COURT ORDER

Crest, et al. v. Padilla
20STCV37513

TYPE OF MOTION:	Motion to Stay Injunction Pending Appeal.
MOVING PARTY:	Defendant, Shirley N. Weber, in her official capacity as Secretary of State of the State of California.
RESPONDING PARTY:	Plaintiffs, Robin Crest, Earl De Vries, and Judy De Vries.
HEARING DATE:	Thursday, July 14, 2022

Plaintiffs seek a declaration from this court that the diversity requirements for corporate boards in California are unconstitutional. Plaintiffs also seek an injunction preventing the Secretary of State from enforcing this requirement.

On September 30, 2020, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief against Defendant Alex Padilla in his official capacity as Secretary of State of the State of California ("Secretary"). On November 4, 2020, Defendant Secretary filed his Answer.

On April 1, 2022, this court granted summary judgment in favor of Plaintiffs. On June 2, 2022, this court entered final judgment and a permanent injunction in favor of Plaintiffs.

On June 6, 2022, Defendant Secretary filed their notice of appeal.

Defendant Secretary now moves this court, per Code of Civil Procedure §§ 916 and 918, for an order staying the permanent injunction pending Defendant Secretary's appeal.

The motion is DENIED.

Defendant Secretary argues that the injunction is subject to an automatic stay on appeal. They also argue that, even if the automatic stay does not apply, this court should exercise its discretion and grant a stay anyway. Defendant argues that this issue is not ripe and should be left for the Court of Appeal. The issue is ripe, the automatic stay does not apply, and since this case involves a constitutional violation, this court should decline to impose a discretionary stay.

Ripeness

"An application for a stay of a judgment should, wherever possible, be made first in the superior court…our refusal to issue a writ of supersedeas does not reflect this court's view of the merits of the appeal…we decline to exercise our discretion to issue supersedeas solely on the narrow ground that the purchasing party should have sought relief in the superior court first." Veyna v. Orange County Nursery, Inc. (2009) 170 Cal.App.4th 146, 157-158. While Defendant Secretary *could* wait and seek a stay from the Court of Appeal, the Court of Appeal has stated a clear preference that such motions be brought to the trial court first. That being the case, this court should not deny the motion on the grounds that it belongs in front of the Court of Appeal.

Automatic Stay

"No statute in chapter 2 of the Code of Civil Procedure part 2, title 13, specifically addresses the stay of injunctive orders, as distinct from other kinds of judgments. From the start, however, courts have understood the default statutory rule governing stays pending appeal to apply to some injunctive orders but not others, embracing a common law distinction between prohibitory, or preventive, injunctions and those mandating performance of an affirmative act." Daly v. San Bernardino County Board of Supervisors (2021) 11 Cal.5th 1030, 1039-40.

"[T]he core rationale underlying the mandatory-prohibitory distinction was based on an abiding concern with preserving the status quo pending appeal. The idea was that a prohibitory injunction is exempt from stay because such an injunction, by its nature, operates to preserve the status quo; by definition such an injunction prevents the defendant from taking actions that would alter the parties' respective provisions. To stay enforcement of such an order pending appeal would not preserve the status quo but instead invite its destruction; a stay would leave the parties free to alter conditions during the appeal, with sometimes irreversible consequences… Not so with the injunction that mandates the performance of an affirmative act — the so-called mandatory injunction. Such an injunction, by definition, commands some change in the parties' positions. The cases hold that before such orders are executed and the defendant must detrimentally alter its position, the defendant is entitled to know whether the order is correct." Daly, *supra*, 11 Cal.5th at 1041-42.

Put in plainer terms, an injunction which orders a party to *stop* or *refrain* from doing something is not automatically stayed. An injunction which orders a party to *start* or *resume* doing something is automatically stayed. The question now is which sort of injunction did the court enter?

The Present Injunction

After ruling on certain objections and directing counsel to confer on a proposed judgment, the court entered the following injunction:

> "Defendant California Secretary of State is hereby permanently enjoined and prohibited from expending or causing any expenditure of the estate, funds, or other property of the State on California Corporations Code § 301.4, as chaptered on September 30, 2020 and in effect on the date of this judgment, and so much of California Corporations Code §§

301.3, subdivision (d), and 2115.6 as pertains to Section 301.4."

This is, on its face, a prohibitory injunction. It prevents the future expenditure of funds on enforcement or implementation of Section 301.4. Defendant Secretary argues that it is, in effect, a mandatory injunction, because Defendant Secretary must take certain affirmative steps to shut down its compliance mechanisms.

Affirmative Acts

The affirmative steps to which Defendant Secretary refers are detailed in the Declaration of Elizabeth Bogart. They include: (1) removal of a question regarding director status from the paper version of Secretary's general disclosure form, (2) alteration of the online version of the Secretary's general disclosure form, (3) a revision of some information offered on a portion of the Secretary's general website. None of these are the sort of affirmative acts which transform a prohibitory injunction into a mandatory injunction.

A person who is ordered to stop doing something may sometimes be forced to perform ancillary affirmative acts to arrest their own momentum. To take examples cited by the Supreme Court in Daly, a party who is ordered to stop using a trade name may have to remove that name from their signage, or a party ordered to stop displaying mobile homes at a park may need to actually remove the mobile homes from the park. Daly, *supra*, 11 Cal.5th at 1047. Changes to a disclosure form and changes to the Secretary's website are the sort of "incidental steps" which do not require an automatic stay. Id.

Status Quo

Defendant Secretary also argues that this is a mandatory injunction because it alters the status quo. For the present purposes, the "status quo" is usually the state of affairs *at the time the injunction was issued*. Daly, *supra*, 11 Cal.5th at 1044. The Legislature enacted Section 301.4, and the Secretary immediately went about following it. This lawsuit resulted, but the Secretary has never stopped following Section 301.4. This court issued the injunction on June 2, 2022. For the Secretary to obey the injunction instead would in fact change the status quo as it existed on June 2, 2022.

However, the operative word in the second sentence of the preceding paragraph was "usually" (the Supreme Court's phrasing was "in the general run of cases"). Daly, *supra*, 11 Cal.5th at 1044. In cases where an injunction halts an ongoing course of conduct that began prior to the lawsuit and promises continue indefinitely, the "status quo" *may* be the state of affairs *before the disputed conduct began*. Id. at 1044-45. The reason for this exception is that, if it were otherwise, the status quo would *always* be the conduct the court had just found unlawful. Id. at 1045-46. The prevailing plaintiff, who had just won a judgment finding that they were suffering from unlawful acts, would simply have to continue suffering those acts for the indefinite duration of the defense's appeal. See Id.

So, in a situation where an injunction would stop an ongoing course of conduct, the court must look to the purpose of the injunction to decide which version of the status quo to use.

Where the purpose of the injunction is purely to prevent future unlawful conduct (e.g. an instruction to a city to stop using private railroad tracks), the court measures the status quo as of the time the disputed conduct began. Daly, *supra*, 11 Cal.5th at 1045-46. Where the purpose of the injunction is *remedial*, meant to correct a previous bad act (e.g. an order to remove a building or change corporate officers), the court measures the status quo as of the time the injunction was issued. Id. at 1046.

This case falls under the exception. This court enjoined the future expenditure of funds. It did not and will not ask the Secretary to go back and somehow un-spend money that has already been laid out. The injunction does not require the Secretary to withdraw the one annual report it issued in advance of the court's ruling. No information which had been collected as of the issuance of the injunction need be concealed. This is not a remedial injunction. It simply prevents Defendant Secretary from engaging in future execution of a law that this court has found unconstitutional.

Therefore, the status quo that is relevant to this analysis is the state of affairs at the time the disputed conduct began – that is, at the time Defendant Secretary began executing Section 301.4. This injunction preserves the status quo as of that time. Therefore, it is not a mandatory injunction. There is no automatic stay here.

Discretionary Stay

Code of Civil Procedure § 918 gives this court general discretion to stay the enforcement of an injunction, even if there is no automatic stay. Defendant Secretary requests that the court do so, for three reasons: (1) the issue of taxpayer standing is presently before the California Supreme Court, (2) this injunction prevents the Legislature from gathering statistical information that might allow it to measure discrimination, (3) no one would be harmed if the injunction is stayed. But waiting for the Supreme Court to decide a specific issue, "one can wait rather a long wait."[1] And Defendant Secretary at once oversells the impact of this injunction and undersells the impact of unconstitutional laws.

Taxpayer standing is only one of the issues presented to the Supreme Court in the appeal to which the Secretary refers. (Declaration of Alexander Prieto Exhibit E). If the Supreme Court decides to limit taxpayer standing in certain ways, it could change the outcome in this case by depriving these individual Plaintiffs of standing. However, the plaintiff in the Supreme Court case is an unincorporated association, and that case also presents issues related to associational and "public interest" standing. (Id.). The parties in this case may wait years for a decision in the Supreme Court case, only to find that the Court never reaches the issue in which they were particularly interested. Such a long wait for a mere chance at a different outcome would be difficult to countenance in an ordinary case, much less here, in a case with constitutional stakes.

What seems to bother Defendant Secretary most is the prospect that this injunction will prevent them from collecting information which the Legislature could use to evaluate discrimination. (Initial Memorandum p. 9:20-21). This is the issue on which the Secretary spends the bulk of their briefing. And it is their most sympathetic argument. Nevertheless, it would be a

[1] The King's Speech (Momentum Pictures 2010).

significant mistake to suppose that Section 301.4 is the Legislature's sole source of information. The Legislature obviously remains ready and able to enact new data collection measures, as long as they are properly free of unconstitutional mandates. Legislative committees retain the ability to demand this information from corporations, and to spontaneously hold hearings and elicit testimony about that information. The injunction in this case stops the execution of a specific law. It does not blind an entire branch of government, nor does it tie them to their chairs.

Finally, Defendant Secretary's estimate of the harms in this case passes right over the need, in a nation governed by law, for the government to be bound by the restrictions imposed by the people in our written constitution. If it were okay for the government to break the law "so long as no one gets hurt," there would never have been a taxpayer standing statute for the anyone to disagree about. The government owes its citizens a fundamental duty to follow its own constitution. Any breach of that duty, however well-intentioned, must be promptly corrected. Any system that depends upon the consent of the government depends also upon its own strict integrity. Loss of that integrity would be a serious harm indeed.

Conclusion

This court found that Corporations Code § 301.4 violated the Equal Protection Clause of the California Constitution by mandating a certain numeric structure on corporate boards on pain of a significant fine. This court also found that, although a pure data collection measure might well have passed muster on its own, the specific data collection provisions in Section 301.4 were structurally and functionally inseparable from enforcement of that section's unconstitutional mandate. Accordingly, the court enjoined the Secretary from expending any further funds on Section 301.4.

That injunction prevents the Secretary from continuing an ongoing course of unlawful conduct. It is prohibitory, not mandatory, and is not subject to an automatic stay on appeal. Nor would it be appropriate for this court to impose a discretionary stay. The mere possibility that the Supreme Court might decide an issue in a ruling on another case at some unknown point in the future is not a sufficient reason to wait. The Legislature retains its full power, ability, and legal right to enact or pursue other data collection measures while the injunction is in force. And since this case involved a fundamental constitutional issue, it would not be appropriate to permit the Secretary to continue the violation merely because there is no tangible harm yet.

The injunction should take effect immediately. The motion is DENIED.

Dated: 7/15/22

Terry A. Green
Judge of the Superior Court