



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

Document Scanning Lead Sheet

Sep-25-2015 3:46 pm

Case Number: CGC-13-534447

Filing Date: Sep-25-2015 3:45

Filed by: DANIAL LEMIRE

Juke Box: 001 Image: 05091739

ORDER

AFT LOCAL 2121 ON BEHALF OF ITSELF AND ITS VS. ACCREDITING
COMMISSION FOR COMMUNITY AND JUNIOR et al

001C05091739

Instructions:

Please place this sheet on top of the document to be scanned.

SEP 25 2015

CLERK OF THE COURT
BY: [Signature] Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

AFT LOCAL 2121 ET AL.,
Plaintiffs,

vs.

ACCREDITING COMMISSION FOR
COMMUNITY AND JUNIOR COLLEGES,
ET AL.,
Defendants.

Case No. CGC – 13-534447

ORDER GRANTING LEAVE TO CITY
ATTORNEY TO FILE AMICUS BRIEF
AND
DENYING DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS
AND
SETTING CASE MANAGEMENT
CONFERENCE

I hear argument on the captioned motion this date.

Introduction

In 2013 San Francisco's City Attorney filed a Complaint against the Accrediting Commission for Community and Junior Colleges (ACCJC) alleging violations of California's Unfair Competition Law (UCL) in connection with its review of the accreditation of City College of San Francisco (CCSF). In February of this year I issued an injunction in that case, *People of the State of California ex rel. Dennis Herrera, San Francisco City Attorney v. Accrediting Commission for Community and Junior Colleges, et al.*, No. CGC-13-533693 (the People's case), ordering the ACCJC to reconsider its decision to withdraw CCSF's accreditation.

On September 24, 2013, shortly after the City Attorney filed his suit, AFT Local 2121 (AFT) filed this case against the ACCJC on behalf of its members, as well as the San Francisco

1 public. As with the People's case, AFT alleged violations of the UCL and sought injunctive
2 relief. In November 2013, the Commission filed an anti-SLAPP motion, which I denied. The
3 ACCJC appealed, and this lawsuit was stayed.

4
5 On June 8, 2015, the Court of Appeal dismissed ACCJC's anti-SLAPP motion,
6 explaining that my decision in the People's case rendered the appeal moot. The ACCJC now
7 moves for judgment on the pleadings, reasoning that AFT's claim is barred by res judicata and,
8 in any event, was rendered moot by the appellate decision.

9
10 **Requests for Judicial Notice**

11 The ACCJC and AFT request judicial notice of numerous documents previously filed in
12 this court and the Court of Appeal, as well as a number of decisions and orders issued by both
13 courts. These requests are unopposed and are granted. Evid. Code § 452(c), (d), (h).

14
15
16 **Leave to File Amicus Curiae Brief by the San Francisco City Attorney**

17 The San Francisco City Attorney's Office requests leave to file an amicus curiae brief in
18 response to the ACCJC's motion for judgment on the pleadings. Courts have discretion over
19 whether to grant such leave. *In re Veteran's Industries, Inc.*, 8 Cal.App.3d 902, 924 (1970). In
20 support of its request, the City Attorney's Office points out that it has a significant interest in the
21 res judicata effects of its decisions to litigate unfair competition claims on behalf of the public. I
22 agree, and leave is granted.

1 **Discussion**

2 **A. Mootness**

3 The ACCJC contends that the “law of the case” doctrine obligates this court to deem
4 AFT’s suit moot. Specifically, the ACCJC points to the appellate statement that my Final
5 Injunction and Judgment in the People’s case “remedied the harm alleged in AFT’s complaint.”
6 Motion at 8.

7 The law of the case doctrine applies if the ruling in question was “necessary to the
8 decision of the case” and if its application would not be unjust. *Morohoshi v. Pac. Home*, 34 Cal.
9 4th 482, 491 (2004).

10 **Points “necessary” to decision:** Only those rulings that are “necessary” to the appellate
11 court’s decision are law of the case. Thus, the doctrine does not apply to a dictum.
12 [*Gyerman v. United States Lines Co.* (1972) 7 C3d 488, 498, 102 CR 795, 801;
13 *Quackenbush v. Super.Ct. (Arthur Andersen LLP)* (2000) 79 CA4th 867, 874, 94 CR2d
14 282, 286; but see also *Lucky United Properties Investments, Inc. v. Lee* (“*Lucky II*”)
15 (2013) 213 CA4th 635, 651, 152 CR3d 641, 654—doctrine applies to ruling that, all
16 though “not essential” to appellate disposition, was made for trial court’s guidance on
remand]

17 Jon B. Eisenberg, CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ 14:184 (2015).

18 The Court of Appeal wrote that AFT’s complaint raised “precisely the issue raised in the
19 San Francisco City Attorney’s complaint and addressed by the trial court’s Final Injunction,” and
20 that “[t]herefore, the court’s Final Injunction . . . remedied the harm alleged in AFT’s
21 complaint.” *Accrediting ACCJC for Community and Junior Colleges v. AFT Local 2121*,
22 A140869 at 2 (June 8, 2015). This language can indeed be read as a holding that all of the relief
23 sought by AFT was mooted by my injunction in the People’s case, and the citation to *Woodward*
24 *Park Homeowners Ass’n v. Garreks, Inc.*, 77 Cal. App. 4th 880, 888 (2000) is indeed to a case in
25 which such case-wide mootness was discussed. But it is important to recall that before the Court
26 of Appeal was only the anti-SLAPP motion, and it is probable that the Court’s authority, a
27

1 function solely of the Legislative determination that denial of anti-SLAPP motions are
2 appealable, *Hewlett-Packard Co. v. Oracle Corp.*, ___Cal.App.4th___, 191 Cal. Rptr. 3d 807, 814
3 (August 27, 2015), was so limited, suggesting that its ruling was similarly limited. Indeed, the
4 opinion states clearly – in its opening paragraph – that both the Final Injunction and the granting
5 of “restoration status” to CCSF “render the *current appeal* moot.” *Accrediting ACCJC for*
6 *Community and Junior Colleges* at 1 (emphasis added), focusing on exactly what was before the
7 Court.
8

9 In any event, a case-wide mootness decision was not *necessary* to the Court of Appeal’s
10 resolution of the anti-SLAPP appeal. Rather, the Court provided a narrower reason why the
11 appeal was moot: “the trial court’s Final Injunction effectively moots AFT’s antiSLAPP motion
12 by demonstrating there was merit to AFT’s claims.” *Id.* As AFT intimates, it would be odd if,
13 having been successful in beating back the motion to strike in the trial and appellate courts, AFT
14 was-- as a direct consequence-- rewarded by a dismissal now.
15

16 For these reasons, the appellate opinion does not moot AFT’s suit. This finding does not
17 preclude my own determination that the entire case or part of it is indeed moot, but that issue is
18 not before me.
19

20 **B. Res Judicata**

21 A suit is barred by res judicata where three elements are satisfied: (1) the issues decided
22 in the prior adjudication are identical to those in the current action; (2) the prior adjudication
23 resulted in a final judgment on the merits; and (3) the party to be precluded was a party to the
24 prior action or in privity with a party to the prior action. *See generally, Citizens for Open Access*
25 *to Sand & Tide, Inc. v. Seadrift Ass’n*, 60 Cal.App.4th 1053, 1065 (1998) (*Seadrift*). The parties
26 do not dispute that the decision in the People’s case is a final judgment on the merits.
27

1. 1.

2 It is unclear whether the issues in the two suits are identical. AFT's prolix complaint
3 makes some factual allegations, and may seek some relief, different from those made or sought
4 by the People. The great bulk of the AFT complaint *does* focus on exactly what the People
5 focused on: injunctive relief to preserve the accreditation of CCSF, done by challenging the
6 process by which ACCJC revoked that status. The Complaint says injunctive relief is needed to
7 enable the College to stay open (§§ 2,3, 5) and indeed all the introductory allegations are about
8 this. E.g. §§ 1-26. The class is focused on the College and City of San Francisco (§ 42) without
9 any plaintiff expressing an interest in any other college, and venue is laid here for just that reason
10 (id. § 47). The reason for the injunctive relief is focused on the college and at least at first blush
11 may be moot if CCSF survives the present restoration procedure. (§§ 450 et seq.). AFT's
12 counsel earlier made it clear that this case was about CCSF.¹ Here and there, we do find
13 allusions to other colleges including relief so directed (e.g. Complaint at p.176).

16 Whether the issues are identical depends on an application of California's "primary
17 rights" doctrine; that is, whether there is the same 'right to be free of a particular injury' at stake
18 in the two cases. *See generally*, Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL
19 PROCEDURE BEFORE TRIAL §§ 6:250, 10:39 (Rutter: 2015). If the primary right is to a fair
20 accreditation process, the same right may be at stake. AFT argues that the issues are different
21 because it has a different series of injunctions it seeks,² based on factual allegations the People
22 did not make, from which I infer that AFT means it has suffered some injuries the People did not
23

26 ¹ Transcript of Hearing, December 26, 2013 at 80.

27 ² Seeking remedies based on distinguishable *specific* harms may be enough to avoid the 'identical claim' prong of the res judicata test. E.g., *Consumer Advocacy Grp., Inc. v. ExxonMobil Corp.*, 168 Cal.App.4th 675, 688 (2008).

1 prosecute. The parties' discussion of this issue is insufficient, and I need not now resolve the
2 issue because of my next determination.

3 2.

4 The People and AFT are not in privity. The dispute here devolves in part to a
5 disagreement of whether I am governed by *Payne v. National Collection Systems, Inc.*, 91
6 Cal.App.4th 1037 (2001), or by *Seadrift*. Citing *Payne*, AFT contends that "traditional res
7 judicata principles" do not apply in this context because unfair competition actions seeking relief
8 for the public are "fundamentally different from a class action or other representative action."
9 Opp., 8 (citing *Payne* at 1045.) The ACCJC counters that *Payne* is inapposite because the suit
10 precluded there was brought by a group of 23 private plaintiffs seeking restitution rather than
11 injunctive relief. Reply, 2. In the ACCJC's view, this case is controlled by *Seadrift*, which
12 precluded a suit filed by a citizen's group seeking public access to the Bolinas Sandpit because
13 the State Attorney General had already sued and secured a settlement. Reply, 1-2.

14 *Seadrift* suggests that it is possible to find privity between a public prosecutor and a
15 private party suing on behalf of the public, even where the private party was not involved in the
16 initial suit. This may happen, for example as *Seadrift* tells us, when the relationship is such that
17 each "represent the same legal rights," 60 Cal.App.4th at 1069.

18 But privity generally requires "an identity or community of interest," "adequate
19 representation," and "a reasonable expectation" by the precluded party that it would "be bound
20 by the prior adjudication." *Lynch v. Glass*, 44 Cal.App.3d 943, 948 (1975). Such an expectation
21 exists where a nonparty "in reality contested the prior action even if he did not make a formal
22 appearance," for instance, by having a "proprietary or financial interest in and control of, a prior
23 action." *Id.* at 949. Here AFT did not expect to be bound by the People's case, and it is plain that
24
25
26
27

1 that it had no control over that litigation. On behalf of some 80,000 students and 1,500 faculty
2 members at CCSF, AFT and the class likely has special interests in the suit distinct from those of
3 the general public, and so probably AFT and the City Attorney did not pursue the 'same legal
4 rights.' Both AFT and the City Attorney disclaim the suggestion that they had the same interests
5 or that the City Attorney was essentially the representative of the AFT plaintiffs. Compare,
6 *Seadrift* 60 Cal. App. 4th at 1070 (there is privity "if his or her interests are so similar to a
7 party's interest that the latter was the former's virtual representative in the earlier action").
8

9 Without privity, res judicata does not apply.
10

11 **Conclusion**

12 The motion is denied.
13
14

15 *

16 **Order setting case management conference**

17 A case management conference is set for **October 28, 2015 at 9:00 a.m.** The parties'
18 joint CMC statement must reflect the results of their meet-and-confer on at least these issues:
19
20

- 21 • Exactly what relief, based on the complaint, does AFT want now? What are the **material**
22 allegations of wrongdoing in the complaint which, if proved, authorize that relief?
- 23 • What injury has the class (or named plaintiffs) suffered?
- 24 • Does ACCJC plan on a motion to attack plaintiffs' standing?
- 25 • Does AFT plan on a motion for class certification?
- 26 • Does the complaint fairly put at issue ACCJC's actions regarding institutions *other* than
27 CCSF?
- As to each kind of (i) relief sought and (ii) allegations of wrongdoing: to what extent are
any mooted by the decision in City Attorney case?
- Should this case be stayed pending resolution of the injunction process and Restoration
process to see if further relief is needed?

- 1 • With respect to all motions contemplated, what is the order in which they should be
2 heard?

3 The parties should be prepared to discuss the need, if any, for discovery for the motions
4 they propose.

5
6
7
8 Dated: September 25, 2015



Curtis E.A. Karnow
Judge Of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **SEP 25 2015**, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **SEP 25 2015**

T. Michael Yuen, Clerk

By: 

DANIAL LEMIRE, Deputy Clerk