

TENTATIVE RULING - DEPT. H

DEC. 3, 2004

CALENDAR NUMBER: 1

SC075348 - BIVENS v. SANFORD**MOTION FOR JUDGMENT ON THE PLEADINGS***Request for Judicial Notice*

Granted as to text of Proposition 64, the fact of its enactment on November 2 204, its effective date on November 3, 2004, and as to the Third Amended Complaint.

Evidentiary objections

Moving party objects to factual assertions in the plaintiff's opposing papers which are not part of the allegations of the complaint. Sustained.

The Court notes that paragraph VI of the Prayer seeks attorneys fees under CCP section "1021.5, and the 'substantial benefit' doctrine."

Merits -summary and disposition

Plaintiff alleges that he is bringing this action as a "private attorney general". [Memorandum 1:7-8 and Third Amended Complaint, par. 1]. Plaintiff's counsel also claims a 'vested right' to attorneys fees for maintaining the action.

As to the first proposition, plaintiff pleads no actual injury and thus Proposition 64 extinguishes *plaintiff's standing* - but not the cause of action, if any: The effect of Proposition 64 is merely to deprive plaintiff of standing; Proposition 64 does not extinguish the right to redress the perceived wrong to the public, but only to differently define the class of persons who may sue to redress that perceived wrong.

Nor is there a vested right in attorneys' fees in this case. That would literally create standing where none otherwise exists - a circumstance which would encourage litigation. Neither the statute nor the doctrine upon which plaintiff relies suggests that there is a vested right to attorneys fees; not does any case cited by plaintiff so hold.

1

THIS RULING IS INTENDED TO GUIDE BUT NOT CONTROL ANY ARGUMENT THAT MAY BE PRESENTED AT THE HEARING OF THIS MATTER. IT IS NOT INTENDED AS A FINAL OR COMPLETE STATEMENT OF THE VIEWS OF THE COURT. IF THESE TENTATIVE RULINGS ARE ADOPTED AS THE RULINGS OF THE COURT, THEY MAY NOT REPRESENT THE EXCLUSIVE BASES FOR THE RULINGS MADE. REFERENCE SHOULD BE MADE TO THE MINUTE ORDER AND THE VERBATIM RECORD OF THE PROCEEDINGS FOR A FULL STATEMENT OF THE REASONS FOR THE RULING[S].

Any such rule would be questionable as a matter of public policy as it would foster litigation. Moreover, the enactment history of Proposition 64 suggests that awards of what are characterized as excessive or unjustified attorneys fees are among the perceived wrongs sought to be remedied by enactment of the new statutory provisions. The Supreme Court's decision in Graham v. DaimlerChrysler Corp. (S112862 Dec. 2, 2004) also suggests that plaintiff's claim of a vested rights to attorneys fees under CCP section 1021.5 is without merit.

Merits - additional comments

The Court notes that other cases that bear on the issue now presented, including but not limited to the following do not support plaintiff's contention: Evangelatos v. Superior Court (1988) 44 Cal.3d 1188; Tapia v. Superior Court (1991) 53 Cal.3d 282; Brenton v. Metabolife (2004) 116 CA4th 679, 687-91; Kuykendall v. State Bd. of Equalization (1994) 22 Cal.App.4th 1194, 1211 n.20 ("[P]arties do not have vested rights in existing remedies and rules of procedure").

In addition, does Plaintiff not concede that numerous California appellate courts - including our Supreme Court - have sanctioned the termination of a pending cause of action via repeal of the statute authorizing the cause of action? See, e.g., International Ass'n of Cleaning and Dye House Workers v. Landowitz (1942) 20 Cal.2d 418 (cause of action under forerunner to Unfair Competition Law vitiated by repeal of statute creating it).

Plaintiff seeks to distinguish the holding of the seminal case of Governing Board of Rialto v. Mann (1977) 18 Cal.3d 819,¹ arguing that Mann "must be squared with the Supreme Court's *later* decision in Evangelatos and other cases dealing with prospective operation of statutes." Opp. at 4;18-24 (emphasis in original). However, the Mann court acknowledged and addressed the rule relied on by the Evangelatos court, that is, the "traditional rule that statutory enactments are generally presumed to have prospective effect..." Mann at 829. In addition, in Evangelatos the Court said nothing to indicate that Mann was, in any respect, no longer binding. In fact, Evangelatos contains no mention of or reference to Mann.

¹ The Mann court unequivocally stated that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, a repeal of the statute without a savings clause terminates the action based thereon. Mann at 829.

THIS RULING IS INTENDED TO GUIDE BUT NOT CONTROL ANY ARGUMENT THAT MAY BE PRESENTED AT THE HEARING OF THIS MATTER. IT IS NOT INTENDED AS A FINAL OR COMPLETE STATEMENT OF THE VIEWS OF THE COURT. IF THESE TENTATIVE RULINGS ARE ADOPTED AS THE RULINGS OF THE COURT, THEY MAY NOT REPRESENT THE EXCLUSIVE BASES FOR THE RULINGS MADE. REFERENCE SHOULD BE MADE TO THE MINUTE ORDER AND THE VERBATIM RECORD OF THE PROCEEDINGS FOR A FULL STATEMENT OF THE REASONS FOR THE RULING[S].

The Court questions whether plaintiffs, who have brought a lawsuit on behalf of the general public, such as the plaintiff herein, are losing a substantive right if Proposition 64 is applied retroactively. In Yoshioka v. Superior Court (1997) 58 Cal.App.4th 972, 981-82, the appellate panel rejected that plaintiff's argument that retroactive application of Proposition 213 violated his due process rights, stating that "[r]etroactive application of a statute is constitutional as long as it does not deprive a person of a substantive right without due process of law.... Such alteration is only forbidden when at the very least the party is *deprived of every reasonable method of securing just compensation* (emphasis added)" Insofar as representative plaintiffs who are suing on behalf of the general public are not losing a right to secure "just compensation" (because damages are not allowed under B&P 17200 and they have not personally suffered any injury to be compensated), arguably there is no deprivation of any substantive right by retroactive application of Proposition 64. Those plaintiffs who have "suffered injury in fact and [have] lost money or property" stand in a different posture.

The Court does not view Plaintiff's "settled expectation in recovering costs and attorney's fees" (Opp. at 7:20) as a an expectation of recovery of just compensation. Sec. 1(b) of Proposition 64, containing many of the findings and declarations of purpose adopted by the electorate in enacting the statutes comprising Proposition 64, states in part that the UCL is "being misused" by private attorneys who "[f]ile ... lawsuits as a means of generating attorney's fees without creating a corresponding public benefit." Id., sec. 1(b)(1). Allowing an action such as this one to proceed merely because the (non-injured) Plaintiff sought to recover attorney's fees and costs would defeat the express and clear intent of the voters.

Motion granted. All future dates and matters are advanced to today and vacated.

NOTICE

Moving party shall prepare, serve ad lodge a proposed judgment and give notice and timely file proof of so doing.

THIS RULING IS INTENDED TO GUIDE BUT NOT CONTROL ANY ARGUMENT THAT MAY BE PRESENTED AT THE HEARING OF THIS MATTER. IT IS NOT INTENDED AS A FINAL OR COMPLETE STATEMENT OF THE VIEWS OF THE COURT. IF THESE TENTATIVE RULINGS ARE ADOPTED AS THE RULINGS OF THE COURT, THEY MAY NOT REPRESENT THE EXCLUSIVE BASES FOR THE RULINGS MADE. REFERENCE SHOULD BE MADE TO THE MINUTE ORDER AND THE VERBATIM RECORD OF THE PROCEEDINGS FOR A FULL STATEMENT OF THE REASONS FOR THE RULING[S].