Filed 11/1/12 Hahn v. Dept. of Pesticide Regulation CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

GEORGE HAHN et al., Plaintiffs and Appellants, v. DEPARTMENT OF PESTICIDE REGULATION, Defendant and Respondent.	C066493 (Super. Ct. No. 34200980000361CUWMGDS)

Plaintiffs George Hahn and California Vermiculture, LLC (collectively plaintiffs), manufacture and sell Wormgold products made from worm feces, otherwise known as castings. Defendant California Department of Pesticide Regulation (department) issued a notice of proposed action for civil penalties against plaintiffs for marketing and selling the Wormgold products as unregistered pesticides in violation of Food and Agriculture Code section 12993, which prohibits the sale of any unregistered "pesticide . . . or any substance . . that is represented to be a pesticide." (Food & Agr. Code, § 12993; further unspecified section references are to this code.) Following an administrative hearing,

plaintiffs were found to be in violation of section 12993 and were ordered to pay $100,000 in civil penalties.

Plaintiffs filed a petition for writ of administrative mandate in the superior court seeking review of the administrative hearing officer's order. Finding plaintiffs represented the Wormgold products to be pesticides in violation of section 12993, the trial court entered judgment denying the writ petition.

On appeal, plaintiffs contend the trial court erred in that the Wormgold products are not "pesticides," as that term is defined in section 12753, subdivision (b) (hereafter section 12753(b)), and are therefore not subject to section 12993's registration requirement or to the department's jurisdiction. The department disputes that claim, asserting the trial court correctly found plaintiffs represented the Wormgold products as pesticides in violation of section 12993.

The parties also dispute the admissibility of evidence, both testimonial and documentary, on which plaintiffs rely in this appeal to support their claim that the Wormgold products are not "pesticides" under section 12753(b). The department asserts plaintiffs never established how the Wormgold products work, if at all, offering no expert testimony in that regard, and that the documents plaintiffs relied on at the administrative hearing were either not offered or admitted for their truth or not admitted at all and thus not admissible on appeal. Plaintiffs also object to the department's references to, and reliance on, federal statutes and regulations in determining whether the Wormgold products are pesticides.

We conclude the record supports the trial court's finding that plaintiffs represented the Wormgold products to be pesticides in violation of section 12993, thus vesting the department with jurisdiction to impose civil penalties for failure to meet applicable registration requirements. We therefore need not decide whether the Wormgold products are in fact "pesticides" as that term is defined in section 12753. We affirm the judgment.

FACTS AND PROCEEDINGS

Plaintiff California Vermiculture, LLC, doing business as Tree and Plant Rescue, manufacture, advertise, distribute, and sell three related products: Wormgold, a product which consists entirely of worm castings collected from worms that have been fed a diet of nothing but cardboard sludge; Wormgold Plus, which consists of worm castings mixed with rock mineral and fossilized kelp; and Tree and Plant Rescue Solution (TPRS), which consists of Wormgold Plus, molasses, vegetable compost, humic acid and oak flour mixed with water. Plaintiff George Hahn is California Vermiculture, LLC's chief executive officer.

Wormgold, Wormgold Plus, and TPRS (collectively the Wormgold products) are applied to the soil around plants or sprayed directly on the plant's leaves, trunk, and stem. Plaintiffs claim the Wormgold products add nutrients to depleted or unhealthy soil, promote plant growth, and improve plants' natural resistance to infestation by insects and other pests. They claim the Wormgold products are not intended to be ingested by pests and do not kill insects, are not poisonous to humans and do not contaminate vegetables, and do not act directly on pests to kill them or bar them from approaching or lighting on a plant. Rather, the Wormgold products are intended to be ingested by plants for the purpose of improving the plant's health and fostering its natural resistance to pests. Plaintiffs believe the Wormgold products accomplish this result by causing plants to produce more chitinase, an enzyme which degrades the chitin contained in the exoskeletons of unfriendly pests, which then causes insects to avoid those plants.

Plaintiffs began selling the Wormgold products in 1998, promoting them with advertisements that touted not only the products' capacity to make plants healthy and strong, but also their "insect repellency" and "fungus control" properties. The ads stated the Wormgold products were "non-toxic" and "all organic." While the ads often stated the Wormgold products were not pesticides, they also frequently contained claims that

the products would "[r]epel harmful insects," "[c]ontrol diseases caused by unfriendly fungus and bacteria," and cause various pests to leave and fungus diseases to die.

Plaintiffs obtained patents related to the Wormgold products for "methods of using worm castings for fungal control" and "methods of using worm castings for insect repellency." While the Wormgold products were never registered as pesticides, plaintiffs did register Wormgold and Wormgold Plus with the Department of Food and Agriculture as "packaged soil amendment[s]" in 2004.

In 2007, the department issued a notice of proposed action (NOPA) against plaintiffs for $110,000 in civil penalties pursuant to section 12999.4 for failure to register the Wormgold products as pesticides. Section 12999.4, subdivision (a), empowers the department to levy civil penalties in lieu of civil prosecution for violations of section 12993.

The first count alleged sales of unregistered Wormgold products on the internet in violation of section 12993, for which the department sought $15,000 in civil penalties. The second count alleged sales of unregistered Wormgold products through the application of TPRS to trees owned by private parties within California in violation of section 12993, for which the department sought $50,000 in civil penalties. The third count proposed a $5,000 penalty for each quarter plaintiffs sold unregistered Wormgold products between April 10, 2003, and June 28, 2005, which amounted to $45,000.

Following an administrative hearing, the hearing officer issued a proposed decision recommending imposition of $100,000 based on a finding that plaintiffs made 20 sales of unregistered product during the relevant time period. The department adopted the hearing officer's recommendations and issued an order directing plaintiffs to pay $100,000 in civil penalties.

Plaintiffs filed a petition for writ of administrative mandate and a complaint for declaratory and injunctive relief in the superior court challenging the department's decision. The writ petition alleged the department proceeded without, or in excess of, its

jurisdiction in issuing the NOPA and in proceeding against plaintiffs because the Wormgold products are not "pesticides" as that term is defined in section 12753(b), and section 12753(b) is unconstitutionally vague and overbroad. In particular, the petition alleged the Wormgold products "do not act on pests directly, either to kill them or to bar them from approaching or lighting on a plant," rather, they are "natural fertilizers that promote plant health and thereby foster their natural resistant properties," making the plants "naturally more resistant to pest attacks." Plaintiffs alleged they never advertised the Wormgold products as pesticides or claimed they killed insects; instead, they truthfully advertised the products as "soil amendments and fertilizers" which "help plants 'suppress pathogens which eliminates diseases, repel[] harmful insects but not beneficial insects, and allow[] plants and trees to thrive in adverse conditions.' "

Plaintiffs moved for judgment on the pleadings, and requested that the court take judicial notice of several articles from internet websites regarding research related to pests and the development of pest-resistant vegetables.

The superior court denied plaintiffs' petition and request for judicial notice and entered judgment in favor of the department. The court found plaintiffs marketed the Wormgold products in such a way as to make "pesticidal claims, namely that the products would repel insects and control fungus diseases," and that those claims "reasonably would lead consumers to believe that the products can and should be used to repel insects and control plant fungus--in addition to improving plant health and growth." Therefore, plaintiffs were required to register the Wormgold products as pesticides.

DISCUSSION

I

Standard of Review

"In an action for administrative mandamus, the court's inquiry extends to whether the agency acted in excess of jurisdiction or abused its discretion by not proceeding in the

manner required by law. (Code Civ. Proc., § 1094.5, subd. (b) . . . .) Where jurisdiction involves the interpretation of a statute, regulation, or ordinance, the issue of whether the agency proceeded in excess of its jurisdiction is a question of law. [Citation.]" (*Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339, 1343-1344.)

Where the appeal from an administrative mandamus proceeding presents questions of law, our review is *de novo*. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 722; *California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1611.) We therefore review *de novo* whether plaintiffs' sale of the unregistered Wormgold products violated section 12993, and thus whether the department had jurisdiction to require plaintiffs to register those products as pesticides and to impose civil penalties for failure to do so.

II

Plaintiffs Represented the Wormgold Products to be Pesticides

Plaintiffs contend the superior court erred in finding a product is a "pesticide" if it is described as causing pest avoidance or if one makes a "pesticidal claim" that the product indirectly causes pest repellency. They also contend they did not market the Wormgold products as pesticides. At the heart of these claims is plaintiffs' ultimate contention that the Wormgold products are not "pesticides," as that term is defined in section 12753(b), because they *indirectly* repel pests and are therefore not subject to the registration requirement or the department's jurisdiction.

We need not decide whether the Wormgold products are in fact pesticides for purposes of departmental registration. Section 12993 prohibits the sale of an unregistered product that is either a pesticide or *is represented to be a pesticide*. As we shall explain, the record here establishes that plaintiffs *represented* the Wormgold products to be pesticides, thereby triggering a registration requirement.

Plaintiffs marketed and sold the Wormgold products with labels stating the products contained "no chemicals" and are "100% organic," and that worm castings "provide the most complete soil amendment available," "control[] odors," and reduce water loss. They also advertised the Wormgold products in print and on the radio. Those advertisements often contained claims that the products would "[r]epel harmful insects," "[c]ontrol diseases caused by unfriendly fungus and bacteria," and cause various pests to leave and fungus diseases to die.

Some of the advertisements for the Wormgold products contained the following statements: (1) Wormgold products "repel[] bark beetles naturally and revitalize[] the health of trees," plaintiffs "use the latest in bio-organic technology to *reintroduce beneficial microorganisms* to your trees," and "bark beetles will avoid and not attack trees when the root zone bark and needles have been treated with the proper beneficial microorganisms"; (2) microbial rich solution is an "array of microbes grown to combat fungal pathogens," an "organic insect repellant," and "custom made to address Beetle infestations"; (3) research findings include a finding that, "[w]hen applied to foliage, beneficial microbes in the compost extract can compete with pathogens on the leaf surface for available space and nutrients" and "[s]ome of the microbes are antagonists that directly attack leaf pathogens"; (4) research findings include a finding that "[o]rganisms in extracted solution specifically protozoa and nematodes (beneficials) consume pathogens and pests preventing further growth & infection"; (5) "Independent Garden Professionals have reported aphids, spider mites, white flies, bark beetles and other pest insects have left plants when they were fed [the Wormgold products]"; (6) "Independent Tests Report that: . . . Whiteflies, Aphids and other bugs leave plants . . . [and] fungal diseases decrease"; and (7) "Organisms consume pathogens and pests" and "[p]revents further growth of pathogens or infection."

Section 12993 provides that "[i]t is unlawful for any person to manufacture, deliver, or sell any pesticide or any substance or mixture of substances *that is represented*

to be a pesticide . . . which is not registered pursuant to this chapter . . . ." (Italics added.) In order to determine whether plaintiffs represented the Wormgold products to be pesticides within the meaning of section 12993, we look to section 12753(b), which defines the term "pesticide" to include "[a]ny substance, or mixture of substances which is intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any pest, as defined in Section 12754.5, which may infest or be detrimental to vegetation, man, animals, or households, or be present in any agricultural or nonagricultural environment whatsoever."

Where, as here, a case presents an issue of statutory interpretation, our task is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. (*People v. Mendoza* (2000) 23 Cal.4th 896, 907 (*Mendoza*); *Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1103.) We begin "by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] In doing so, however, we do not consider the statutory language 'in isolation.' [Citation.]" (*Mendoza,* at p. 907.) Rather, we construe the words of the statute " 'in context, keeping in mind the nature and obvious purpose of the statute . . . .' [Citation.]" (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608.) In other words, we must "harmonize 'the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.' " (*Mendoza*, *supra*, 23 Cal.4th at p. 908.) And "[w]e must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend." (*Ibid.*)

Giving the language of section 12753(b) its "plain and commonsense meaning" (*Mendoza, supra,* 23 Cal.4th at p. 907), we believe a substance is represented to be a "pesticide" if, like the Wormgold products, it is represented to "[r]epel harmful insects," "[c]ontrol diseases caused by unfriendly fungus and bacteria," and cause various pests to leave and fungus diseases to die. That the statute does not include the word "directly" suggests the Legislature did not intend to distinguish between substances intended to be

used to *directly* prevent, destroy, repel or mitigate pests and those intended to do so *indirectly*. Thus, the statute is broad in its application, covering all products represented to be for the ultimate purpose of preventing, destroying, repelling, or mitigating pests.

This interpretation also comports with the " 'context of the statutory framework as a whole.' " (*Mendoza*, *supra*, 23 Cal.4th at p. 908.) The purpose of pesticide regulation under the Food and Agriculture Code is to require registration of any substance having the potential to impact public health or the environment and to test its safety and efficacy. (§ 11501.) That purpose includes the elimination of substances which are either misrepresented or not beneficial for the purpose for which they are being sold. (§ 12824.) The registration process is a stringent one, requiring at a minimum a clear delineation of all active ingredients, as well as the organisms and components that make up a particular substance. (See §§ 12811, 12824, 12825, 12993; Cal. Code Regs., tit. 3, § 6158.) Even assuming a product kills or deters pests *indirectly*, that product is nonetheless potentially harmful to public health or the environment and is therefore subject to the same rigorous testing procedures to determine its efficacy and what, if any, are its impacts on humans, their pets, the animals and produce they consume, and the environment in which they live.

Further, had the Legislature intended for the term "pesticide" to include only those substances acting *directly* on pests, it would have been simple for the Legislature to spell out that designation. Instead, section 12753(b) was drafted broadly to include substances that act on pests without limiting the registration requirement to those having a direct impact only. So, too, was the term "pesticides," which includes not only those substances that destroy (i.e., kill) pests, but also those which prevent, repel and mitigate them. That, in conjunction with section 12754.5's broad definition of "pest" which includes any "insect, predatory animal, rodent, nematode, or weed," or "[a]ny form of terrestrial, aquatic, or aerial plant or animal, virus, fungus, bacteria, or other microorganism (except viruses, fungi, bacteria, or other microorganisms on or in living man or other living

animals)," that "is, or is liable to become, dangerous or detrimental to the agricultural or nonagricultural environment of the state" (§ 12754.5, subds. (a) & (b)), demonstrates the Legislature's intent not to limit "pesticide" as plaintiffs suggest.

The record supports the trial court's finding that plaintiffs *represented* the unregistered Wormgold products *to be pesticides* in violation of section 12993. In light of that determination, we need not decide whether the Wormgold products are in fact "pesticides" under section 12753(b), and thus we need not decide whether the disputed evidence offered by plaintiffs for that purpose is admissible, nor must we reach the issue of whether application of federal statutes and regulations is appropriate to determine if the Wormgold products are pesticides.

Plaintiffs claim the words "intended *to be used for* . . . preventing, destroying, repelling, or mitigating any pests" show that section 12753 contemplates only substances which are directly applied to, or ingested by, pests. Without any supporting authority, plaintiffs simply insert into the statutory language words that are not there in an attempt to restate their previous claim. We therefore reject it for the reasons stated above.

Plaintiffs also claim their interpretation of section 12753 finds support in California Code of Regulations, title 3, section 6147, which provides a list of certain "pesticide products" which are exempt from registration, including untreated natural cedar blocks, nontopical citronella, cinnamon, and garlic. (Cal. Code Regs., tit. 3, § 6147, subd. (a).) They argue the exempt products in that statute are "natural products which are used directly to repel pests," whereas, products like the Wormgold products which "are only used to encourage plant health, and only indirectly prevent pest infestation," fall within the gambit of title 3, section 2304 of the California Code of Regulations, which governs the registration of "fertilizing materials for which claims are made relating to organisms, enzymes or organisms by-products." (Cal. Code Regs., tit. 3, § 2304.) That section, they claim, "explicitly contemplate[s] fertilizers or plant foods having secondary effects like those caused by [the Wormgold products]." We disagree.

There is nothing in the language of California Code of Regulations, title 3, section 6147, to suggest that any of the exempted products are either used *directly* or *indirectly*. Even assuming section 2304 does so contemplate, an assumption which is neither well-supported by plaintiffs nor evident from the language of the statute itself, that section does not specify, expressly or impliedly, that a product must be registered exclusively as either a fertilizer or a pesticide. To the contrary, a product can, and under certain circumstances should, be registered as both a fertilizer and a pesticide. Indeed, although section 2304 addresses the registration requirements for "fertilizing materials" for which certain claims are made, it does not address registration requirements for fertilizing materials which are also "intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any pest." That, of course, is addressed, at least in part, in Food and Agriculture Code section 12753.

In support of their claim that the Wormgold products are not "pesticides," plaintiffs rely heavily on *People v. Worst* (1943) 57 Cal.App.2d Supp. 1028 (*Worst*), an opinion rendered by the appellate division of the superior court. The court in *Worst* held that a particular bush that was said to repel gophers was not an "economic poison" requiring a license pursuant to then-existing section 1071 of the California Agricultural Code. (*Id.* at p. 1031.)

But as we have noted, the question we decide today is not whether the Wormgold products *are* pesticides, but whether plaintiffs *represented them to be* pesticides. As previously discussed, they did.

III

Other Claims

Plaintiffs assert the superior court's interpretation of section 12993 leads to absurd results, "making any product--even water or 'gopher purge'--into a pesticide whenever a person says that the product can be used, even indirectly, to keep pests away from plants." We disagree. As previously discussed, section 12993 was intended to require

registration, and thus testing for efficacy and environmental safety, of substances which are pesticides as well as those which are represented to be pesticides. In other words, the statute concerns itself with those products which are being marketed to the public. Thus, while professional gardeners might recommend water to eradicate pests as plaintiffs suggest, there was no evidence presented to show that water is being *marketed and sold* as a pesticide. However, assuming it was, that product would indeed require registration.

Further, as the department correctly points out, products such as tap water, barbed wire, scarecrows, Teflon, duct tape, tree paint, protective metal stripping, as well as the tree in *Worst,* are either excluded from the definition of "pesticide" or otherwise exempt from registration. (Food & Agr. Code, §§ 12801, 12803; 40 C.F.R. §§ 152.10(c) (2012) [products providing physical barrier], 152.20(a) [living plants], 152.500 [devices].)

Throughout the litigation the parties, the hearing officer, and the trial court have referred to "pesticidal claims," as an apparent shorthand for representations that a substance or a mixture of substances is a pesticide.

Plaintiffs claim that the term "pesticidal claim" is undefined and vague. We find that assertion to be somewhat disingenuous. Throughout the proceedings, plaintiffs used, or acquiesced in the use of, terms such as "pesticidal properties," "pesticidal use," "pesticidal capabilities," "pesticidal language," and "pesticidal manner" in pleadings and correspondence, suggesting not only a familiarity with, but also a mutual understanding of the meaning of, the term "pesticidal" as used to modify other terms relevant to the issues in dispute.

Furthermore, over the course of the administrative hearing, the term "pesticidal claim" was used more than 30 times, including numerous references made by plaintiff George Hahn during testimony, as well as use of the term by Hahn in prior correspondence with the department. At one point, plaintiffs' counsel stated, "We are not disputing what is and what is not a pesticidal claim." In response to a later objection by plaintiffs' co-counsel that "pesticidal claims" had not yet been defined, counsel for the

department asked Hahn, "Do you know what I mean when I say 'pesticidal claim'?" Hahn answered, "Yes, I do." Later, plaintiffs' counsel objected once again to use of the term "pesticidal claims" or "pesticidal properties" without "some definition being agreed to." The hearing officer proposed that the word "pesticide" be used "as per the definitions just read [from section 12753 and its federal counterpart]." Plaintiffs' counsel responded, "We agree to that." The term apparently is not so vague and ambiguous that it escaped the understanding of the parties to this litigation.

Plaintiffs assert that truthful claims that a product can boost a plant's resiliency against pests should not "transform [that product] into a pesticide for purposes of [s]ection 12753." To the contrary, it was plaintiffs' representations that the Wormgold products "[r]epel harmful insects," "[c]ontrol diseases caused by unfriendly fungus and bacteria," and cause various pests to leave and fungus diseases to die that were found by the superior court to be in violation of section 12993. As previously discussed, we agree with that finding.

Finally, plaintiffs assert that the superior court's interpretation of sections 12753 and 12993 prohibits businesses from making truthful claims about their products, thus threatening important constitutional rights. The resulting infringement on the right of a manufacturer of a nonpesticide product to truthfully advertise that the product indirectly repels pests could be avoided, they claim, by more narrowly construing the statute to apply the registration requirement only to products "that are actually pesticides." Plaintiffs urge that theirs is not a constitutional challenge to the statute, but rather a "statutory construction argument going to the [department's] jurisdiction" over the sale of products that do not qualify as pesticides, and as such they need not comply with the exhaustion doctrine pursuant to the holdings in *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 322 (*Campbell*), and *County of Los Angeles v. Dept. of Soc. Welfare* (1953) 41 Cal.2d 455, 457 (*County of Los Angeles*).

The department argues plaintiffs' failure to raise the issue during the administrative hearing violates the exhaustion doctrine and forfeits the claim on appeal. We agree.

"[T]he rule of exhaustion of administrative remedies is well established in California jurisprudence . . . . 'In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' [Citation.]" (*Campbell, supra*, 35 Cal.4th at p. 321.) The exhaustion rule has several exceptions, including "when the subject of controversy lies outside the agency's jurisdiction." (*Id.* at p. 322.)

The jurisdictional exception plaintiffs rely on contemplates situations in which the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties. Such was the case in *County of Los Angeles, supra,* 41 Cal.2d at page 457, where this state's highest court held the State Social Welfare Board lacked jurisdiction over the subject matter of the proceedings--the administration of relief to indigent residents--and thus the county was not required to seek rehearing at the administrative level.

In contrast, the subject matter of the proceedings in *Campbell* was a policy established by the Regents to address complaints of retaliatory dismissal for whistleblowing. Finding that policy required Campbell "to resort initially to internal grievance practices and procedures," the high court concluded Campbell had an administrative remedy and her claim therefore fell under the exhaustion rule. (*Campbell, supra,* 35 Cal.4th at p. 324; see *id.* at pp. 323-324.)

The exhaustion rule applies here as well, where the department has exclusive jurisdiction over pesticide regulation (§ 11501.1) and plaintiffs, having been issued a notice of proposed action for civil penalties for failure to register the Wormgold products as pesticides, had an administrative remedy via section 12999.4. Under the circumstances, the department has jurisdiction to determine whether, in fact, the

Wormgold products are pesticides in the first instance. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 302-303 [a court has jurisdiction to determine whether it has jurisdiction].) Plaintiffs' failure to raise the constitutional issue at the administrative hearing violates that rule and forfeits the claim on appeal.

Plaintiffs nevertheless complain that the statute, though not facially unconstitutional, should be construed narrowly so as not to infringe on their right to advertise truthfully. Put another way, while the statute makes no reference to advertisement, plaintiffs challenge the department's regulation, promulgated via the statute, of their ability to advertise and promote the Wormgold products as having "indirect pest-repellency benefits." This argument raises issues of fact, including most notably, the issue of whether plaintiffs' claims are in fact truthful. Again, plaintiffs' failure to raise or develop the issue at the administrative hearing forfeits the claim on appeal. As such, we need not address the issue further.

DISPOSITION

The judgment is affirmed. The department shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

HULL, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.