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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RAMONA RITA MORALES et al., Plaintiffs and Appellants, v. SILVER & WRIGHT, LLP, Defendant and Respondent.	E077797 (Super.Ct.No. RIC1803060) OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge. Affirmed.

O'Melveny & Myers, Sabrina Strong, Rob Barthelmess, and Jeffrey Senning; Institute for Justice, Joshua A. House and Jeffrey H. Redfern for Plaintiffs and Appellants.

Klinedinst, Gregor A. Hensrude, Robert M. Shaughnessy and Harold C. Trimmer for Defendant and Respondent.

Ramona Rita Morales and others[1] (collectively Morales) filed a putative class action against two cities — Indio and Coachella — and also against Silver & Wright, LLP (Silver). The cities had retained Silver as city prosecutor to prosecute criminal violations of their nuisance abatement codes. Morales alleged that Silver had a direct pecuniary interest in the attorney fees and costs that the cities collected in such cases, in violation of due process. She sought, among other things, a refund of all fees and fines paid, and a writ of error *coram nobis* to vacate all convictions obtained by Silver.

The cities settled; they agreed to refund all fees and costs collected by Silver, and they stipulated that the class was entitled to *coram nobis*. The trial court stayed further proceedings against the cities. Meanwhile, Penal Code section 688.5 went into effect; it prohibits a local government from charging a criminal defendant for the costs of prosecution. The trial court therefore dismissed Morales's due process claims; this left standing only her *coram nobis* claim against Silver.

Silver filed a motion for summary judgment, on multiple alternative grounds. The trial court granted the motion.

Morales appeals. She contends:

(1) By the time of the summary judgment motion, Silver was no longer the city prosecutor for either Indio or Coachella; therefore, it had become a nonparty, and it was not entitled to file a motion for summary judgment.

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[1] The other named plaintiffs are Isabell Sanchez, Cesar Manuel Garcia, and Investment Development Group, LLC.

(2) The trial court erred by granting summary judgment while discovery was stayed.

(3) The trial court erred by granting summary judgment based on Morales's failure to file a separate statement, because it was not allowed to do so unless Silver made a prima facie showing that it was entitled to summary judgment.

(4) All of the grounds on which Silver moved for summary judgment were meritless.

(5) The trial court erred by finding that Silver was the prevailing party for purposes of an award of costs.

We have no idea why this appeal is here. We have no idea why Morales did not simply dismiss Silver when it supposedly became a nonparty. We have no idea why, when Morales wants us to declare Silver a nonparty, she has a problem with Silver obtaining summary judgment; either way, Silver is out of the case. On these facts, the only difference would seem to affect Silver's right to costs, and as far as the record shows, the trial court has not awarded costs. In any event, costs would seem to be de minimis as compared to the cost of litigating this appeal.

We will hold that the trial court properly granted summary judgment because Silver was not a proper party to Morales's *coram nobis* claim. We will reject Morales's other arguments.

I

STATEMENT OF THE CASE

Morales filed this action in 2018, naming as defendants the City of Indio, the City of Coachella, and "Silver & Wright LLP in its official capacity as City Prosecutor . . . ."

In the operative (second amended) complaint, she asserted two causes of action for violation of due process,[2] in that Silver had a financial interest in the cases it prosecuted. She sought a refund of all fines and fees collected by Silver and an injunction against further unconstitutional prosecutions. She also asserted a cause of action for a writ of error *coram nobis* to vacate the criminal judgment against her.[3]

On January 1, 2019, Penal Code section 688.5 went into effect. In general, it prohibits a local government from charging a defendant for its costs of investigation, prosecution, or appeal in a criminal case. Morales conceded that, in light of Penal Code section 688.5, her due process claims were moot but argued that her *coram nobis* claim survived. Based on this concession, the trial court dismissed the due process claims.

Morales entered into separate settlement agreements with Indio and Coachella. The settlement agreements required the cities to repay all fees collected by Silver and to

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[2] One cause of action was under the federal constitution and the other was under the state constitution.

[3] "[T]he writ's purpose 'is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court' [citation]." (*People v. Kim* (2009) 45 Cal.4th 1078, 1091.) "The grounds on which a litigant may obtain relief via a writ of error *coram nobis* are narrower than on habeas corpus [citation]." (*Ibid.*)

relinquish all claims for unpaid fees. The *coram nobis* claim against the cities was not to be dismissed; however, the cities stipulated "that the elements of *coram nobis* are met as to the [c]lass [m]embers." Morales conceded that the settlement agreements "provid[ed] Plaintiffs all of the prospective and retrospective relief they sought."

The trial court preliminarily approved the settlement agreements and certified a settlement class. It stayed all proceedings against Indio and Coachella other than those related to final approval of the settlements.

Silver then moved for summary judgment. It argued:

(1) Its actions had been authorized by statute and did not violate due process.

(2) *Coram nobis* must be sought in the underlying criminal action and cannot be sought in a separate civil action.

(3) Morales was not entitled to *coram nobis* because her claim was not based on any newly discovered fact pointing to innocence or reduced culpability.

(4) The action was barred by prosecutorial immunity.

(5) The action was barred by the litigation privilege.

Morales filed an untimely opposition. It did not include a separate statement. It did include declarations, but they did not controvert Silver's declarations; they merely attempted to show that Silver was no longer city prosecutor. Morales argued:

(1) Silver was no longer a proper party because it was no longer city prosecutor.

(2) The motion was "premature" because discovery had been stayed.

(3) Morales had adequately alleged a violation of due process.

(4) *Coram nobis* can be sought in a separate civil action.

(5) *Coram nobis* does not require a showing of factual innocence.

(6) Prosecutorial immunity and the litigation privilege did not apply.

(7) It was the "law of the case," based on the rulings on previous demurrers and anti-SLAPP motions, that Silver's arguments regarding *coram nobis* were not valid.

The trial court granted the motion. It adopted its tentative ruling as its final ruling. It therefore entered judgment against Morales and in favor of Silver.

II

SILVER'S PARTY STATUS

Morales contends that Silver was a nonparty, because it had been sued solely in its official capacity, and it had ceased to be city prosecutor; therefore, it could not move for or be granted summary judgment.

Preliminarily, Silver responds that it was not sued solely in its official capacity, because the relief sought in the complaint included "[a]n order enjoining Silver . . . against any further unconstitutional prosecutions on behalf of cities in Riverside County . . . ." Such relief, if granted, would have affected Silver in its individual capacity. By the time of the motion for summary judgment, however, the due process claims had been dismissed as moot. Morales's requests for injunctive relief were gone with them. She was not going to get an injunction against Silver on a *coram nobis* theory.

The evidence, however, fell short of showing that Silver was no longer city prosecutor. It did show that Indio had terminated its agreement with Silver for legal

services. As to Coachella, however, Morales submitted an *unsigned* declaration by the city manager stating that Coachella had terminated its agreement with Silver for legal services.[4] It also submitted its attorney's declaration, stating: "Counsel for Coachella has represented to Plaintiffs' counsel that the facts stated in this draft declaration are true, and that it will provide an executed copy of the declaration in the near future." Silver duly objected to the declaration, as unsigned, and to the attorney's declaration, as hearsay and not made on personal knowledge. These objections were well-taken. (Code Civ. Proc., § 2015.5; Evid. Code, § 1200, subds. (a)-(b).) The trial court therefore had to disregard this evidence.

In her opening brief, however, Morales argues that Silver's status was "jurisdiction[al]," and thus it became a nonparty "automatically." In her reply brief, she adds that, for this reason, she did not have any burden of proving that Silver was no longer city prosecutor.

At first glance, it would appear that Silver was still a party. Morales had named Silver in her complaint, albeit only in its official capacity, it had been served, and it had appeared. When Morales became aware that Silver was no longer city prosecutor, she could have dismissed it, but she did not. Between the signing of the settlement agreements and the filing of the motion for summary judgment, 18 months went by. Even in the face of the motion for summary judgment, she still did not dismiss Silver.

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[4] Interestingly, the declaration was labeled as part of a "Motion to Dismiss." Apparently Morales contemplated filing a motion to dismiss Silver but decided not to.

Her failure to do so implies that she was still seeking some kind of relief against Silver. For example, she could have moved to amend her complaint so as to allege some kind of cause of action against Silver in its individual capacity. Thus, her argument is, "Heads, I win; tails, you lose"; she could keep Silver in the action as long as she wanted, but if Silver sought any relief, such as a summary judgment, it would suddenly (and retroactively) become a nonparty.

Assuming Silver had, in fact, ceased to be city prosecutor, then the complaint no longer stated a cause of action against it. However, a defendant is a defendant, even if the complaint fails to state a cause of action. The trial court has to do something to let the defendant out of the action — enter a voluntary dismissal, sustain a demurrer, grant a motion for judgment on the pleadings, grant summary judgment, etc.

Morales relies on cases dealing with substitution of parties. For example, she cites *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, in which the court, on its own motion, substituted a successor official for his or her predecessor. (*Id.* at p. 543, fn. 1.)[5] This suggests the exact opposite — that a court must take some formal action to effect a substitution.

Code of Civil Procedure section 368.5 provides that "[a]n action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the

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[5] She also cites a California Supreme Court order, to the same effect. (*Briggs v. Brown* (Cal. 2017) 212 Cal.Rptr.3d 871.) An order is not a published opinion and is not citable authority.

original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." In other words, substitution is not automatic.

Code of Civil Procedure section 367 provides that "[e]very action must be *prosecuted* in the name of the real party in interest . . . ." (Italics added.) We know of no requirement that an action must be *defended* only by a real party. Or, to put it another way, suing a defendant *makes* it a real party. We prohibit collusive suits (*City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 693-694), but this is not one.

Morales also cites *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110 (*Tokio*) for the proposition that courts do not have jurisdiction to enter judgment in favor of a nonparty.[6] However, this begs the question of whether Silver was a party.

Morales cites no authority supporting the proposition that Silver became a nonparty *automatically*.

She does cite *Bender v. Williamsport Area School Dist.* (1986) 475 U.S. 534, which held that a defendant named in an official capacity cannot appeal in his or her

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[6] *Tokio* involved a judgment *against* nonparties, and it did not hold that the trial court lacked *jurisdiction*. To the contrary, it acknowledged that the nonparties "arguably submitted to the personal jurisdiction of the court" by making a general appearance. (*Tokio, supra*, 75 Cal.App.4th. at pp. 121-122.) Rather, it held that the judgment violated due process, because the nonparties had not had any notice or any opportunity to be heard. (*Id.* at pp. 119-124.) That is hardly Silver's situation.

We acknowledge, however, that there are other cases holding that a court lacks jurisdiction to enter a judgment in favor of a nonparty. (E.g., *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 249; see generally 2 Witkin, Cal. Proc. (6th ed. 2022) Jurisdiction § 331.)

individual capacity. (*Id.* at pp. 543-544.) There, however, the fact that the defendant had gone out of office had been brought to the attention of the court. (*Id.* at p. 539, fn. 2.)

Next, she cites *State ex rel. Cooper v. Washington County Comm'n* (Mo.Ct.App. 1993) 848 S.W.2d 620, which stated, "Once a public official is separated from office, his or her successor is automatically substituted as a party, irrespective of whether or not a court order has been entered." (*Id.* at p. 621.) However, it cited Rule 52.13(d) of the Missouri Supreme Court Rules, which provides: "When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, . . . [the] successor is automatically substituted as a party." California has no such rule.

Finally, she asserts that "courts have a duty to determine whether an official capacity litigant has ceased to hold that office," citing *Morton v. Broderick* (1897) 118 Cal. 474. We find nothing to that effect in the case.

We therefore conclude that Silver was still a party to the action, and thus it was entitled to obtain summary judgment.

III

GRANTING SUMMARY JUDGMENT WHILE DISCOVERY WAS STAYED

Morales contends that the trial court erred by granting summary judgment because discovery had been stayed.

Under Code of Civil Procedure section 437c, subdivision (h), "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts

essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just."

Morales did not submit any declarations to that effect. She did submit declarations, but they did not speak to whether she needed further discovery. Instead, in her memorandum of points and authorities, she stated, "Each version of the complaint was verified by the plaintiffs, which satisfies the requirement that affidavits be submitted demonstrating that facts may exist essential to justify the opposition to the motion for summary judgment."

Four out of the five grounds of Silver's motion, however, raised issues of law, not fact. If the trial court granted the motion on any of these grounds, then Morales's complaint, verified or not, failed to show that any *facts* essential to justify opposition existed. Indeed, in arguing that the trial court should not have granted the motion based on her failure to file a separate statement, Morales herself asserts: "[T]he failure did not significantly affect the clarity or sufficiency of their opposition papers. . . . [T]his is not a case in which there was any lack of clarity about the factual dispute or the relevant evidence."

Separately and alternatively, Morales failed to show that those facts "cannot, for reasons stated, be presented."

The mere existence of the discovery stay failed to show this. The action had been filed in February 2018. The discovery stay went into effect in October 2019. Morales

did not disclose what discovery had already taken place or why that discovery was not adequate to enable her to oppose the motion. "'A good faith showing that further discovery is needed to oppose summary judgement requires some justification for why such discovery could not have been completed sooner.' [Citations.]" (*Braganza v. Albertson's LLC* (2021) 67 Cal.App.5th 144, 156.) In addition, discovery *against Silver* had not been stayed.

Morales also did not disclose what evidence she already had, or could get, without formal discovery. As her complaint shows, she already knew what her own experience with Silver had been; she already had evidence of how Silver marketed itself to cities; she already had Silver's contract with the cities. She was free to contact other people prosecuted by Silver and to ask them about their experiences. It was up to her to explain, to the trial court, via declarations, what more she needed.

"'Code of Civil Procedure section 437c, subdivision (h) requires more than a simple recital that "facts essential to justify opposition may exist."' [Citation.] 'The statute cannot be employed as a device to get an automatic continuance by every unprepared party who simply files a declaration stating that unspecified essential facts may exist. The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.' [Citation.] Plaintiff here failed to detail the facts she expected to discover and the specific procedures she intended to use to obtain that evidence. Plaintiff therefore was not entitled to a mandatory continuance under Code of Civil Procedure

section 437c, subdivision (h)." (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532.)

Morales complains that "the trial court suggested that Plaintiffs were at fault for not filing a motion requesting that the discovery stay be lifted . . . ." She argues that this reasoning was flawed. Her assertion is not cited to the record. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) Indeed, it could not be, as there is no reporter's transcript of the hearing. We therefore disregard this argument.

IV

SUMMARY JUDGMENT BASED ON

FAILURE TO FILE A SEPARATE STATEMENT

Morales represents that the trial court granted the motion for summary judgment based solely on her failure to file a separate statement. She then contends that this was error, because Silver had not made a prima facie showing that it was entitled to summary judgment.

The trial court's minute order did not state reasons. The court adopted its tentative ruling, but that is not in the record. The notice of ruling also is not in the record. The trial court did not issue a formal written order, and there was no court reporter.

The subsequent judgment, however, recites that:

"The Court . . . found Plaintiffs' third cause of action to be meritless as against S[ilver]." "S[ilver]'s motion was supported by legal argument and evidence sufficient to shift the burden to Plaintiffs to establish one or more triable issues of fact. [Citation.]

Plaintiffs failed to present evidence and argument sufficient to establish the merit of their sole remaining cause of action against S[ilver]. Summary judgment is proper where there is no triable issue as to any material fact and the moving party is therefore entitled to a judgment as a matter of law. [Citation.]"

"In addition, Plaintiffs' opposition failed to include a separate statement of facts as required. [Citations.] [']Failure to comply with this requirement may constitute sufficient grounds, in the court's discretion, for granting the motion.' [Citation.]"

Thus, the record shows that the trial court did *not* grant the motion based solely on the failure to file a separate statement. In any event, even if it had, we could affirm the judgment on any of the grounds that Silver raised below, because the parties have fully briefed them in this appeal. (Code Civ. Proc., § 437c, subd. (m)(2); *Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493, 501, fn. 2.)

V

SUMMARY JUDGMENT BASED ON WHETHER MORALES CAN SEEK *CORAM NOBIS* IN A CIVIL ACTION AGAINST SILVER

Morales contends that she can properly seek *coram nobis* in this action against Silver because *coram nobis* is a civil proceeding that can be filed separately from the underlying criminal action.

In its motion for summary judgment, Silver argued that *coram nobis* must be sought in the underlying criminal action and cannot be sought in a separate civil action. As part of that overall argument, it added: "S[ilver] was not a party in the underlying

criminal cases. It was the *prosecutor*. Yet this action names S[ilver] as a defendant to a novel *civil* coram nobis 'count' . . . ." "Allowing plaintiffs' coram nobis petition to proceed in this Court risks opening a floodgate of meritless collateral attacks on criminal judgments. Convicted criminal defendants will *sue prosecutors in civil court* for any number of alleged procedural violations seeking coram nobis relief."

Although "[t]he writ of error *coram nobis* may be used following judgment in a civil proceeding" (*In re Dyer* (1948) 85 Cal.App.2d 394, 400), "in California its use has been chiefly in criminal cases. [Citation.]" (*Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 8.)

"Historically, [*c*]*oram nobis* was a civil proceeding, but in modern procedure . . . 'a petition for writ of [*c*]*oram nobis* is the equivalent of a motion to vacate a judgment.' [Citation.] [¶] Such a motion to set aside a judgment of conviction is considered a part of the criminal case . . . . [Citations.]" (*People v. Kraus* (1975) 47 Cal.App.3d 568, 573.) *Coram nobis* has been treated as criminal for purposes of (1) appealability under Penal Code section 1237 (*People v. Kraus*, *supra*, 47 Cal.App.3d at p. 573), (2) appointment of counsel (*People v. Shipman* (1965) 62 Cal.2d 226, 231), (3) the payment of a filing fee (*Bravo v. Cabell* (1974) 11 Cal.3d 834, 839-840 [*Bravo*]), and (4) payment of costs of the record on appeal (*In re Paiva* (1948) 31 Cal.2d 503, 510 [*Paiva*]).

In *Bravo*, the Supreme Court said: "[A]lthough a proceeding for a writ has been traditionally characterized as civil in nature when viewed as an entity in itself, where it relates to and arises out of a criminal action, it must be regarded as a part of such criminal

action. [Citation.]" (*Bravo*, *supra*, 11 Cal.3d at p. 838.) "[A] proceeding for a prerogative writ arising from a criminal action" "initiate[s] no new controversy but relate[s] only to the action below." (*Id.* at pp. 839-840.)

Similarly, in *Paiva*, it said: "Whatever may be the nature of the proceeding traditionally, . . . in California a proceeding in the nature of a writ of *coram nobis* is properly regarded 'as a part of the proceedings in the case to which it refers' rather than as 'a new adversary suit.'" (*Paiva*, *supra*, 31 Cal.2d at p. 509.) "[A] motion to vacate a judgment in a criminal case upon grounds which make such motion the equivalent of a proceeding in the nature of a writ of error *coram nobis*[] must be regarded as a part of the proceedings in the criminal case." (*Id.* at p. 510.)

We need not decide whether Morales had to bring her *coram nobis* claim under the caption and case number of her criminal case. We also need not decide whether a single complaint could assert both a civil claim and a claim for criminal *coram nobis*. And we need not decide whether a *coram nobis* petition can be brought as a class action. It is sufficient to hold that, because the *coram nobis* claim in this case was criminal, Silver was not a proper party to it. A prosecutor is not a proper party to a *coram nobis* claim, any more than the prosecutor is a party to an ordinary criminal action. A prosecutor is merely an attorney representing the proper party — the People.[7]

The trial court therefore properly granted summary judgment in favor of Silver.

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[7] Indeed, we question whether the cities were proper parties.

VI

PREVAILING PARTY FINDING

In the judgment, the trial court found that Silver was the prevailing party and awarded Silver costs in an amount to be determined. Silver filed a memorandum of costs; however, it is not in the record. Morales did not file a motion to strike or to tax costs. The register of actions does not show any amended judgment or any order awarding costs.

Morales contends that the trial court erred by finding that Silver was the prevailing party for purposes of an award of costs.

Silver responds (among other things) that we cannot reach that issue in this appeal, because a postjudgment award of costs is separately appealable. (See Code Civ. Proc., § 904.1, subd. (a)(2); *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693.)

We agree. In *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047 (*Burke*), we held that "if a judgment determines that a party is entitled to attorney's fees but does not determine the amount, that portion of the judgment is nonfinal and nonappealable." (*Id.* at p. 1053.) "[A]n order determining the entitlement to attorney's fees, but not the amount of the fee award, is interlocutory. This is true even if such an order is contained in what is otherwise an appealable judgment." (*Id.* at p. 1055.) We also noted that "[t]his is consistent with the policy against piecemeal appeals." (*Id.* at p. 1054.)

Admittedly, here we are dealing not with attorney fees, but with costs. However, the reasoning in *Burke* applies equally to costs. For example, Silver's memorandum of costs may have been untimely. On August 3, 2021, Silver filed a notice of entry of judgment, along with a proof of electronic service. Hence, any memorandum of costs had to be filed by August 20, 2021 (15 days, plus 2 court days for electronic service). (Code Civ. Proc., § 1010.6, subd. (a)(4)(B); Cal. Rules of Court, rule 3.1700(a)(1); *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227, 235-237.) Silver actually filed its memorandum of costs on August 23, 2021. We speculate that that may be why the trial court never entered any amended judgment awarding costs. (See Cal. Rules of Court, rule 3.1700(b)(4).)

We need not decide whether the memorandum of costs was, in fact, untimely. We raise the possibility as a thought experiment, to illustrate why the policy against piecemeal appeals applies here: When an order adjudicates the entitlement to costs but not the amount, subsequent events could make it unnecessary to review the order.

VII

DISPOSITION

The judgment is affirmed. Silver is awarded costs on appeal against Morales.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.