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LOS ANGELES SUPERIOR COURT
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JOHN A. CLARKE, CLERK
BY N. DIGIAMBATTISTA, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MERCURY INSURANCE COMPANY, ET AL Petitioner	)	
vs	)	CASE NO. BS137151
DAVE JONES, ETC. Respondent	)	

COURT'S RULING ON RESONDENT'S DEMURRER HEARD ON SEPTEMBER 12, 2012

Respondent Commissioner demurs to the Petition on the grounds that Petitioners failed to exhaust their administrative remedies, and the Petition fails to state facts sufficient to allege a cause of action for a writ of mandate under either Code of Civil Procedure section 1085 or 1094.5.

After reading and considering the pleadings and having heard argument, the Court renders the following decision:

Statement of the Case

Petitioners Mercury Insurance Company; Mercury Casualty Company; and California Automobile Insurance Company (collectively "Mercury") seek review of Respondent Commissioner's March 30, 2012 order rejecting an ALJ's Proposed Decision dismissing a noncompliance proceeding against Petitioners Mercury. Petition, ¶ 1.

The California Department of Insurance ("CDI") initiated a Notice of Noncompliance ("NNC") against Mercury on February 2, 2004. Petition, ¶ 5. The Notice of Noncompliance, OSC, and Accusation alleged that Petitioners Mercury charged and collected premiums in excess of the rates approved by Respondent Commissioner, subjected their insureds to unfair rate discrimination, misrepresented the actual price insurance consumers could expect to pay for insurance, and engaged in unfair, deceptive, or fraudulent business practices. Id., ¶¶ 34-36; Exhibit B.

On January 31, 2012, the ALJ submitted a Proposed Decision to Respondent Commissioner, which purported to dismiss the noncompliance proceeding against Mercury on procedural grounds, including *inter alia* alleged ex parte communications between the CDI and Respondent Commissioner's office; an alleged failure of the CDI to maintain a separation between its investigator, prosecutor, rule-maker, and adjudicator functions; and the applicability of an amended California Code of Regulations section 2614.13 relating to the preparation of direct witness testimony to adverse witnesses. Petition, Exhibit B.

On March 30, 2012, Respondent Commissioner issued an order rejecting the ALJ's Proposed Decision, referring the matter back to the ALJ to convene an administrative hearing, take substantive evidence on the allegations contained in the NNC and issue a proposed decision on the NNC. Id., Exhibit A.

It is undisputed that the ALJ did not conduct a hearing or take substantive evidence in the matter. Id.

Petitioners allege that Respondent Commissioner violated the Administrative Procedure Act by summarily rejecting the ALJ's Proposed Decision without addressing the alleged due process violations cited by the ALJ. Petition, ¶¶ 3, 4.

Petitioners now seek a peremptory writ of mandate pursuant to Code of Civil Procedure sections 1085 and 1094.5 directing Respondent Commissioner to set aside Respondent's March 30, 2012 and issue a new order dismissing the NNC against Petitioners.

Procedural History

Petitioners filed a verified Petition on April 19, 2012.

On April 26, 2012, the Court set a trial-setting conference for July 31, 2012.

On May 2, 2012, Petitioners filed a peremptory challenge against Judge Chalfant; the case was subsequently transferred to Department 86, Judge Ann I. Jones presiding, for all further proceedings and the Court vacated the July 31, 2012 trial-setting conference.

On May 3, 2012, the Court set a status conference for October 5, 2012 and ordered Petitioners to give notice, which Petitioners filed on May 7, 2012.

On June 4, 2012, nonparty CW filed a motion for leave to intervene. On June 18, 2012, Petitioners filed an opposition and on June 25, 2012, nonparty CW filed a reply.

On June 5, 2012, Respondent Commissioner filed a demurrer to the Petition.

On June 5, 2012, the court continued the hearing on the demurrer from July 18, 2012 to July 25, 2012.

On June 27, 2012, pursuant to the stipulation and order signed and filed that date, the opposition to the demurrer set for September 14, 2012 was ordered to be filed and served by July 31, 2012 and any reply was ordered to be filed and served by August 17, 2012.

On July 2, 2012, the Court denied CW's motion to intervene.

On July 31, 2012, Petitioners filed an opposition to Respondent's demurrer, and on August 17, 2012, Respondent filed a reply.

Summary of Applicable Law

Where pleadings are defective, a party may raise the defect by way of a demurrer. Coyne v. Krempels, 36 Cal.2d 257 (1950). A demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. Code Civil Procedure section 430.30(a); Blank v. Kirwan, 39 Cal.3d 311, 318 (1985).

A demurrer may be sustained without leave to amend when there is no reasonable possibility that the defect can be cured by amendment. Blank v. Kirwan, 39 Cal.3d 311, 318 (1985). Indeed, where the facts are not in dispute and the nature of the plaintiff's claim is clear, but no liability exists under substantive law and no amendment would change the result, the sustaining of a demurrer without leave to amend is proper. City of Ceres v. City of Modesto, 274 Cal. App. 2d 545, 554 (1969). The burden is on the plaintiff to show how the complaint might be amended so as to cure the defect. Ass'n of Community Orgs. for Reform Now v. Dept. of Industrial Relations, 41 Cal.App.4th 298, 302 (1995).

There are two essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure section 1085: (1) a clear, present and ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. California Ass'n for Health Services at Home v. Department of Health Services, 148 Cal. App. 4th 696, 704 (2007).

California Code of Civil Procedure section 1094.5 is the administrative mandamus provision providing the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514-15 (1974). Under CCP section 1094.5(b), the pertinent issues are: whether Respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if Respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. Code Civ. Pro. § 1094.5(b).

Leave to amend is granted because courts generally allow at least one time to amend a complaint, after sustaining a demurrer, even without any request for leave to amend. McDonald v. Superior Court, 180 Cal.App.3d 297, 303 (1986).

Analysis

Petitioners allege claims under both administrative mandamus and traditional mandamus. The Court will consider those alternatives below.

1. 1094.5 Claim

A writ of mandate pursuant to Code of Civil Procedure section 1094.5 seeks review of "the validity of any final administrative order or decision *made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer.*" (emphasis added).

The nature of the administrative proceeding at issue here is an adjudicative one – for which evidence is required to be taken. Under the Department of Insurance's regulations, a non-compliance proceeding provides for the taking of evidence. See Cal. Code of Regulations, title 10, section 2614.13. That regulation, although later amended by the Department of Insurance to limit the manner in which certain testimony would be taken, was found by the ALJ assigned to this adjudication to be inapplicable to the instant proceeding. In a later proceeding, before evidentiary hearings took place, the ALJ issued a Proposed Decision dismissing the Non-Compliance Proceeding.

That the ALJ believed that he did not require evidence to be taken in the proceeding, however, does not affect the fact that a Non-Compliance administrative action is a proceeding in which by law a hearing is required, evidence is required and discretion in the determination of facts is vested in the inferior tribunal or officer.
Where, as in this case, the challenge asserted is to an adjudicative proceeding at which the agency is required to hold an evidentiary hearing, a writ of administrative mandate is Petitioners' exclusive remedy. And, the decisions in Quintanar and Chevron Stations do not compel a different result. In neither of those cases did the parties attempt to "jump the line" and demand a hearing in superior court of a not-yet-final adjudicative proceeding.

Given that administrative mandamus is the sole remedy available to challenge a final decision in an administrative adjudication of the type in which Mercury finds itself, it is also Petitioner's burden to allege that the proceeding has been fully exhausted, or that exhaustion is otherwise excused. [1]

[1] The Petitioner bears the "burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy." Westinghouse Elec. Corp. v. County of Los Angeles, 42 Cal. App.3d 32, 37 (1974). "The bare allegation in [Petitioner's] complaint that he 'has exhausted his administrative remedies' does not relieve him of the burden of doing so and properly pleading the results thereof." Logan v. Southern Cal. Rapid Transit Dist., 136 Cal. App.3d 116, 124 (1982). The mere allegation that Petitioners "have exhausted their administrative remedies" is a conclusion of law or fact insufficient to show exhaustion of administrative remedies. Pan Pacific Properties, Inc. v. County of Santa Cruz, 81 Cal.App.3d 244, 251 (1978).

This exhaustion requirement is a jurisdictional prerequisite. Abelliera v. District Court of Appeal, 17 Cal.2d 280, 292-293 (1941); Corona-Norco Unified School Dist. v. City of Corona, 17 Cal.App.4th 985, 993 (1993).

Petitioners assert that they are not required to exhaust administrative remedies because the proceeding on remand is without jurisdiction. They are incorrect.

This is not a situation in which exhaustion may be excused because the agency facially lacked authority or jurisdiction to decide the underlying dispute between the parties. See Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd., 35 Cal.4th 1072, 1081-82 (2005).

The resolution of disputes over compliance with insurance rates is governed by the Insurance Code section 1858 *et seq*. Under those provisions, the Commissioner is given the authority to convene hearings, take evidence, render a preliminary determination and, thereafter, to issue a final decision on the merits. If, as Mercury contends here, there has been a defective procedure employed by the Commissioner in the process of this exercise of jurisdiction and discretion, those claims are preserved and shall be included as part of any subsequent petition for administrative mandamus.

In addition, pursuant to Government Code section 11517 *et seq.*, the Commissioner also has the jurisdiction to reject a proposed decision and to remand the matter back to the ALJ for further evidentiary hearings. See also California Code of Regs., tit. 10, section 2416.24. Under subsection (c)(2)(D), the "Agency may reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge to take additional evidence." There is no limitation on the scope of the additional evidence that can be taken, as Petitioners' counsel claimed at oral argument. In fact, the balance of that sub-section provides for a "revised proposed decision . . . based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing."

In this case, additional development of the record and the application of the agency's expertise are essential to assist in resolving this court in any future determination of Petitioners' "jurisdictional" arguments.[2] In addition, requiring administrative exhaustion will not impose a significant injury on Petitioners. In fact, Petitioners' jurisdictional objections may be rendered moot if Petitioners prevail on the substantive merits of the case.

Petitioners also argue that the administrative remedy is inadequate because of Respondent's and CDI's violation of Petitioners' due process rights.

In the instant case, further notice and an additional opportunity to be heard upon remand does not violate due process. A hearing to develop further the evidence upon which the ALJ's recommendation and proposed decision will rest not only meets the requirements of due process, it embodies it. Petitioners conflate the available administrative remedy—an administrative

[2] Although Mercury claims that the Commissioner's remand is a "jurisdictional" defect, what is really being argued here is that the agency has not proceeded in a manner required by law. This issue will be part of the final administrative mandamus Petition once a final administrative adjudication is complete.

hearing—with impermissible ex parte communications; they are not identical and it does not necessarily follow that an administrative hearing will be tainted by improper ex parte communications on remand.

Petitioners also argue that the administrative remedy is futile and, therefore, their failure to exhaust their administrative remedies is excused. "A plaintiff need not pursue administrative remedies where the agency's decision is certain to be adverse." Howard v. County of San Diego, 184 Cal.App.4th 1422, 1430 (2010).

In the instant case, Petitioners have failed to allege sufficient facts upon which it could be found that the agency's decision is "certain to be adverse." The futility exception requires that the party invoking it positively state that the agency has declared what its ruling will be on a particular case. Mercury has not established how the Commissioner will rule on the ultimate merits of the Noncompliance hearing. At best, it might be able to assert that it can predict the Commissioner's interpretation of Regulation 2624.13 as it applied to the direct testimony of adverse witnesses. The outcome of this partial evidentiary issue, however, does not equate to being able to predict with requisite certainty the outcome of the underlying administrative proceeding. Cf. Coachella Valley, *supra*, 35 Cal. 4th at 1081.

Based on the foregoing, the Court finds that Petitioners have failed to adequately allege that exhaustion of their administrative remedies is excused.

2. 1085 Claim

In an attempt to evade the requirement of administrative exhaustion, Petitioners have also sought mandamus under Code of Civil Procedure Section 1085. That effort is unavailing.
First, with regard to the judicial review of the present Noncompliance proceeding, the sole avenue is through a writ of administrative mandate. As discussed *infra*, the comprehensive procedures governing Noncompliance Proceedings require a hearing to be given, evidence to be taken, and vest discretion in the Commissioner to render a final decision in the case. Accordingly, a cause of action for review by ordinary mandamus under Section 1085 is not available. McGill v. Regents of the Univ. of Calif., 44 Cal. App. 4th 1776, 1785 (1996)(citing Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 35 n.2 (1974)).

Second, Petitioners' effort to re-characterize an exercise of agency discretion at the conclusion of an adjudicative proceeding as "ministerial" is unavailing. Mercury fails to cite any statute that imposes a ministerial duty on the Commissioner to adopt the Proposed Decision. In the instant case, Government Code section 11517(c)(2) grants Respondent Commissioner *discretion* to decide whether to adopt, reduce, change, or reject a proposed decision. Thus, Petitioners' argument that the actions challenged here are ministerial, not discretionary, is flatly inconsistent with the statutory language.

Third, even were a traditional mandamus cause of action available to challenge the Commissioner's exercise of his discretion in remanding the matter for further evidentiary hearing, it would also be subject to a requirement of administrative exhaustion. The exhaustion requirement "applies to actions seeking both ordinary and administrative mandamus."

Endangered Habitats League, Inc. v. State Water Resources Control Bd., 63 Cal.App.4th 227, 237 (1997).

Conclusion

Based on the foregoing, the Court sustains Respondent District's demurrer to the Petition without leave to amend.

In this case, the Commissioner's order is not final because it remanded the matter back to the Office of Administrative Hearings for additional proceedings and to convene an evidentiary hearing on the Department's substantive allegations against Mercury. Therefore, the Petitioners' only viable cause of action -- under CCP 1094.5 -- is not yet actionable as there is no final decision ripe for review.[3]

[3] Declaratory relief is not appropriate to attack an agency's adjudicatory decision in order to circumvent the limits of review under CCP 1094.5. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 123 (1973).