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LOS ANGELES SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDMUND G. BROWN JR., Attorney General of The State of California, Plaintiff, vs. ROBERT A. RIZZO, et al., Defendants.	CASE NO. BC445497 **ORDER ON DEMURRERS AND MOTIONS TO STRIKE DIRECTED TO FIRST AMENDED COMPLAINT**

The California Attorney General has filed this action against the City of Bell and various former officials of the City. Some of the defendants have demurred to the Attorney General's first amended complaint ("FAC") and moved to strike portions of that pleading. This is the court's ruling on these challenges.

The FAC is summarized below. It names the following former City officials as defendants: Robert Rizzo ("Rizzo"), former Chief Administrative Officer; Pier' Angela Spaccia ("Spaccia"), former Assistant Chief Administrative Officer; Randy G. Adams ("Adams"), Chief of Police from May, 2009 through at least July, 2010; Oscar Hernandez ("Hernandez"), a council member and mayor; and former council members Teresa

Jacobo ("Jacobo"), George Mirabal ("Mirabal"), Victor Bello ("Bello"), and George Cole ("Cole").

Each individual defendant has received excessive and wasteful compensation from City. (FAC ¶ 22.) Rizzo's salary in 2010 was $787,500 and city council raised his salary 16 times since 1993 (FAC ¶¶ 23-25); council member defendants (Hernandez, Jacobo, Mirabal, Bello, and Cole) also provided Rizzo excessive benefits, 107 vacation days and 36 sick days per year (FAC ¶ 29). Council member defendants raised Spaccia's salary 19 percent a year from 2003, so that her base salary in 2010 was $336,000 in 2010, and provided her 107 days vacation and 36 days sick leave per year (FAC ¶¶ 34-39). Council member defendants approved Rizzo's employment contracts and Spaccia's 2008 employment contract without requisite deliberation and due care (FAC ¶¶ 33, 41). Adams as Chief of Police had a base salary of more than $457,000; Rizzo approved Adams's employment contract in 2009 without approval of council member defendants and without requisite deliberation and due care (FAC ¶¶ 42-49). Council member defendants awarded themselves salary increases averaging 16 percent each year since 2003, without requisite deliberation and due care (FAC ¶¶ 50-55). In 2005 council member defendants defrauded the public by approving "An Ordinance . . . Limiting Compensation for Members of the City Council Pursuant to California Government Code § 36516(c)," and by including in the ordinance a purported factual justification stating there had been no salary increase since 1991, when the most recent increase was in 2001, so that the ordinance increased these defendants' salaries from $673 (in 2001, not 1991) to $1,332 per month; in so titling and describing the ordinance and passing it as part of a consent agenda without public discussion or deliberation, said defendants intended to deceive the public (FAC ¶¶ 63-69). At least Cole and Bello were aware of this deception when they approved this ordinance (FAC ¶ 70). Council member defendants awarded 2010 city council salaries of over $96,000, whereas council members of general law cities receive no more than $4,800 per year but have similar duties and responsibilities (FAC ¶¶ 51-52). Defendants converted City from a general law city to a

charter city in 2006 so they could increase their pay. (FAC ¶¶ 56-60). In 2008 Rizzo had a memorandum prepared and told the city clerk to distribute it to any member of the public who inquired about salaries of city officers or employees; the memorandum was provided to members of the public; and it falsely stated that council member defendants were paid $673 per month and Rizzo was paid $15,478 per month, when council member defendants were actually paid over $7,600 per month and Rizzo was paid over $52,000 per month; defendants knew of this deception and agreed to dissemination of the memorandum (FAC ¶¶ 80-85).

Each of the FAC's causes of action repeats and incorporates the allegations summarized above. The first cause of action, denominated waste of public funds/illegal expenditure of public funds (Code of Civil Procedure section 526a), is alleged against all defendants and City. The second cause of action, denominated negligence, is alleged against council member defendants and Rizzo. The third cause of action, denominated fraudulent deceit, is alleged against council member defendants and Rizzo. The fourth cause of action, denominated fraudulent deceit, is alleged against Rizzo. The fifth cause of action, denominated Government Code section 1090, is alleged against Rizzo and Spaccia. The sixth cause of action, denominated breach of fiduciary duty and violation of public trust, is alleged against all defendants (except City).

The FAC seeks a judgment: requiring individual defendants "to make restitution to the City for compensation they approved and/or accepted, and which was in excess of what was reasonable and appropriate, in an amount to be proven at trial"; imposing a constructive trust over the proceeds of compensation "in excess of what was reasonable and appropriate"; declaring that all employment contracts and addenda of Rizzo, Spaccia, and Adams executed in and after 2005 are null and void *ab initio*; requiring each defendant to make restitution to the People, including CalPERS, for any amount of pension benefits received "in excess of what was reasonable and appropriate"; a declaration that council member defendants, Rizzo, and Spaccia are disqualified from holding public office; enjoining City from paying salaries or providing benefits "in excess of what is

commensurate with their [*sic*] duties and responsibilities, in an amount to be proven at trial"; exemplary damages.

Judicial Notice

Rizzo asks the court to take judicial notice of the Charter of the City of Bell and the 2010 California Roster of Public Agencies. The court takes judicial notice of these documents pursuant to California Evidence Code section 452(h).

Adams asks the court to take judicial notice of his employment contract and an addendum to his employment contract. The court declines to take judicial notice of these documents because they have not been authenticated and are not reasonably beyond being subject to dispute.

City asks the court to take judicial notice of Resolution No. 2010-32, a resolution of the city council requesting the consolidation of a special election and regular election to be held on March 8, 2011. City also asks the court to take judicial notice of felony complaints in Los Angeles County Superior Court Case Nos. BA376026 and BA377197. The court takes judicial notice of these documents but not of the truth of all matters therein pursuant to California Evidence Code section 452(h).

Analysis

1. First cause of action (waste of public funds) against individual defendants and City

Plaintiff alleges the excessive compensation that was paid to defendants and authorized by City ordinances and/or defendants' employment contracts constitutes waste of public funds pursuant to Code of Civil Procedure section 526a. This statute provides:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is

assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.

As noted above, plaintiff's FAC (¶ 22) alleges "each defendant has received excessive and wasteful compensation from the City. The amount of compensation that exceeds what was reasonable and commensurate with defendants' respective duties and responsibilities provided no use or benefit to the City, and was totally unnecessary, wasteful, and illegal." The prayer of the FAC seeks "[a] declaration that all employment contracts and addenda of Rizzo, Spaccia, and Adams executed in and after 2005 are null and void *ab initio*" (¶ 2) and "[a]n order enjoining the City from paying salaries or providing benefits to defendants in excess of what is commensurate with their duties and responsibilities, in an amount to be proven at trial" (¶ 12).

Defendants Adams, Cole, Hernandez, Jacobson, Rizzo, Spaccia, and City demur to this cause of action on the ground of failure to state facts sufficient to constitute a cause of action.

The California Constitution expressly provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const. art. III, § 3.) This provision gives rise to the separation of powers doctrine.

In article XI, section 5, subdivision (b)(4) the California Constitution grants to charter cities "plenary authority . . . subject only to the restrictions of this article, to provide therein or by amendment thereto the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed . . . and for their compensation . . . ."

Plaintiff is asking the court to substitute its judgment for that of the legislative body of the City insofar as that body's determination of the compensation of municipal officers and employees. The court does not have this power, and plaintiff has cited no provision of law that would guide the court in reaching such a determination. In *Sklar v.*

Franchise Tax Board (1986) 185 Cal.App.3d 616, 618, the court held taxpayers could not invoke judicial power to force the Franchise Tax Board, an administrative body, to control the use of alcohol entertainment expenses as a business deduction on state income tax returns. The court noted "'the well-established principle, rooted in the doctrine of separation of powers [citation], that the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation.' [Citation.] . . . '[B]y virtue of the separation of powers doctrine courts lack the power to order the Legislature to pass a prescribed legislative act.' [Citation.] . . . Were it otherwise, courts would be involved in 'an attempt to exercise legislative functions, which . . . is expressly forbidden . . . .' [Citations.]" (*Id.* at p. 624) And in *Hilton v. Board of Supervisors* (1970) 7 Cal.App.3d 708, 714, the court held: "[S]ince the passage of a zoning ordinance is a legislative act, it necessarily follows that the vacating of such an enactment (the relief sought here) is likewise legislative in character. As in *Tandy v. City of Oakland* [(1962) 208 Cal.App.2d 609] 'the complaint simply asks the court to issue the writ to compel the city council of the defendant city to perform a legislative act. . . . It is elementary that the courts have no such power.' (*Supra*, p. 711.)" (Accord, *Serrano v. Priest* (1976) 18 Cal.3d 728, 751 ("courts may not order the Legislature or its members to enact or not to enact [footnote omitted] . . . specific legislation"); *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 235.)

An equally important corollary of the separation of powers doctrine is that legislators have absolute immunity from damage suits and claims for declaratory relief based on legislative acts. (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1784.) The doctrine of legislative immunity has been construed expansively to apply to those activities involving planning or enacting legislation. (*Ibid.*) Moreover, the principle of legislative immunity protects not only the conduct of municipal legislators, but also the acts of municipal administrators and executives taken in direct assistance of legislative activity. (*D'Amato v. Superior Court* (2009) 167 Cal.App.4th 861, 871.) Here plaintiff alleges the excess compensation was approved by City ordinances. (FAC ¶ 95.) These

allegations therefore trigger the doctrine of legislative immunity. That plaintiff characterizes those ordinances as wasteful does not avoid the rule of legislative immunity.

In sum, legislators cannot be sued for passing ordinances to raise their own compensation. The conduct alleged by plaintiff in support of the first cause of action may be remiss, but it is not actionable in civil court. The proper means of reforming a legislature rife with greed and ineptitude is the electoral process. Defendants' demurrers to plaintiff's first cause of action are sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

2. Second cause of action (negligence) against council member defendants and Rizzo

The council member defendants and Rizzo demur to the second cause of action for negligence on the ground of failure to state facts sufficient to constitute a cause of action.

Plaintiff's second cause of action is based on the same underlying allegations as the first cause of action. The reasons discussed for sustaining the demurrers to plaintiff's first cause of action apply here, and the court is aware of no legal authority establishing that legislators can be personally liable for not using due care in authorizing the expenditure of public funds. *Stanson v. Mott* (1976) 17 Cal.3d 206, 226-227, the only case plaintiff cites in opposition to defendants' demurrers, is not on point. *Stanson* involved a public agency expending public funds to promote a partisan election campaign. This case involves no comparable facts. For the reasons stated the demurrers of defendants Cole, Hernandez, Jacobson, and Rizzo are sustained to plaintiff's second cause of action without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

3. Third cause of action (fraudulent deceit) against council member defendants and Rizzo

The council member defendants and Rizzo demur to the third cause of action for negligence on the ground of failure to state facts sufficient to constitute a cause of action.

The elements of a fraud claim are: (1) misrepresentation, concealment, or non-disclosure by the defendant, (2) knowledge of falsity by the defendant, (3) intent to defraud by the defendant, i.e., intent to induce reliance from the plaintiff, (4) justifiable reliance by the plaintiff, and (5) resulting damage to the plaintiff. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

For a fraud claim to withstand a demurrer, "the facts constituting every element of fraud must be alleged with particularity, and the claim cannot be salvaged by references to the general policy favoring the liberal construction of pleadings." (*Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782.) "This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73, citing *Hills Trans. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.)

Plaintiff alleges that defendants defrauded the public by passing Ordinance No. 1158 in February, 2005 titled "An Ordinance of the City Council of the City of Bell Limiting Compensation for Members of the City Council Pursuant to California Government Code § 36516(c)." (FAC ¶ 63.) Plaintiff takes issue with Ordinance No. 1158 because the text of the ordinance actually *increased* the council member defendants' salaries. (FAC ¶ 64.)

Plaintiff's allegations are insufficient to withstand defendants' demurrer. First, there are the aforementioned issues of separation of powers/legislative immunity, the latter of which applies to the passage of Ordinance No. 1158. Second, plaintiff has not plead how anyone relied on the purported misrepresentations and consequently has not plead how the misrepresentations caused damage. Third, the title of the ordinance in question is not misleading. The definition of "limit," a transitive verb, includes the following: "To fix definitely; to specify." (The American Heritage College Dictionary (3d ed. 1993) p. 787.)

For the reasons stated, the demurrers of defendants Cole, Hernandez, Jacobson, and Rizzo to plaintiff's third cause of action are sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

4. Fourth cause of action (fraudulent deceit) against Rizzo

This cause of action is based on the allegations that in 2008 Rizzo had a memorandum prepared and distributed to any member of the public who inquired about salaries of city officers or employees. Plaintiff alleges: the memorandum falsely stated that council member defendants were paid $673 per month and Rizzo was paid $15,478 per month, when council member defendants were actually paid over $7,600 per month and Rizzo was paid over $52,000 per month; Rizzo knew of this deception and agreed to dissemination of the memorandum; and City was damaged because the excess compensation that defendants awarded to themselves and each other provided no use or benefit to the City and was wasteful of public funds. (FAC ¶¶ 80-85, 118-124).

As noted above, the doctrine of separation of powers precludes the court from declaring an amount of compensation established by legislative ordinance to be excessive. Accordingly, Rizzo's demurrer to the fourth cause of action is sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

5. Fifth cause of action (Government Code section 1090) against Rizzo and Spaccia

Government Code section 1090 states:

> Members of the Legislature, state, county, district, judicial district, 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. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

In California, "[t]o determine whether section 1090 has been violated, a court must identify (1) whether the defendant government officials or employees participated in the making of a contract in their official capacities, (2) whether the defendants had a cognizable financial interest in that contract, and (3) (if raised as an affirmative defense) whether the cognizable interest falls within any one of section 1091's or section 1091.5's exceptions for remote or minimal interests. [Footnote and citations omitted.]" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1074.)

Plaintiff alleges that Rizzo and Spaccia violated section 1090 by "direct[ing] the modification of the City's Supplemental Retirement Plan such that it created particularized benefits to themselves and furthered their personal agendas. (FAC ¶ 127.) This occurred in August, 2003 when City implemented a Supplemental Retirement Plan that provided retirement benefits, at the expense of the City, to a small group of City officers and employees, including the defendants. (FAC ¶ 86.) Since the implementation of the plan, Rizzo, Spaccia, and other defendants have modified the plan to maximize their own benefits. (FAC ¶ 87.) The allegations of modifications to maximize defendants' own benefits are conclusory.

Defendants believe plaintiff has not clearly identified a contract at issue. (See Rizzo Demurrer, pp. 7-8.) The court agrees. Plaintiff has not identified what party, if any, defendants purportedly contracted with and has not alleged how defendants' conduct can fall under the purview of section 1090. The demurrers of Rizzo and Spaccia to plaintiff's fifth cause of action are sustained with leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

6. <u>Sixth cause of action (breach of fiduciary duty) against individual defendants</u>

The sixth cause of action is based on plaintiff's allegations of excessive compensation. For the reasons stated in connection with the first cause of action, these claims are not actionable under the doctrines of separation of powers and legislative immunity.

The demurrers of defendants Adams, Cole, Hernandez, Jacobson, Rizzo, and Spaccia to plaintiff's sixth cause of action are sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

7. Additional arguments and motions made by defendants

Except with respect to the fifth cause of action, it is unnecessary to reach the contentions of defendants Rizzo and Spaccia that the Attorney General lacks standing to sue and has not complied with the presentation requirements of the Tort Claims Act. The court does not doubt the Attorney General's standing to enforce Government Code section 1090 (see *People v. New Penn Mines, Inc.* (1963) 212 Cal.App.2d 667 (as chief law enforcement officer of state, attorney general has broad common law power, and in absence of contrary statute, may may file any civil action he/she deems necessary for enforcement of state laws); Cal. Const. art. V, § 13), and the Tort Claims Act is not applicable to an action by a public entity to recover moneys misappropriated or illegally expended by a public employee. (See *Stanton v. Mott* (1976) 17 Cal.3d 206, 226.)

Based on the court's rulings, the motions of defendants Adams and City of Bell to strike portions of the complaint are moot.

Disposition

IT IS ORDERED:

1. The demurrers of defendants Adams, Cole, Hernandez, Jacobson, Rizzo, Spaccia, and City to the first cause of action are sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

2. The demurrers of defendants Cole, Hernandez, Jacobson, and Rizzo to the second and third causes of action are sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

3. The demurrer of defendant Rizzo to the fourth cause of action is sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

4. The demurrers of defendants Rizzo and Spaccia to the fifth cause of action are sustained with leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

5. The demurrers of defendants Adams, Cole, Hernandez, Jacobson, Rizzo, Spaccia to the sixth cause of action are sustained without leave to amend on the ground of failure to state facts sufficient to constitute a cause of action.

6. The motions of defendants City of Bell and Adams to strike portions of the FAC are moot.

Dated: May 2, 2011

RALPH W. DAU

Ralph W. Dau, Judge