

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF DINUBA et al.,

Plaintiffs and Appellants,

v.

COUNTY OF TULARE et al.,

Defendants and Respondents.

F046252

(Super. Ct. No. 03-205854)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Meyers, Nave, Riback, Silver & Wilson, Steven R. Meyers, Andrea J. Saltzman and Joseph M. Quinn; Tuttle & McCloskey and Daniel T. McCloskey for Plaintiffs and Appellants.

Brown, Winfield & Canzoneri, Inc., Thomas F. Winfield III and Michael H. Wallenstein for Defendants and Respondents.

Counties are required by law to collect property taxes on behalf of local taxing entities and then distribute the revenue to these entities pursuant to statute. This appeal concerns such distributions by respondents, the County of Tulare and the responsible county officials (collectively Tulare), to appellant, the City of Dinuba Redevelopment Agency (Agency).

The Agency conducted an audit and discovered that, due to Tulare's miscoding of certain parcels within a redevelopment project, the Agency had not received tax revenues to which it was entitled. Tulare agreed to correct this mistake prospectively but refused to allocate the mandated amount to the Agency retroactively. In response, the Agency along with co-appellant, the City of Dinuba (Dinuba), filed the underlying action seeking these prior tax revenues. However, the trial court dismissed this action on the ground that Tulare was immune from liability under Government Code section 860.2.

Appellants contend their claims for relief are not encompassed by the Tort Claims Act (Gov. Code, § 810 et seq.) and thus the trial court erred in sustaining Tulare's demurrer without leave to amend. As discussed below, appellants are correct. Accordingly, the judgment will be reversed.

### **BACKGROUND**

Under California law, a community may form a redevelopment agency to rehabilitate blighted areas. (*Community Redevelopment Agency v. County of Los Angeles* (2001) 89 Cal.App.4th 719, 721.) Once a redevelopment or project area is designated and a plan adopted, the agency has broad powers to implement the plan. (*Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 27.) However, an agency does not have either the power or the ability to levy a tax to finance the redevelopment. (*Ibid.*) Thus, community redevelopment agencies

typically use bonds to fund their projects. (*Community Redevelopment Agency v. County of Los Angeles, supra*, 89 Cal.App.4th at p. 721.)

In general, as property values in a redevelopment area increase, tax revenues also increase. These increases are referred to as “tax increments.” (*Community Redevelopment Agency v. County of Los Angeles, supra*, 89 Cal.App.4th at p. 721.)

In accordance with the California Constitution, the Legislature has provided that the taxes levied on the redevelopment property are divided between the taxing agency and the redevelopment agency. (*Redevelopment Agency v. County of San Bernardino* (1978) 21 Cal.3d 255, 259.) The taxing agency receives the same amount it would have realized had development not been undertaken. (*Ibid.*) However, to ensure that the redevelopment agency is able to perform its obligations, it is entitled to all tax increment funds as they become available, until the agency’s debt has been paid. (*Marek v. Napa Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1082.)

In 2002, appellants retained a private consultant to audit Tulare’s property tax assessment and allocation procedures. This audit revealed numerous clerical errors that resulted in the Agency not receiving tax increment revenue to which it was entitled for the 2002-2003 year and the four prior years. According to appellants, Tulare failed to assign the proper tax rate code to certain parcels within the redevelopment project. When appellants brought these errors to Tulare’s attention, Tulare made the appropriate corrections to the current assessment roll. However, Tulare refused to correct the miscoding retroactively and pay the miscollected tax increment revenue.

In November 2002, appellants filed a formal claim with Tulare for payment of the full amount of the tax increment funds that the Agency was entitled to for the past

four years. When Tulare did not act on the claim, appellants filed a petition for writ of mandate and complaint for declaratory relief.

This petition and complaint, as amended, sought a writ of mandate compelling Tulare to: (1) calculate and distribute the unpaid and underpaid tax increment for fiscal years 1997-1998 through 2003-2004; (2) correct the tax rolls for all prior fiscal years wherein Tulare miscoded and/or failed to properly code parcels; and (3) pay appellants their respective shares of tax increment unlawfully withheld. Appellants also requested a declaration and determination that Tulare was required to: (1) correct all previous fiscal year tax rolls wherein Tulare either failed to code or miscoded certain parcels and deprived appellants of their respective share of tax increment; and (2) calculate and pay to appellants their respective share of tax increment as corrected.

Tulare demurred to the petition and complaint on the grounds that: (1) the disputed tax revenue had already been distributed to other taxing agencies and Tulare could not be required to either recover the funds or pay appellants out of its general fund; and (2) Tulare was immune from liability under Government Code section 860.2.<sup>1</sup> In opposing the demurrer, appellants claimed they could amend the complaint to allege causes of action for money had and received and constructive trust.

The trial court sustained the demurrer on both grounds. The court ruled that appellants had “not stated a statutory basis to impose liability upon these public entities and their employees, and/or stated a case on point to overcome the immunity afforded the public entities and their employees under Government Code section 860.2.” However, the court granted leave to amend noting that, because appellants

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<sup>1</sup> “Neither a public entity nor a public employee is liable for an injury caused by: [¶] ... [¶] (b) An act or omission in the interpretation or application of any law relating to a tax.” (Gov. Code, § 860.2.)

were not required to file a tort claim under Government Code section 905, subdivision (i), the “new theories for recovery” were not barred.

Appellants then filed their second amended complaint. This complaint stated a cause of action for money had and received against Tulare and the nine taxing agencies that had been mistakenly allocated a portion of the tax increment due to the Agency. This cause of action sought a specific amount, plus interest. The complaint also alleged a cause of action for imposition of a constructive trust.

Tulare again demurred. The court sustained the demurrer without leave to amend finding:

“No matter how Plaintiffs attempt to plead this case, the facts are that the public entity and its officers have immunity under Government Code section 860.2 for any act or omission in the interpretation or application of any law relating to a tax. Plaintiffs have plead that the Defendants miscoded the tax rate areas and collected taxes and failed to give them the proper credit for their fair share of the tax increment revenue. Plaintiffs have attempted to allege causes of action for money had and received and for a constructive trust, but these fail as a matter of law.... [C]learly[,] the facts are that Defendants’ acts were either an interpretation or application of a law relating to a tax, and thus the Defendants would have immunity for Plaintiff’s injury. Therefore, no further leave to amend is granted.”

Judgment was entered dismissing Tulare from the action with prejudice.

## **DISCUSSION**

### **1. *Standard of review.***

On appeal from a judgment dismissing an action after a demurrer is sustained without leave to amend, the reviewing court assumes the truth of the facts alleged in the complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) The complaint is liberally construed but in a reasonable manner. (*Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 525.) The court then determines de

novo whether the complaint states facts sufficient to state a cause of action under any possible legal theory. (*Ibid.*) Accordingly, the court is not limited to the plaintiff's theory of recovery or "form of action" pleaded in testing the sufficiency of the complaint. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.)

As noted above, two demurrers were sustained, the first with leave to amend. Appellants opted to amend their complaint rather than appeal the trial court's ruling. However, while based on the same facts, appellants' second amended complaint dropped the requests for both a writ of mandate and declaratory relief.

In general, plaintiffs who amend a complaint rather than appeal the trial court's order waive the right to appeal any error in the sustaining of the first demurrer. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 966, fn. 2.) An appellate court will not consider the allegations of a superseded complaint. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209.) However, that rule does not apply if the trial court denied plaintiffs leave to include those allegations in an amended complaint. (*Ibid.*)

Appellants argue this exception applies here. They acknowledge that the trial court did not explicitly deny leave to amend as to a particular cause of action. Nevertheless, appellants interpret the court's order as "not allowing an amendment to tinker with the original theories of recovery."

Contrary to appellants' position, the trial court did not prohibit inclusion of the original allegations. Appellants were granted leave "to remedy the problems with their Petition for Writ of Mandate and Complaint for Declaratory Relief." The court simply noted that appellants could allege new theories of recovery because they had not been required to file a tort claim under Government Code section 905, subdivision (i). Accordingly, review is limited to the order sustaining the demurrer to the second amended complaint.

**2. Governmental immunity does not bar appellants' claims.**

Pursuant to California Constitution, Article XVI, section 16, and Health and Safety Code section 33670, Tulare was required to allocate and distribute the tax increments to the Agency. (*Marek v. Napa Community Redevelopment Agency, supra*, 46 Cal.3d at p. 1083.) The second amended complaint alleges that from 1997 through 2003, Tulare misallocated a portion of the Agency's tax increment revenue to itself and to nine other local taxing entities. All of these parties are named as defendants. Appellants' complaint seeks to recover specific misallocated amounts from each defendant through a common count for money had and received and imposition of a constructive trust. Thus, appellants are suing for the return of specific sums of money from each entity that erroneously received a portion of the tax increment revenue that should have been distributed to the Agency.<sup>2</sup>

A claim for money had and received is proper when the plaintiff claims a certain sum of money due as indebtedness. The claim can be based upon money paid by mistake. (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958.) Such is the situation here. Appellants seek recovery of amounts certain that were allegedly distributed to other entities by mistake.

Moreover, withholding money to which the Agency is entitled subjects Tulare and the other local taxing entities to an equitable duty to convey that money to the Agency under the unjust enrichment doctrine. Accordingly, a cause of action for

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<sup>2</sup> Tulare argues that the money at issue belonged to it in the first place because appellants promised to pay all of the tax increment back to Tulare in two separate agreements. These agreements are exhibits to the second amended complaint. Appellants disagree with Tulare's interpretation on the ground that these agreements involve tax increment revenue from different parcels. In light of the applicable standard of review, this court must accept appellants' position.

imposition of a constructive trust is appropriate. (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 627-628.)

Tulare argues, and the trial court ruled, that Tulare is immune from liability under the Tort Claims Act (Gov. Code, § 810, et seq.). This act provides generally that public entities are not liable for an injury “[e]xcept as otherwise provided by statute ....” (Gov. Code, § 815, subd. (a).) “Accordingly, ‘public entities may be held liable only if a statute ... is found declaring them to be liable.’” (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 53.) Nevertheless, public entities do not enjoy immunity from liability for contract claims. (Gov. Code, § 814; *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 830.)

The trial court relied on Government Code section 860.2, subdivision (b), to find Tulare immune. Under that section, a public entity is not liable for an *injury* caused by “[a]n act or omission in the interpretation or application of any law relating to a tax.” An injury is defined as “death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.” (Gov. Code, § 810.8.) Because the complaint alleged errors in the allocation and distribution of tax increment revenue, the court ruled that section 860.2 applied. However, to make this ruling, the court must have first concluded that appellants were suing in tort, not contract. Government Code immunities only extend to tort actions that seek money damages. (*Schooler v. State of California* (2000) 85 Cal.App.4th 1004, 1013.)

Whether governmental tort immunity applies does not depend on either the form of the pleading or the relief sought. (*Janis v. California State Lottery Com., supra*, 68 Cal.App.4th at p. 830.) Rather, the court must examine the nature of the right sued upon. (*Ibid.*) “If based on breach of promise it is contractual; if based on



breach of a noncontractual duty it is tortious. [Citation.] If unclear the action will be considered based on contract rather than tort. [Citation.]” (*Roe v. State of California* (2001) 94 Cal.App.4th 64, 69.)

In the context of the claim filing requirement under Government Code section 905, the California Supreme Court noted that “[a] claim for the specific recovery of property has never been considered a claim for ‘money or damages’ ....” (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 121.) In *Minsky*, the specific property was approximately \$7,000 that was taken from a defendant when he was arrested but not returned upon disposition of the criminal case.

Other cases have also found allegations that money was wrongfully withheld by a public agency to be contractual, not tortious. For example, in *Gonzales v. State of California, supra*, the court concluded that the cause of action was based on implied contract where the defendants were seeking imposition of a constructive trust for the return of fines collected under a statute later declared unconstitutional. (68 Cal.App.3d at pp. 627-628.) Further, where the defendant sought the return of funds that were collected by the county sheriff through execution of a writ of attachment and then mistakenly distributed to another creditor, the court held the action was either in equity or in contract, not in tort. (*National Automobile & Cas. Ins. Co. v. Pitchess* (1973) 35 Cal.App.3d 62, 65). In *Utility Audit Co., Inc. v. City of Los Angeles, supra*, the court concluded that the count for money had and received alleging that the plaintiffs were entitled to interest on improperly collected sewer fees was based on breach of a contractual duty. (112 Cal.App.3d at p. 958.)

Here, appellants are seeking specific amounts of tax increment revenue that was mistakenly distributed to other local taxing agencies. This situation is analogous to the above authorities. Appellants were entitled to the tax increment revenue by statute. Thus, appellants are essentially seeking the release of property that is rightfully theirs

but that was wrongfully detained. This is not an action for damages against the sovereign. (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 588.) Rather, the complaint is based on breach of a contractual duty. Accordingly, Tulare is not immune under Government Code section 820.6. Therefore, the trial court erred in sustaining the demurrer to the second amended complaint and dismissing Tulare from the action.

**DISPOSITION**

The judgment is reversed. Costs on appeal are awarded to appellants.

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Levy, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Wiseman, J.