

IN THE
Court of Appeal
State of California
Fourth Appellate District
Division Three

Dr. Orly TAITZ,

Appellant,

v.

Damon DUNN, an individual,

Respondent.

No. G045351

Appeal From Orange County
Superior Court No. 30-2010-
00381664

Hon. Geoffrey Glass

Appellant's Opening Brief

Dr. Orly Taitz, Esq.
Appellant
In Propria Persona
29839 Santa Margarita Pkwy., Ste 100
Rancho Santa Margarita, CA 92688

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
BASIS FOR REVIEW.....	5
Nature of the Action Below.....	5
Judgment Appealed From.....	5
Appeal of Final Judgments.....	5
FACTUAL SUMMARY.....	5
QUESTION PRESENTED.....	7
ARGUMENT.....	8
I. STANDARD OF REVIEW.....	8
II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CASE WITHOUT LEAVE TO AMEND ON A MOTION FOR JUDGMENT ON THE PLEADINGS.....	9
<i>A. Dr. Taitz's Complaint States Facts Upon Which Relief Could Be Granted; At A Minimum She Should Have Been Granted An Opportunity To Amend The Complaint To Clarify the Relief Sought.....</i>	<i>10</i>
<i>B. Dr. Taitz's Complaint Alleges Facts Which Support Claims Under the Elections Code, Civil Code or Common Law.....</i>	<i>10</i>
1. Dr. Taitz stated a valid claim under California Elections Code section 16101.....	10

2. Dr. Taitz stated a valid claim for common law deceit or fraudulent concealment.....	13
3. Dr. Taitz’s claims are not moot.....	15
CONCLUSION.....	18
CERTIFICATE OF WORD COUNT.....	19
CERTIFICATE OF SERVICE.....	20

TABLE OF AUTHORITIES

Cases

<i>Bach v. McNelis</i>	8
(1989) 207 Cal. App. 3d 852, 865-66	
<i>Bradley v. Perrodin</i>	16
(2003) 106 Cal. App. 4th 1153	
<i>Gami v. Mullikin Medical Center</i>	10
(1993) 18 Cal. App. 4 th 870, 877	
<i>Engalla v. Permanente Medical Group, Inc.</i>	14
(1997) 15 Cal.4th 951, 974	
<i>Lance Camper Manufacturing Corp.</i> <i>v. Republic Indemnity Co.</i>	8, 9
(1996) 44 Cal. App. 4 th 194, 198 (<i>Rev. den.</i>)	
<i>Molko v. Holy Spirit Assn.</i>	14
(1988) 46 Cal. 3d 1092, 1108	
<i>Reisner v. Regents of University of California</i>	9
(1995) 31 Cal. App. 4 th 1195, 1198, fn. 1	
<i>Schabarum v. California Legislature</i>	8
(1998) 60 Cal. App. 4 th 1205, 1216, (<i>Rev. den.</i>)	
<i>Thomas v. Chadwick</i>	10
(1990) 224 Cal. App. 3d 813, 816, fn. 1.	

Statutes

California Civil Code section 1709.....	7
California Elections Code section 16101.....	<i>passim</i>
California Elections Code section 18500.....	12
California Elections Code section 18502.....	12

BASIS FOR REVIEW

Nature of the Action Below

The action below concerns an election contest under California Elections Code section 16101, *et seq.*, along with causes of action for deceit, fraudulent concealment, injunctive relief and declaratory relief filed by Dr. Orly Taitz (“Dr. Taitz”), a Republican Candidate for Secretary of State in the California State Republican Primary Election of June 2010.

Judgment Appealed From

Taitz appeals from a Judgment on the Pleadings for Defendant Damon Dunn.

Appeal of Final Judgment

The judgment below is final and appealable; it disposed of all causes of action stated by the parties below.

FACTUAL SUMMARY

Dr. Taitz’s complaint alleges that her opponent in that election, Defendant Damon Dunn (“Dunn”), backdated his

California voter registration card to indicate he registered as a Republican in 1976 when, in fact, it was executed in March of 2009. Taitz further alleges that Dunn intentionally concealed the fact he was registered in two other states as a Democrat and engaged in affirmative conduct to try and have his voter registration in at least one of those states “deleted” from the public record. Additionally, she provided information, that at least two individuals, who allegedly nominated Dunn to run for the position of secretary of state, stated that they did not nominate him, that it was a “nomination fraud”.

An interview with those alleged nominators was shown on television in a program by William Wagener, who provided an affidavit attesting to the fact that he personally interviewed an elderly couple in a retirement community of Leisure World where most of Dunn’s nominations were allegedly signed and this couple stated on camera, in a recorded interview, that they never signed the nomination.

Taitz alleged that the averred conduct violated California Elections Code sections 18500 (ineligibility) and 18502 and constituted a form of statutory deceit under California Civil

Code section 1709 and/or the common law. She was authorized to bring such challenge under the authority of California Elections Code section 16100 which enables a candidate in a primary election to bring an action when a candidate is ineligible (16100(a)) or if a candidate violates certain of the provisions in the 18000 series of the Election Code.

Dr. Taitz contends the matter below was improperly dismissed without leave to amend on the basis of Dunn's Motion for Judgment on the Pleadings. Oral argument was heard on the subject motion on March 14, 2011 and the matter was "taken under submission" briefly. The order granting the motion was issued that same day on March 14, 2011.

QUESTION PRESENTED

Did the trial court err in dismissing Dr. Taitz's case without leave to amend on a Motion for Judgment on the Pleadings?

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a judgment on the pleadings, the standard of review is *de novo*:

The reviewing court does not give deference to the trial court's factual inferences, but is required to render an independent judgment on whether a cause of action has been stated. *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*, (1996) 44 Cal. App. 4th 194, 198, (*Rev. denied*).

Further, in determining whether the pleadings, together with matters that may be judicially noticed, entitle a party to judgment, a reviewing court can itself conduct the appropriate analysis and need not defer to the trial court. *Schabarum v. California Legislature*, (1998) 60 Cal. App. 4th 1205, 1216, (*Rev. denied*).

Finally, a Motion for Judgment on the Pleadings must be denied where there are material factual issues that require evidentiary resolution. *Bach v. McNelis*, (1989) 207 Cal. App. 3d 852, 865-66.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CASE WITHOUT LEAVE TO AMEND ON A MOTION FOR JUDGMENT ON THE PLEADINGS.

A. Dr. Taitz's Complaint States Facts Upon Which Relief Could Be Granted; At A Minimum She Should Have Been Granted An Opportunity To Amend The Complaint To Clarify the Relief Sought.

With respect to an appeal from a dismissal of an action based on a Motion for Judgment on the Pleadings, the task of the reviewing court is to determine whether the complaint states a cause of action. *Lance Camper, supra at 198*. All facts alleged in the complaint are deemed admitted, and the court gives the complaint a reasonable interpretation by reading it as a whole and all of its parts in their context. *Id.*

On an appeal from a judgment on the pleadings the reviewing court accepts as true the allegations of the operative pleading and does not speculate about the specifics of the charges. *Reisner v. Regents of University of California*, (1995) 31 Cal. App. 4th 1195, 1198, fn. 1.

The reviewing court examines only the face of the pleading, accepting as true all material facts properly pled, regardless of the difficulty of proving them, to determine

whether such facts plead a cause of action. *Thomas v. Chadwick*, (1990) 224 Cal. App. 3d 813, 816, fn. 1.

Importantly, if a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. *Gami v. Mullikin Medical Center*, (1993) 18 Cal. App. 4th 870, 877.

B. Dr. Taitz's Complaint Alleges Facts Which Support Claims Under the Elections Code, Civil Code or Common Law.

1. Dr. Taitz stated a valid claim under California Elections Code section 16101.

The focus of this Court's review will center on the Complaint itself, which is included as the sole Exhibit in the Augmentation to the Clerk's Transcript. However, Appellant also directs the Court's attention to specific sections from the Oral Argument on the hearing of the Motion for Judgment on the Pleadings (*See Reporter's Transcript*), and to the Trial Court's tentative ruling, order, and judgment, none of which

display any developed rationale for dismissing the case on the pleadings without leave to amend.

On page 4 of the complaint, Dr. Taitz alleges that Dunn backdated his California voter registration card to 1976, thereby indicating he had been a registered Republican in California since that date.

Dr. Taitz also alleges on page 4 that in actuality Dunn had registered as a California Republican voter in March of 2009.

Dr. Taitz further alleges on page 4 that Dunn held meetings with the public wherein he identified himself as a “recovering non-voter” further reinforcing the deceit.

On page 5 of the complaint, Dr. Taitz avers that Dunn in fact had prior voter registrations in Texas and Florida. Notably, the complaint alleges that Dunn was registered as a Democrat in Florida and sought by a July 10, 2009 letter to persuade the Manager of Elections in Duval County Florida to “delete” Dunn’s voter registration from the public records, thereby concealing the true fact of his voter registration as a Democrat in Florida.

Dr. Taitz alleges on page 5 of the complaint that the averred conduct of Dunn violates California Elections Code sections 18500 and 18502.

Unfortunately, Dr. Taitz did not refer to section 16101 in the complaint, which was the primary statutory authority for her elections contest. This may have confused the trial court which referred in oral argument and in its tentative ruling only to the 18000 series, and stating that those were “criminal statutes” not susceptible to action by a private citizen.

During the oral argument Taitz referred to the fact, that statutes 18500-18502 are enforceable by the contestant in an election and as a result Judge Glass removed from his final ruling a reference to the fact, that the criminal statutes are not enforceable by the election contestant. When judge Glass changed his tentative order for the second time and removed this notation from the final order, he was left with an order without any reasoning, without any indication to the basis on which he dismissed the case in light of evidence of fraud and did not even provide a leave to amend.

Dr. Taitz should have been allowed to proceed under the authority of section 16101 even though it was not specifically referenced in her complaint. In relevant part, section 16101 states that any candidate at a primary election may contest the right of another candidate to nomination to the same office by filing an affidavit alleging that (a) the defendant is not eligible to the office in dispute or that (b) the defendant has committed any offense against the elective franchise defined in Division 18 of the Elections Code (commencing with Section 18000.)

Whether or not Dunn violated either of the two 18000 sections, Dr. Taitz avers quite clearly that a fraudulent voter registration card invalidates the registration and because a valid voter registration is a prerequisite for candidacy, Dunn was ineligible to run for the office he sought.

2. Dr. Taitz stated a valid claim for common law deceit or fraudulent concealment.

California Civil Code section 1709 defines "deceit" generally: "One who willfully deceives another with intent to

induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

A deceit, within the meaning of section 1709, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,
4. A promise, made without any intention of performing it [promissory fraud].

The tort of deceit or fraud requires:

"(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; *see also Molko v. Holy Spirit Assn.* (1988) 46 Cal. 3d 1092, 1108.

The gravamen of Dr. Taitz's claim(s) (other than the Election Code claims) against Dunn—whether such claims are ultimately identified as deceit or fraudulent concealment—is that Dunn made a knowing misrepresentation intended to deceive her, that Dr. Taitz reasonably relied on this false statement, and that it caused her to spend approximately \$40,000 she would not have otherwise had to spend.

This basic allegation is spread throughout the complaint which does establish a knowing misrepresentation upon which Dr. Taitz initially relied and claims that it cost her a specific amount of money that she would not have otherwise had to spend if Dunn had not committed the alleged fraud.

These alleged facts state a cognizable claim for deceit or fraudulent concealment under Civil Code section 1709 and the common law. If the allegations are deficient or unintelligible as drafted, Dr. Taitz should have an opportunity to try again.

3. Dr. Taitz's claims are not moot.

Dr. Taitz anticipates an argument from the Respondent regarding mootness. At oral argument in the underlying

matter, Dr. Taitz made the following comments regarding the election contest: “Your Honor, it is not moot for a number of reasons. First of all, it is very important and there is ... big political capital for somebody to win a nomination of a major party like the Republican Party, a nomination for Secretary of State which is a statewide important election. So it is not moot if, indeed, the jury finds on June 6th that Mr. Dunn has committed fraud and his nomination was annulled and I am declared as the winner of that primary election. That has very important political capital for me.”

In the case of *Bradley v. Perrodin*, (2003) 106 Cal. App. 4th 1153 (*Rev. den.*), the Court of Appeal upheld a trial court decision to install the proper winners of an election after the fact. It was not a primary election, but it corrected the record of the earlier election. The same result should obtain here. There is nothing in the text of Election Code section 16101 which discusses mootness just because the “improper” winner of a primary election did not go on to win the general. It would be important to Dr. Taitz’s standing within the Republic party and as a citizen active in public affairs to have her “opponent”

declared to have been ineligible to run by virtue of his fraudulent voter registration card and his attempt to cover up the true nature of his voter registration in other states. One could argue there is a public interest at stake as well in these facts becoming judicially determined.

Additionally, Taitz, who is a known political dissident, was attacked in the media and accused of being a racist for bringing this complaint against Damon Dunn. National network MSNBC ran a special by Rachel Maddow, titled “Orly Taitz for secretary of state”, where Maddow implied that Taitz brought a frivolous action against another black man. On election day prime time anchor of MSNBC Chris Mathews ran a special, where he stated “Orly Taitz is a malignancy. I want you to tie her up like a witch to the stake” (Chris Mathews, Hardball, MSNBC). It is important for Taitz to correct the public record to show that she is not a “racist,” not a “malignancy” and not a “witch”, but a civil rights and constitutional attorney, who brought a legitimate legal action.

CONCLUSION

For all the foregoing reasons, Apellant Dr. Orly Taitz requests this Honorable Court reverse and remand the matter to the trial court for further proceedings consistent with the claims stated in her complaint, or be granted leave to amend the complaint to cure any defects on the face of the complaint.

November 23, 2011

Dr. Orly Taitz, Esq.

CERTIFICATION OF WORD COUNT

The total word count is within the allowed 14,000 words and is approximately 2700 words.

November 23, 2011

Dr. Orly Taitz, Esq.

CERTIFICATE OF SERVICE

I, John Carmichael, am not a party to this legal action, I attest that I served the Appellee by sending above pleadings by first class mail to the counselor for the Appellee, Charles Bell at _____ on November 23, 2011. I also served a copy by first class mail on the trial court The Honorable Judge Jeffrey Glass and electronically to the California Supreme Court.

Signed:

John H. Carmichael

November 23, 2011

