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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALFREDO A. FIGUEROA et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ,

Defendant and Respondent;

BLYTHE ENERGY, LLC, etc. ,

Defendant and Real Party in Interest.

E030510

(Super.Ct.No. BLC1812)

TENTATIVE OPINION

APPEAL from the Superior Court of Riverside County. Arjuna T. Saraydarian, Judge. Reversed.

Gabrielli Law Office and John C. Gabrielli for Plaintiffs and Appellants.

William M. Chamberlain, Jonathan Blees and Lisa Decarlo for Defendant and Respondent.

Weston, Benshoof, Rochefort, Rubalcaca & Maccuish, Ward L. Benshoff and Elaine M. Lemke for Defendant and Real Party in Interest.

Plaintiffs and appellants Alfredo A. Figueroa, and Caramel F. Garlic (plaintiffs), appeal after the trial court dismissed their action against defendant and respondent California Energy Resources Conservation and Development Commission (the Energy Commission), and Defendant and Real Party in Interest Blythe Energy, LLC (Blythe Energy). The trial court had sustained the defendants' demurrers to plaintiffs' complaint, without leave to amend, on the ground that the action was barred by a special statute of limitations. We shall reverse.

FACTS AND PROCEDURAL HISTORY

The Energy Commission approved Blythe Energy's application to develop a new power plant on a site located near the city of Blythe. Plaintiffs filed an action challenging the approval, focusing largely on alleged noncompliance with the California Environmental Quality Act (CEQA). {AA 2}

Defendants demurred on the ground that the complaint was untimely under a special statute of limitations provided in the Warren-Aliquots State Energy Resources Conservation and Development Act (the Warren-Aliquots Act), contained in Public Resources Code section 25000, et seq. Public Resources Code section 25901 provides, in pertinent part: "Within 30 days after the [Energy Commission] issues its determination on any matter specified in this division, except as provided in Section 25531, any

aggrieved person may file with the superior court a petition for writ of mandate for review thereof."

The face of the complaint alleges that the Energy Commission issued its decision approving the project on March 21, 2001.{Complete. par. 17, AA 5-6} The Energy Commission's regulations provide that, "Unless otherwise specified in the final decision on a notice or application, the effective date of the decision is the date that it is filed with the Docket Unit."[1] Defendants urged that the decision was docketed on March 26, 2001, and that plaintiffs were therefore required to file their complaint on or before April 25, 2001.{AA 26} The complaint was filed on May 11, 2001, and was therefore untimely.

The trial court considered the defendants' moving papers and sustained the demurrer without leave to amend.{AA 109} The court then dismissed plaintiffs' action.{AA 113}

ANALYSIS

I. Standard of Review

On appellate review when a demurrer has been sustained, the appellate court normally examines the factual allegations of the complaint to determine whether they

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[1] California Code of Regulations, title 20, section 1720.4.

state a cause of action under any available legal theory.[2] The court then treats the demurrer as admitting all material facts which were properly pleaded.[3]

When the trial court has not allowed leave to amend, that ruling is reviewed separately for abuse of discretion.[4]

Additional factors affect our review here, however. Although a demurrer tests the sufficiency of the factual allegations of a complaint, here, the ground of demurrer was that the action was untimely under a particular statute of limitations. Whether the statute of limitations had run turns not only upon the factual matters of when certain events occurred, but in this case depends upon the appropriate interpretation of the limitation statute itself. The interpretation of a statute presents a question of law which this court decides independently.[5]

We turn to the statute of limitations question.

II. The Court Erred in Sustaining the Demurrer

Public Resources Code section 25901 is the applicable statute. It provides that a writ of mandate must be filed within 30 days after the Commission "issues" its determination. The limitations period therefore began to run when the decision was

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[2] *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.

[3] *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.

[4] *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.

[5] *R & P Capital Resources, Inc. v. California State Lottery* (1995) 31 Cal.App.4th 1033, 1036.

issued, and the dispositive question is when "issuance" occurred. In this case, it is undisputed that the Energy Commission's decision was dated March 21, 2001, and filed with the docketing unit on March 26, 2001. The defendants argued that the Energy Commission's decision was issued when it was filed with the docketing unit on March 26, 2001, and the mandate action was therefore untimely.

The term "issues" is, however, undefined. The Energy Commission argues that the term is clarified by its regulation which states: "Unless otherwise specified in the final decision on a notice or application, the effective date of the decision is the date that it is filed with the Docket Unit." (Cal. Code Regs., tit. 20, § 1720.4.) Under the Energy Commission's argument, the term "issued" means "ready for judicial review" and the decision became ready for judicial review when it was filed with the docketing unit.

But the regulation requires a "final decision" as a condition precedent to an "effective date"; i.e., the decision must be final before it can have an effective date. Obviously, a decision is not ready for judicial review until it becomes final. Under Public Resources Code section 25530, any Energy Commission decision is subject to reconsideration within 30 days after it is "adopted." Presumably, no Energy Commission decision can be deemed "final" until the reconsideration period has elapsed.

Regulation 1720.4 also provides that the effective date is *not* the date of filing of the decision with the docket unit, if the Energy Commission's decision specifies a different effective date. Here, the Energy Commission's counsel submitted a sworn declaration that its decision did not establish any alternative effective date. Despite this

misleading declaration, however, the Energy Commission's decision itself indicates otherwise. That decision states: *"For purposes of judicial review pursuant to Public Resources Code section 25531, this Decision is final thirty (30) days after its filing in the absence of the filing of a petition for reconsideration* or, if a petition for reconsideration is filed within thirty (30) days, upon the adoption and filing of an Order upon reconsideration with the Commission's Docket Unit." (Italics added.) {AA 63}

This provision in the Energy Commission's decision does in fact state an alternative effective date: it states the decision is final for purposes of judicial review 30 days after its filing. Otherwise, a mandamus action would have to have been brought before the administrative decision became final, thus violating the principle that a writ of mandate can be brought only to challenge final agency action.[6] Here, the writ could not be brought, however, until *after* the Energy Commission's action had become final; the Energy Commission's decision specifies that it became final 30 days after the decision was filed with the docket unit.

The arguments for a contrary conclusion are unpersuasive. It could be argued that the Energy Commission's decision simply adopts the normal rule of the regulation by stating: "For purposes of reconsideration pursuant to Public Resources Code section 25530, this Decision is deemed adopted when filed with the Commission's Docket Unit."

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[6] Code Civil Procedure § 1094.5, subdivision (a); *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618, 1621.

Obviously, this paragraph is limited, however, to defining the time of *adoption* for purposes of the reconsideration statute, Public Resources Code section 25530. It does not shed any light on the question of finality for purposes of judicial review, which is discussed in the following paragraph, quoted above.

We cannot accept the suggestion that the paragraph dealing with judicial review does not establish a different effective date, and that the normal, docketing-unit rule specified in the regulation would thus presumably apply. Rather, the quoted paragraph specifically defines finality for judicial review purposes to be 30 days *after* filing the decision with the docket unit. This implies that the commencement of the period in which a petition for judicial review may be filed is at the end of the 30-day period following filing with the docket unit. Plaintiffs thus properly argued that they had a total of 60 days from filing with the docketing unit to file their petition. Because they did so, the statute of limitations is not a viable defense.

Neither do we discern any alleged intent of the Energy Commission not to delay the effective date of the decision by an additional 30 days. The Energy Commission created the confusion in the first place by using a mishmash of different terms without ever defining the term "issuance" as used in Public Resources Code section 25901. The Energy Commission also misled the trial court by submitting an incorrect factual declaration in support of its demurrer. Under these circumstances, we determine that the Energy Commission's decision must be taken at its word: it is final 30 days after its filing with the docketing unit. The ambiguities created by the undefined statutory term

("issuance"), the regulation ("effective date") and the Energy Commission's decision ("final") defeat any attempt by the Energy Commission to retrospectively create an intent that did not exist. The Energy Commission cannot exploit the ambiguity it created.

In sum, we conclude that the Energy Commission has not established that the face of the complaint shows that the action is barred by the statute of limitations.[7]

The sole ground of demurrer was the expiration of the statute of limitations. Defendant's have not suggested any other manner in which the complaint was deficient. Because the statute of limitations did not defeat the complaint, and because defendants have not otherwise shown that the allegations of the complaint failed to state a viable cause of action, the court erred in sustaining the demurrer. The judgment of dismissal must be reversed.

DISPOSITION

The judgment of dismissal is reversed. Appellants shall recover costs on appeal to be shared equally by respondent and real party in interest.

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[7] *Lowe v. City of Commerce* (1997) 59 Cal.App.4th 1075, 1080.