Hearing Date: 7/2/2024
Department: 85
John Lee v. Los Angeles City Ethics Committee, 23STCP03827

Tentative decision on demurrer: sustained without leave to amend

Respondent Los Angeles City Ethics Commission ("LACEC") demurs to the First Amended Petition ("FAP") filed by Petitioner John Lee ("Lee").

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. The First Amended Petition

On October 17, 2023, Petitioner Lee filed the Petition for writ of mandate against Respondent LACEC. The operative pleading is the FAP, filed on April 25, 2024. The FAP alleges two causes of action: (1) traditional mandamus under Code of Civil Procedure ("CCP") section 1085, and (2) administrative mandamus under CCP section 1094.5. The FAP also seeks injunctive relief prohibiting LACEC from continuing with the administrative proceeding again him. The FAP alleges in pertinent part as follows.

Lee is a resident of the City of Los Angeles ("City") and the City Councilman for CD 12. FAP, ¶2. Respondent LACEC is an agency of the City tasked with the monitoring and enforcement of issues dealing with campaign finance. FAP, ¶3.

On March 29, 2020, the U.S. Department of Justice issued a press release that former City Councilman Mitch Englander ("Englander") had been named in a previously sealed indictment returned by a federal grand jury. FAP, ¶2.[1] Lee was not a party to, or the subject of, the

federal proceeding. FAP, ¶9.

LACEC has stated that it determined after the Englander indictment was unsealed that Lee went on a trip to Las Vegas with a businessperson who provided gifts that should have been reported on Lee's Form 700. FAP, ¶¶ 3, 5. Lee was first contacted by LACEC investigators regarding these events on February 25, 2022, nearly two years after the Englander indictment was unsealed and nearly five years after the alleged incidents. FAP, ¶8.

Not until June 6, 2023, did LACEC, through its Director of Enforcement, submit and serve a Probable Cause Report against Lee stemming from alleged incidents that took place in 2016 and 2017. FAP, ¶¶ 3-4. The Probable Cause Report is void of information to establish that Lee committed any ethics violations. FAP, ¶. It alleged that Lee received reportable gifts from "Business Person A" through a dinner estimated at over $50 in 2016, a poker night in May 2017 estimated at over $133, and a Vegas trip in June 2017 estimated to be over the threshold for a reportable gift. FAP, ¶7. The Probable Cause Report fails to allege or provide evidence that (1) Lee was required to report the gift under the applicable laws, (2) he intentionally failed to disclose this information, and (3) he knew the non-disclosure to be false. Thus, the doctrine of fraudulent concealment does not apply to the Probable Cause Report. FAP, ¶10.

Under LAAC section 24.26(a)(2), "[a] Probable Cause Report may not be served to commence administrative enforcement proceedings more than four years after the date of an alleged violation." FAP, ¶11. Prior to service of the Probable Cause Report, Lee engaged in an informal conference with LACEC's Director of Enforcement in which he and his counsel stated that any Probable Cause Report would be outside the statute of limitations. FAP, ¶13. The Director of Enforcement argued that the statute of limitations was tolled because Lee did not provide the information on his Form 700. FAP, ¶13.

Lee has exhausted his legal remedies because the Probable Cause Report has already been issued, he has taken steps to ask the Director of Enforcement to withdraw the Probable Cause Report, and LACEC refuses to do so. FAP, ¶12.

On August 31, 2023, at a Probable Cause Conference, Lee argued to the LACEC that the Probable Cause Report was untimely filed and served and that any enforcement was barred by the statute of

served and that any enforcement was barred by the statute of limitations. FAP, ¶15. The Director of Enforcement argued that the statute of limitations was tolled pursuant to LAAC section 24.26(a)(2)(A), because Lee was alleged to have engaged in concealment or deceit. FAP, ¶16. The parties provided all their evidence and legal arguments with regard to the statute of limitations at this hearing and any additional hearing before the LACEC would be repetitive. FAP, ¶¶ 17-18.

On September 22, 2023, LACEC made a Probable Cause Determination, finding no probable cause for Count 12 of the Probable Cause Report but finding probable cause for Counts 1-9 and 11. FAP, ¶¶ 19-20. In making the Probable Cause Determination, the Executive Director stated that, based on the available evidence and the legal framework, the statute of limitations was tolled by concealment. FAP, ¶21. Specifically, LACEC found that the Director of Enforcement sufficiently alleged concealment such that it tolled the statute of limitations until March 9, 2020, the date the Englander indictment was unsealed. FAP, ¶22.

Any additional hearing before LACEC would be futile, as LACEC failed to withdraw its Probable Cause Report and the parties already argued the statute of limitations issue at the Probable Cause Conference. FAP, ¶23. If Lee makes any additional argument, LACEC has already shown its inevitable decision through the Enforcement Director's conclusion, and LACEC's Probable Cause Determination, that the statute of limitations was tolled. FAP, ¶24.

The first cause of action for traditional mandate (CCP §1085) alleges that LACEC served a Probable Cause Report to commence administrative enforcement proceedings more than four years after the date of the alleged violations and that it has a pattern and practice of finding that a failure to provide information on a required form, such as Form 700, is concealment which rises to toll the statute of limitations. FAP, ¶30. In its rebuttal to Lee's brief for the Probable Cause hearing, LACEC stated that because Lee committed concealment and deceit because he did not include information on, or amend, his Form 700. FAP, ¶31. The Director of Enforcement also stated that leaving information off a form is considered deceit. FAP, ¶32. LACEC has a policy and practice which does not follow the law. FAP, ¶33. The court should mandate that LACEC cannot take such actions in enforcement proceedings. FAP, ¶35.

The second cause of action for administrative mandamus (CCP §1094.6) alleges that, under LAAC section 24.26(a)(2), "[a] Probable Cause Report may not be served to commence administrative enforcement proceedings more than four years after the date of an alleged violation." FAP, ¶37. LACEC served a Probable Cause Report to commence administrative enforcement proceedings more than four years after the date of the alleged violations. FAP, ¶38. LACEC does not have jurisdiction to commence enforcement proceedings in this matter. FAP, ¶39. Lee is entitled to a writ of administrative mandate under CCP section 1094.5 commanding LACEC to set aside the decision finding probable cause in this matter. FAP, ¶39. Lee has exhausted all administrative remedies as to the issuance of the Probable Cause Report. FAP, ¶40.

Lee prays for (1) a peremptory writ of mandate and preliminary and permanent injunctive relief prohibiting LACEC from continuing enforcement proceedings against him and (2) a writ of mandate pursuant to CCP section 1094.6 ordering LACEC to set aside its Probable Cause Determination. FAP at 7.

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2. Course of Proceedings

On April 5, 2024, the court sustained LACEC's demurrer to the Petition and granted Lee leave to amend to either plead that he has exhausted his administrative remedies or that he is exempt from the exhaustion requirement. The court added that "to the extent Petitioner is alleging a pattern and practice, he must allege facts to support his claim for relief" under CCP section 1085.

On April 25, 2024, Petitioner Lee filed the FAP.

B. Applicable Law

A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257.

The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain ("uncertain" includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, ("Blank") (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, ("Vance") (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.31(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.31(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the meet and confer requirement has been met. CCP §430.31(a)(3).

"[A] demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred." State ex rel. Metz v. CCC Information Services, Inc., (2007) 149 Cal.App.4th 402, 413.

If a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. CCP §472a(c). It is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend if there is any reasonable possibility that the plaintiff can state a good cause of action. Dudley v. Finance of Transportation ("Dudley") (2001), 90 Cal. App. 4th 255, 260. However, in response to a demurrer and prior to the case being at issue, a complaint or cross-complaint shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action. CCP §430.41(e)(1).

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C. Governing Law[2]

LACEC is charged with the impartial and effective administration, implementation, and enforcement of the City's governmental ethics laws. To help restore public trust in government, the City adopted the

Governmental Ethics Ordinance ("GEO"). Los Angeles Municipal Code ("LAMC") §§49.5.1 *et seq*. The GEO governs the conduct of City officials and others. In part, the GEO incorporates the Political Reform Act's limit on the monetary value of gifts that a City official may receive from a single source during a calendar year. LAMC §49.5.8(B); Gov't Code §89503.

LACEC enforcement procedures are governed by detailed regulations contained in the Los Angeles Administrative Code ("LAAC"). LAAC §§ 24.21–24.29. Following a staff level investigation, the Director of Enforcement files a probable cause report with the Executive Director and serves it on the respondent. LAAC §§ 24.25(a)-(b), 24.26(a)(1).

The respondent may request a probable cause conference conducted before the Executive Director or the Executive Director's designee. LAAC §§ 24.26(a)-(b), (e). The Executive Director or designee makes the probable cause determination. If the Executive Director or designee finds there is probable cause, then the Director of Enforcement issues an "accusation." LAAC §24.26(c)-(d). The matter is then presented to the LACEC Commissioners for the appointment of a hearing officer. LAAC §24.27 (a).

The hearing procedures include a provision for hearings on preliminary matters including, procedural questions, the validity or interpretation of the applicable laws, disqualification of a member of the Commission from participating as a hearing officer, discovery, and any other matter not related to the truth or falsity of the factual allegations in the accusation or to a possible penalty. LAAC §24.27(e)(1).

At the conclusion of the administrative hearing, the hearing officer will prepare a written report containing proposed findings of fact, conclusions of law, and a summary of the evidence supporting each proposed finding. LAAC §24.27 (g)(2)(A).) The matter is then considered by LACEC, which makes a final determination. LAAC §24.27(g)(2)(C)-(D).

D. <u>Analysis</u>

LACEC demurs to the FAP.[3] LACEC notes that Petitioner Lee, a Los Angeles City Councilmember, has been accused of various GEO violations that occurred when he served as Chief of Staff to then-

Councilmember Mitchell Englander and thereafter, including when he was a candidate for City Council, stemming from gifts received from businessmen and lobbyists. Dem. at 2-3.

LACEC argues that its staff investigated allegations that Lee violated provisions of the GEO and thereafter, issued a Probable Cause Report. Lee exercised his right to request a probable cause conference before the Executive Director at which he argued that the statute of limitations barred the administrative enforcement proceeding against him. The Executive Director disagreed and issued the accusation pursuant to LAAC section 24.26. Dem. at 3.

Under the City Charter and LAAC section 24.27(i)(2), an evidentiary hearing must now be held to determine whether the alleged violations occurred. City Charter §706(c); LAAC §§ 24.26(d)(4), 24.27(a)(1). In an effort to prevent the evidentiary hearing from moving forward, on October 17, 2023, Lee filed the Petition and seeking an injunction prohibiting LACEC from continuing with administrative proceeding. Cameron Decl., ¶3. Dem. at 3-4.

1. Failure to Exhaust

Petitioner Lee seeks mandamus to compel LACEC to dismiss its accusation against him because the statute of limitations has passed.

A writ of mandate will only issue when the petitioner has no plain, speedy, or adequate remedy at law. CCP §1086. As a general rule, a court will not issue a writ of mandate unless a petitioner has first exhausted its available administrative remedies. *See*, *e.g.*, Alta Loma School Dist. v. San Bernardino County Com. On School Dist. Reorganization, (1981) 124 Cal.App.3d 542, 554. Under this rule, an administrative remedy is exhausted only upon termination of all available, non-duplicative administrative review procedures. Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd., (2005) 35 Cal.4th 1072, 1080.

The exhaustion doctrine has been described as “a jurisdictional prerequisite to resort to the courts.” Abelleira v. District Court of Appeal, (1941) 17 Cal.2d 280, 293. The exhaustion doctrine contemplates that the real issues in controversy be presented to the administrative body, which must be given the opportunity to apply its

special expertise to correct any errors and reach a final decision, thereby saving the already overworked courts from intervening into an administrative dispute unless absolutely necessary. Farmers Ins. Exchange v. Superior Court, (1992) 2 Cal.4th 377, 391.

The failure to allege exhaustion of administrative remedies or facts excusing the failure to exhaust renders the petition subject to demurrer for failure to state a cause of action. *See*, *e.g.*, Stenocord Corp. v. City & County of San Francisco, (1970) 2 Cal.3d 984, 990. A mere allegation that petitioners have exhausted their administrative remedies has been held to be conclusory and insufficient to survive demurrer. Pan Pacific Property v. County of Santa Cruz, (1978) 81 Cal.App.3d 244, 251. In another case, such an allegation has also been held sufficient to survive demurrer. Wong v. Regents of University of California, (1971) 15 Cal.App.3d 823, 829. Therefore, the court has discretion in determining whether the allegation is adequate.

While the FAP claims Lee has exhausted all administrative remedies (FAP, ¶40), this conclusory statement is not supported by the law or underlying plead facts. LACEC correctly argues (Dem. at 6) that the FAP essentially re-alleges the exhaustion in the Petition that was rejected by Judge Beckloff. Lee may have raised his statute of limitations argument prior to the Probable Cause Report but that does not exhaust his administrative remedies. The next step is an evidentiary hearing. LAAC §24.27. The action has not even been referred to the OAH as of yet. The FAP admits that administrative remedies have not been exhausted by alleging that LACEC will continue to move forward with an administrative hearing against Lee (FAP, ¶41) and by praying for relief prohibiting LACEC from continuing enforcement proceedings against him.

Nor will Lee be significantly harmed by proceeding through hearing. LACEC's procedures include a provision for raising preliminary matters prior to the hearing, including procedural questions, the validity or interpretation of the applicable laws, disqualification of a member of the Commission from participating as a hearing officer, discovery, and any other matter not related to the truth or falsity of the factual allegations in the accusation or to a possible penalty. LAAC §24.27(e)(1). Lee can make his arguments regarding jurisdiction and the statute of limitations before the ALJ assigned by the OAH. Lee has not exhausted his administrative remedies on the statute of limitations issue.

Lee attempts to plead the futility exception to the exhaustion requirement. Exhaustion of administrative remedies may be excused if the administrative agency has made it clear what its ruling would be such that an administrative appeal would be futile. Huntington Beach Police Officers' Assn. v. City of Huntington Beach, (1976) 58 Cal.App.3d 492, 499. Futility is shown when "the petitioner can positively state that the [decision maker] has declared what its ruling will be in the particular case." Gantner & Mattern Co. v. California Employment Com., (1941) 17 Cal.2d 314, 318. The futility exception applies only if the administrative process would serve no purpose because the agency's denial of relief is a *fait accompli*. *See* Sea & Sage Audubon Society v. Planning Commission of the City of Anaheim, (1983) 34 Cal.3d 412, 418-19.

The futility exception to the exhaustion requirement is a mixed question of law and fact. Econ. Empowerment Foundation v. Quackenbush, (1997) 57 Cal.App.4th 677, 692. Where facts are pled that would show an administrative remedy is futile, the matter is a question of fact to be decided when evidence can be presented. Twain Harte Associates, ltd. v. County of Tuolumne, (1990) 217 Cal.App.3d 71, 90. However, allegations contradicted by judicially noticed facts may be disregarded. Intengan v. BAC Home Loans Servicing LP, (2013) 214 Cal.App.4th 1047, 1055. Evidence that the decision-maker has previously decided cases on similar facts against the petitioner's position does not show futility. Abelleira v. District Court of Appeal, (1941) 17 Cal.2d 280, 300.

Lee has not alleged sufficient facts to show futility. The matter will be heard by an ALJ from OAH. That hearing officer will be independent and will make a written report containing proposed findings of fact, conclusions of law, and a summary of the evidence supporting each proposed finding. LAAC §24.27 (g)(2)(A).) The matter will then be considered by the Commission, which makes a final determination. LAAC §24.27(g)(2)(C)-(D). Lee cannot speculate what the hearing officer will recommend. Nor can he foresee what LACEC will do with that recommendation. While the Executive Director has made a Probable Cause Determination under LAAC section 24.26, that decision was only a preliminary determination whether the case should move forward to an evidentiary hearing. It does not demonstrate what the hearing officer or LACEC will do. The issue of tolling remains at issue for the adjudicatory phase of the process. The FAP does not allege facts showing futility.

Lee has failed to exhaust his administrative remedies and has failed to adequately plead his exemption from exhaustion.

2. The Pattern and Practice Claim

In his opposition to LACEC's first demurrer, Lee relied on Conlan v. Bonta, (2002) 102 Cal. App. 4th 745, to argue that he should be permitted to challenge the Probable Cause Determination as it relates to his statute of limitations argument. Judge Beckloff permitted Lee to plead facts to show that LACEC has a pattern and practice of bringing enforcement actions where the statute of limitations has expired.

Traditional mandamus is available to challenge an agency's pattern or practice in violation of a ministerial duty. Conlan v. Bonta, *supra,* 102 Cal.App.4th at 752 (petitioners used administrative mandamus to challenge state agency's' failure to reimburse them for out-of-pocket Medi-Cal expenses, and could also use traditional mandamus to challenge agency's practice of failing to reimburse Medi-Cal recipients directly for amounts owed for covered services obtained while Medi-Cal application was pending).

The FAP alleges that LACEC has a pattern and practice of finding that a failure to provide information on a required form, such as Form 700, is concealment which rises to toll the statute of limitations. FAP, ¶30. In its rebuttal to Lee's brief for the Probable Cause hearing, LACEC stated that Lee committed concealment and deceit because he did not include information on, or amend, his Form 700. FAP, ¶31. The Director of Enforcement also stated that leaving information off a form is considered deceit. FAP, ¶32. The FAP contends that LACEC has a "pattern and practice of holding that the failure to provide information on a Form 700 is tantamount to concealment and conceit outside the law." FAP, ¶35.

This conclusory allegation is insufficient for a pattern and practice claim. As LACEC argues (Dem. at 8), the FAC fails to plead any facts that would support a pattern or practice of unlawful conduct. There is no ministerial duty alleged. Merely asserting that LACEC has a pattern and practice of finding that an official's "failure to provide information on a required form, such as a Form 700, is concealment…" does not show anything unlawful or wrong. It is little different than asserting that

an employer has a custom and practice of firing lazy or insubordinate employees. So what? Some lazy or insubordinate employees should be fired, and others not. The FAP alleges no facts of a pattern or practice by LACEC that is in any way wrong or violative of a ministerial duty. Nor would a pattern and practice claim halt the administrative hearing, which seems to be Lee's goal.[4]

D. <u>Conclusion</u>

The demurrer to the FAP is sustained without leave to amend. An order to show cause re: dismissal under CCP section 581(f)(1) is set for July 23, 2024 at 9:30 a.m.

[1] The FAP restarts the paragraph numbering in its statement of facts.

[2] LACEC notes that, on April 5, 2024 and in connection with the previous demurrer, Judge Beckloff granted judicial notice of LAAC sections 24.21 through 24.29 and minutes from the November 8, 2023 LACEC meeting. Cameron Decl., ¶10. Apparently, LACEC believes that once a matter has been judicially noticed in a case, it may be used for all purposes. This is incorrect. LACEC should have re-presented these exhibits to the court for the instant demurrer. Lee does not object to this procedure, however.

[3] Counsel for Lee and LACEC met and conferred telephonically on the demurrer to the FAP on May 24, 2024, but continue to have disagreeing viewpoints as to the underlying law. Cameron Decl., ¶9. LACEC has satisfied the requirements of CCP section 430.31(a).

[4] LACEC also argues that the court should not grant Lee injunctive relief as he has failed to establish such a remedy is necessary. Dem. at 9-10. As Lee points out, a demurrer cannot be made to the relief sought. The proper remedy would have been a motion to strike, a fact pointed out by both Lee and Judge Beckloff. *See* Opp. at 7.