(19) **Tentative Ruling**

Re: ***Davis v. Fresno Unified School District***
Court Case No. 12CECG03718

Hearing Date: May 11, 2016 (Department 502)

Motion: by defendant Fresno Unified School District for judgment on the pleadings

Tentative Ruling:

To deny.

Explanation:

Introduction

This case arises out of a Site Lease and Facilities Lease (collectively "the Lease-Leaseback Agreement") entered into between defendant, Fresno Unified School District ("FUSD"), and defendant, Harris Construction ("Harris"), for the construction of the Rutherford B. Gaston Sr. Middle School Phase II Project ("Gaston Middle School"). Plaintiff brings this lawsuit as a taxpayer challenging the Lease-Leaseback Agreement.

The matter returns to this court after an appeal by plaintiff of the court's sustaining of FUSD's demurrer to the First Amended Complaint. After plaintiff elected not to amend and appealed, that order was partially affirmed and partially reversed by the Court of Appeal in *Davis v. Fresno Unified School District* (2015) 237 Cal. App. 4th 261 (*rev. denied*)("Davis").

After the ruling of the Court of Appeal, four causes of action remain: (1) a claim that a conflict of interest existed between Harris and FUSD (the "Conflict Claim"); (2) and (3) claims that the Lease-Leaseback Agreement did not comply with the statutory requirements of the Education Code (the "Lease-Leaseback Claims"); and (4) a derivative claim for declaratory relief.

FUSD now moves for judgment on the pleadings on the single ground that plaintiff's allegation that he sues as a taxpayer fails to adequately allege standing to bring any of the remaining claims. More particularly, FUSD argues: (1) plaintiff has no standing under either Government Code section 1090 or the common law as codified in Code of Civil Procedure section 526a to bring the Conflict Claim; (2) plaintiff has no standing to bring the Lease-Leaseback Claims because neither Education Code sections 17400-17429 nor Public Contract Code sections 20100 et seq., pursuant to which plaintiff alleges the Lease-Leaseback Agreement was improper, authorize a validation claim and thus do not confer plaintiff with standing; and (3) since it is derivative of plaintiff's other claims, the Declaratory Relief claim also fails for lack of standing.

The Conflict Claim

In *Davis*, the Court of Appeal stated:

> *The term "any party" is not restricted to parties to the contract*. Defendants did not base their demurrer on the ground Davis lacked standing to bring the conflict of interest claim under Government Code section 1090 since it is recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090. (E.g., *Thomson v. Call* (1985) 38 Cal. 3d 633 [taxpayer suit successfully challenged validity of land transfer from city council member through intermediaries to city]; see Kaufmann & Widiss, *The California Conflict of Interest Laws* (1963) 36 So. Cal. L. Rev. 186, 200.)

(*Davis, supra,* 237 Cal. App. 4th at 297, fn. 20). Though generally "when an appellate court states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout the case's subsequent progress," (*People v. Barragan* (2004) 32 Cal. 4th 236, 246), as the *Davis* court acknowledged, defendants did not base their demurrer on the ground that plaintiff lacked standing. Indeed, in part because the issue had not been raised, *Davis* has been criticized for its finding regarding standing under Government Code section 1090. (*San Bernadino County v. Superior Court* (2015) 239 Cal. App. 4th 679, 687, fn. 5 ("*San Bernardino*").) Because the issue of standing was not raised by the parties, *Davis'* statement regarding plaintiff's standing is not "law of the case" which must be adhered to in this proceeding.

Nevertheless, *Davis'* statement is in accord with the great weight of authority on this subject. (See, e.g., *Gilbane Building Co. v. Superior Court* (2014) 223 Cal. App. 4th 1527, 1532, *Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572, *San Diegans for Open Government v Har Construction, Inc.* (2015) 240 Cal. App. 4th 611 and *Torres v. City of Montebello* (2015) 234 Cal. App. 4th 382, 398-399.) *Davis* has also very recently been discussed approvingly in *McGee v. Balfour Beatty Construction, LLC* (Cal. Ct. App., April 12, 2016, No. B262850) 2016 WL 1449591 ("*McGee*"), recently ordered published, which found standing under section 1090 in a very similar case, and, even if *Davis'* statement is not "law of the case," would appear to be binding on this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding upon ... all superior courts of this state"].)

McGee also distinguished *San Bernardino*, upon which FUSD places principal reliance:

> *Davis* is closer to this case than *San Bernardino*. As in *Davis,* this case involved a validation action in which the court had authority to set aside void contracts. A contract in violation of section 1090 is void. (*Klistoff v. Superior Court, supra,* 157 Cal.App.4th at p. 481.) In contrast, in *San Bernardino,* plaintiffs' challenge to the agreement was barred by a prior

> validation judgment. (*San Bernardino, supra,* 239 Cal.App.4th at p. 688.) Additionally, in contrast to *San Bernardino,* this case did not involve a decision by former school board members, but was brought shortly after the District approved the contracts.

(*McGee, supra* [p. 7].)

Thomson v. Call (2985) 38 Cal. 3d 633 ("*Thompson*") is the Supreme Court case on which the Courts of Appeal have relied to find standing on the part of citizens to challenge contracts allegedly rendered void by conflict of interest laws. The plaintiffs there were also taxpayers, seeking to declare void a land purchase which directly benefited a member of the city council that made the purchase. The Court found that the lawsuit was a proper remedy under Government Code section 1090 to force the city council member to disgorge the sale price back to the city. The Thompson court "could not have concluded a contract was invalid in violation of section 1090 without implicitly concluding that the taxpayers challenging it had standing. (Citation.)" (McGee, supra, [p. 6].)

The *Thompson* court relied on its prior decision in *Stigall v. City of Taft* (1962) 58 Cal. 2d 565, 568, where a taxpayer brought a suit to deem a contract void under the conflict of interest statutes. The *Stigall* court specifically cited the language of Government Code section 1092 asserted by FUSD to bar a taxpayer suit, yet found that such suit was proper. If such could be called *dicta*, it is very persuasive *dicta*. (*Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal. App. 4th 1, 13, fnt. 4.)

"To say that *dicta* are not controlling does not mean that they are to be ignored; on the contrary, *dicta* are often followed. As a statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed." (9 Witkin, Cal. Proc 5th (2008) Appeal, section 511 at pp. 575 – 576.)

Further, to read the statute as FUSD would, that only parties to a void contract can seek to invalidate it, would render the statute intermittedly effective, depending on whim of the government agency. That would conflict with the purpose of the statute, and give hope to those who seek to profit where there is a conflict of interest – the result the Legislature wanted to avoid:

> "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation."

(*Thomson, supra,* 38 Cal. 3d at 648.)

Defendant's interpretation would thus defeat the purpose of the statutory scheme – to deter any contracts where a conflict of interest was involved, whether made in good faith or through fraud. That would violate the cannon of statutory construction discussed in *Lakin v. Watkins Assoc. Ind.* (1993) 6 Cal. 4th 644, 659 (internal citations omitted):

> "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory scheme."

The court thus finds plaintiff has adequately alleged standing to assert the Conflict Claim and denies the motion for judgment on the pleadings as to that claim.

The Lease-Leaseback Claims

FUSD argues plaintiff has no standing to assert the Lease-Leaseback Claims because the Legislature has not declared claims under Education Code sections 17400-17429 and Public Contract Code sections 20100 et seq. to be subject to the validation statutes, Code of Civil Procedure sections 863, et seq. Plaintiff argues that pursuant to Government Code section 53511 the validation statutes apply to "an action to determine the validity of [a local agency's] bonds, warrants, contracts, obligations, or other evidences of indebtedness. FUSD counters that the Lease-Leaseback claims do not challenge any instrument or evidence of "indebtedness."

FUSD cites *Kaatz v. City of Seaside* (2006) 143 Cal. App. 4th 13 and *SCOPE v. Abercrombie* (2015) 240 Cal. App. 300 in support of its claim that the contract in question is not a proper subject of a validation statute because it is not one evidencing indebtedness. However, *Davis* found that the Legislature permitted the lease/leaseback arrangement due to specific factors:

> (1) [A] constitutional provision that prohibited counties, cities and school districts from incurring any indebtedness or liability exceeding the amount of one year's income without the assent of two-thirds of its voters and (2) the California Supreme Court's determination that leases do not create an indebtedness for the aggregate amount of all installments, but create a debt limited in amount to the installments due each year. (See *City of Los Angeles v. Offner* (1942) 19 Cal. 2d 843.)

(*Davis, supra*, 237 Cal. App. 4th at 278.)

Davis explained that a construction contract by a school district is a contract of indebtedness, and signing it could create a debt then due and owing, even if to be paid over time. A lease, as described by the Legislature, created a debt only for the year's lease payments as they came due, under *City of Los Angeles v. Offner* (1942) 19 Cal. 2d 483 ("*Offner*"). "Thus, the Legislature adopted the lease-leaseback structure to create a way for school districts to pay for construction over time and avoid the constitutional limitation on debt." *(Davis, supra*, 237 Cal. App. 4th at 278.)

A finding that the construction contract at issue is not a contract of indebtedness would violate the law of the case doctrine. It was necessary for the *Davis* court to discuss the essence of the Lease-Leaseback Agreement and why the construction contract before it did not qualify to avoid the constitutional ceiling on indebtedness, under the exception for lease payments discussed in *Offner, supra*. The decision in *Davis* is in accord with other Courts of Appeal. (See *McLeod v. Vista USD* (2008) 158 Cal. App. 4th 1156, 1166, also found that a taxpayer could bring a reverse validation claim over such issues pursuant to Code of Civil Procedure sections 526a and 863. ["If the public agency does not bring a validation action, any interested person may bring an action within the time and in the court specified by section 860 to determine the validity of such matter."])

Plaintiff has alleged standing to bring a reverse validation action. FUSD's motion for judgment on the pleadings is denied as to the Lease-Leaseback Claims.

<u>The Declaratory Relief Claim</u>

The parties acknowledge the Declaratory Relief Claim is derivative of plaintiff's substantive claims discussed above. As such, the motion for judgment on the pleadings is denied as to the Declaratory Relief Claim.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 5/5/16 .
(Judge's initials) (Date)