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COUNTY OF SAN MATEO

7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 IN AND FOR THE COUNTY OF SAN MATEO

10 ADAM ULLMAN,

11 Plaintiff,

12 vs.

13 COUNTY OF SAN MATEO

14 Defendant.
15

Case No. SCS133314

TRIAL BRIEF

Hearing

Date: August 26, 2016
Time: 9 a.m.

1 **I. Introduction**

2 The County of San Mateo (the “County”) appeals the decision of the Small Claims Court
3 awarding Plaintiff \$1,000 in damages for his claim for \$5,000 based on “the failure of the County to
4 mitigate the continuing public nuisance of very loud aircraft flying over my home” which is located at 15
5 Lorne Way, Menlo Park, CA. Plaintiff apparently claims that those “very loud aircraft” fly into or from
6 the County-owned San Carlos Airport (the “Airport”).

7 The County would not ordinarily appeal such a small judgment. However, plaintiff has been
8 publicizing his award and encouraging others to file similar claims against the County, raising the
9 possibility of substantial additional liability. More fundamentally, the summary nature of the
10 proceedings in the Small Claims Court failed to address several key factual and legal issues that should
11 have precluded any award to plaintiff, and that would preclude similar awards in favor of others.
12 Specifically, the Small Claims Court failed to evaluate whether (1) plaintiff had standing to assert a
13 public nuisance claim, (2) whether the damages he asserts for the cost of his time petitioning the County
14 for noise relief and excess payments of property taxes are compensable in a public nuisance claim, (3)
15 whether he met his burden of proof as to the reasonableness of his claims and the County’s responsibility
16 for his purported injuries and (4) whether the operation of the Airport in full compliance with all state
17 and federal laws and regulations can constitute a public nuisance. As detailed below, the answer to each
18 of these questions is “no,” and judgment should never have been entered against the County.

19 **II. Argument**

20 **A. Plaintiff lacks standing to bring an action for public nuisance.**

21 Plaintiff’s complaint alleges that aircraft overflight from aircraft using San Carlos Airport
22 constitute a “continuous public nuisance.” Complaint at pg. 2, section 3. Both statutory and case
23 authority make it clear that plaintiff cannot maintain an action for public nuisance in this case.

24 “A public nuisance is one which affects at the same time an entire community or neighborhood,
25 or any considerable number of persons, although the extent of the annoyance or damage inflicted upon
26 individuals may be unequal.” Civil Code Section 3480. “A private person may maintain an action for a
27 public nuisance, if it is specially injurious to himself, but not otherwise.” Civil Code Section 3493.
28 “Generally speaking, a public nuisance does not furnish ground for action by a private person, but such

1 public nuisance may inflict upon an individual such peculiar injury as to entitle him to maintain a
2 separate action for its abatement, or to recover damages therefor. [Citations.] The injury to the
3 individual must, however, be **different in kind and not merely in degree** from that suffered by the
4 general public. [Citations.]” *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1137 (1991)
5 (citing *Brown v. Rea*, 150 Cal. 171, 174. (1907)(emphasis added)).

6 The alleged public nuisance raised by plaintiff -- continuous and loud aircraft overflights -- fits
7 squarely within the statutory definition of a public nuisance. Pursuant to Civil Code Section 3493, in
8 order to recover as an individual on a theory of public nuisance, plaintiff must have suffered special
9 damage that is “different in kind” from the damage caused to the public at large by the nuisance.
10 However, plaintiff lives approximately 4 miles from the Airport and the aircraft overflights of which he
11 complains impact at least “an entire community or neighborhood.” The claim and specific injuries
12 plaintiff alleges could be made by thousands of other residents and landowners. Furthermore, as a
13 factual matter, he has made no claims of unique or unusual injury relative to his neighbors. Plaintiff’s
14 annoyance or damage cannot be distinguished from that of others in the neighborhood. In light of this he
15 has not suffered the requisite special injury, and therefore lacks standing to pursue his public nuisance
16 claim.

17 **B. Plaintiff fails to allege injuries that are compensable in a nuisance action.**

18 Even if plaintiff had standing to bring his public nuisance claim and were to be able to introduce
19 sufficient evidence to support his claim, he has not alleged the type of damages that are compensable in a
20 nuisance action. “Once a cause of action for trespass or nuisance is established, an occupant of land may
21 recover damages for annoyance and discomfort that would naturally ensue therefrom.” *Kornoff v.*
22 *Kingsburg Cotton Oil Co.*, 45 Cal. 2d 265, 272 (1955); *see also* California Civil Jury Instruction 2031
23 Damages for Annoyance and Discomfort – Trespass or Nuisance (allows recovery of damages for trespass
24 or nuisance that would reasonably compensate plaintiff for “annoyance or discomfort caused by the injury
25 to his/her peaceful enjoyment of the property that he/she occupied.”).

26 Plaintiff’s complaint alleges he is entitled to damages for (1) “time spent working with the
27 County to resolve this issue and making it aware of its legal obligations to the community” and (2) “a
28 portion of [his] property taxes for no longer being able to peaceably enjoy [his] home.” These types of

1 damages are not compensable as nuisance damages. The first category is the value of time spent lobbying
2 the County to take certain discretionary actions and is not a measure of any loss of peaceful enjoyment.
3 The second category appears to relate to plaintiff's unsupported belief that he owes less property tax
4 because the aircraft overflights have diminished the assessed value of his property. This is also not a
5 measure of any loss of peaceful enjoyment, and in fact, there is a separate statutory scheme that provides
6 plaintiff a means for asserting that a decline in assessed value should result in lower property taxes.
7 Plaintiff is essentially demanding a refund of property taxes, and the Revenue and Taxation Code lays out
8 a process for this. Ordinarily a taxpayer seeking relief from an erroneous assessment must exhaust
9 available administrative remedies before resorting to the courts. *Steinhart v. County of Los Angeles*, 47
10 Cal. 4th 1298, 1308-09 (2010). In the property tax context, application of the exhaustion principle means
11 that a taxpayer ordinarily may not file or pursue a court action for a tax refund without first applying to
12 the local board of equalization for assessment reduction under Section 1603 of the Revenue and Taxation
13 Code and filing an administrative tax refund claim under Section 5097 of the Revenue and Taxation Code.
14 *Id.* at 1308.

15 **C. Plaintiff Must Provide Specific Evidence of Damages and Prove the Connection Between**
16 **His Damages and the Airport's Operations.**

17 Even if plaintiff were able to allege damages compensable through a nuisance action, he needs to
18 provide specific evidence of those damages and prove the connection between his damages and the
19 Airport's operations. There is no strict liability for a public nuisance, and plaintiff must establish that an
20 ordinary person would be reasonably annoyed or disturbed by the alleged conditions. Plaintiff's claims of
21 annoyance and disturbance, and minimal supporting evidence, must be evaluated for reasonableness. *See*
22 California Civil Jury Instruction 2020 Public Nuisance – Essential Factual Elements. It is not enough for
23 plaintiff to provide subjective descriptions of his alleged injury (even assuming that spending time
24 lobbying could constitute an injury); he must provide evidence that an ordinary person would be similarly,
25 adversely impacted by the alleged conditions. The state's own description of acceptable aircraft noise
26 provides context for this analysis: "The standard for the acceptable level of aircraft noise for persons
27
28

1 living in the vicinity of airports is hereby established to be a community noise equivalent level of 65
2 decibels.”¹ Title 21 California Code of Regulations Section 5012. There is no evidence in the record that
3 the aircraft noise has reached this level; rather the only evidence regarding noise is directly to the
4 contrary, as reflected in a May 27, 2015 Coffman Associates Aircraft Noise Measurement Report
5 regarding noise data collected approximately ¼ mile away from plaintiff’s residence.²

6 Plaintiff also needs to show a nexus between his alleged injuries and the County’s operation of
7 the Airport. Liability for nuisance does not hinge on whether the defendant owns, possesses or controls
8 the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the
9 defendant created or assisted in the creation of the nuisance. *City of Modesto Redevelopment Agency v.*
10 *Superior Court*, 119 Cal. App. 4th 28, 38 (App. 1 Dist. 2004).

11 Plaintiff must show that the County has created the public nuisance in question, but he cannot. It
12 is not enough for him to argue that the County controls the airport or that the County could abate or
13 otherwise stop the nuisance. This is essentially all plaintiff alleges; that the County has not abated the
14 purported nuisance. The Complaint states that the County is liable for nuisance because of a “[f]ailure to
15 mitigate the continuous public nuisance....” Complaint at page 2, paragraph 3. The County cannot be
16 liable for this. Nor can the County be liable for creating or assisting in the creation of the nuisance. The
17 evidence shows that the time, location, speed, altitude and route of aircraft in flight are all created by the
18 FAA’s air traffic control or the aircraft operators. Users’ access to the Airport facilities is required by
19 federal law and regulations. Any agreements between Airport users and the County are a product of the
20 FAA’s requirements.

21 In addition and on a related note, plaintiff needs to show that the allegedly injurious aircraft

22 _____
23 ¹ “Community noise equivalent level” is defined in 21 CCR 5001, and is a calculated average noise level
over a 24 hour period.

24 ² This report contains data collected at 37 Holbrook Lane, Atherton, CA, which is a residence
25 approximately ¼ mile from plaintiff’s residence and also subject to aircraft overflights. While the scope
26 of the report is limited, it is the only noise study employing industry-standard noise monitoring
27 techniques that has been conducted at or near plaintiff’s home. The results of that study show the
community noise equivalent at the test site was approximately 45 decibels, far below the state standard
28 (particularly in light of the logarithmic nature of the decibel as a unit of measurement). The 20 decibel
difference between the observed level and the standard equates to a factor of 100.

1 overflights are even related to the Airport. The airspace over plaintiff's residence contains air traffic
2 from numerous airports in addition to the Airport, including San Francisco International Airport (SFO),
3 Oakland International Airport and San Jose International Airport and many smaller airports including
4 Palo Alto Airport and Hayward Airport. In fact, aircraft using one of the primary approaches to SFO
5 also passes nearly directly over plaintiff's home. This approach accounts for approximately 63% of
6 SFO's arrival traffic and consists of tens of thousands of overflights monthly at altitudes between 1000ft.
7 and 6000 ft. SFO is one of the ten busiest airports in the nation and twentieth busiest in the world. Every
8 year, just under a half million aircraft arrive or depart SFO, meaning that on any single day there could
9 be more than 1300 aircraft arrivals or departures over San Mateo County communities. In addition to
10 SFO arrivals and departures, aircraft overflying communities in San Mateo County, including the
11 plaintiff's community, could be flying to or from any of the several other airports in or near the County,
12 or could be enroute to destinations anywhere on the west coast of the United States. In contrast, San
13 Carlos Airport receives about 300 landings or takeoffs on a typical day, which is a small percentage of
14 the total aircraft overflights over San Mateo County communities. Plaintiff's home lies beneath what is
15 essentially a busy freeway-in-the-sky for all sorts of aircraft, most of which are neither landing nor taking
16 off from the County-operated San Carlos Airport. Plaintiff has simply failed to show that his damages, if
17 any, are caused by aircraft operating at San Carlos Airport.

18 **D. It is Plaintiff's Burden to Prove that the Airport is a Nuisance.**

19 "An airport is not a nuisance per se, but that it may become a nuisance either because of
20 unsuitable location or improper operation or both has been clearly decided. [Citations.]" *Anderson v.*
21 *Souza*, 38 Cal. 2d 825, 838 (1952). The Airport has been in its present location for over 60 years and
22 predated much of the development in the area, and the flight path in the vicinity of plaintiff's home
23 predates plaintiff's residing underneath the flight path. Plaintiff, who moved to his present residence
24 approximately ten years ago, is not in a position to claim that the airport's location constitutes a nuisance.

25 Based on his claims, it appears that plaintiff believes the County's operation of the Airport is
26 improper, thereby creating a nuisance. However, the County is operating the Airport in full compliance
27 with all state and federal requirements, both statutory and regulatory, and plaintiff cannot prove
28 otherwise. There is nothing improper about the County's operation of the Airport.

1 **III. Conclusion**

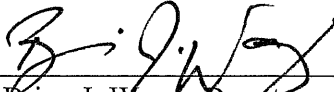
2 In light of the plaintiff's lack of standing and failure to allege damages compensable in a nuisance
3 action, the Complaint in this matter should be dismissed. If the Court would like to receive evidence on
4 whether the County should be liable for the alleged nuisance, the County is prepared to provide evidence
5 on the relevant issues, including evidence relating to:

- 6 • How plaintiff has failed to meet the legal requirement that he demonstrate his alleged
7 injuries are unique relative to his community;
- 8 • The lack of a nexus between alleged aircraft overflights of plaintiff's property and Airport
9 activity;
- 10 • Whether it is reasonable to conclude that the alleged injuries rise to the level of nuisance
11 injury;
- 12 • The existence of the flight path and aircraft overflights prior to plaintiff moving to his
13 residence;
- 14 • The propriety of the County's efforts to regulate its activities, including issues related to
15 noise.
- 16 • The lack of County involvement in the creation of the public nuisance at issue.

17
18 Dated: August 26, 2016

Respectfully submitted,

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20
21 By: 
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23 Attorneys for Defendant
24 COUNTY OF SAN MATEO

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