

MAR 05 2008

Nguyen, et al. v. County of Los Angeles, et al.
BS 112581

Tentative decision on motion for preliminary injunction: granted
LOS ANGELES SUPERIOR COURT

Petitioner Cathy Nguyen (“Nguyen”) seeks a preliminary injunction prohibiting Respondent County of Los Angeles (“Respondent”) from denying Nguyen the opportunity to pull animals from shelters operated by the County’s Department of Animal Care and Control (“DACC”).¹ The court has read and considered the moving papers, opposition and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioners Nguyen, Rebecca Arvizu (“Arvizu”) and No Kill Advocacy Center (“No Kill”) commenced this proceeding on December 20, 2007. Petitioners allege that DACC operates its animal shelters in violation of state policy, and euthanizes animals too soon.

In addition to seeking a writ of mandate, the Petition includes “causes of action” for injunctive relief and violation of 42 USC §1983.

B. Applicable Law

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. See Comfort v. Comfort (1941) 17 Cal.2d 736, 741. McDowell v. Watson (1997) 59 Cal.App.4th 1155, 1160.² It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. Meridian, Ltd. v. City And County of San Francisco, et al. (1939) 13 Cal.2d 424.

The purpose of a preliminary injunction is to preserve the *status quo* pending final resolution upon a trial. See Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal.App.3d 1536. Grothe v. Cortlandt Corp. (1992) 11 Cal.App.4th 1313, 1316; Major v. Miraverde Homeowners Assn. (1992) 7 Cal.App.4th 618, 623. The *status quo* has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. Voorhies v. Greene

¹Nguyen also purports to enjoin DACC from denying similar rights to non-party Janet Taylor, to enjoin Respondent from revoking the “Adoption Partner” status of the Irvine Animal Care Center, and to enjoin Respondent from prohibiting non-party Taylor from volunteering at DACC’s Carson shelter. Nguyen has no standing to seek relief on behalf of anyone other than herself. Thus, the court addresses only the injunctive relief sought on behalf of Ms. Nguyen.

²The courts look to the substance of an injunction to determine whether it is prohibitory or mandatory. Agricultural Labor Relations Bd. v. Superior Court, (1983) 149 Cal.App.3d 709, 713. A mandatory injunction--one that mandates a party to affirmatively act, carries a heavy burden: “[t]he granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established.” Teachers Ins. & Annuity Assoc. v. Furlotti, (1999) 70 Cal.App.4th 187, 1493.

(1983) 139 Cal.App.3d 989, 995, quoting United Railroads v. Superior Court (1916) 172 Cal. 80, 87. 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402.

A preliminary injunction is issued after hearing on a noticed motion. The complaint normally must plead injunctive relief. CCP §526(a)(1)-(2).³ Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. See e.g. Ancora-Citronelle Corp. v. Green, 41 Cal.App.3d 146, 150. Injunctive relief may be granted based on a verified complaint only if it contains sufficient evidentiary, not ultimate, facts. See CCP §527(a). For this reason, a pleading alone rarely suffices. Weil & Brown, California Procedure Before Trial, 9:579, 9(11)-21 (The Rutter Group 2007). The burden of proof is on the plaintiff as moving party. O'Connell v. Superior Court, (2006) 141 Cal.App.4th 1452, 1481.

A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. CCP §526(4); Thayer Plymouth Center, Inc. v. Chrysler Motors, (1967) 255 Cal.App.2d 300, 307; Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal.App.4th 1554, 1565. The idea "inadequacy of the legal remedy" or "inadequacy of damages" dates from the time of the early courts of chancery, the idea being that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal.App.4th 1554, 1565.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial (CCP §526(a)(1)), and (2) a balancing of the "irreparable harm" that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. CCP §526(a)(2) 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402; Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal.App.4th 1279, 1283 [Rev. Den. 10/1/97]; Davenport v. Blue Cross of California (1997) 52 Cal.App.4th 435, 446; Abrams v. St. Johns Hospital (1994) 25 Cal.App.4th 628, 636. Thus, a preliminary injunction may not issue without some showing of potential entitlement to such relief. Doe v. Wilson (1997) 57 Cal.App.4th 296, 304. The decision to grant a preliminary injunction generally lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Thornton v. Carlson (1992) 4 Cal.App.4th 1249, 1255.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. See CCP §529(a); City of South San Francisco v. Cypress Lawn Cemetery Assn. (1992) 11 Cal.App.4th 916, 920.

C. Analysis

³However, a court may issue an injunction to maintain the *status quo* without a cause of action in the complaint. CCP §526(a)(3).

Petitioner Nguyen seeks a preliminary injunction in connection with her section 1983 claim.

1. Statement of Facts

Nguyen presents the following pertinent evidence. Nguyen is a volunteer animal rescuer, conducting her efforts in her spare time at the Irvine Animal Care Center, a public animal shelter run by the City of Irvine, the Seal Beach Animal Care Center, and other private organizations. Before October 2006, she had little involvement with DACC. Since November 2006, Nguyen has visited the Carson shelter of DACC every weekend to assess the condition of animals held there, and pull those most in danger of being killed. She performed this task with a partner, Janet Taylor, who photographs animals and emails the picture to Nguyen. Either Taylor or Nguyen pulls the animal and transfers it to the Irvine or Seal Beach Center, which cares for the animal until a permanent home is found or until a nonprofit group accepts the animal. Nguyen and Taylor saved 160 dogs from the Carson shelter in a one year period.

Beginning March 2007, Nguyen wrote numerous emails to Defendant Marcia Mayeda (“Mayeda”), head of DACC, to complain about conditions at DACC shelters and the entity’s failure to comply with state law concerning humane animal care and efforts to find the animals’ owners. On November 21, 2007, Nguyen authorized her attorneys to send Mayeda a letter threatening suit to compel compliance with DACC’s legal obligations. At the end of November 2007, Nguyen generated media coverage with respect to the Carson shelter’s treatment of a 10-month old puppy.

On December 13, 2007, Nguyen was suspended by the Carson shelter from “adoption” privileges. Taylor was suspended on the same day, as was the Irvine Animal Care Center.

3. Probability of Success

Nguyen contends that DACC has violated her free speech rights by suspending her right to adopt animals from DACC shelters in retaliation for her complaints about how the shelters are operated.

In order to establish a violation of her free speech rights under section 1983, Nguyen must demonstrate that (1) she was engaged in constitutionally protected activity, (2) the DACC took retaliatory action which would cause a person of ordinary firmness to be chilled or deterred in continuing that activity, and (3) the retaliation was motivated at least in part by the protected free speech activity. *See Mendocino Environmental Center v. Mendocino County*, (9th Cir. 1999) 192 F.2d 1283, 1300.

Nguyen has a First Amendment right to speak out on perceived abuses of animals at DACC shelters and failure to comply with state law. She demonstrates that she did so by writing e-mails to Mayeda beginning in March 2007 and by authorizing her attorneys on November 21, 2007 to threaten suit, and by generating adverse media coverage for DACC at the end of November 2007. Thus, Nguyen was engaged in constitutionally protected activity.

Nguyen does not present any direct evidence that DACC was motivated by her protected activity in suspending her animal adoption privileges. Instead, she relies on the timing of events as circumstantial evidence of retaliation. The privileges of Nguyen, Taylor, and the Irvine Animal Care Center were suspended on December 13, 2007, less than a month after Nguyen’s protected

activity of threatening suit and generating adverse publicity for DACC. In other contexts, the close proximity of events is sufficient to raise an inference of retaliation. See Alpha Energy Savers, Inc. v. Hansen, (9th Cir. 2004) 381 F.3d 917, 929. (retaliation in denying government benefits). A failure to explain apparent retaliation supports such an inference. Southern California Rapid Transit District v. Superior Court, (1994) 30 Cal.App.4th 713, 730. Nguyen has presented evidence to suggest that the suspension of her adoption privilege is causally connected to her free speech activity.

DACC mysteriously argues that the decision to suspend Nguyen's adoption privileges (which is only an interim suspension) was made shortly after the initiation of some sort of "investigation" by the Los Angeles County Auditor-Controller after DACC discovered certain information on December 11, 2007. Of course, without any information as to what kind of investigation this is, the assertion is meaningless.

DACC also argues that Nguyen cannot show that the suspension of her privileges would chill a person of ordinary firmness from future First Amendment activity. Mendocino, 192 F.3d at 1300. However, the "person of ordinary firmness" must be one engaged in animal care and advocacy. There is no doubt that such a person would be chilled by having their animal adoption rights suspended; such rights are critically important to such a person. See Huland v. Wonder, (9th Cir. 1992) 972 F.2d 1129, 1135 (opportunity to serve as a volunteer is a protected government privilege).

In short, because DACC has failed to explain its reasons for suspending Nguyen other than some unexplained investigation, Nguyen has demonstrated a probability of succeeding on her section 1983 claim.

3. Irreparable Harm

Nguyen's showing of probability of success does not end the inquiry. The court must also consider the balance of interim harm.

Nguyen has not demonstrated that she suffered any irreparable injury. She has suffered no pecuniary loss and remains free to pursue her volunteer efforts and to rescue animals from shelters other than those operated by the DACC. She is only restricted from adopting animals from DACC.

DACC relies heavily on the lack of harm to Nguyen in opposing a preliminary injunction. However, a lack of irreparable harm to Nguyen does not end the inquiry. The trial court must consider and weigh both the probability of success and irreparable harm factors in deciding whether to grant a preliminary injunction. The Right Site Coalition v. Los Angeles Unified School District, (January 30, 2008) __ Cal.App.4th __, 2008 DJDAR 2747. The more likely it is that the plaintiff will ultimately prevail, the less severe must be the harm that is necessary to the plaintiff if the injunction does not issue. If the showing is sufficiently strong, the trial court has discretion to issue the injunction notwithstanding the plaintiff's inability to show that the balance of harms tips in his or her favor at all. Id.

Nguyen's failure to show any irreparable injury does not mean that the preliminary injunction must be denied. She has made a strong showing of probability of success as a result of DACC's refusal to explain why it suspended her privileges. She also has shown some harm from the suspension. Conversely, DACC has shown no harm resulting to it from a preliminary

injunction. Although she has suffered no irreparable harm, the balance of harms tips in Nguyen's favor or at least is evenly balanced. See The Right Site Coalition.

The motion for preliminary injunction is granted.