

**COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

CITIZENS OVERSIGHT, INC., a
Delaware non-profit corporation and
RAYMOND LUTZ, an individual,

Plaintiffs and Appellants,

v.

MICHAEL VU, San Diego Registrar
of Voters and SAN DIEGO COUNTY,
a public entity,

Defendants and Respondents.

) 4th Civil No. **D073522**

) (San Diego Superior Court
) Case No. 37-2017-00027595-CU-MC-CTL)

Appeal from a Judgment of the Superior Court,
State of California, County of San Diego
Honorable Kenneth J. Medel

RESPONDENTS' BRIEF

THOMAS E. MONTGOMERY, County Counsel
County of San Diego
*TIMOTHY M. BARRY, Chief Deputy (SBN 89019)
Email: timothy.barry@sdcounty.ca.gov
STEPHANIE KARNAVAS, Senior Deputy (SBN No. 255596)
Email: stephanie.karnavas@sdcounty.ca.gov
1600 Pacific Highway, Room 355
San Diego, CA 92101
Tel: (619) 531-6259; Fax: (619) 531-6005

Attorneys for Respondents Michael Vu, Registrar of Voters
and County of San Diego

INTRODUCTION

This case involves the third in a series of three lawsuits filed by Raymond Lutz and his alter ego Citizens' Oversight, Inc. (collectively "Lutz") arising out of the June 2016 Presidential Primary election all of which have been judicially determined to be without merit.

In *Lutz v. Vu, I*,¹ Lutz challenged the manner in which the Registrar conducted the post-election 1% manual tally required by Elections Code section 15360. In an unpublished decision issued on July 11, 2018, this court found that the Registrar properly conducted the 1% manual tally and ordered that the portion of the judgment entered by the trial court in favor of Lutz be reversed and that judgment be entered in favor of Respondents.

In *Lutz v. Vu, II*,² Lutz brought an election contest challenging the results of the presidential primary between Hilary Clinton and Bernie Sanders. In that case the superior court granted Respondents' motion for judgment on the pleadings and entered judgment in favor of Respondents and against Lutz on July 20, 2018. (Respondents' Request for Judicial Notice, Exhibit 1.)

In this case, *Lutz v. Vu, III*, Lutz seeks to set aside the trial court's order and judgment granting Respondents' demurrer to Lutz's complaint for declaratory relief and mandamus for violation of the California Public Records Act, without leave to amend.

¹ *Citizens Oversight, Inc., a Delaware non-profit corporation; Raymond Lutz, an individual v. Michael Vu, San Diego Registrar of Voters, Helen Robbins-Meyer, San Diego County Chief Administrative Officer and San Diego County*, (D071907) unpub. Opn. July 11, 2018.

² *Raymond Lutz v. Michael Vu, Registrar of Voters for the County of San Diego; Hilary Clinton, Democratic Presidential Party Candidate*, San Diego County Superior Court Case No. 37-2017-00023347-CU-PT-CTL, filed July 11, 2016.

As with the other cases filed by Lutz, this case is without merit. The applicable provisions of the Elections Code require that voted ballots involving a federal contest be kept under seal for a period of 22 months after the election and then destroyed or recycled. The ballots are not subject to inspection unless a statutorily authorized exception applies. In this case, no exception applies. The judgment of the superior court must be affirmed.

STATEMENT OF FACTS

On February 2, 2017, plaintiff Lutz sent an email to Michael Vu, the Registrar of Voters for the County of San Diego, requesting that he and his supporters be allowed to “conduct recount [sic] of the presidential race in the June 2016 primary in certain batches or precincts of ballots.” (See, Clerk’s Transcript (“CT”), p. 09, Paragraph 12 and Supplemental Clerk’s Transcript (“SCT”), p. 002.)

On February 7, 2017, Mr. Vu responded indicating that “[t]he time period to request a recount has passed and the ballots for the 2016 June Primary Election have been sealed per State law.” (See, CT, p. 09, Paragraph 12 and SCT, p. 003.)

On February 17, 2017, Lutz emailed Mr. Vu as follows: “. . . per California Public Records Act, please provide the legal basis for withholding ballots from our inspection. Please specifically state which exemption you are claiming and how the exemption applies.” (See, CT, p. 9, Paragraph 12 and SCT, p. 004.)

Mr. Vu. Responded to Lutz via email on February 23, 2017, informing him that the ballots had been sealed pursuant to Elections Code sections 15370 and 17301, and that production of the requested ballots was

exempt from the requirements of the Public Records Act citing Government Code section 6245, subdivision (k).

On April 4, 2017, counsel for plaintiffs' wrote counsel for the County requesting that his clients be allowed to "inspect the ballots from the June 6, 2016, Presidential Primary." (See, CT, p. 09, Paragraph 13 and SCT, p. 008.)

On April 11, 2017, counsel for the County wrote back, in relevant part, stating:

The ballots from the June election have been sealed pursuant to California Elections Code 15370 and 17301(b). Once sealed pursuant to these sections 'the elections official may not open any ballots or permit any ballots to be opened....' (Elections Code §15307) Elections Code §17301(b) also requires that voted ballots in Presidential Elections be kept sealed and 'shall be kept by the elections official unopened and unaltered....' Although there are exceptions to the sealing requirement, none apply to your client's Public Records Act request."

Documents whose disclosure is exempted or prohibited by state law are not subject to disclosure under the Public Records Act. (Government Code §6254(k). See also Evidence Code §1040(b)(1).)"

(See, CT, p. 10, Paragraph 14 and SCT, p. 011.)

This lawsuit followed.

PROCEDURAL HISTORY

Appellants filed their complaint for declaratory relief and petition for writ of mandate on July 25, 2017. (CT, p. 7-12.) Respondents demurred to the complaint and writ petition. (CT, p. 20-21.) The hearing on the demurrer was held on October 13, 2017, at which time the demurrer was sustained without leave to amend. (CT, 79-80.) Judgment of dismissal in favor of the County was entered on December 8, 2017. (CT, 81.) Appellants filed their notice of appeal on December 18, 2017. (CT, 83-87.)

STANDARD OF REVIEW

Where, as is here, the issues presented raise purely legal questions the courts are to exercise independent judgment on review. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.)

When any ground for objection to a complaint, in this case, a petition for writ of mandate, appears on the face thereof, the objection on that ground may be taken by a demurrer to the pleading. (Code Civ. Proc., § 430.30, subd. (a).) The party against whom a complaint has been filed may object by demurrer to the pleading, on the ground that the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

A general demurrer tests the legal sufficiency of the pleadings. (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 939.) It assumes as true all properly pleaded material facts, but not the truth of contentions, deductions, or conclusions of fact or law. (*Moore v. Regents of Univ. of California* (1990) 51 Cal. 3d 120, 125.) But facts not alleged are presumed not to exist. (*Melikian v. Truck Ins. Exchange* (1955) 133 Cal.App.2d 113, 115.) Moreover, where the facts appearing in exhibits attached to a petition contradict the facts alleged, the facts in the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

LEGAL ARGUMENT

1. The Elections Code Prohibits Elections Officials from Producing Voted Ballots for Review and Inspection Except Under Limited Circumstances

The Elections Code³ mandates that the Registrar seal and maintain the ballots from an election involving contests for federal office for a period of 22 months and prohibits the Registrar from unsealing the ballots except

³ Unless otherwise noted all references are to the Elections Code.

under limited circumstances set forth in the Elections Code. (§§ 17301 and 15370.) Section 15370 plainly states: “After ballots are counted and sealed, the elections official may not open any ballots *nor permit any ballots to be opened* except as permitted in Sections 15303⁴ and 15304⁵, or in the event of a recount.”⁶ (§ 15370, emphasis added.) Section 17301 likewise states: “The packages containing the . . . ballots and identification envelopes shall be kept by the elections official, unopened and unaltered, for 22 months from the date of the election. . . .” (§ 17301(b).) This statute goes on to state that if an elections contest or criminal prosecution for voter related fraud or forgery is not commenced within the 22-month period, then the elections official “shall” have the ballots destroyed or recycled.⁷ (§ 17301, subd. (c).) Lest there be any doubt as to when else the ballots may be accessed by anyone, the last sentence of the statute expressly states: “*The packages shall otherwise remain unopened until the ballots are destroyed or recycled.*” (*Ibid*, emphasis added.)

⁴ Section 15303 provides that if during the official canvass of an election, it appears that the returns from any precinct “are incomplete, ambiguous, not properly authenticated, or otherwise defective, the elections official may issue and serve subpoenas requiring members of the precinct board to appear and be examined under oath concerning the manner in which votes were counted and the result of the count in their precinct. Section 15303 only applies when ballots are tabulated at the polls. San Diego does not tabulate ballots at the polls.

⁵ Section 15304 relates to jurisdictions using a central counting place and provides that during the official canvass an “elections official may appoint not less than three deputies to open the envelopes or containers with the materials returned from the precincts. If, after examination, any of the materials are incomplete, ambiguous, not properly authenticated, or otherwise defective, the precinct officers may be summoned before the elections official and examined under oath to describe polling place procedures and to correct errors and omissions.

⁶ A request for a recount must be made within 5 days of the completion of the official canvass. (§§ 15620 and 15621.)

⁷ Twenty-two months after the June 7, 2016 Presidential Primary was April 7, 2018. The ballots from the June 2016 election have been recycled and are no longer available for review.

The obvious reason for sealing the ballots is to preserve the chain of custody and integrity of the ballots in the event the results of an election are called into question through the statutorily authorized procedures for contesting the results of an election. In the case of an election involving contests for federal offices, the Legislature requires that the ballots be sealed and retained for 22 months after the election. Allowing random individuals to cull through selected ballots during this 22-month period for reasons other than as authorized by statute would compromise the chain of custody and bring into question the integrity of the results in the event of an election contest or criminal prosecution for election fraud. The Elections Code is clear. Unless the circumstances set forth in the Elections Code are satisfied, the Registrar has *no discretion or duty* to unseal the ballots and make them available to a member of the public.

2. Ballots from the June 2016 Presidential Primary are Exempt from Production Pursuant to the Public Records Act.

Government Code section 6254, subdivision (k) provides that the Public Records Act (Gov. Code, §§ 6250-6276.48) does not require the disclosure of “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” (Gov. Code, § 6254, subd. (k).) Evidence Code section 1040, subdivision (b)(1) provides that the County has a privilege to refuse to disclose official information if the disclosure is forbidden by ... a statute of this state.”

3. The Trial Court Properly Sustained Respondents’ Demurrer to the Petition for Writ of Mandate without Leave to Amend.

To obtain a writ of mandate, Appellants had the burden to prove “(1) a clear, present and usually ministerial duty on the part of the

respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty....” (*San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys.* (2012) 206 Cal.App.4th 594, 622, citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540; see also *California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 709 – “[A]n applicant for a writ of mandate must show a present duty for the performance of the act sought to be compelled.”)

In this case, Lutz failed to demonstrate that the Registrar had a clear, present and ministerial duty to unseal the ballots sought to be reviewed or that Lutz had a clear, present and beneficial right to review the ballots. State law prohibits the Registrar from unsealing the ballots and making them available for review unless certain statutory exceptions are met. Because none of the exceptions applied, there was no legal basis for unsealing the ballots. Absent a legal basis for relief, Appellants were not entitled to writ relief and the trial court properly dismissed the petition on the grounds that, as a matter of law, “there [was] no ministerial duty on the part of the Registrar to turn over the ballots upon request.” (CT, p. 080.)

4. The Trial Court Properly Ordered that Appellants’ Entire Action be Dismissed With Prejudice

While a general demurrer is generally not the appropriate means of deciding the merits of the controversy in a declaratory relief action, where any declaration of rights on the merits would have been unfavorable and consistent with the disposition of the other cause of action, dismissal of the declaratory relief action without a judgment on the merits is not reversible error. (*Anderson v. Stansbury* (1952) 38 Cal.2d 707, 717.) Where, as is the case here, “the issue is purely one of law, if the reviewing court agree[s]

with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal rights and duties of the parties concerning the matter in controversy." (*Taschner v. City Council* (1973) 31 Cal.App.3d 48, 57; *see also Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 24 and *Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 769.)

Lutz's complaint for declaratory relief simply asked for a different form of relief based on the same set of facts that was the basis for their petition for writ of mandate. As demonstrated above, there was no legal basis for granting the writ relief requested by Appellants. Because the court's order denying writ relief, essentially provided Lutz' with the declaratory relief requested, albeit not the answer they wanted, the court's judgment of dismissal should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court properly granted Respondents' demurrer without leave to amend and entered judgment in favor of Respondents. This Court should affirm the judgment.

DATED: October 1, 2018

THOMAS E. MONTGOMERY,
County Counsel

By: s/Timothy M. Barry
TIMOTHY M. BARRY, Chief Deputy
Attorneys for Respondents