

California Appellate Court Breaks New Ground Under CCP § 1038 While Reiterating Need to Follow Appellate Briefing Rules

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INTRODUCTION

As evidenced by a recent appellate court decision in *Ponte v. County of Calaveras* (2017) 14 Cal.App.5th 551 (writ denied Oct. 18, 2017) (“*Ponte*”), California Code of Civil Procedure section 1038 remains a powerful statutory weapon available to public entities to combat frivolous lawsuits. In *Ponte*, the plaintiff’s five-year long, relentless pursuit of a six-figure payout from the County resulted, instead, in a judgment in excess of six figures in favor of the County. The appellate court broke new ground under section 1038 in this landslide repair case, and reiterated the consequences of failing to follow appellate briefing rules in the process.

Section 1038 allows a public entity to recover its reasonable attorney and expert witness fees expended to defend an action where the trial court finds that the plaintiff lacked *either* reasonable cause, *or* good faith, in the filing and maintaining of a lawsuit against a public entity.² *Ponte* is the first published decision from California’s Third District Court of Appeal to address section 1038 since 1996, and the first appellate decision of any kind applying that statute to public contracting requirements and promissory estoppel.

FACTUAL AND PROCEDURAL BACKGROUND IN PONTE

The plaintiff in *Ponte* was an unlicensed contractor who sued the County to recover more than \$150,000 for labor and materials relating to his purported repair of a landslide on a slope located at the intersection of a County road and a private driveway. Plaintiff asserted that the County impliedly entered into a contract with him to perform the repair work based on a conversation the plaintiff claimed to have overheard from several feet away between a County employee and a geotechnical engineer hired by the owner of the private driveway.

Plaintiff asserted various causes of action, including breach of contract and promissory estoppel. Before any responsive pleading was due, defense counsel began a series of meet and confer efforts demanding that the plaintiff dismiss the lawsuit, but those efforts were ignored. The trial court granted the County summary judgment on all causes of action on the basis that the plaintiff failed to satisfy local ordinances mandating that contracts with the County be in writing and approved by the Board of Supervisors, among other prerequisites. The trial court also held that promissory estoppel could

not be used by a litigant to bypass those contracting requirements.³ Thereafter, the trial court awarded the County \$65,000 in reasonable attorneys’ fees pursuant to section 1038 in addition to its prevailing party costs.

The Court of Appeal affirmed both the grant of summary judgment and award of attorneys’ fees to the County under section 1038, and ordered that the County be awarded its reasonable attorneys’ fees on appeal. The plaintiff then filed a petition for review by the California Supreme Court, which was summarily denied on October 18, 2017. In December 2017, the trial court awarded the County the entirety of its additional \$36,676 in attorneys’ fees and costs to defend against the years-long appeal and subsequent petition for review.

THE DECISION BY THE THIRD DISTRICT COURT OF APPEAL

By the time the case reached the oral argument stage in the Court of Appeal, only the promissory estoppel claim remained. As to that cause of action, the Court held: “Promissory estoppel cannot be asserted against a public entity to bypass rules that require contracts to be in writing

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or be put out for bids, rules which reflect a public policy to preclude oral contracts or other exposures to liability, including claims of promissory estoppel.” *Ponte, supra*, 14 Cal.App.5th at 556.

The Court first noted that the California Supreme Court, in *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 495, n.30, left open a “narrow window for the application of promissory estoppel against public entities,” where the facts “go beyond the ordinary principles of estoppel.” However, as noted in *Long Beach*, “each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted, or public policy defeated.” *Ponte*, at 557. Finding that this was not an “exceptional case,” the Court of Appeal held: “[a]llowing promissory estoppel in this case would undermine ordinances setting rules for public contracts, which in part is to preclude oral contract claims.” *Id.*

The Court of Appeal then explained that section 1038 “provides public entities a statutory remedy akin to a malicious prosecution action – which is not available to a public entity because of the First Amendment right to petition the government – so that the public fisc is not saddled with unreasonable litigation costs.” *Ponte*, at 558-559 (citations omitted).

Citing to large portions of its last published decision in *Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, the *Ponte* Court reiterated that the defendant must negate either good faith or

reasonable cause to prevail under section 1038. *Ponte*, at 559. However, it affirmed the trial court’s finding that *Ponte*’s claims were not “brought or maintained in both subjective and objective good faith.” *Id.* at 553 (italics in original).

The good faith analysis involves a factual inquiry into plaintiff’s subjective state of mind – i.e., did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? Because the inquiry as to good faith is factual, the question on appeal is whether the evidence was sufficient to sustain the trial court’s finding. Under the words of the statute, “good faith” is linked to a belief in a justifiable controversy under the facts and law. *Id.* at 559.

On the other hand, the “reasonable cause” analysis is determined objectively and as a matter of law on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide “[w]hether any reasonable attorney would have thought the claim tenable.” This analysis is subject to de novo review on appeal.

The plaintiff argued that because he was purportedly out \$150,000, his attempt to collect from the County was not “bad faith,” but instead, normal behavior motivated by a hope to get paid. The Court of Appeal held that, while that desire may show the plaintiff’s subjective desire to be paid, it did not establish an objectively reasonable basis for this lawsuit, such that any

reasonable attorney would have thought the claim tenable. *Id.* at 560.

The Court also rejected *Ponte*’s argument for the application of an emergency exception to government contracting rules: “[a]bsent a declared emergency, and some statute or ordinance authorizing work in such circumstances absent compliance with normal public contracting procedures, no reasonable attorney would believe there was a tenable basis for this lawsuit, which, as we have explained, is based only a purported oral agreement between *Ponte* and a County employee.” *Id.* The appellate court concluded by affirming the trial court’s decision that “no reasonable attorney would have thought the claims made were legally tenable.” *Id.* at 560.

ADDITIONAL TAKEAWAYS FROM PONTE

1. Although Not Statutorily Required, Don’t Forget to Meet and Confer!

Ponte demonstrates that courts will look to early, and possibly repeated, notices to plaintiff’s counsel that the lawsuit lacks merit, as pertinent to the analysis under section 1038 of whether any “reasonable attorney would have thought the claim tenable.” Although the statute contains no meet and confer requirement, the appellate panel asked detailed questions at oral argument relating to the defense counsel’s multiple meet and confer efforts. The first paragraph of the decision reflects

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the importance of these efforts: “Ponte disregarded opportunities to abandon his claims after the County provided him with pertinent legal authority demonstrating that his claims lacked merit.” *Id.* at 553.

2. Filing a Demurrer May Have an Impact on the Section 1038 Analysis

In this case, the County filed three separate demurrers, each of which were sustained with leave to amend, but without any discussion by the trial court. In his appellate reply brief, the plaintiff attempted to use the County’s decision not to demur to the Third Amended Complaint as a basis to establish his reasonable belief in the merits of the action. The Court of Appeal rejected this argument as well, finding that even if they were to consider this belated argument, the Court “fail[ed] to see how the County’s failure to demur yet again somehow made Ponte’s claim objectively reasonable.”

Section 1038 fees cannot be recovered based upon a judgment obtained after a successful demurrer. Consequently, counsel hoping to recover defense fees and costs will need to determine whether to file a demurrer, and risk an adverse decision that could preclude a later award under section 1038, or to file an answer followed by summary judgment (after which the statute’s language allows defense costs to be recovered). However, if an untenable claim can be gleaned from the face of the complaint alone, defense counsel may need to be prepared to explain why no demurrer had been filed at the outset of the case.

3. Follow Appellate Procedural Rules

The *Ponte* Court did not hide its disdain for the appellant’s failure to follow procedural rules, beginning its background discussion by noting “with disapproval the paucity of pertinent record citations throughout Ponte’s opening brief,” which placed an “unfair burden” on the appellate court. *Id.* at 554, n.1. After noting that a certain portion of Ponte’s brief was “devoid of record citations and any discussion of the appropriate standard of review,” the court

held that “Ponte has not fulfilled his duty to make a coherent legal argument, supported by record citations, demonstrating error.” *Id.* at 555.

The Court reiterated that it disregards new claims raised or suggested in the reply brief, and rejects arguments “not fairly embraced by the heading” in the appellate brief. *Id.*, at 554-555, & n.1. The decision also underscores the need for clear, separate arguments in the brief. The Court described one section of Ponte’s brief as “12 pages of disjointed contentions, with no clear identification of where one ends and one begins.” *Id.* at 555.

Most importantly, the Court could have passed on the merits of the appeal regarding the award of fees under section 1038, given its finding that Ponte’s “procedural failure” to provide any record citations or legal authority in the portion of his opening brief addressing section 1038 “forfeit[ed] his claim of error regarding the award of fees.” *Id.* at 558. ☐

ENDNOTES

- 1 The author defended the trial court action, briefed and argued the subsequent appeal, and opposed the petition for review to the California Supreme Court.
- 2 CCP § 1038; *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 853, & n.1.
- 3 The County also moved for summary judgment on the basis that the action was barred under California’s Contractors State License Law, Business & Professions Code §§ 7000, *et seq.* because the plaintiff was an unlicensed contractor. Neither the trial nor the appellate court reached this issue.



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