Filed 9/30/03 Godfrey v. CYA CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[NO CHANGE IN JUDGMENT]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VALERIE GODFREY, Plaintiff and Respondent, v. CALIFORNIA YOUTH AUTHORITY et al. Defendants and Appellants; STATE PERSONNEL BOARD, Real Party in Interest.	2d Civil No. B162597 (Super. Ct. No. CV010866) (San Luis Obispo County) ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on September 4, 2003, be modified as follows:

1. On page 7, the following language is inserted after the second full paragraph, which ends with the sentence, "We have already concluded that her petition was timely; ergo, it does no more than seek the direct review to which she is entitled by statute.":

CYA and Harper cite one opinion rejecting a claim of intrinsic fraud as a basis for relief in an administrative mandamus proceeding. In *Mullen v. Department of Real Estate* (1988) 204 Cal.App.3d 295, the petitioner was a realtor challenging a disciplinary action by the California State Department of Real Estate. On appeal from the superior court order denying the petition, the realtor asked for leave to present the appellate court with newly discovered evidence of a key witness's perjury during the administrative proceeding. (*Id*. at p. 301.) The court denied the request, concluding that the evidence of perjury was evidence of intrinsic fraud that could not be used to set aside the lower court's judgment denying the writ and affirming the Department of Real Estate's order. (*Ibid.*)

Mullen is distinguishable because the petitioner in that case presented the evidence of perjury for the first time in an appeal from the superior court order denying a writ of mandamus. This was the functional equivalent of seeking a writ of error coram vobis ordering the trial court to reconsider its decision in light of evidence discovered during the pendency of the appeal. (*Mullen v. Department of Real Estate*, *supra*, 204 Cal.App.3d at p. 301.) Unlike an order granting a new trial, which may be based on a claim of intrinsic fraud, coram vobis relief can be based only on extrinsic fraud. (See generally *Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 8-10.)

Here, the superior court considered the evidence of perjury in the first instance and remanded the case for a new administrative hearing under Code of Civil Procedure section 1094.5, subdivision (e). The remand procedure under subdivision (e) is broadly authorized when "there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced" at the administrative hearing. The subdivision does not purport to limit the type of evidence that may support a remand, and its language is similar to that found in Code of Civil Procedure section 657, paragraph 4, which authorizes an order granting a new trial based on "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have

discovered and produced at trial." The standard for granting a remand under section 1094.5, subdivision (e) is more akin to the standard for an order granting a new trial (which may be based on new evidence of intrinsic fraud) than to the standard for granting a writ of error coram vobis (which may only be based on a claim of extrinsic fraud). The court did not err when it remanded the case based on new evidence falling within the category of intrinsic fraud.

2. On page 10, the first paragraph beginning with "Howard L. Schwartz" is is deleted and the following paragraph is inserted in its place:

Howard L. Schwartz, Chief Counsel, Linda D. Buzzini, Deputy Chief Counsel, Warren C. Stracener, Assistant Chief Counsel, Gregory Thomas Lyall, Labor Relations Counsel, for Defendants and Appellants.

3. On page 10, the second paragraph beginning with "Law Offices" is deleted and the following paragraph is inserted in its place:

Law Office of Kimberly Daniels and Kimberly Y. Daniels, Law Office of David P. Warren and David P. Warren for Plaintiff and Respondent.

There is no change in judgment.

Appellant's petition for rehearing is denied.