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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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ROGER VICE,

Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY et al.,

Defendants and Respondents.

C059920

(Super. Ct. No. CV029734)

Plaintiff Roger Vice has been an insurance agent with defendants State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, State Farm Fire and Casualty Company, and State Farm General Insurance Company (State Farm) since 1969. Since 1987 he has been operating in Lodi, California under the terms of a so-called "AA-4" form of agency agreement. It is undisputed that State Farm has never threatened to terminate Vice's AA-4 agency agreement. Indeed, Vice admits he has no reason to believe State Farm has ever considered terminating his agency agreement. There is no

evidence that State Farm has sought to change Vice's agency agreement. Nevertheless, Vice brought this action seeking a declaratory judgment that his relationship with State Farm is that of a franchisor/franchisee, entitling him to the protections of two bodies of law, the California Franchise Investment Law (Corp. Code, § 31000 et seq., hereafter CFIL), and the California Franchise Relations Act (Bus. & Prof. Code § 20000 et seq., hereafter CFRA). CFIL regulates the offer and sale of franchises, as well as the material modification of existing franchise agreements (Corp. Code, §§ 31110, 31125); CFRA, among other things, provides a franchise may not be terminated without good cause prior to the expiration of the franchise term. (Bus. & Prof. Code, § 20020.)<sup>1</sup> We conclude declaratory relief under Code of Civil Procedure section 1060 is not appropriate as there is no actual controversy between Vice and State Farm.

We shall reverse the judgment of the trial court because the trial court erred in reaching the merits of Vice's claims. We shall direct the trial court to vacate its order granting summary judgment and to enter a new order granting State Farm's motion for summary judgment of Vice's second cause of action on the sole ground that declaratory relief is not appropriate. We

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<sup>1</sup> Vice's complaint also sought damages for the diminution in value of his agency if it was not a franchise. State Farm's demurrer to this cause of action was sustained with leave to amend. Vice did not amend his complaint and raises no claim of error regarding this cause of action on appeal. The only issue on appeal is his cause of action for declaratory relief.

shall direct the trial court to enter a new judgment in favor of State Farm and against Vice based on Vice's failure to amend his first cause of action after the demurrer was sustained with leave to amend and on there being no actual controversy as required for his second cause of action.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

In 1969, after two years as an employee of State Farm, Vice became an independent contractor agent for State Farm, signing the agency agreement then in use by State Farm. In 1987, Vice terminated his existing agency agreement and signed a new agency agreement using a so-called AA-4 form, and began operations in Lodi. The AA-4 agreement has no set expiration term, except in the event of Vice's death. Otherwise, the agreement may be terminated by either State Farm or Vice upon written notice to the other.

As a State Farm agent, Vice earns commissions on State Farm policies credited to his account. When Vice established his Lodi agency, State Farm assigned to him, without charge, 2,200 existing State Farm policies that he could service and use to generate future commission income. Vice has operated his Lodi agency since 1987 and was acting as agent on approximately 2,900 State Farm policies in mid-2006 when he filed this action against State Farm.

In his complaint, Vice alleged that "State Farm has, over the past decade, terminated agents without cause and has threatened to terminate agents without cause in order to secure their compliance with policies or procedures of State Farm that

are not required by the agent agreements. Agents have contested State Farm's purported right to terminate them without cause and specifically have demanded that they be treated as franchises under the law, which would protect them from termination without cause. State Farm has refused to treat them as franchises and has continued to insist that agents are not franchises and that State Farm has the right to terminate them without cause." Vice additionally alleged that "State Farm has offered, or attempted to offer, to Plaintiff additional or amendatory agreements that constitute franchises under California law, without registration or disclosure of the offering." As a result, according to Vice, "[a]n actual, present, justiciable case and controversy has arisen and now exists between Plaintiff on the one hand and State Farm on the other, as to whether the agreement between Plaintiff and State Farm is a 'franchise' under [CFIL] and the [CFRA] in that Plaintiff contends that the agreement is a 'franchise' . . . and State Farm disagrees with that contention." Vice sought a declaration that his contract and relationship with State Farm was a franchise within the meaning of the CFIL and CFRA.

State Farm answered Vice's complaint with a general denial of the allegations and alleged as affirmative defenses, in pertinent part, that the allegations did not state facts sufficient to constitute a valid cause of action and that the case and controversy purporting to give rise to the complaint was purely speculative and hypothetical.

Vice filed a motion for summary judgment claiming the undisputed facts showed his relationship with State Farm met the definition of a franchise under California law.<sup>2</sup> Vice claimed his agency agreement with State Farm involved the "use of a trademark; the prescription by [State Farm] of a marketing plan or system; and the payment by [him] of a franchise fee." With respect to the last element, Vice claimed the following business expenditures constituted franchise fees: (a) his cost for participating in State Farm telephone directory advertising, his general advertising in local newspapers, and direct mail advertising; (b) his purchase from State Farm of promotional items bearing the State Farm trademark or logo, such as pencils, calendars, candy, golf balls, and sales brochures; (c) his purchase of a sign for his agency; and (d) his cost for leasing from State Farm additional computer terminals and printers, as well as his purchase of printer cartridges and supplies from

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<sup>2</sup> The CFIL and the CFRA contain the same definition of "franchise." (Bus. & Prof. Code, § 20001; Corp. Code, § 31005.) "'Franchise' means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which: [¶] (1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and [¶] (2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and [¶] (3) The franchisee is required to pay, directly or indirectly, a franchise fee." (Corp. Code, § 31005, subd. (a); accord, Bus. & Prof. Code, § 20001, subds. (a)-(c).)

State Farm. Vice's statement of undisputed material fact addressed these claims, but contained no facts supporting the allegations in his complaint that State Farm had a practice of terminating agents without cause or that State Farm had ever attempted to add to or amend his AA-4 agency agreement.

State Farm filed a cross-motion for summary judgment. State Farm contended the CFIL and CFRA were not intended to encompass relationships between insurance companies and their agents and that the essential elements of a franchise relationship were absent from its relationship with Vice. State Farm claimed Vice was not granted the right to offer, sell or distribute a good or service as required for the relationship to be a franchise. State Farm claimed Vice had never been required to pay a franchise fee for the right to be an agent and disputed that any of the expenditures noted by Vice qualified as franchise fees. State Farm also contended the undisputed facts showed there was no actual controversy between it and Vice that warranted declaratory relief.

Vice admitted in his response to State Farm's statement of undisputed facts that "[d]uring the years that Vice has operated his Lodi agency and up to the present time, State Farm has never threatened to terminate Vice's Agent's Agreement." Vice agreed it was undisputed that he "has no reason to believe that State Farm has considered terminating its contract with [him], at any time during the past 25 years." Vice admitted he received a solicitation in 2006 from a group of State Farm agents inquiring of his interest in becoming a plaintiff in an action to

adjudicate whether State Farm agents were franchisees, but claimed he brought this action to establish his own rights and liabilities.

The trial court denied Vice's motion for summary judgment and granted State Farm's motion. The trial court did not address State Farm's claim that declaratory relief was not appropriate, but impliedly rejected such claim by ruling on the merits. The trial court concluded Vice's relationship with State Farm was not a franchise because insurance is not a good or service, a State Farm agent does not offer, sell, or distribute State Farm insurance products, and the four categories of payments made by Vice were not franchise fees.

#### DISCUSSION

##### There Is No Actual Controversy As Necessary For Declaratory Relief

Vice claims on appeal the trial court erred in granting summary judgment as the evidence showed his relationship with State Farm was a franchise or that there were at least triable issues of material fact that his relationship was a franchise. State Farm disputes Vice's claims and argues again that there is no actual controversy here to warrant declaratory relief. We find this latter point dispositive. Here we conclude the undisputed facts submitted on the parties' cross-motions for summary judgment show there is no "actual controversy" as a matter of law.

Code of Civil Procedure section 1060 (section 1060) provides: "Any person interested . . . under a contract, or who

desires a declaration of his or her rights or duties with respect to another . . . may, *in cases of actual controversy* relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties . . . , including a determination of any question of construction . . . arising under the . . . contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (Italics added.)

"The "actual controversy" referred to in this statute is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do. [Citations.]'" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 360, quoting *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117.)

A plaintiff seeking declaratory relief under section 1060 must show an actual, present controversy that exists separate from the declaratory relief action itself. As our Supreme Court

has explained: "The requirement that plaintiffs seeking declaratory relief allege 'the existence of an actual, present controversy' [citation] would be illusory if a plaintiff could meet it simply by pointing to the very lawsuit in which he or she seeks that relief. Obviously, the requirement cannot be met in such a bootstrapping manner; 'a request for declaratory relief will not create a cause of action that otherwise does not exist.' [Citation.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80, italics omitted.)

A plaintiff seeking declaratory relief must show more than a difference of opinion regarding a legal issue. (*Wilson v. Transit Authority of Sacramento* (1962) 199 Cal.App.2d 716, 722-723.) Declaratory relief is not available to provide judicial answers to theoretical, hypothetical, or academic questions. (*Id.* at pp. 722-724.) It is not the role of the court to provide advisory opinions. (*Ibid.*) It is not enough that the parties want to know. (See *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746; *City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1323-1324.)

It is true that declaratory relief "'operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' [Citations.]" (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.) However, declaratory relief is appropriate only when

there is a "probable" future controversy relating to the legal rights and duties of the parties (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606; *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885),<sup>3</sup> not a "conjectur[al]" future controversy. (*Merkley v. Merkley* (1939) 12 Cal.2d 543, 547; see *BKHN, Inc. v. Department of Health Services* (1992) 3 Cal.App.4th 301, 308-310.)

"The purpose of a declaratory judgment is to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.'" [Citation.] "Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation [citation]." [Citation.]' [Citation.] "One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights." [Citation.]" (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647.) The idea is that the parties need the judicial answer in order to conform their conduct to the law and prevent likely future litigation. (*Id.* at p. 648.)

"Whether a claim presents an 'actual controversy' within the meaning of Code of Civil Procedure section 1060 is a

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<sup>3</sup> "[A]n actual justiciable controversy may exist even though the parties are not antagonistic[.]" (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 481.)

question of law that we review de novo. We glean this standard of review both from the language of Code of Civil Procedure section 1060 that makes the presence of an 'actual controversy' a jurisdictional requirement to the grant of declaratory relief and from case law outside of the context of the statute that ripeness is a matter of law subject to de novo review."

*(Environmental Defense Project of Sierra County v. County of Sierra, supra, 158 Cal.App.4th at p. 885; accord County of San Diego v. State of California, supra, 164 Cal.App.4th at p. 606.)*

When an actual controversy exists, the trial court has discretion whether to grant or deny relief. *(Environmental Defense Project of Sierra County v. County of Sierra, supra, at p. 885; Code Civ. Proc., § 1061.)* We review such exercise of discretion for abuse. *(Meyer v. Sprint Spectrum L.P., supra, 45 Cal.4th at p. 647; see Filarsky v. Superior Court (2002) 28 Cal.4th 419, 433.)*

Although Vice alleged in his complaint that State Farm had a practice of terminating agents without cause, his statement of undisputed material fact contained no statements with supporting evidence to support his allegations. Thus, Vice never established any reason for him to believe State Farm might seek to terminate his agency agreement without cause. In fact, Vice agreed it was undisputed that "[d]uring the years that [he] has operated his Lodi agency and up to the present time, State Farm has never threatened to terminate [his] Agent's Agreement" and that he "has no reason to believe that State Farm has considered terminating its contract with [him], at any time during the past

25 years." (Italics added.) From this, we can only conclude there is no likely or probable future controversy between State Farm and Vice regarding termination. To the extent Vice's complaint could be understood to mean that he feels threatened that he could be terminated by refusing State Farm's offer or attempted offer of additional or amendatory agreements, Vice's separate statement of undisputed facts is devoid of any such evidence. Outside of the present litigation, there exists no dispute between State Farm and Vice regarding whether his relationship is covered by the CFRA. There is no "practical end" to be served by a declaration of the parties' rights.

(*Meyer v. Sprint Spectrum L.P.*, *supra*, 45 Cal.4th at p. 647.)

There is no looming subsequent litigation to be avoided.

(*Ibid.*) Vice has not shown that a declaration as to whether he is/is not a franchisee would guide or even affect his future conduct. (*Ibid.*) In fact, the record and briefs are silent about Vice's future conduct. Presumably Vice will continue to operate his insurance agency to the best of his ability, if for no other reason than his own self-interest in maximizing his income. Vice has not shown what he would do differently, if anything, if he knew whether or not he could be terminated without cause. Under these circumstances, Vice's desire "to know" whether he is a franchisee is simply not sufficient to establish a present, actual controversy that would warrant declaratory relief. We will not provide an advisory opinion.

Nor has Vice provided any factual support for a claim of actual controversy regarding application of the CFIL to him. It

is undisputed he has been operating continuously since 1987 under the same AA-4 agency agreement. Such agreement has no set date for expiration. There is no evidence supporting the allegations in his complaint that State Farm has attempted to add to or amend his agency agreement. We will not speculate that any future attempt to add or amend his agreement will be a nonexempt material modification. (Corp. Code, § 31125, subds. (b)-(d).) Again, without a present, concrete controversy, declaratory relief is not appropriate.

The trial court erred in reaching the merits of the issues presented in the absence of an actual controversy warranting declaratory relief under section 1060.<sup>4</sup>

#### **DISPOSITION**

The judgment is reversed and the matter remanded with directions to the trial court to vacate its prior order granting summary judgment and to enter a new order granting State Farm's motion for summary judgment of Vice's second cause of action on the sole ground that declaratory relief is not appropriate. The trial court is directed to enter a new judgment in favor of State Farm and against Vice based on Vice's failure to amend his first cause of action after the demurrer was sustained with leave to amend and on there being no actual controversy as

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<sup>4</sup> In light of this conclusion we do not address the underlying issues and this opinion should not be read as expressing any view on the merits of the claims made by Vice or the positions taken by State Farm.

required for his second cause of action. Costs on appeal are awarded to State Farm. (Cal. Rules of Court, rule 8.278(a)(1).)

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.