Filed 9/24/19 Baum v. City of Thousand Oaks CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MICHELLE BAUM, Plaintiff and Appellant, v. CITY OF THOUSAND OAKS et al., Defendants and Respondents.	2d Civil No. B288957 (Super. Ct. No. 56-2017-00493537-CU-NP-VTA) (Ventura County)

An unleashed Rottweiler attacked Michelle Baum. She sued the City of Thousand Oaks (the City) and the County of Los Angeles (the County; collectively, Respondents), alleging that they failed to perform their duty to capture and take into custody dogs running at large. The trial court sustained Respondents' demurrer to Baum's second amended complaint without leave to amend, and dismissed Baum's lawsuit.

On appeal, Baum contends she should be granted leave to amend because she can show that: (1) Respondents

failed to perform a mandatory duty, (2) that failure caused her injuries, and (3) Respondents are not immune from liability. We conclude that Baum cannot show that Respondents had a mandatory duty to perform, and thus do not reach her remaining contentions. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Relevant ordinances and agreements

In July 2012, the City enacted Ordinance No. 1579-NS.[1] The ordinance repealed and replaced section 6-1.100 of the City's municipal code (section 6-1.100). As replaced, subdivision (a) of section 6-1.100 provided that, "as of the date of adoption of the ordinance," an amended version of Title 10 of the Los Angeles County Code (Title 10) was incorporated into the City's municipal code as its animal control regulatory scheme. The Office of the City Clerk was required to keep "[a]t least one copy of the version of Title 10 as adopted" on file for public inspection. Subdivision (b) of section 6-1.100 provided that "[i]n the event a conflict arises concerning the interpretation of the provisions of the [City's] [m]unicipal [c]ode and Title 10 . . . the language and provisions of Title 10 . . . [would] take precedence."

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[1] We grant Baum's request to take judicial notice of the ordinance. (Evid. Code, §§ 452, subd. (b), 459, subd. (a).) We also grant her request to take judicial notice of the version of Title 10 of the Los Angeles County Code kept on file by the Thousand Oaks Office of the City Clerk, section 10.12.090 of Title 10, and all documents properly noticed by the trial court. (Evid. Code, §§ 452, subds. (b) & (c), 459, subd. (a).) We deny the parties' remaining requests because the materials sought to be noticed are irrelevant to our decision. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 387, fn. 15.)

Pursuant to Ordinance No. 1579-NS, section 10.12.090 of Title 10 (section 10.12.090) was incorporated into the municipal code. As incorporated, section 10.12.090 provided that "[t]he [Director of the Department of Animal Care and Control] *shall* capture and take into custody" dogs running at large "contrary to the provisions of the Food and Agriculture Code or any other state statute or of this Division 1." (Italics added.) Section 10.04.020 of Title 10 (section 10.04.020), also incorporated into the municipal code, provided that "[w]henever any reference is made to any portion of this Division 1, such reference applies to all amendments and additions thereto now or hereafter made." The Office of the City Clerk maintained a copy of the 2012 version of Title 10 for public inspection.

In 2013, the County amended section 10.12.090. As amended, section 10.12.090 provided that "[t]he [Director of the Department of Animal Care and Control] *is authorized to* capture and take into custody" dogs running at large. (Italics added.)

The following year, Respondents adopted a joint powers agreement (JPA). As part of the JPA, the County agreed to provide animal control services in the City pursuant to Title 10, its amendments, and provisions of the City's municipal code.

A Rottweiler attacks Baum

In July 2016, Baum's neighbor saw an unleashed Rottweiler in front of his condominium. Around 6:30 a.m., he notified both the City and the County's Department of Animal Care and Control that a potentially dangerous dog was running loose in his neighborhood. The operator said that the call was of the "highest priority" and would be dealt with expeditiously.

About 40 minutes later, Baum's neighbor called back to "repeat the urgency of the matter." He was again assured that the call was of the "highest priority."

Around 7:30 a.m., the Rottweiler attacked Baum. She suffered a broken arm. Her arm required surgery and the installation of bolts and a metal plate. Animal control personnel arrived on scene over an hour later, around 9:00 a.m.

Baum's lawsuit

Baum sued the Rottweiler's owners, their landlords, and Respondents.[2] She alleged Respondents failed to perform their mandatory duty "to capture and impound" the Rottweiler in a "timely manner," as required by section 10.12.090 and the JPA. She also alleged the dog was previously reported to be off leash and running free on at least four prior occasions, most recently less than two months before the attack on her.

Respondents demurred to Baum's second amended complaint. They argued Baum could not show that they failed to perform a mandatory duty because the 2013 version of section 10.12.090 merely "authorized" them to take custody of dogs running at large. The trial court agreed, and sustained Respondents' demurrer without leave to amend. The court dismissed Baum's lawsuit with prejudice.

DISCUSSION

Standard of review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) "'We treat the

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[2] One of the Rottweiler's owners and his landlords remain defendants in the underlying action, but are not parties to this appeal.

demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.'" (*Ibid.*) "'We also consider matters which may be judicially noticed.' [Citation.]" (*Ibid.*) "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*)

When the trial court sustains a demurrer, we independently determine whether the complaint states a cause of action. (*Blank*, *supra*, 39 Cal.3d at p. 318.) If the court sustains the demurrer without leave to amend, we determine "whether there is a reasonable possibility that the defect can be cured by amendment." (*Ibid.*) If it can, the court has abused its discretion. (*Ibid.*) If it cannot, there has been no abuse. (*Ibid.*)

A plaintiff bears the burden of showing a reasonable possibility that a defect can be cured by amendment. (*Blank*, *supra*, 39 Cal.3d at p. 318.) The plaintiff may make that showing for the first time on appeal. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) To do so, they "'must show in what manner [they] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading.' [Citation.]" (*Ibid.*) They must "clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment," and "set forth factual allegations that sufficiently state all required elements of that cause of action." (*Ibid.*) "'If the plaintiff . . . does not advance on appeal any proposed allegations that will cure the defect or otherwise state a claim, the burden of proof has not been satisfied.' [Citation.]" (*Placer Foreclosure, Inc. v. Aflalo* (2018) 23 Cal.App.5th 1109, 1117.)

Mandatory duty

Baum contends the trial court erred when it sustained Respondents' demurrer without leave to amend because there is a reasonable possibility she can show that they had a mandatory duty to take the Rottweiler into custody. We disagree.

Except as provided by statute, a city or county is not liable for injuries that stem from acts or omissions of the entity or its employees. (Gov. Code,[3] § 815, subd. (a).) Section 815.6 sets forth one such exception: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." "For liability to attach under this statute, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered." (*Davila v. County of Los Angeles* (1996) 50 Cal.App.4th 137, 140.)

A duty is "mandatory" when it is "obligatory, rather than merely discretionary or permissive, in its directions to the public entity." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498 (*Haggis*), italics omitted.) That is, the enactment "must require, rather than merely authorize or permit, that a particular action be taken or not taken." (*Ibid*., italics omitted.) Whether an enactment imposes a mandatory duty is a question of law for

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[3] All further unlabeled statutory references are to the Government Code.

our independent review. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1458; see also *County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 668 [interpretation of city and county ordinances presents a question of law].)

Our task in answering this question is to effectuate the purposes of the ordinances. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724 (*Bruns*).) We first examine the ordinances' words, giving them their plain, commonsense meanings. (*Ibid.*) We give meaning to every word, and strive to avoid an interpretation that renders words surplusage. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 849-850.) We examine the words in the context of the ordinances' framework, working to harmonize provisions relating to the same subject matter. (*Bruns*, at p. 724.) We follow the plain meaning of the ordinances unless doing so would lead to absurd results. (*Ibid.*)

1. The City's duty

Baum argues the City had a mandatory duty to take the Rottweiler into custody because it adopted the 2012 version of section 10.12.190, which stated that the Director of Animal Care and Control "shall capture and take into custody" dogs running at large. We disagree. The plain meanings of the ordinances here show that the 2013 version of section 10.12.090 was in effect when the Rottweiler attacked Baum.

In 2012, the City repealed and replaced section 6-1.100 of its municipal code. Subdivision (a) of that section adopted Title 10 in full, subject to limited exceptions. Subdivision (b) stated that if a conflict arose between the municipal code and Title 10, "the language and provisions of Title 10" were to take precedence.

When adopted pursuant to section 6-1.100, subdivision (a), section 10.12.090 provided that the Director of the Department of Animal Care and Control "*shall* capture and take into custody" dogs running at large. The following year, the County amended section 10.12.090 to state that the director "*is authorized to* capture and take into custody" dogs running at large. Because there is a conflict in the language of the two versions of section 10.12.090, the 2013 version controls pursuant to the terms of section 6-1.100, subdivision (b).

That section 6-1.100, subdivision (a), stated that the City adopted the version of Title 10 "in effect as of the date of adoption of" Ordinance No. 1579-NS does not change our conclusion. The City adopted subdivision (b) of section 6-1.100 at the same time. The adoption of that subdivision demonstrates that the City recognized that the County could amend Title 10 from time to time, and that those amendments were to be given effect. The City's concurrent adoption of section 10.04.020—which similarly stated that amendments to Title 10 were to be enforced—reinforces this interpretation. Interpreting section 6-1.100, subdivision (a), otherwise—i.e., as a singular, static adoption of the 2012 version of section 10.12.090, as Baum proposes—would result in a conflict with subdivision (b), an outcome we strive to avoid. (*Bruns*, *supra*, 51 Cal.4th at p. 724.)

Ordinance No. 1579-NS's adoption of amendments to Title 10 do not show that the 2012 version of section 10.12.090 remained in effect at the time of Baum's injuries, as she claims. Those amendments pertained to public nuisances, duties to report potential rabies cases, the isolation of animals with rabies, cat licensing, dog microchipping, and service fees. They were also codified in different sections of the municipal code. Because the

amendments pertained to different subject matters, they do not conflict with our interpretation that section 6-1.100, subdivision (b), incorporated the 2013 version of section 10.12.090 into the municipal code. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 21.) They are not relevant to our interpretation. (*Ibid.*; see also *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4 ["different statutes should be construed together only if they stand in pari materia"].)

We are also unpersuaded that the Office of the City Clerk's possession of the 2012 version of Title 10 shows that the 2012 version of section 10.12.090 was in effect when Baum was attacked. Section 6-1.100, subdivision (a), required the clerk to keep a copy of the version of Title 10 *as adopted*. It did not require the clerk to keep a copy of Title 10 *currently in effect*. Even if it did, the clerk's failure to do so is not relevant to which version of section 10.12.090 animal control personnel were required to enforce. (Cf. *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 902 [public entity does not have mandatory duty if enactment applies to different entity].)

We accordingly hold that the 2013 version of section 10.12.090 was in effect when Baum was attacked. Because that version "authorized" the City to capture and take custody of the Rottweiler, it had no mandatory to do so. (*Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 593, disapproved on another ground in *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815, fn. 8; see also *Haggis*, *supra*, 22 Cal.4th at p. 498 [enactment that "merely authorize[s] or permit[s]" an act is not mandatory].) There is thus no reasonable possibility that Baum can state a cause of action. The

trial court did not abuse its discretion when it denied leave to amend.

2. The County's duty

Baum argues the JPA renders the County jointly liable for the City's failure to timely take the Rottweiler into custody. But this argument presumes that the City had a mandatory duty to do so. As set forth above, it did not. The County thus has no joint liability.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

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