b), p. 289.)

"The rule is now established that the defendant cannot, on demurrer, attack the merits of the plaintiff's claim. The complaint is sufficient if it shows an actual controversy; it need not show that plaintiff is in the right." (Ibid.)

The Complaint sufficiently shows an actual controversy as pleaded. The demurrer to the First Cause of Action for Declaratory Relief is therefore OVERRULED.

Second Cause of Action for Injunctive Relief is Adequately Pleaded (CCP § 430.10(e)) Ordinarily, to qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined (here, declaratory relief); and (2) the grounds for equitable relief. (City of South Pasadena v. Department of Transportation (1994) 29 Cal.App.4th 1280, 1293; San Diego Unified Port Dist. v. Gallagher (1998) 62 Cal.App.4th 501, 503-504.) Here, CCP § 526a expressly provides that an "action to obtain a judgment, restraining and preventing any illegal expenditure . . . may be maintained . . ." provided that the requirements of CCP § 526a are satisfied. A unanimous court in Wirin v. Horrall (1948) 85 Cal.App.2d 497, 504-505, held that the mere expending of the time of the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts' constituted an unlawful use of funds which could be enjoined under section 526a. (See also Vogel v. County of Los Angeles (1967) 68 Cal.2d 18.) Additionally, money damages would be of no use to the Plaintiff in this case because the Complaint is based on the alleged illegality of the conduct and practices of the Los Angeles Police Department. While the Complaint does not expressly plead inadequacy of remedy at law, the Court assumes all the facts alleged in the complaint are true, along with all facts that may be implied or inferred from those expressly alleged. (Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal.App.4th 1397, 1403.) Here the elements of injunction have been adequately pleaded.

The Complaint sufficiently pleads a cause of action under CCP § 526a involving an allegedly wrongful act(s) that is sought to be enjoined in this case and the grounds for injunctive relief by pleading the wrongful conduct under CCP § 526a.

The demurrer to the Second Cause of Action for Injunctive Relief is therefore OVERRULED.

3. Defendants' Motion to Strike

DISCUSSION

Grounds for a motion to strike exist where the pleading is "irrelevant, false, or improper matter" or where the pleading is "not drawn or filed in conformity with the laws of this state." (Cal. Code Civ. Proc. § 436.)

An action involving the application of equitable doctrines and the granting of relief that is obtainable only in courts of equity is an equitable action triable by the court. (See Dow Jones Co. v. Avenel (1984) 151 Cal.App.3d 144, 147.) The right to a jury trial is guaranteed by the California Constitution. (Cal. Const., art. I, § 16.) The right guaranteed as it existed at common law in 1850, when the Constitution was first adopted; the jury trial is a matter of right in a civil action at law, but not in equity. (C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 8.) A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law. (People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 299.) On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines, the parties are not entitled to a

