Filed 1/25/12 Pet Food Express v. Dept. of Pesticide Regulation CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PET FOOD EXPRESS LIMITED, Plaintiff and Appellant, v. DEPARTMENT OF PESTICIDE REGULATION OF THE STATE OF CALIFORNIA, Defendant and Respondent.	A131058 (Alameda County Super. Ct. No. RG-08-397339)

Appellant Pet Food Express Limited (PFE) sold foreign-made flea prevention products that were not properly labeled and registered as pesticides under California law. After administrative proceedings, respondent Department of Pesticide Regulation of the State of California (Department) imposed a fine of $212,500. The trial court denied PFE's petition for writ of administrative mandate seeking review of the penalty order. PFE contends the products were not pesticides because a flea is not a "pest" under the applicable statute. It also raises a procedural objection regarding the proceedings below and argues the fine is excessive. We reject PFE's contentions and affirm.

I. PROCEDURAL BACKGROUND & FACTS

We find the early history of this case in a decision of the Third District, *State ex. rel. Dept. of Pesticide Regulation v. Pet Food Express* (2008) 165 Cal.App.4th 841 (*Pet Food Express*).

"PFE is a chain of pet food/supply stores. PFE bought some flea prevention products made by European drug companies and imported through a British distributor,

Abbeyvet, until the Department advised PFE in August 2003 that the foreign-made products were not properly registered under California law . . . ." (*Pet Food Express, supra,* 165 Cal.App.4th at p. 845.)

In February 2005, the Department issued a notice of proposed action under Food and Agricultural Code section 12999.4, proposing to levy $700,000 of civil penalties against PFE for selling flea prevention products which were neither properly labeled or properly registered under Food and Agricultural Code sections 12992 and 12993.[1] (*Pet Food Express, supra,* 165 Cal.App.4th at pp. 845−846.)

In June 2006, the Department issued an administrative subpoena for PFE's sales records with regard to the foreign-made flea prevention products. PFE did not respond to the subpoena, and in May 2007 the Department petitioned the Superior Court of Sacramento County for an order of compliance. (*Pet Food Express, supra,* 165 Cal.App.4th at pp. 841, 846−848.) In August 2007, the superior court issued an order compelling PFE to comply with the administrative subpoena. PFE appealed. (*Id.* at p. 849.)

Meanwhile, the Department conducted administrative proceedings on the notice of proposed action. A Department hearing officer held an administrative hearing on April 28, 2008. The hearing officer found that PFE sold unregistered and misbranded flea prevention products between September 2, 2002 and August 13, 2003. Acting without the PFE sales records—which had been subpoenaed but not yet released by PFE because it resisted the subpoena—the hearing officer used an inferential process, based on PFE's purchase invoices of the Abbeyvet products, to find 49 separate violations of sections 12992 and 12993.

---

[1] Subsequent statutory references are to the Food and Agriculture Code unless otherwise indicated.

Section 12992 provides, in pertinent part: "It is unlawful for any person to sell any adulterated or misbranded pesticide."

Section 12993 provides, in pertinent part: "It 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 . . . ."

Section 12999.4, subdivision (a) provides for a maximum penalty of $5,000 per violation. Relying on a number of factors, the hearing officer imposed a penalty of $2,500 per violation, for a total penalty of $122,500.

On June 16, 2008, the Department adopted the hearing officer's decision and order to pay civil penalties.

On July 9, 2008, PFE challenged the Department's order by a petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5.) PFE filed its petition in the Superior Court of Alameda County.

On July 31, 2008, the Third District Court of Appeal decided *Pet Food Express*, upholding the order of compliance. (*Pet Food Express, supra,* 165 Cal.App.4th at pp. 841, 853−856.)

On September 8, 2008, during the pendency of the Alameda County administrative mandate proceedings, PFE complied with the administrative subpoena and produced the sales records. The Department requested the Alameda County Superior Court to remand the mandate proceeding for consideration of further evidence, i.e., the sales records, pursuant to Code of Civil Procedure section 1094.5, subdivision (e).[2]

On March 12, 2009, after a hearing on the mandate petition, the Alameda County Superior Court issued an order denying the petition in part, rejecting several substantive arguments of PFE. But the court remanded the matter for consideration of further evidence. The court found the sales records were relevant to the issue of penalty and could not be produced before the hearing officer. (At the time of the April 28, 2008 administrative hearing, PFE was still resisting the subpoena and *Pet Food Express* had not been decided.) With regard to further administrative proceedings, the court noted the hearing officer had discretion to determine the amount of the penalty and "[s]o long as such discretion is not abused, the amount of the penalty up to the statutory limit of $5000

[2] That subdivision provides: "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence . . . ."

per violation is within the agency's exercise of its discretion." The court did admonish the Department not to use "underground" or "secret" guidelines to determine the appropriate penalty, but to use its inherent discretion to determine a penalty that was reasonable in light of the evidence.

On November 3, 2009, a different Department hearing officer conducted an administrative hearing. Mindful of the superior court's admonition, the hearing officer thoughtfully considered several factors, both mitigating and otherwise, in determining a reasonable penalty: that PFE is a generally law-abiding company and an industry leader; that PFE made "a significant investment in an illegal product with a significant return"; that PFE's actions fell "far below the standard of care that must be expected of a company regularly dealing with pesticide products"; that a penalty should deter companies from purchasing foreign, and thus unregulated, products; and that PFE did not immediately cease sales of the misbranded pesticides.

The hearing officer concluded: "There are three factors which reasonably would lead to recommending a penalty at the lower end of the range: The company has no history of prior violations; it may have been duped through carelessness; and there is no evidence that actual harm occurred to anyone in the public. Unfortunately, these three mitigating factors are overwhelmed by those which call for a high penalty. The quantity involved, whether measured in units, sales, or profits, is enormous. The company possesses a degree of sophistication that makes its failure of reasonable inquiry less excusable, and continued sales baffling. Although no harm was demonstrated, the public was exposed to risk. And finally, the conduct, if not punished in a significant way, sends a message to the industry that large scale detours around the regulatory process and its requirements might be worth the risk."

Relying on the actual sales records, the hearing officer imposed a higher penalty than the previous hearing officer because the records showed an additional six weeks of sales "when [PFE was] unambiguously aware that sales of the products were unlawful." The hearing officer agreed with the previous hearing officer that $2,500 per violation was a reasonable penalty, except for the final six weeks when PFE knew sales were unlawful.

For those additional violations the hearing officer imposed the maximum $5,000 per violation. The total penalty imposed was $212,500.

On April 7, 2010, the Department adopted the hearing officer's decision and order to pay civil penalties.

On May 6, 2010, PFE challenged the penalty order by a second petition for writ of administrative mandate. PFE argued, inter alia, that there was no evidence the products were "pesticides" as defined by section 12753, and the penalty was so excessive as to be unconstitutional.

On November 1, 2010, the trial court denied the petition, finding there was substantial evidence to support the April 7, 2010 order based on the findings and recommendations of the hearing officer. The court expressly found that the penalty imposed was not an abuse of discretion and was not based on underground or secret guidelines.

II. DISCUSSION

PFE raises three contentions on appeal. First, PFE argues the Abbeyvet flea prevention products are not "pesticides" under California law because a flea is not a "pest." We disagree with this unsupported semantic contention for the following reasons.

Section 12753, subdivision (b) defines "pesticide" as follows:[3] "Any 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."

Section 12754.5 defines "pest," as here pertinent, as follows: " 'Pest' means any of the following that is, or is liable to become, dangerous or detrimental to the agricultural or nonagricultural environment of the state: [¶] (a) Any insect, predatory animal, rodent, nematode, or weed."

[3] There is a second definition in subdivision (a) which is not pertinent here.

PFE concedes that fleas are "insects," but claims there is not substantial evidence that fleas are "pests" within the above statutory definitions. We disagree. Apart from the common knowledge that fleas have been responsible for plague and infest dogs and cats to the detriment of the animals' well-being[4]—which explains why there is a major industry devoted to the sale of flea prevention products—there is, as the trial court found, substantial evidence in the administrative record that the Abbeyvet products are pesticides.[5] Indeed, PFE has *admitted* the products were pesticides: in the points and authorities in support of the first mandate petition, PFE described the Abbeyvet products as "pesticide products."

Next, PFE contends the Department lacked "standing" to request a remand under Code of Civil Procedure section 1094.5. PFE is incorrect. Judicial review of Department decisions is governed by section 12999.4, subdivision (c), which provides for review by petition for administrative mandate pursuant to Code of Civil Procedure section 1094.5. Subdivision (e) of the latter statute, quoted in footnote 2 *ante*, gives *the trial court* the power to order remand for evidence which could not have been produced before the Department at the administrative hearing. Nothing in the statute, nor any logical interpretation thereof, limits the power of any party to request the court to invoke its power of remand. Moreover, PFE, in essence, argues that it can resist a lawful administrative subpoena, thereby depriving the Department of significant evidence, and then foreclose the Department from requesting remand once an appellate court has upheld the subpoena, thereby leading to an incongruous, absurd result.

Finally, PFE contends the fine of $212,500 is so excessive as to be unconstitutional. PFE relies on the landmark punitive damage case from the United States Supreme Court, *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S.

---

[4] Entomologists classify the flea as a member of the order of Siphonaptera of small, wingless, bloodsucking insects that have legs adapted to leaping and feed on warm blooded animals. <http://insects.tamu.edu/fieldguide/orders/siphonaptera.html> [as of Jan. 25, 2011.]

[5] Certainly household animals are within the "nonagricultural environment of the state."

408. This decision is inapposite here. We are not dealing with punitive damages, but with a statutorily authorized civil penalty imposed by an administrative agency. The penalty was determined after a thoughtful weighing of various factors, mitigating and otherwise, by the hearing officer and is below the statutory maximum. As the trial court correctly found, the penalty is not an abuse of discretion.

III. DISPOSITION

The order denying the petition for writ of administrative mandate is affirmed.

_____
Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Banke, J.