

**SUPERIOR COURT OF CALIFORNIA,**

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - March 26, 2014

EVENT DATE: 03/28/2014

EVENT TIME: 01:30:00 PM

DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2013-00062908-CU-MC-CTL

CASE TITLE: SAN DIEGANS FOR OPEN GOVERNMENT VS. CITY OF SAN DIEGO [IMAGED]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Misc Complaints - Other

EVENT TYPE: Demurrer / Motion to Strike

CAUSAL DOCUMENT/DATE FILED: Demurrer, 01/14/2014

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**Tentative Rulings for March 28, 2014 – PBID/MAD Challenge Case**

*SDOG v. City of San Diego and County of San Diego*, Case No. 2013-062908

1:30 p.m., Dept. 72

**1. Overview and Procedural Posture.**

In this case, plaintiff San Diegans for Open Government (plaintiff or SDOG) challenges the legality of assessments levied in connection with the Downtown Property and Business Improvement District (PBID) and 57 Maintenance Assessment Districts (MADs). These Districts were created by the City Council of defendant City of San Diego (City), and plaintiff believes the assessments are illegal taxes not properly approved by the voters. Plaintiff contends this conclusion follows from the decision of the Fourth District Court of Appeal, Division 1, in *Golden Hill Neighborhood Ass'n. v. City of San Diego* (2011) 199 Cal.App.4<sup>th</sup> 416, 440 (*Golden Hill*).

The court incorporates the minutes from December 9, 2013 [ROA 53]. In that order, which came after spirited argument on December 6, 2013, the court recited in detail the procedural history of the case to that date. The court then sustained the City's demurrer to the first, second, and third causes of action of plaintiff's first amended complaint (FAC). The court held that SDOG had failed to plead standing to sue. The court held this failure was a fatal blow to all three causes of action. Second, the court adopted the City's effort to distinguish *Golden Hill*. Third, the court held the first and second causes of action failed inasmuch as the FAC did not demonstrate that the causes of action are not barred by the statute of limitations found in the PBID law. Fourth, the court held the third cause of action fails since there is no allegation establishing that the MAD assessments are not in fact special property based assessments. The court granted leave to amend, although the court believed the case was headed to the Fourth District Court of Appeal, Division 1 [and even made bold to suggest a member of the merits panel].

To the court's surprise, plaintiff did not pursue appellate review; instead, it filed the second amended complaint (SAC). ROA 67. The SAC pleads (1) a first cause of action that challenges the 2014 PBID Resolution regarding the 2014 PBID levy ["Violation of the California Constitution with 2014 PBID Resolution"]; and (2) a second cause of action that challenges the 2014 MAD Resolutions regarding the 2014 MAD levy ["Violation of the California Constitution with 2014 MAD Resolutions"].

The first cause of action alleges the City has the burden of proof under Article XIID, section 4(f), of the California Constitution to demonstrate the validity of any special assessment and to show that the properties within the City's 2014 PBID receive a special benefit over and above the benefits conferred on the public at large due to the City's 2014 PBID levy. SAC, ¶ 17. In count one, SDOG also contends that given the City adopted Resolution R-300287 that authorized the 2014 PBID levy under Article XIID, section 4, of the California Constitution and Government Code sections 53739, 53750, 53753, and 54954.5 and does not specifically reference the PBID law [Streets and Highways Code §§ 36600 through 36671], the provisions of the PBID law do not apply to the 2014 PBID levy, thus plaintiff is not bound by the preclusive effect of the Streets and Highways section 36333, 30-day time bar. SAC, ¶¶ 20, 21, 21A. SDOG thereafter contends the City's approval of the 2014 PBID levy should be governed by Government Code section 53753(s) that concerns a "levy of a new or increased assessment" and which is part of the Proposition 218 Omnibus Implementation Act. SAC, ¶ 21A. The cause of action moreover contends the 2014 PBID levy is a "tax" within the meaning of Article XIII A, section 4, of the California Constitution. SAC, ¶ 24.

The second cause of action [like the third cause of action in the FAC] contends that the City's 2014 MAD Resolutions constitutes an illegal "tax" within the meaning of Article XIIC of the California Constitution. SAC, ¶ 33.

The first and second causes of action request that the court declare the 2014 PBID and 2014 MAD Resolutions violate the California Constitution; declare the taxes authorized by the same Resolutions are invalid; declare the assessments to be unauthorized taxes; and enjoin the City from levying or collecting taxes under the same Resolutions.

SDOG then approached the court *ex parte* on January 7, 2014, seeking to have its request for preliminary injunctive relief calendared for the same day as the City's challenged to the SAC. This request was granted [ROA 85], and the court also set [at SDOG's request] a trial date of May 9, 2014. *Id.* A subsequent *ex parte* request by the City relating to a discovery motion was also granted. ROA 101. Thus, the following matters are before the court today:

- A. City's demurrer to SAC [ROA 92].
- B. City's motion to strike portions of Exhibit B to the SAC [ROA 91].
- C. SDOG's renewed motion for a preliminary injunction [ROA 73-74, 85].
- D. City's motion to compel further special interrogatory responses [ROA 93].
- E. Case Management Conference.

SDOG has filed opposition to the City's pleading challenges. ROA 102-105. City filed reply to the opposition. ROA 108-109. SDOG failed to file moving papers for its renewed motion for a preliminary injunction (probably believing the May 9 trial date will suffice if the SAC survives). As such, the motion is off calendar and no further discussion of the motion is contained herein. ROA 107. SDOG filed opposition to the motion to compel further special interrogatory responses. ROA 102. City filed reply to the opposition. ROA 110.

The demurrer challenges the SAC on three grounds: failure to allege standing; the first and second causes of action fail to state a cause of action; and both counts are uncertain. The motion to strike attacks portions of Exhibit B attached to the SAC as improper and irrelevant matter. The motion to compel further interrogatory responses seeks an order compelling SDOG to provide a further response to City's first set of special interrogatories, numbers 1-3, 10-11, 23-200, 228-230, and 245, identified in City's 558-page, CRC 3.1345 separate statement that accompanies the motion. The motion also requests monetary sanctions in the sum of \$4750 against plaintiff and their attorneys.

Several months after the proceedings summarized in the court's December 9, 2013 minute order [ROA 53], the Fourth District Court of Appeal, Division 1 published *Gilbane Building Co. v. Superior Court*, No. D063685 (*Gilbane*). In *Gilbane*, the learned Court rejected petitioner's assertions that SDOG lacked

"associational standing" in an action under Code of Civil Procedure section 526a. The decision was based in part on *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1031-1033, where the learned Court affirmed the undersigned in part. City's demurrer and motion to strike do not argue that plaintiff must meet the standing requirements under section 526a and do not mention that code section.

## 2. Applicable Standards.

A. A demurrer may only be sustained if the complaint fails to state a cause of action under any possible legal theory. *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810; *McCall v. PacificCare of California, Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967. Moreover, "[r]egardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion." *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322. The courts of appeal give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." *Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at 967; *Zelig v. County of Los Angeles* (2000) 27 Cal.4th 1112, 1126. Courts must liberally construe the pleading with a view to substantial justice between the parties. Code of Civil Procedure § 452; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1120.

B. A motion to strike lies either to strike any "irrelevant, false, or improper matter inserted into any pleading" or to strike any pleading or part thereof "not drawn or filed in conformity with the laws of this State, a court rule or order of court." Code of Civil Procedure § 436. As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice [e.g. the court's own files or records]. Code of Civil Procedure § 437. As with demurrers, motions to strike are disfavored; the policy of the law is to construe pleadings liberally with a view to substantial justice. Code of Civil Procedure § 452. When ruling on a motion to strike, in the absence of contradictory facts that the court is required to take judicial notice of, the factual allegations set forth in a complaint must be construed as true. *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255. When granting a motion to strike, a court may allow an amended complaint upon such terms as may be just. Code of Civil Procedure § 472a(d); *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, n. 12.

C. Code of Civil Procedure section 2017.010 provides: "Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. . . ."

A party rebuffed in its effort to conduct pretrial discovery may, of course, file a motion to compel. The discovery statutes generally require a pre-motion effort to resolve the discovery dispute – referred to as "meet and confer." See generally, Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group), § 8:1163. The meet and confer effort is summarized in the Carmen A. Brock supporting declaration, ¶¶ 3-6.

An interrogatory may properly ask a party to state his or her contentions as to any matter or issue in the case; and the facts, witnesses or writings on which the contentions are based. Code of Civil Procedure § 2030.010(b); *Burke v. Superior Court* (1969) 71 Cal.2d 276, 281. Each answer in the response to the interrogatory must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code of Civil Procedure § 2030.220(a),(b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." Code of Civil Procedure § 2030.220(c).

### **3. Requests for Judicial Notice.**

The court incorporates part 3 of the order of September 27, 2013 [ROA 39], and the judicial notice rules related therein as if fully set forth herein. Accordingly, the court grants judicial notice of Exhibits A, B, C, D, and E found in the City's request for judicial notice that accompanies the City's demurrer. The court granted judicial notice of these same exhibits in part 3 of the order of December 9, 2013. ROA 54.

The court grants judicial notice of Exhibits A and B [Resolution Numbers 308267 and 308268] found in the City's request for judicial notice that accompanies the City's motion to strike. The court denies judicial notice of Exhibits C, D, E, F, G, H, I, and J [City's Annual Update Reports] found in the same request for judicial notice that accompanies the City's motion to strike. The Reports are missing the City Clerk's certification and signature on the final page.

The court denies judicial notice of Exhibit 1 [City's Annual Update Report] found in plaintiff's opposition to the motion to strike. The Report is missing the City Clerk's certification and signature on the final page.

### **4. Discussion and Rulings.**

#### **A. Demurrer.**

The City's demurrer is sustained to the first and second causes of action of plaintiff's SAC.

First, plaintiff fails to plead standing to sue to maintain its causes of action in the SAC. This failure undermines both causes of action, and as such, they fail for pleading purposes.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Code of Civil Procedure section 367. "[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Independent Roofing Contractors v California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1341, quoting *Warth v. Seldin* (2003) 422 U.S. 490, 499.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Property Owners of Whispering Palms, Inc. v. Newport Pacific Inc.* (2005) 132 Cal App. 4th 666, 672-673, quoting *Hunt v. Washington State Apple Advertising* (1977) 432 U.S. 333, 343. Only the party obligated to pay the sales tax has standing to bring a suit to invalidate a tax. *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1042.

Here, the SAC does not plead that plaintiff pays the PBID assessment, nor does it plead that plaintiff pays any of the 57 MAD assessments. Rather, the SAC pleads that plaintiff has "at least one member" who has been assessed or whose property has been assessed the taxes that are the subject of the 2014 PBID Resolution; plaintiff has "at least one member" who has been "assessed for one or more" of the 2014 MAD assessments or has refrained from purchasing real property in a MAD due to the increased ownership cost posed by the MAD assessment; plaintiff has "members who pay taxes" to City; and plaintiff and its members "have concerns about affordable housing". SAC, ¶¶ 13B, 13C, 13D, and 13E. The SAC, nonetheless, does not plead that plaintiff has a member that is a property owner in each of the 57 MADs who has paid, or will be obligated to pay, the 2014 Fiscal Year special assessment that plaintiff claims is illegal. Also, the SAC does not expressly plead that the SDOG member [whose identity is not alleged] is a property owner within the PBID who is obligated to pay the 2014 PBID assessment.

Simply, a citizen association does not have standing to sue unless its members have standing to sue in their own right. And it is the property owner who must pay the assessment to have standing to sue in

their own right. Standing to sue does not exist for those who reside in the City, for those who desire to purchase property, for those who pay taxes to the city, and/or for those who have concerns about affordable housing. Thus, the SAC fails to adequately plead that plaintiff has standing to bring this lawsuit on behalf of the 57 MADs and the PBID at issue in this case.

*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4<sup>th</sup> 155 (*Plastic Bag*), cited in the opposition, does not confer standing. Opposition memorandum, page 4. The case did not involve standing to sue by a taxpayer group challenging property based special assessments. Instead, the case involved two issues under the California Environmental Quality Act: (1) the "standing requirements for a corporate entity to challenge a determination on the preparation of an environmental impact report"; and (2) whether the City of Manhattan Beach was "required to prepare an EIR on the effects of an ordinance banning the use of plastic bags by local businesses". *Plastic Bag, supra*, 160. In addition, the Supreme Court found that the "strict rules of standing" that are appropriate in most other contexts do not apply "where broad and long-term [environmental] effects are involved." *Id.* at 170, citing *Bozung v. Local Agency Formation Comm.* (1975) 13 Cal.3d 263, 272. *Plastic Bag* does not confer standing.

*Common Cause of California v. Board of Supervisors of Los Angeles* (1989) 49 Cal.3d 432 (*Common Cause*), cited in the opposition, also does not confer standing. Opposition memorandum, page 5. In *Common Cause*, the court asserted that when the action is one for mandamus "to procure the enforcement of a public duty", it is sufficient that the plaintiff-citizen assert the right to have the laws executed and enforced to establish standing to sue. *Common Cause, supra*, 439. The SAC does not allege there is any public duty or law in need of enforcement. *Common Cause* does not confer standing.

The demurrer does not argue that the plaintiff must meet the Code of Civil Procedure section 526a standing requirements for standing, as contended by the opposition. Opposition memorandum, pages 6-7.

Essentially, the SAC fails to adequately plead that plaintiff has standing to bring this lawsuit on behalf of the 57 MADs and the PBID at issue in this case. As such, the first and second causes of action in the SAC fail against the City for pleading purposes.

Second, the first cause of action fails since the SAC does not demonstrate that the cause of action is not barred by the statute of limitations found in the PBID law.

The PBID law limits challenges to the validity of a PBID levy to 30 days after the resolution forming, or re-authorizing, the district. Streets and Highways section 36633 ["The validity of an assessment levied under this part shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the resolution levying the assessment is adopted pursuant to Section 36626..."] The PBID law states the adoption of the resolution of formation shall constitute the levy of an assessment in each of the fiscal years referred to in the management district plan. Streets and Highways Code section 36625(b) ["The adoption of the resolution of formation and, if required, recordation of the notice and map pursuant to Section 36627 shall constitute the levy of an assessment in each of the fiscal years referred to in the management district plan."] The assessments set forth in City's PBID Management Plan were authorized for a ten-year period upon the renewal of the PBID in 2005. *E.g.*, City's request for judicial notice, Exhibit A and SAC, Exhibit A. The 30-day period to challenge the validity of the levy thus ended in 2005. Therefore, the first cause of action is time-barred by the Streets and Highway section 36633, 30-day statute of limitations.

The first cause of action, which challenges the 2014 PBID levy, does not plead why it is not time-barred by the Streets and Highway section 36633, 30-day statute of limitations.

The SAC does not plead that the City changed the assessment methodology or that the 2014 PBID assessment levy is not in compliance with the five percent per annum assessment allowance established in the 2005 PBID Management Plan. City's request for judicial notice, Exhibit D, pages 10-11 [*e.g.*, "In future years, assessments may change, up or down, if square footage information changes and / or PBID budgets. Annual assessments may be adjusted by the Downtown San Diego

PBID Advisory Board and its Zone Committees up to 5% per year ...The following table presents the maximum assessment rates by Zone that may be levied during the 10 year term of the proposed assessments ..."]

Plaintiff's reliance on the Government Code sections, e.g., Government Code sections 53753 and 53753.5 which address the notice, protests, and hearing requirements for assessments under Article XIII D, section 4, are found in the 2014 PBID Levy Resolution and in the PBID 2005 Renewal Resolutions. City's request for judicial notice, Exhibits A, E. The allegation that the 2014 PBID levy is a "tax" within the meaning of Article XIII A, section 4, of the California Constitution [SAC, ¶ 24] fails given Article XIII C, section 1, subdivision (e)(7) specifically excludes property based assessments from the definition of a "tax". Article XIII C, section 1, subdivision (e)(7), text cited below. No facts are alleged that establish the 2014 PBID levy does not qualify under the Article XIII C, section 1, subdivision (e)(7) exclusion. Thus, the first cause of action fails.

Third, the second cause of action fails since there is no allegation establishing that the MAD assessments are not in fact special property based assessments. Pursuant to Proposition 26, Article XIII C, section 1, subdivision (e)(7) of the California Constitution specifically excludes property based assessments from the definition of a "tax." Article XIII C, section 1, subdivision (e)(7) ["As used in this article, 'tax' means any levy, charge, or exaction of any kind imposed by a local government, except the following: ... (7) Assessments and property-related fees ..."] The allegations in the second cause of action are similar to those in the third cause of action of the FAC; there are no changes to the legal contentions in the second cause of action. The second cause of action fails.

Where a demurrer is sustained, leave to amend is typically granted. *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227. In fact, it is an abuse of discretion to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.

Plaintiff in their opposition requests leave to amend to correct pleading defects. Opposition memorandum, page 15:17-198 ["Any defects in the allegations can easily be amended, and Plaintiff requests leave to amend if the Court believes the allegations are not sufficient to overrule the demurrer."] The request is not supported by any indication how plaintiff can state a good cause of action against the City. Plaintiff has the burden to show in what manner it can amend the SAC and how the amendment will change the legal effect of the pleading. *Goodman v. Kennedy, supra*, 18 Cal.3d at 349. Plaintiff makes no real effort to comply with this requirement. Plaintiff has had three opportunities to state a good cause of action against the City, i.e., the complaint, the FAC, and the SAC. Despite three opportunities, plaintiff has failed to do so. Leave to amend is denied.

## **B. Motion to Strike.**

City's motion to strike portions of Exhibit B to the SAC is moot by virtue of the demurrer ruling. Nonetheless, the motion is granted to the following extent.

The motion to strike seeks to strike nine attachments contained in Exhibit B to the SAC which consists of the dated June 4, 2013 Scott Koppel deposition transcript and eight dated 2012 Engineer's Reports as improper and irrelevant matter. Plaintiff fails to offer any legitimate basis why these nine attachments are proper attachments to the SAC.

The Scott Koppel deposition is improper and irrelevant given the deposition was taken in another action that was voluntarily dismissed by plaintiff, San Diego Superior Court Case No. 2012-00103136. Also, that action challenged the City's 2013 PBID and MAD levies, whereas the SAC in this action challenges the City's 2014 PBID and MAD levies. Moreover, the Scott Koppel deposition is unsigned and uncertified. The eight 2012 Engineer's Reports are improper and irrelevant given they were prepared for a different assessment year, not 2014, and moreover, the reports are all unsigned and uncertified.

**C. Motion to Compel Further Special Interrogatory Responses.**

City's motion to compel further special interrogatory responses is moot due to the demurrer ruling.



**D. CMC.**

The court will hear from the parties on the status of defendant County of San Diego, the remaining named defendant, whose involvement is limited to collecting the assessments on property tax bills and distributing same to the City. Absent the granting of leave to amend, the court will take the May 9 trial off calendar and order the City to prepare and submit a form of judgment of dismissal.