

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

FILED

SEP - 8 2005

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT

BY _____ Deputy

C049042

(Super. Ct. No. 04AS01213)

PETRINI VAN & STORAGE, INC.,

Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent.

MIKE MUNOZ,

Real Party in Interest.

Real party in interest Mike Munoz, Director of Organizing for the Northern California Carpenters Regional Council, sued petitioner Petrini Van & Storage, Inc. (Petrini) "as an individual and on behalf of the general public" for violation of California's unfair competition law (UCL). (Bus. & Prof. Code, § 17200 et seq.)¹ Munoz based his single cause of

¹ Undesignated statutory references are to the Business and Professions Code.

SEE CONCURRING OPINION

action on alleged violations of prevailing wage laws. Munoz admits he was never employed by Petrini and the complaint does not allege that he individually or in his representative capacity suffered any injury as a result of Petrini's conduct.

On November 2, 2004, while Munoz's lawsuit was pending in the superior court, the California electorate approved Proposition 64, which amended sections 17203 and 17204 to limit standing to bring a cause of action under the UCL to government prosecutors or individuals who have suffered actual injury, and, if acting on behalf of others, have satisfied the class certification requirements set forth in Code of Civil Procedure section 382. Proposition 64 became effective on November 3, 2004. (Cal. Const., art. II, § 10, subd. (a).)

After the passage of Proposition 64, Petrini immediately moved for judgment on the pleadings, arguing that Munoz no longer had standing to sue under the UCL. The trial court disagreed, ruling that the amendments approved in Proposition 64 did not apply to pending actions. The court also found this case presented "a controlling question of law [in] which there are substantial grounds for difference of opinion" and that "appellate resolution of the legal question -- whether or not Proposition 64 should be applied prospectively only or retroactively -- [would] materially advance the conclusion of this litigation." (See Code Civ. Proc., § 166.1.) The matter is properly before us on Petrini's petition for writ of mandate, and/or prohibition or other appropriate relief. (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 451.) We

issued the alternative writ and stayed further proceedings in the superior court.

Petrini argues that Proposition 64 applies to this pending case because: (1) it repealed the right of an uninjured person to sue under the UCL; (2) the voters intended Proposition 64 to immediately close the procedural loophole that allowed uninjured private parties to sue; and (3) the amendments were procedural and applied to pending UCL actions. Munoz responds that: (1) the statutory repeal rule is "outdated" and does not override the presumption that statutory changes operate prospectively; (2) there is no clear indication that the voters intended the amendments in Proposition 64 to be retroactive; (3) the section 17200 cause of action is derived in part from the common law; and (4) the amendments impact substantive rights.

The parties are well aware that the issues joined in this proceeding are currently before the California Supreme Court.² We agree with a majority of the related decisions that have been granted review by the Supreme Court. These decisions hold that

² (See *Thornton v. Career Training Center* (2005) 128 Cal.App.4th 116 [Fourth Dist., Div. One], review granted July 20, 2005, S133938; *Litwin v. Fry's Electronics* (2005) 126 Cal.App.4th 1455 [Fourth Dist., Div. One], review granted April 27, 2005, S133075; *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392 [Fourth Dist., Div. One], review granted April 27, 2005, S132695; *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887 [Fourth Dist., Div. Three], review granted April 27, 2005, S132443; *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828 [Second Dist., Div. Four], review granted April 27, 2005, S132433; *Californians for Disability Rights v. Mervyn's LLC* (2005) 126 Cal.App.4th 386 [First Dist., Div. Four], review granted April 27, 2005, S131798.)

the statutory repeal rule applies and the amendments to the standing requirements apply to pending cases. Munoz failed to satisfy the new standing requirements and the trial court erred in denying Petrini's motion for judgment on the pleadings. In light of our conclusion that the statutory repeal rule applies, we need not determine the voters' intent or decide whether Proposition 64's amendments to the UCL are procedural or substantive.

DISCUSSION

I

Standard of Review

"In deciding or reviewing a judgment on the pleadings, all properly pleaded material facts are deemed to be true, as well as all facts that may be implied or inferred from those expressly alleged. [Citation.] A ruling on a motion for judgment on the pleadings 'resolves a mixed question of law and fact that is predominantly one of law, viz., whether or not the factual allegations that the plaintiff makes are sufficient to constitute a cause of action. [Citation.] The resolution of a question of this sort calls for examination de novo. [Citation.]' [Citation.]" (*Fire Ins. Exchange v. Superior Court, supra*, 116 Cal.App.4th at pp. 452-453.)

II

The Statutory Repeal Rule

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (§ 17200.) "The Legislature intended

this 'sweeping language' to include "anything that can properly be called a business practice and that at the same time is forbidden by law." [Citation.] (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1266.) Standing to sue was expansive as well. Under former section 17204, a UCL action could be brought by a public prosecutor or "by any person acting for the interests of itself, its members or the general public." (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1143.)

Proposition 64 amended section 17204 to limit standing to public prosecutors and "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." In addition, Proposition 64 amended section 17203 to require that a private party may bring a representative action only if he or she meets the standing requirements of section 17204 and complies with class certification requirements set forth in Code of Civil Procedure section 382.³ (§ 17203.) The amendments do not include a savings clause.

Courts ordinarily presume that a newly enacted statute operates prospectively, but also hold "that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute

³ Code of Civil Procedure section 382 reads in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

without a saving clause will terminate all pending actions based thereon.'" (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829-831 (*Mann*), quoting *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12.) What has come to be known as the statutory repeal rule applies regardless of whether the repeal takes the form of an amendment to a specific code section or impacts an entire code. (*Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184-185; see *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109.) We conclude the statutory repeal rule applies to Proposition 64's amendments to sections 17203 and 17204, leaving Munoz without standing to sue under the UCL.

"The repeal of a statutory right or remedy . . . presents entirely distinct issues from that of the prospective or retroactive application of a statute. A well-established line of authority holds: "'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal.'"" (*Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125-126.) "'The justification for [the statutory repeal] rule is that all statutory remedies are pursued with full realization that the [L]egislature may abolish the right . . . at any time.'" (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 690, quoting *Callet v. Alioto* (1930) 210

Cal. 65, 67-68; see Gov. Code, § 9606 ["Persons acting under any statute act in contemplation of this power of repeal"].)

The statutory repeal rule applies only "when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action." (*Callet v. Alioto, supra*, 210 Cal. at p. 68.)

Contrary to Munoz's argument, his UCL claim rests entirely on statutory grounds and does not derive from a common law cause of action. The Supreme Court has repeatedly held that the UCL set forth in section 17200 et seq., and its predecessor statute, "cannot be equated with the common law definition of 'unfair competition.'" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109; see also *Bank of the West v. Superior Court, supra*, 2 Cal.4th at pp. 1263-1264.)

We also reject Munoz's argument that the amendments should not be applied to this pending action because they substantially affect his rights to seek redress under the UCL. Munoz claims that absent settled expectations regarding the UCL's standing requirements, he "could have sought the assistance of a public prosecutor, or enlisted the participation of members of his organization and other Petrini employees who have been deprived of wages and overtime compensation for work already performed."

In his return, Munoz suggests that he can amend the complaint to substitute a plaintiff with standing. Munoz's concerns are addressed by remanding the case to permit the trial court to consider a motion for leave to amend. California courts permit amendment of complaints under Code of Civil Procedure section 473 when the named plaintiffs are not able to maintain the cause of action, as long as the amendment does not present an entirely new set of facts and the defendant is not prejudiced. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; see *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872; *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 21.)

DISPOSITION

Let a writ of mandate issue directing respondent superior court to vacate its order denying Petrini's motion for judgment on the pleadings and enter a new and different order granting that motion. The matter is remanded with directions to afford Munoz the opportunity to seek leave to amend the second amended complaint to allege facts establishing the new standing requirements. Munoz must move for leave to amend within 30 days of the filing of the remittitur. Petrini is awarded costs. (Cal. Rules of Court, rule 56(1)(1).)

CANTIL-SAKAUYE, J.

I concur:

DAVIS, J.

SEE CONCURRING OPINION

Concurring opinion of Sims, J.

I concur wholeheartedly in the well reasoned majority opinion.

I write separately to point out that the plain meaning of language enacted by Proposition 64 says that its standing requirement applies to pending actions.

Business and Professions Code section 17204, as amended by Proposition 64, provides, in part: "Actions for any relief pursuant to this chapter shall be *prosecuted* exclusively . . . by [a government prosecutor] or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." (Italics added.) By using the term "prosecuted" rather than "filed" or "brought," the Legislature in previous versions of the statute, and the electorate, pursuant to Proposition 64, meant for this statute to provide the continuing standing to litigate the action, not just to file the action. "Prosecute" means to "commence *and carry out* a legal action." (Black's Law Dict. (8th ed. 2004) p. 1258, italics added; see *Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 160-161 ["prosecution" includes every step from commencement to final determination of action].) The text of Proposition 64 makes it clear that "prosecute" means more than just filing: "It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to *file and prosecute* actions on behalf of the general public." (Prop. 64, § 1(f), italics added; see *California Mfrs. Assn. v. Public Utilities Com.*

