Mac Robertson, et al. v. Bureau of Automotive Repair, 23CV03805
Hearing Date: Dec. 5, 2023
Writ of Administrative Mandate

PROPOSED TENTATIVE

Petitioner Bill Mac Roberston, dba as Robertson Gomez Automotive, LLC (hereafter, Mac Robertson or petitioner), has filed a petition for writ of administrative mandamus against the Bureau of Automotive Repair, a California state agency (hereafter, Bureau or respondent), challenging the Bureau's August 3, 2023, decision to deny petitioner's application for licensure as a smog station. According to the petition, on October 31, 2022, the Bureau issued a "Statement of Issues" to petitioner, claiming petitioner made "false statements of fact on an earlier [a]utomotive [d]ealer [a]pplication and that [p]etitioner fraudulently issued a smog check certificates." It is also alleged that on January 11, 2023, an administrative hearing occurred, and Administrative Law Judge Joseph Montoya issued a proposed decision "in [p]etitioner's favor on all contested issues." Further, on April 10, 2023, the Bureau "adopted that decisions as its own, making the decision effective on May 31, 2023." Petitioner thereafter applied on June 28, 2023, for a "Licensure as Smog Check Station," and (according to the petition) despite the Administrative Judge Montoya's decision with regard to the dealer application, the Bureau denied the smog licensure application on August 3, 2023. Petitioner contends the Bureau, in denying the latter application, prejudicially erred in failing to proceed in a manner required by law after adopting the February 9, 2023 decision of Administrative Montoya; further, the Bureau's decision is not supported by substantial evidence. The petition mentions all of these documents – but they are not attached to the petition.

The Bureau has filed a demurrer, accompanied by a request for judicial notice, advancing one claim -- the court lacks jurisdiction over the subject matter of the petition because petitioner has failed to exhaust all administrative remedies.[1] According to the Bureau, the court should sustain the demurrer without leave to amend. Petitioner filed opposition on November 21, 2023, and then a "First Amended opposition" on November 27, 2023. Respondent filed a reply on November 28, 2023, accompanied by a supplemental request for judicial notice.

The court will first address the legal standards applicable to the present inquiry; it will then address the propriety of the Bureau's request for judicial notice and its supplemental request for judicial notice, as well as the propriety of petitioner's untimely opposition and first amended opposition. The court will then assess the merits of the demurrer, and conclude with brief summary of its determinations.

[1] Respondent in its Notice of Motion raises an alternative argument – that a general demurrer is appropriate because the petition fails to state facts sufficient to constitute a cause of action. This is not actually an alternative claim, for the essentially dovetails into the failure to satisfy and thus plead exhaustion of administrative remedies. The court as a result will not treat this issue separately. In the end, as the entire focus of Bureau's argument in its memorandum of points and authorities involves petitioner's failure to exhaust administrative remedies, that will be the scope and thus focus of this order.

A) Legal Standards

` A proceeding in mandamus, including one seeking a writ of administrative mandate under Code of Civil Procedure section 1094.5, "is subject to the general rules of pleading applicable to civil actions." (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271, 29 Cal.Rptr.3d 852; *Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 573; see Code Civ. Proc., § 1109.) The court will therefore assume the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524.) A "demurrer tests the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint.' "[7] (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864) Specifically, documents in the administrative record are not considered in ruling on a demurrer unless they are "by appropriate reference made a part of the complaint or petition." (*Kleiner v. Garrison* (1947) 82 Cal.App.2d 442, 445–446, 187 P.2d 57; see *San Remo Hotel v. City And County of San Francisco* (2002) 27 Cal.4th 643, 649, 653, 117 Cal.Rptr.2d 269, 41 P.3d 87 [where petition for writ of administrative mandate was pled as one cause of action in civil complaint and resolved on the merits, administrative record could not be considered in determining whether other causes of action were properly dismissed on demurrer]; see S*aint Francis Memorial Hospital v. State Department of Public Health* (2021) 59 Cal.App.5th 965, 973–974

"Before seeking [judicial] relief [for an administrative writ of mandate], a party must exhaust available administrative remedies." (*Grist v. Creek Aggregates, LLC v. Superior Court* (2017) 12 Cal.App.5th 979, 991.) "[T]he rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) "The primary purpose of the doctrine 'is to afford administrative tribunals the opportunity to decide in a final way matters within their area of expertise prior to judicial review.' [Citation.] 'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.' [Citations.] The doctrine prevents courts from interfering with the subject matter of another tribunal." (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874, 50 Cal.Rptr.3d 636.)

In fact, "[t]he 'rule of exhaustion of administrative remedies is well established in California jurisprudence. . . . ' (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.) Generally, it means a party must exhaust administrative remedies before resorting to the courts. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080.) More specifically, ' "[t]he doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided by statute, regulation, or ordinance, relief must be sought by exhausting this remedy before the courts will act." ' " (*Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1379; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) "Exhaustion of administrative remedies is 'a jurisdictional prerequisite to resort to the courts.' " (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, italics omitted; see also *Grist Creek Aggregates, LLC, supra*, 12 Cal.App.5th at p. 991.) The exhaustion requirement, and its pleading predicate, applies to

petitions for writ of administrative mandamus. (See, e.g., *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1125 [administrative writ per Code Civ. § 1094.5 requires pleading that exhaustion of all administrative remedies has occurred, a final decision on the merits; when a final decision on the merits has not been made, and there is no exception to exhaustion pleaded, the petitioner cannot go forward]; see also *Eight Unnamed Physicians v. Medical Executive Com.* (2007) 150 Cal.App.4th 503, 511 [exhaustion requirement applies in traditional and mandamus writ contexts].)

A court may properly sustain a demurrer when a plaintiff fails to plead exhaustion of administrative remedies. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156.) "A complaint is vulnerable to demurrer on administrative exhaustion grounds when it fails to plead either that administrative remedies were exhausted or that a valid excuse exists for not exhausting. (See *Campbell, supra,* 35 Cal.4th at pp. 321–322, 333; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 736–737; *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 439.) A complaint is also vulnerable to demurrer on administrative exhaustion grounds where the complaint's allegations, documents attached thereto, or judicially noticeable facts indicate that exhaustion has not occurred and no valid excuse is alleged in the pleading to avoid the exhaustion requirement. (*Foster v. Sexton* (2021) 61 Cal.App.5th 998, 1023.) This exhaustion requirement does not apply where "the administrative remedy is inadequate [citation]; where it is unavailable [citation]; or where it would be futile to pursue such remedy [citation].' " (*Automotive Management Group, Inc. v. New Motor Vehicle Bd.* (1993) 20 Cal.App.4th 1002, 1015; see also U*nnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 620.)

B) Request for Judicial Notice; Supplemental Request for Judicial Notice; and Untimely Opposition (along with a "First Amended Opposition")

Bureau, in request accompanying its demurrer, properly asks the court to take judicial notice of the following documents: 1) the "Proposed Decision" authored by Administrative Law Judge Joseph Montoya, dated February 9, 2023,; this decision is approximately 12 pages in length, indicating that petitioner's "Automotive Repair Dealer registration" will be revoked, with the decision stayed for and petitioner placed on probation for three years, with numerous terms and conditions; 2) the August 3, 2023 denial letter authored by the Bureau's "Enforcement Operations Branch," indicating petitioner's request for "licensure as a Smog Check Station" was denied;[2] and 3) a September 15, 2023 letter, authored by petitioner's counsel, Mr. William McCullough, and addressed to the Bureau, indicating that petitioner requested a hearing following denial of the licensure request outlined in the August 3, 2023 letter. As these documents are mentioned in the petition, or are relevant to the allegations that should be in the petition, the court grants the unopposed request for judicial notice.

[2] The August 3, 2023 letter expressly identifies petitioner's remedies. "If you wish to appeal this denial, you are entitled to a hearing on the matter under Chapter 5 (commencing with § 11500) of Part 1 of Division 3 of Title 2 of the Government Code. To request a hearing, you must submit a written request to this officer within (60) days of service of this notification. Your right to a hearing will be deemed waived, and the denial of your applications affirmed, if a written request is not received within the 60-day period. . . ."

The court is nevertheless troubled by the parties' efforts in opposition and reply. Not only was petitioner's first opposition untimely, but the "First Amended Opposition" – something not contemplated by timelines for law and motion without the court's permission – simply underscored and highlighted the procedural impropriety. Respondent's acts also are far from admirable – it filed a supplemental request for judicial notice *with the reply*, which is clearly inappropriate under traditional law and motion rules. (See, e.g., *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 680, fn. 8 [trial court properly denied request for judicial notice because it was an effort to introduce "new evidence" on reply].) The court, after some consideration (coupled with a desire to resolve the issues expeditiously), will accept the late oppositions and grant the supplemental judicial notice request (as it sees no prejudice to any party in so doing[3]), with the following warning to both sides – the time frames and rules attendant to law and motion practice exist for a reason, and should not be so cavalierly ignored in the future.

C) Merits

Based on the foregoing precedent outlined above, petitioner is required to allege that he/it exhausted administrative remedies or that he/it had a valid excuse for failure to exhaust. He has not pleaded exhaustion, and clearly an administrative remedy exists, as petitioner was told in the August 3, 2023 letter. (See *Eight Unnamed Physicians, supra*, 150 Cal.App.4th at p. 511 [the exhaustion requirement does not apply if no administrative remedy is available].)

Petitioner in opposition[4] contends that the demurrer should be overruled because the Bureau is barred – under principles of res judicata and collateral estoppel (claim and issue preclusion) – from denying his license for a smog station because the issues were resolved in petitioner's favor in the prior decision by Administrative Law Judge Montoya, in the written opinion dated February 9, 2023. The latter decision involved petitioner's application for an Automotive Repair Dealer registration, rather than an application for a licensure as a Smog Check Station (the subject of the extant writ petition). According to petitioner, however, the same issues were raised and rejected in Judge Montoya's decision, which was fully adopted by respondent, and as a consequence the Bureau is precluded from denying the licensure at issue here. As relevant for our purposes, petitioner contends that these res judicata principles "satisfy the [e]xhaustion" requirements of administrative remedies," citing *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464. Accordingly, opines petition, the court should overrule the demurrer.

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[3] The supplemental judicial notice request includes the following documents: 1) a statement of issues filed on November 9, 2023, in the pending administrative action; and 2) a "Notice of Assigned Hearing Date" in the administrative matter at issue in No. 1, *ante*. These documents are the proper subject matter of judicial notice, and are at issue in the operative pleading. The documents seem to have been unavailable at the time the original request for judicial notice was filed, a circumstance that militates in favor of granting the request. Nevertheless, the appropriate procedure would have been to obtain the court's permission to include the new evidence. In the end, these documents are not critical to resolution of the motion – they seem cumulative to the documents contained in the initial judicial notice request. And as for the late-filed opposition, as discussed in footnote 4, *infra*, the amended opposition seems to add little substance to the initial opposition, and respondent in reply has been able to fully address petitioner's claims.

[4] It is not entirely clear to the court what differences exist between the "First Amended Opposition" filed on November 27, 2023, and the original opposition filed on November 21, 2023. The differences, if any, appear insubstantial (or at least are not material).

The court is not persuaded by petitioner's exhaustion argument. Unquestionably res judicata and collateral estoppel are affirmative defenses, and prevent an administrative agency from reconsidering, in the absence of new facts, its prior final decision made in judicial or quasi-judicial capacity in the context of an adversarial hearing. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 794; *Berg v. Davi* (2005) 130 Cal.App.4th 223, 231; see also *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609; *Briley v. City of West Covina* (2021) 66 Cal.App.5th 119, 131, fn. 6 ["Res judicata is not a jurisdictional defense, and may be waived . . . ."].)[5] But there is absolutely no reason why the decision-making entity in the *pending* administrative appeal – triggered by petitioner's September 15, 2023 notice – cannot determine in the first instance whether the Bureau can deny the smog licensure or whether it is barred from doing so as a result of the February 9, 2023, decision by Judge Montoya. The facts in this case are similar to those in *Berg v. Davi*, in which the Department of Real Estate denied one Berg a real estate license based on his prior disbarment by the State Bar. (*Id.* at p. 225.) The appellate court upheld the administrative agency's decision to apply res judicata to bar Berg from collaterally attacking the State Bar Court's finding. (*Id*. at pp. 230-231.) Similarly, in this case, it is the administrative hearing entity that must decide in the first instance whether the Bureau can reject petitioner's application for smog licensure or whether it is barred from doing so as a result of the prior administrative decision, as adopted by the Bureau.[6] (See also *Pacific Coast Medical Enterprises v. Department of Benefit Payments* (1983) 140 Cal.App.3d 197, 214 [it is now generally recognized that res judicata applies in administrative proceedings to decisions of an administrative agency made pursuant to its judicial function; "it follows that since res judicata may be raised in administrative proceedings**,** it may also be waived if not properly asserted"]; see also *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 669 fn. 6 [parties to administrative proceedings can waive res judicata and collateral estoppel defenses if they do not raise them in those proceedings].) As petitioner has otherwise failed to show that these administrative remedies are inadequate, or exhaustion would be futile, the court will sustain the demurrer.

Nothing in *Takahashi*, cited by petitioner, suggests otherwise. In *Takahashi*, the trial court granted defendant's motion for summary judgment, dismissing plaintiff's causes of action

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[5] In reply, respondent argues the merits of the res judicata defenses advanced by petitioner. This misses the point of the administrative exhaustion doctrine – the question is not whether the defense has merit, but who should first decide the issue in the first instance. The defenses should be raised in the administrative agency appeal process, and do not act as a basis to satisfy or act as an exception to the administrative exhaustion requirement. The court expresses no view at this time about the merits of any res judicata defense identified and advanced by petitioner.

[6] Petitioner seems to suggest that the exhaustion requirement should not apply because res judicata and collateral estoppel are nonstatutory defenses under the common law (and thus fall outside the statutory administrative scheme). This argument overlooks the fact that the central issue in this case is one of statutory law, properly addressed in the first instance through the administrative procedures at play. It also overlooks the fact that there is a pervasive and self-contained system of administrative procedure for regulating smog licensure, for which the Bureau is particularly specialized in assessing, thus requiring petitioner to exhaust administratively before filing a civil action. (See, e.g., *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 396-398; see p. 396, fn. 15 [acknowledging that courts have reference these factors under "exhaustion" even though the real issue involves primary jurisdiction].) This matter is far different from that presented under the Fair Employment and Housing Act, where the high court has concluded *(inter alia*) that a plaintiff may proceed with a civil suit based on common law claims for damages without prior resort to the administrative process, for two reasons: 1) there was no pervasive and self-contained system of administrative procedures; and 2) the issues in a discrimination cases are not beyond the usual ken of a the judiciary. (*Id.* at p. 396.) That is simply not the case here.

against defendants Livingston Union High School District, Board of Education of Livingston Union School District, and certain individuals. The issue on appeal was whether judgments in the litigation previously initiated by plaintiff in both California and federal courts against one or more of the defendants operated as a bar to the present action under res judicata principles. The court ultimately found that res judicata principles were inapplicable. (202 Cal.App.3d at p. 1468.) The *Takahashi* court was not presented with and thus did not address any issue about whether res judicata principles could act as an exception to the administrative exhaustion requirement.[7] It is axiomatic that cases are not authority for propositions not considered. (*Gormley v. Gonzalez* (2022) 84 Cal.App.5th 72, 88.)

The remaining issue is whether the court will sustain the demurrer with leave to amend (if plaintiff can show that it can amend the existing complaint to allege exhaustion or an exception); sustain the demurrer without leave to amend (as requested by defendant); or simply stay the matter as the petition technically is premature (allowing the administrative remedy to run its course). The last potential solution implicates the primary jurisdiction doctrine, which is closely related to the doctrine of exhaustion of administrative remedies, although the two are often confused. (*City of Industry v. City of Filmore* (20110 198 Cal.App.4th 191, 210.) The primary jurisdiction doctrine requires a party to resort to an administrative remedy to resolve issues within the agency's particular area of expertise (even though the court has jurisdiction). (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 931.) The exhaustion doctrine applies where the claim or cause of action is originally within the exclusive jurisdiction of an administrative agency, while the primary jurisdiction doctrine applies where the cause of action is originally cognizable in the courts but requires the resolution of issues that are within the special competence of an administrative body. (*Id.* at pp. 931–932; *Farmers, supra,* 2 Cal.4th at p. 390.) Application of the primary jurisdiction doctrine results in a stay of the action pending resolution of the issues within the expertise of the administrative body, rather than a dismissal, which is more associated with the failure to exhaust administrative remedies.[8] As the present issue involves exhaustion and not an issue of primary jurisdiction, a stay seems inappropriate.

In the end, unless petitioner can demonstrate at the hearing that it can plead exhaustion of administrative remedies or an exception thereto (and based on the opposition(s) it appears petitioner cannot), an amended pleading would be ineffective, and thus the court will sustain respondent's demurrer without leave to amend. The court wishes to make it clear in the final order, however, that the court's decision does not preclude petitioner from filing an

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[7] In fact, a close review of *Takahashi* indicates that plaintiff did in fact exhaust all administrative remedies before filing any lawsuit in any court. It was the impact of those judicial matters, filed after the administrative remedies were completed, that were at issue – something particularly amenable to judicial determination under the circumstances.

[8] There is one exception to this under existing case law. If there are claims that require exhaustion of administrative remedies, but also claims that do not require exhaustion of administrative remedies, all alleged in the operative pleading, the appropriate remedy would be to stay the matter rather the sustain the demurrer in its entirety without leave to amend. This rule is not implicated here. (See, e.g., *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1085; see generally *Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152["[a]ny party to a judicial proceeding 'is entitled to a stay of those proceedings whenever (1) the arbitration of a controversy has been ordered, and (2) that controversy is also an issue involved in the pending judicial action'."].)

administrative writ of mandate in the future following the final administrative decision, should that be appropriate. Respondent is directed to provide a proposed order (with a judgment indicating it is without prejudice) for the court's signature.