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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BENJAMIN FRANK VENTI, Plaintiff and Appellant, v. ALFRED P. BALDERRAMA et al., Defendants and Respondents.	B162071 c/w B168001 (Los Angeles County Super. Ct. No. GC028666)

APPEAL from judgments of the Superior Court of Los Angeles County. Coleman A. Swart, Judge. Affirmed.

Foley & Lardner and Kenneth S. Klein for Plaintiff and Appellant.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Louis R. Miller, Seong H. Kim and Marisa G. Westervelt for Defendants and Respondents Alfred P. Balderrama and City of Monterey Park.

Freeman, Freeman & Smiley and Steven E. Young for Defendants and Respondents Gil Barnett, Parking Concepts, Inc. and PCI Fleet Maintenance, Inc.

In this appeal, following *Cartsen v. Psychology Examining Com.* (1980) 27 Cal.3d 793 (*Cartsen*) and *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 92 (*Braude*), we hold that the dissenting member of a city council lacks standing to question the validity of a contract awarded by that city council. Under *Cartsen*, the dissenting city council member is not "a mere taxpayer" for purposes of this litigation. (*Cartsen, supra*, 27 Cal.3d at p. 798.) We also conclude that the permanent disqualification from public office included among the penalties in Government Code section 1097 may be imposed only after a person is convicted of violating Government Code section 1090. We shall affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 2001, The Monterey Park City Council by a 2 to 1 vote awarded its Spirit Bus Contract (Contract) to Parking Concepts, Inc. (PCI), dba Transportation Concepts. Benjamin Venti, a member of the City Council voted against the contract. Following the advice of the Monterey Park City Attorney, Alfred Balderrama, another City Council member, abstained. Balderrama had been employed as vice-president of PCI. During the fall of 2000, Balderrama became vice-president of PCI's sister corporation PCI Fleet Maintenance (PCIFM), a position he held at the time the contract was awarded.

At a hearing on the Contract, Venti pointed out that Balderrama gave Amy Ho, the head of the City's Department of Transportation, a business card indicating that he was vice president of PCI. Venti expressed concern he was not informed that Balderrama was involved "in that company" until he asked the City Manager. Venti questioned why PCI's bid, which according to him, contained a calculation error, was not rejected when prior bids had been rejected for a similar reason. Venti questioned the City Attorney's conclusion that PCI Fleet Maintenance and PCI were separate entities. Venti also

disputed the City Attorney's conclusion that three votes were not necessary to approve the Contract because the contract was not a payment of money.[1]

After he lost the vote in the City Council, Venti sued Balderrama, PCI, PCIFM, Gill Barnett, the president and sole shareholder of PCI and PCIFM, and the City of Monterey Park (collectively Respondents). The City's treasurer, Mitchell Ing, was named as the real party in interest. Venti sued as a citizen taxpayer under Code of Civil Procedure section 526 and alleged that he brought the suit "without any potential financial benefit to himself, for the benefit of the public, to vindicate important public rights to have government which is free from influence peddling, violations of conflict of interest laws, and which is compliant with applicable laws governing its procedures."

Venti sought a declaration that the Contract is void because it was made in violation of Government Code sections 1090 and 36936 and in violation of common law. Venti requested an injunction removing Balderrama and permanently barring Balderrama from seeking public office. He also requested an injunction enjoining the City from making any payments or directing its treasurer to issue any payments under the Contract. Finally, Venti sought an injunction ordering PCI, PCFI, Balderrama, and Barnett to return to the City any monies paid by the City under the Contract.

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[1] We express no opinion with respect to the correctness of the statements made by the City Attorney.

The court awarded summary judgment in favor of Balderrama, and in a separate judgment, awarded summary judgment in favor of the remaining Respondents. It found that, under *Cartsen* and *Braude,* Respondents lack standing to prosecute the action. The court denied a request that Venti be allowed to substitute a plaintiff with standing. These appeals followed.[2]

DISCUSSION

Government Code section 1090 provides: "Members of the Legislature . . . and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."[3] Section 36936 provides: "Resolutions, orders for the payment of money, and all ordinances require a recorded majority vote of the total membership of the city council." Venti argues that the contract violates both of these statutes and is therefore void. Venti also argues that Balderrama should be permanently disqualified from holding office under Government Code section 1097.

Respondents challenge Venti's standing to bring this lawsuit and argue that Venti cannot seek Balderrama's permanent disqualification from holding public office in this litigation.

I. Venti Lacks Standing To Contest The Validity Of The Contract

In *Cartsen v. Psychology Examining Com.* (1980) 27 Cal.3d 793, our high court considered whether "a member of an administrative agency [may] employ judicial processes to challenge the legality of action taken by the very board on which he or she serves as a member[.]" (*Id.* at p. 795.) The issue arose in the context of a petition for

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[2] We grant Respondents' request to take judicial notice of pleadings filed in the trial court. (Evid. Code §§ 452, subd. (d), 459.) We decline Respondents' request to take judicial notice of information available on the City of Monterey Park's website.

[3] All further undesignated statutory citations are to this code.

writ of mandate to compel the Psychology Examining Committee of the Board of Medical Quality Assurance of the State of California to comply with Business and Professions Code section 2942. (*Id.* at p. 795.) A petition for a writ of mandate must be brought by a "beneficially interested" party (*id.* at p. 796; Code Civ. Proc § 1086), which generally may include taxpayers. (*Id.* at p. 798.)

The issue before the high court was: "[W]hether an administrative board member is, for purposes of this litigation, a mere taxpayer." (*Cartsen, supra,* 27 Cal.3d at p. 798.) The court held that "a board member is not a citizen-taxpayer for the purpose of having standing to sue the very board on which she sits." (*Id.* at p. 801.) Policy concerns guided the court's decision; it worried (1) litigation would affect the internal workings of board members; (2) "[t]he number of such suits emanating from members on city, county, special district and state boards, will add significantly to court calendar congestion"; and (3) the petitioner's "interest in the subject matter was piqued by service on the board, not by the virtue of neutrality of citizenship." (*Id.* at pp. 798-799.)

The *Cartsen* rule was extended in *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83 to apply to a lawsuit brought by a city council member against the city council and mayor. (*Id.* at pp. 90-91.) The *Braude* court found that "[w]hile an ordinary citizen-taxpayer probably could successfully challenge the expenditure of public funds this project [the construction of an office building] will likely require, Braude is foreclosed by the decision in *Cartsen v. Psychology Examining Com., supra*, 27 Cal.3d 793, from making this same argument." (*Id.* at p. 90.) "[A]s a member of the city council, [Braude] has forfeited his right to bring a lawsuit as a citizen-taxpayer against the governmental body of which he is a member." (*Braude, supra,* 226 Cal.App.3d at p. 91.)

Under *Cartsen* and *Braude*, Venti, a city-council member, does not have standing as a citizen taxpayer, the basis for his suit. Like the petitioner, in *Cartsen*, Venti's interest "was piqued by service" as a council member. Venti expressly tried to persuade his colleagues that they could not enter the contract with PCI because of Balderrama's

interest and challenged the City Attorney's contrary conclusion. Venti also attempted to persuade his colleagues that the contract required a minimum of three votes because it obligated the City to pay money. The policy concerns of the *Cartsen* court are implicated here: affording Venti standing would affect the internal workings of the city council. The dissident city-council member, failing to persuade his colleagues "now has to persuade merely one judge. The number of such suits emanating from members on city, county, special district, and state boards will add significantly to court calendar congestion." (*Cartsen, supra,* 27 Cal.3d at pp. 798-799.)

Venti attempts to distinguish *Cartsen* and *Braude* arguing that this case involves a request for declaratory and injunctive relief under Code of Civil Procedure section 526a, not a petition for a writ of mandate. While *Cartsen* involved a petition for writ of mandate, nothing in the decision limits it to that procedural posture. The *Cartsen* court held that a board member is not a taxpayer for purposes of suing the board; here, Venti seeks to sue the council of which he is a member as a citizen taxpayer. The standing requirements for proceeding under Code of Civil Procedure section 1086 are similar to those imposed in other civil lawsuits, (*Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 877), and the different procedural posture between this case and *Cartsen* is not a basis for circumventing the policy considerations our Supreme Court found paramount in analyzing standing.

While *Cartsen* involved a suit by a board member against that board, the *Cartsen* court cited approvingly a case that found a member of Congress lacked standing to sue the Department of Defense, after she was unable to persuade her colleagues that the war on Cambodia was illegal. (*Cartsen, supra,* 27 Cal.3d at p. 800, citing *Holzman v. Schlesinger* (2d Cir. 1973) 484 F.2d 1307.) *Braude* similarly held that a city council member could not sue the mayor in an effort "to do indirectly what he cannot do directly for substantial policy reasons . . . ." (*Braude, supra*, 226 Cal.App.3d at p. 92.) For the

same reason, Venti, a city council member, cannot sue any of the Respondents to invalidate the Contract, i.e. to do indirectly what he cannot do directly.[4]

Venti argues that the trial court abused its discretion in denying him leave to amend to substitute a proper plaintiff. Outside this context, his argument would be persuasive as amendment should be freely allowed where a plaintiff without authority to sue seeks to substitute the real party in interest. (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1678; *California Air Resources Bd. v. Hart* (1993) 21 Cal.App.4th 289, 300.) However, in the context of a lawsuit between a board member and the board, the *Cartsen* court, which we are required to follow (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450), rejected this rule when it rejected the petitioner's argument that even if she lacked standing "others may be induced to do so on her behalf." (*Cartsen, supra*, 27 Cal.3d at pp. 800-801.) Because its ruling was consistent with *Cartsen*, the trial court did not abuse its discretion in denying Venti's request to amend his complaint.[5]

II. Venti Cannot Permanently Disqualify Balderrama From Public Office

In addition to attempting to invalidate the Contract, Venti seeks an injunction permanently removing Balderrama from public office. Venti relies on section 1097, which provides: "Every officer or person prohibited by the laws of this state from making or being interested in contracts . . . who willfully violates any of the provisions of

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[4] We need not consider Respondents' argument that Balderrama is not a proper party to the portion of the suit alleging that the contract is void because we conclude that Venti cannot sue any of the Respondents for declaratory or injunctive relief related to the Contract.

[5] Venti also challenges the trial courts award of costs to Balderrama on the ground that the costs should have been apportioned between Balderrama and the City because the same counsel represented both Respondents. This issue is now moot in light of our finding that the trial court correctly granted summary judgment in favor of all Respondents.

such laws, is punishable by a fine of not more than one thousand dollars ($1000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state."

If Balderrama had been convicted of willfully violating section 1090, permanent disqualification is a "penalty attached to a violation of Government Code section 1090." (*People v. Watson* (1971) 15 Cal.App.3d 28, 45.) In *Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, the court found that under a similar statute, Elections Code section 18501,[6] the permanent disqualification "flows *solely* from a felony conviction under that statute." (Emphasis added.) Because Balderrama was not convicted of violating section 1090, the penalty included within section 1097 is inapplicable.

Helena Rubenstein Internat. v. Younger (1977) 71 Cal.App.3d 406, a case relied upon by Venti, supports this conclusion. In that case, the court considered the "meaning of 'convicted' or 'conviction' under California law for purposes of exclusion from public office" under section 1021. (*Id.* at p. 409.) That statute provides: "A person is disqualified from holding any office upon conviction of designated crimes as specified in the Constitution and laws of the State." (§ 1021.) The appellants argued that a jury verdict convicting the Lieutenant Governor of perjury permanently disqualified him from holding office. (*Helena Rubenstein Internat. v. Younger*, at p. 409.) The court concluded "that 'conviction' so as to exclude from public office does not occur until rendition of judgment following the verdict." (*Id.* at p. 411.) Under *Younger*, a person is not permanently disqualified from holding office until a judgment of conviction of certain

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[6] That statute provides: "Any public official who knowingly violates any of the provisions of this chapter, and thereby aids in any way the illegal casting or attempting to cast a vote, or who connives to nullify any of the provisions of this chapter in order that fraud may be perpetrated, shall forever be disqualified from holding office in this state and upon conviction shall be sentenced to a state prison for 16 months or two or three years."

crimes is rendered. Section 1097 identifies one such crime – the violation of section 1090. Thus, under *Younger*, a judgment of conviction must precede the permanent disqualification.

III. Alleged Procedural Flaws

Venti argues that the trial court failed to permit oral argument at the hearing on the second summary judgment motion. He also argues that the trial court's order is flawed because it does not refer to the evidence indicating no triable issue of material fact exists and relies on evidence filed with Respondents' reply papers.

The trial court held a hearing on the second summary judgment motion, but interrupted counsel when counsel began arguing the merits of the case. The court stated "the ruling is going to be based upon the standing issue alone." The trial court's order reflects that it ruled only on the standing issue. Given the limited nature of the trial court's ruling these procedures were appropriate. Entertaining argument on the merits or reviewing the merits in its order would have been an exercise in futility here, where Venti cannot overcome the threshold standing requirement. With respect to the evidence objected to by Venti, it is not critical to any of his arguments advocating reversal in his appeal and we do not consider it. Therefore, whether the trial court erred in considering the evidence is now moot.

DISPOSITION

The judgments are affirmed. Each party to bear his or its own costs.

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COOPER, P.J.

We concur:

BOLAND, J. FLIER, J.