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David H. Hernandez, Clerk of the Superior Court
County of Santa Clara, California
By: A. Ramirez
City Clerk

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12 Mary Kathleen McCarthy, Than Ho, Randy Sekany,
13 Ken Heredia, Teresa Harris, Jon Reger, Moses Serrano,
14 John Mukhar, Dale Dapp, James Atkins, William Buffington
15 and Kirk Pennington

16 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
17 **IN AND FOR THE COUNTY OF SANTA CLARA**

18 SAN JOSE POLICE OFFICERS' ASSOCIATION,

19 Plaintiff,

20 vs.

21 CITY OF SAN JOSE AND BOARD OF
22 ADMINISTRATION FOR THE POLICE AND FIRE
23 DEPARTMENT RETIREMENT PLAN OF CITY OF
24 SAN JOSE

25 Defendants.

Case No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-
225928, 1-12-CV-226570, 1-12-CV-
226574, and 1-12-CV-227864)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO STRIKE
AND/OR DISMISS DEFENDANT CITY
OF SAN JOSE'S MOTION FOR
SUMMARY ADJUDICATION**

26 and Consolidated Actions

27 CITY OF SAN JOSE

28 Cross-Complainant,

vs.

SAN JOSE POLICE OFFICERS' ASSOCIATION, *et*
al.

Cross-Defendants.

Date: *March 15, 2013*
Time: 9:00 a.m.
Dept: 8
Judge: Hon. Peter H. Kirwan

INTRODUCTION

1
2 Section 437c subdivision (f) (1) of the Code of Civil Procedure provides that a
3 motion for summary adjudication shall be granted “only if it completely disposes of a cause
4 of action, an affirmative defense, a claim for damages, or an issue of duty.” Defendant
5 City of San Jose (City) has moved for summary adjudication on certain discrete issues,
6 outside the proscription of Section 437c subdivision (f) (1), precluding disposition of any
7 cause of action asserted in plaintiffs’ complaints. Therefore, in order to relieve the parties
8 from the onerous burden of responding to the City’s improper motion, the court should
9 strike and/or dismiss the City’s motion for summary adjudication because it fails to qualify
10 as a cognizable motion under the Code of Civil Procedure.
11

ARGUMENT

12
13 These cases involve constitutional challenges to a charter amendment, Measure B,
14 adopted at the June 5, 2012 Primary Election. Plaintiffs maintain that Measure B’s
15 limitations on and changes to the pension rights of plan participants and annuitants are
16 unconstitutional as an invalid impairment of contract under the California Constitution, Art.
17 I, § 9.
18

19 All three of the complaints allege a single cause of action for unconstitutional
20 impairment of contract, and all three allege the following similar or “common” facts all
21 arising *from the enactment of Measure B* in support of that theory:

- 22 1. Revision of the definition of disability retirement entitlement or method by which
23 the disability is determined;
- 24 2. The revision of the cost of living adjustments;
- 25 3. Increases in employees’ contributions to pay for unfunded liabilities, previously
26 the sole liability of the City;
27
28

1 4. Imposing obligations to contribute to the unfunded liability for retiree health
2 benefits;

3 5. Elimination of the supplemental retirement benefits.

4 These factual allegations establish distinct common issues of fact, but not separate causes
5 of action, within each of plaintiffs' complaints.¹
6

7 The City's motion seeks summary adjudication on three of the factual allegations set
8 forth in plaintiffs' impairment of contract cause of action.² It does not address, nor eliminate
9 all of the factual allegations supporting the essential cause of action alleged in the
10 complaint.

11 **I. The City's Motion For Summary Adjudication Is Improper Under**
12 **Section 437c Because It Does Not Dispose Of A Cause Of Action.**

13 It is self-evident that even if granted, the City's motion does not dispose of any
14 cause of action to be tried. Because the City's motion for summary adjudication does not
15 dispose of the cause of action, it is improper under Section 437c, subdivision (f) (1) of the
16 Code of Civil Procedure and should be stricken or dismissed.
17

18 The authority relied upon by the City in support of the motion for summary
19 adjudication actually supports plaintiffs' motion to strike and dismiss.

20 In *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, a legal
21 malpractice action against former attorneys, the plaintiff alleged that the attorneys
22 committed legal malpractice "at different times on two separate and distinct matters". *Id.*,
23 at 1850. As the court noted "there is no dispute that the two matters have no relation to
24 each other and involve legal services performed at different times, with different and
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26 ¹ The three complaints brought by plaintiffs set forth five cause of action, all premised on "facts common to all
27 causes of action" and on three essential claims of Measure B's unconstitutionality under the California
Constitution.

28 ² See City's Mem. P & A at ¶ III D 2 (employee liability to unfunded retiree health care); at ¶ III D (increases in
employee contributions for unfunded pension liabilities); and at ¶ III D 3 (elimination of the supplemental
retirement reserve benefit).

1 distinct obligations and distinct and separate alleged damages.” 12 Cal.App.4th at 1854. In
2 interpreting the provisions of §437c, subdivision (f), the court held that a motion for
3 summary adjudication was appropriate where there were separate distinct wrongful acts
4 even though contained in one count. 12 Cal.App.4th at 1854-1855. Here, however,
5 plaintiffs do not allege separate and distinct wrongful acts, but rather allege that Measure B
6 violates the constitution for several different factual reasons. Thus, unlike the setting in the
7 *Lilienthal & Fowler* case, here there is only one wrongful act, one cause of action,
8 presented by plaintiffs’ complaints in this case.
9

10 After *Lilienthal & Fowler* was decided, the Legislature amended the provisions of
11 subdivision (f) (1) of Section 437c. (Stats. 1993, ch. 276, § 1.) This revision makes plain
12 that the holding in *Lilienthal & Fowler* does not support the City’s argument that the court
13 has authority under the Code of Civil Procedure to entertain its motion for summary
14 adjudication of issues. Indeed, the City’s interpretation of the *Lilienthal & Fowler* decision
15 was disposed of in *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1094, where a defendant
16 brought a motion for summary adjudication of 130 “issues” in response to a complaint
17 asserting seven causes of action. In footnote number 2, 73 Cal.App.4th at 1097, the court
18 discussed the defendants’ reliance on *Lilienthal & Fowler*.
19

20 The authority for this extraordinary motion is *Lilienthal &*
21 *Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848. 16
22 Cal.Rptr.2d 458, in which Division Two of the First District
23 construed the language now found in subdivision (f)(1) of
24 section 437c to permit summary adjudication motions to
25 challenge a separate and distinct wrongful act, even though it
26 is combined with other wrongful acts alleged within the same
27 cause of action. We question whether *Lilienthal* properly
28 construed subdivision (f)(1) of section 437c (which, as
drafted, authorizes a motion for summary adjudication as to
“one or more causes of action within an action, one or more
affirmative defenses, one or more claims for damages, or one
or more issues of duty.”(Italics added.) As subsequently
amended, subdivision (f)(1) now provides that a “motion for
summary adjudication shall be granted only if it completely

1 disposes of a cause of action, an affirmative defense, a claim
2 for damages, or an issue of duty.” (Citation omitted.) In any
3 event, the *Lilienthal* court was faced with three requests for
4 summary adjudication. We cannot imagine that the results
5 would have been the same had the request been for one
6 hundred and thirty separate summary adjudications.

7 The City’s reliance on two additional cases as authority for the propriety of its motion
8 for summary adjudication is also misplaced.

9 In *Mathieu v. Norrell* (2004) 115 Cal.App.4th 1174, the plaintiff alleged in one cause
10 of action two claims for violation of the Fair Employment and Housing Act, one for sexual
11 harassment and one for retaliation. The court on appeal noted that these two claims
12 constituted a violation of separate sections of Government Code §12940 and constituted
13 separate causes of action even though combined in one count. *Mathieu, supra*, 115
14 Cal.App.4th at 1189. This was appropriate since under Government Code §12940 a
15 violation of subdivision (a) (sexual discrimination) is a separate and distinct cause of action
16 from a claim of violation of subdivision (h) prohibiting retaliation. *Mathieu, supra* at 1185.
17 But in this case, plaintiffs allege only one central cause of action: violation of the
18 constitutional prohibition on impairment of contract – circumstances different from the facts
19 presented in *Mathieu*.

20 In *Garrett v. Howmedica Osteonics Corp.* (2012) 211 Cal.App.4th 389, the plaintiff
21 alleged that he sustained damages as a result of a prescribed prosthetic device and filed a
22 complaint alleging strict products liability based on manufacturing and design defects,
23 liability based on failure to warn, breach of express warranty and negligence. The court
24 ruled that a summary adjudication as to the design defect cause of action under either the
25 risk benefit or consumer expectation test was appropriate given the status of the motion
26 and the opposition but that the motion was improperly granted as to the other causes of
27 action. *Id.*, 211 Cal.App.4th at 398-399, 403. The court noted in a footnote that the defective
28

1 design and defective manufacture were alleged in one count but since they were two
2 separate theories they could have been alleged in separate counts, and therefore summary
3 adjudication of the design defect claim was authorized since it disposed of a cause of
4 action. 211 Cal.App.4th at 399, n. 7. This result is appropriate since the granting of the
5 motion disposed of one cause of action and/or issue of duty. Here, in contrast to the
6 *Garrett* case, the City's motion for summary adjudication will not dispose of one cause of
7 action or issue of duty. If granted, under the City's motion for summary adjudication no
8 cause of action is completely disposed of nor is the duty of the City to refrain from imposing
9 unconstitutional revision to the pension plans eliminated. Thus the City's improper motion
10 for summary adjudication should be stricken and dismissed.

12 **II. The City Did Not Comply With The Limited Procedure Under Section**
13 **437c permitting Consideration Of Its Motion.**

14 In 2011 the California legislature added a new subdivision to §437c. (Stats. 2011,
15 ch. 419, § 3.) This new provision, subdivision (s) (1) - (7), provides a limited procedure for
16 summary adjudication of a legal issue even though it does not completely dispose of a
17 cause of action as required by subdivision (f). There are two conditions which must be met
18 to make such a motion. First all parties must stipulate to the motion and second the court
19 has to approve of the proceeding. The import of this amendment is that absent compliance
20 with Section 437c, subdivision (s), there is no authority to bring a motion for summary
21 adjudication of issues which is not dispositive unless the conditions of a stipulation and
22 court approval are met. The City does not purport to be proceeding under subdivision (s)
23 and therefore should not be allowed to proceed with its motion.

25 While the fact that City's moving papers do not comply with Section 437c,
26 subdivision (f) (1) nor with the provisions of subdivision (s) could be raised as a defense to
27 the City's motion, it is appropriate for the court to address this issue before the plaintiffs
28

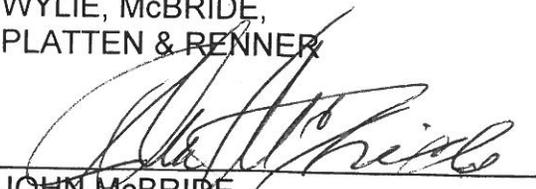
1 and the court have to expend the extraordinary time that would be required in response to
2 the City's voluminous moving papers. (See Declaration of John McBride.)

3 **CONCLUSION**

4 It is respectfully submitted that the court should order that the City's motion for
5 summary adjudication of issues be stricken and/or dismissed.

6
7 Dated: February 25, 2013

8 WYLIE, McBRIDE,
9 PLATTEN & RENNER

10 
11 JOHN McBRIDE

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17 Kirk Pennington

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