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Court of Appeal, First District, Division 5, California.

SMALL PROPERTY OWNERS OF SAN FRANCISCO et al., Plaintiffs and Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents;
San Francisco Tenants Union, Intervenor and Respondent.

No. A104499.
|
(San Francisco County Super. Ct. No. 323591).
|
June 21, 2005.

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**Opinion**

SIMONS, J.

***1** In *Tom v. City & County of San Francisco* (2004) 120 Cal.App.4th 674 (*Tom* ), we upheld a constitutional challenge to an ordinance passed by the San Francisco Board of Supervisors that precluded tenants in common from entering into exclusive right of occupancy agreements. (*Id.* at pp. 677, 688.) While that appeal was ongoing, all plaintiffs unsuccessfully moved the trial court for an award of attorney fees under the private attorney general theory of Code of Civil Procedure section 1021.5 (hereafter section 1021.5). Two plaintiffs appeal that ruling and we affirm.[1]

Background

Due to the high cost of purchasing residential real property in some California cities including San Francisco, a practice arose whereby buyers would purchase multi-unit buildings as tenants in common and then agree among themselves to give each owner an exclusive right of occupancy (ERO) in a particular dwelling unit within the overall tenancy in common (TIC) property. Absent such an ERO agreement, co-owners of real property who purchased the property as tenants in common would each have equal rights to occupy the entire property and no right to exclude any of the other tenants in common from any part of the property. (*Tom, supra,* 120 Cal.App.4th at p. 677; see *Bakanauskas v. Urdan* (1988) 206 Cal.App.3d 621, 628-630.) To discourage the use of TIC agreements in the conversion of multi-unit rental housing to owner occupied housing, the Board enacted an ordinance forbidding such ERO agreements (Ordinance). (*Tom,* at pp. 677-678.) The trial court struck down the Ordinance after concluding that it was preempted by the Ellis Act (Gov.Code, § 7060 et seq.) and violated the rights of privacy and equal protection guaranteed by the California Constitution. (*Tom,* at p. 677.)

In the *Tom* decision, this division affirmed the ruling, based on our determination that a privacy violation had been demonstrated because the Ordinance implicated the right of privacy in the home and the defendant did not meet its burden to establish invasion of the privacy right was justified by one or more countervailing interests. (*Tom, supra,* 120 Cal.App.4th at pp. 683-686, 688.)

*Motion For Attorney Fees*

While the *Tom* appeal was pending in this court, all plaintiffs moved the trial court for an award of attorney fees under section 1021.5.[2] The trial court denied the motion after determining the moving parties had failed to present evidence satisfying the requirements for such fees. Only two plaintiffs, SPOSF and SFAA, are appealing that decision.

Discussion

I. *Attorney Fees Under Section 1021.5*

A. *General Principles*

" 'Section 1021.5 codifies the "private attorney general" doctrine under which attorney fees may be awarded to successful litigants.... "The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]" [Citation.] Entitlement to fees under section 1021.5 [is based on a three-part test and] requires a showing that the litigation: "(1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) [was necessary and] imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter." [Citation.]' [Citation.]" (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors,* 79 Cal.App.4th 505, 511.) Section 1021.5 states the three criteria in the conjunctive, requiring each standard to be met to justify a fee award. (*Punsly v. Ho* (2003) 105 Cal.App.4th 102, 114.) However, all three criteria are closely interrelated. (*Id.* at p. 113.)

***2** Here, the City concedes that the *Tom* action satisfies the first two parts of the test prescribed by section 1021.5 because the judgment invalidating the Ordinance enforced an important constitutional right and conferred a benefit on members of the public. The dispute centers on the third part of the test, whether the litigation was necessary and imposed a financial burden on petitioners which was disproportionate to their individual stake in the matter. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors, supra,* 79 Cal.App.4th at p. 511.)

B. *Necessity and Financial Burden of Private Enforcement*

Entitlement to an award of attorney fees under section 1021.5 turns upon a comparison of the litigant's private interests with the anticipated costs of suit. (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570 (*CLFA* ).) Section 1021.5 is intended to encourage the pursuit of public interest litigation under circumstances where the public interest at stake in the litigation does not involve any individual's financial interests to the extent necessary to encourage private litigation to vindicate the right. (*CLFA,* at p. 570.) Attorney fees are awarded under section 1021.5 "when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action." (*Beach Colony II v. California Costal Com.* (1985) 166 Cal.App.3d 106, 114.) "Section 1021.5 is intended as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public. [Citations.]" (*CLFA,* at p. 570.)

The burden of proof is on the attorney fee claimant to show that its litigation costs transcend its personal interests. (*Beach Colony II v. California Costal Com., supra,* 166 Cal.App.3d at p. 113.) The claimant must present evidence establishing that the financial burden of pursing the litigation was out of proportion to its personal stake in litigating the case. (*Ibid.;* accord, *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691.)

A trial court's determination regarding a claim for attorney fees under section 1021.5 lies within the court's discretion. On appeal, the trial court's discretion will not be disturbed absent a prejudicial abuse of discretion. (*Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 964-965; *City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100, 1112-1113.) "As applied, this rule means that we should not reverse unless 'the record establishes there is no reasonable basis' for the trial court's action. [Citation.]" (*Williams,* at p. 965.) In addition, the court's judgment or order is presumed correct on appeal and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)[3]

***3** In this instance, appellants contend that they satisfied the third aspect of the test because the financial burden of the litigation outweighed any economic benefit they might obtain from the litigation. Appellants rely upon the fact that their respective organizations do not own any property subject to the Ordinance, and, because the organizations are "nonhuman entities," they could not occupy residential properties. Appellants acknowledge that "certain indeterminable members of the organizations" could "theoretically receive a monetary benefit" from the litigation.

  

The City counters that appellants presented no evidence to the trial court establishing the financial burden of the litigation was disproportionate to their individual stake in the matter. Furthermore, the City argues it was appropriate for the trial court to take the financial interests of the individual members into account under the decision in *CLFA,* and that the trial court acted within its discretion in making an implied finding that the interests of the members of SPOSF and SFAA were proportionate to the costs of the litigation. We agree.

In the *CLFA* decision, the Court of Appeal concluded that the cost of litigation pursued by a nonprofit association of foresters (the CLFA), seeking to bar enforcement of emergency regulations adopted by the California State Board of Forestry, was proportionate to the CLFA's stake in the outcome, and, therefore, the association did not qualify as a private attorney general under section 1021.5. (*CLFA, supra,* 30 Cal.App.4th at pp. 565-567, 569, fn. 7.) The appellate court determined that the CLFA held a financial stake in pursuing litigation on behalf of its membership "to the same extent as its members," based on the appellate court's assessment that the "very existence" of the association depended upon the economic vitality of its members and that "any benefit or burden derived by CLFA from this lawsuit ultimately redounds to the membership." (*CLFA,* at p. 570.) The appellate court held the trial court had abused its discretion to award attorney fees to the CLFA because the economic interest of the association and its members had been sufficient motivation for bringing the action. (*CLFA,* at p. 573 .)

Here, too, the trial court was entitled to conclude that the economic interests of the individual members of the plaintiff associations were proportionate to the cost of the litigation. It was undisputed that the SPOSF had approximately 2,500 members and pursued the *Tom* litigation "to protect and preserve home ownership opportunities for middle and lower income San Franciscans" including, of course, its own members. The SPOSF solicited funds for this litigation from its apartment building owner members on the basis of the economic impact of the Ordinance. The City also presented evidence that SPOSF members who wanted to sell multi-unit residential buildings as TIC's would benefit from the invalidation of the restrictions the Ordinance would have placed on TIC development. In addition, SPOSF members seeking to purchase a residence in San Francisco would benefit from invalidation of the Ordinance in those instances where the purchase of a multi-unit TIC apartment was the only housing option that the member could afford.

***4** The SFAA is a nonprofit organization of 2,700 "owners and management companies," the members of which own over 60,000 rental units in San Francisco. It conducts "lobbying efforts and litigation ... designed to protect the private property rights of its members and all owners of residential rental property in San Francisco."

Finally, the members of the Greater Association of San Francisco Realtors[4] are "real estate brokers and agents who depend for their livelihood upon the sale and management of [residential] real property in San Francisco." By foreclosing TIC conversions, the Ordinance reduced the value of one segment of the residential real estate market and, presumably, the income of its members.

Appellants made no showing to counter this evidence and, in fact, conceded in the trial court that there were "individual members of [the] groups who did get an economic benefit. We don't dispute that ." Instead, appellants assert that their motivation in filing the *Tom* litigation "was unrelated to the specific economic interests" of their individual members. They also assert that the individual members of their groups who benefited economically from the litigation were not moving parties in the fee motion, and that the litigation "accomplished more than just the economic stake" of their individual members because the litigation made homeownership more affordable in San Francisco for everyone.

The shortcomings of appellants' position are at least twofold. First, appellants ignore the fact that the burden rested squarely with them, as attorney fee claimants, to present evidence establishing that the financial burden of pursuing the litigation was out of proportion to their personal stake in litigating the case. (*Beach Colony II v. California Coastal Com., supra,* 166 Cal.App.3d at p. 113; accord, *Planned Parenthood v. City of Santa Maria, supra,* 16 Cal.App.4th at p. 691.) They made no such showing. In fact, nothing in the record reveals the amount of each appellant's fees in this case. Thus, we are unable to evaluate the relationship between those fees and each appellant's personal stake in the litigation.[5] Second, appellants misconstrue the test for the private attorney general fee provision when they attempt to divert our focus to the altruistic motivation for the lawsuit and away from the economic benefit to their membership. Section 1021.5 was intended to apply in those situations where individual financial interests are insufficient to encourage private litigation to vindicate important public rights. (*CLFA,*

*supra,* 30 Cal.App.4th at p. 570.) Section 1021.5 is not triggered where, as here, litigants possessing an economic incentive to pursue the litigation coincidentally also serve a greater public interest. (*Ibid.*) Here, the trial court applied the proper analysis and was justified in determining that the evidence failed to support appellants' contention that the anticipated cost of the litigation was disproportionate to the economic interest the organizations and their members had in pursuing the litigation.

***5** Appellants have failed to demonstrate the trial court abused its discretion in determining they were not functioning as a private attorney general when undertaking the *Tom* action.

Disposition

The order denying attorney fees is affirmed. Respondents shall recover their costs on appeal.

We concur. STEVENS, Acting P.J., and GEMELLO, J.

**All Citations**

Not Reported in Cal.Rptr.3d, 2005 WL 1444213

Footnotes

1 The parties to this appeal are as follows: Plaintiffs and appellants, Small Property Owners of San Francisco (SPOSF) and San Francisco Apartment Association (SFAA); defendants and respondents, the City and County of San Francisco (City) and the San Francisco Board of Supervisors (Board); and, intervenor and respondent, the San Francisco Tenants Union.

2 Section 1021.5 provides in relevant part: “Upon motion, a court may award [attorney] fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.”

3 Because we are not in any better position than the trial court to consider the evidence pertinent to the third aspect of the section 1021.5 test, we reject appellants' assertion that a level of appellate scrutiny other than the customary “abuse of discretion” standard applies to our review of this appeal. (Cf. *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App .3d 1, 7-11.)

4 Appellants contend it is inappropriate to consider the economic benefit the court case conferred on those petitioners who did not appeal the trial court ruling. We disagree. All three associations jointly brought the lawsuit and agreed to pay an unspecified portion of the legal fees incurred. Thus, the private interests of all three associations in this litigation must be considered. (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 249-250.)

5 In their reply brief on appeal, appellants argue that all fees incurred after the trial court's decision on the Ellis Act preemption issue should be awarded because “litigation on the constitutional issue resulted in *no* additional monetary gain to any organization.” We will not consider points raised for the first time on appeal in a reply brief. (*Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 270.)