

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE ex rel.
WAYNE STRUMPFER, as
Commissioner of Corporations, etc.,

Plaintiff,

v.

WESTOAKS INVESTMENT #27 et al.,

Defendants and Respondents.

LAWRENCE L. MATHENEY, as
County Treasurer-Tax Collector, etc.,
et. al.,

Objectors and Appellants.

B178628

(Los Angeles County
Super. Ct. No. C 756611)

APPEAL from an order of the Superior Court of Los Angeles County,
Mary Ann Murphy, Judge. Reversed and remanded with directions.

Noel A. Klebaum, County Counsel, and John E. Polich, Assistant County
Counsel, for Objectors and Appellants.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 3, 4, 5, 6, 7, and 8 of the Discussion.

Richard Weissman for Defendant and Respondent Westoaks Investment #27.

Law Offices of Roger L. Stanard and Roger L. Stanard for Defendants and Respondents Westoaks Investment #58 and Joint Venture 58.

This appeal involves what appears to be a question of first impression concerning a statute that addresses the cancellation of penalties imposed when property taxes are not timely paid. The case was filed by the State of California, by and through its Commissioner of Corporations, and is based on the state's allegation that investors in certain real property limited partnerships were defrauded on a massive scale. The receiver who was appointed to oversee the assets involved in the case sought the cancellation of real property tax delinquency penalties, paid by certain of the limited partnerships to Los Angeles County and Ventura County, so that the delinquency charges could be refunded to the receivership estate. When those counties denied the receiver's request, he filed motions with the trial court, on behalf of one of the limited partnerships, for an order directing the counties to cancel the charges. Subsequently, one of the other limited partnerships moved for such relief on its own behalf as to

Ventura County. Ultimately Los Angeles County (Los Angeles) settled with the receiver but Ventura County (Ventura) did not.¹

The receiver's motions for relief were based on Revenue and Taxation Code section 4985.2 (§ 4985.2), which states: "Any penalty, costs, or other charges resulting from tax delinquency may be cancelled by the auditor or the tax collector upon a finding of any of the following: [¶] "(a) Failure to make a timely payment is due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the exercise of ordinary care in the absence of willful neglect, provided the principal payment for the proper amount of the tax due is made no later than June 30 of the fourth fiscal year following the fiscal year in which the tax became delinquent. [¶] (b) There was an inadvertent error in the amount of payment made by the taxpayer, provided the principal payment for the proper amount of the tax due is made within 10 days after the notice of shortage is mailed by the tax collector. [¶] (c) The cancellation was ordered by a local, state, or federal court."²

The trial court determined that subdivision (c) of section 4985.2 gives a court *independent* authority to cancel tax penalties, costs and other charges and therefore a taxpayer seeking such cancellation need not invoke subdivisions (a) or (b) of

¹ Ventura and Los Angeles were not named parties in the suit since they were not alleged to be connected to the fraudulent activities set out in the state's complaint. They were issued orders to show cause by the trial court pursuant to the motions for cancellation of tax delinquency penalties, and thereafter they filed responsive papers and made court appearances on that matter.

² Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

section 4985.2, or any other statutory authority, to obtain that relief. The court granted the motions directed against Ventura for cancellation of tax delinquency charges, and this appeal was filed by Ventura's treasurer-tax collector, Lawrence Matheney, and its county board of supervisors.

The main issue raised in the appeal is whether the trial court correctly construed subdivision (c) of section 4985.2. We find it did not. We hold that subdivision (c), which was added to section 4985.2 by amendment subsequent to the original enactment of the statute, was only intended by the Legislature to *authorize* tax collectors and auditors to obey court orders directing them to cancel tax delinquency penalties, costs and other charges, and therefore such orders for cancellation must be based on some statutory authority other than subdivision (c) of section 4985.2. Subdivision (c) is not a grant of independent judicial authority to relieve taxpayers of liability for tax delinquency penalties.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Complaint

The Commissioner of Corporations (Commissioner) filed this action on March 28, 1990. Named as defendants were Olen Boyce Phillips (Phillips), several companies and partnerships bearing his name, several other companies, 36 limited partnerships entitled "Westoaks Investment," each bearing a different numerical designation (e.g., "Westoaks Investment #9, a California limited partnership"), and the Phillips Financial Group. The complaint alleges that Phillips is the general partner of

the limited partnership defendants, and the president and manager and/or controlling supervisor of ten defendant companies.

By this suit, the Commissioner sought to enjoin the defendants from, among other things, operating what amounted to a Ponzi scheme, engaging in other acts of fraud and violations of state securities laws, and acting upon the real and personal property assets in their possession or under their control. The Commissioner also requested an order for payment of civil penalties by the defendants for each and every one of their acts that violated corporate securities laws. A receiver was requested and attorney Richard Weissman (“Weissman”) was appointed to that position on the date the suit was filed. He took control of the defendant entities and has remained the receiver throughout the case.³

2. *The Default Judgment*

A default judgment was signed and filed on August 12, 1996. Weissman was directed to continue as receiver in the case and to submit a written plan for distribution

³ In his declaration filed in support of his request for a judgment by default, receiver Weissman stated that in the course of his duties, he had not discovered any evidence that trust deed investors were told, at the time of their investments in the late 1980’s, of the true financial situation of Phillips Financial Group and its entities and programs (“PFG”). Nor were they told that their investments were unsafe or significantly at risk, and that new investor money was being used to pay off old investors. Additionally, they were not informed how many trust deeds were senior to theirs. The declaration states that in some cases, “there were in excess of two hundred trust deeds senior to that investor.” The receiver opined that PFG’s failure to so inform the trust deed investors of those facts was a material misrepresentation or omission, and further opined that much of the trust deed money raised by PFG in the late 1980’s and in 1990 was raised by use of fraudulent statements or omissions, and that encumbering partnership properties with numerous deeds of trust securing promissory notes amounted to a theft of the investors’ investments.

of the defaulting defendants' assets. The court retained jurisdiction to implement the terms of its orders (past or future) and to entertain applications and motions by any party for additional relief.

3. *The Motions to Have Ventura Cancel Real Property Tax Penalties*

On March 4, 2004, the receiver filed a motion for an order directing Ventura to show cause why the court should not order that county to cancel all real property tax delinquency penalties, costs and other charges (hereinafter referred to collectively as penalties) resulting from a delinquency in payment of real property taxes by defendant Westoaks Investment #27. The authority cited for such relief was section 4985.2. The basis of the motion was the receiver's assertion that (1) Westoaks Investment #27 did not have any financial resources with which to timely pay real property taxes to Ventura from approximately 1985 through the date of the sale of Westoaks Investment #27's real property in April 1999, (2) like the other Westoaks Investment defendants, Westoaks Investment #27 was controlled by its general partner, Phillips, and (3) Phillips had not paid the taxes owed by the partnership.⁴

The receiver asserted that to avoid an imminent tax sale of Westoaks Investment #27's land, the accrued principal taxes and delinquency penalties claimed by Ventura

⁴ As noted above, the receiver filed a similar motion directed at Los Angeles. That motion involved property belonging to other limited partnerships, not to Westoaks Investment #27. After Los Angeles filed opposition to the motion, it entered into a written stipulation for settlement with the receiver. It was agreed that the stipulated settlement would not represent, by either party, an admission of liability or validity of the other's contentions. An order on the settlement was signed and filed, pursuant to which \$56,764 in tax penalties was cancelled and Los Angeles was ordered to pay that sum to the receiver for deposit into the receivership account.

for the years 1990 to 1996 were paid by a group of Westoaks Investment #27's limited partners and holders of promissory notes secured by deeds of trust encumbering Westoaks Investment #27's real property. Such payment was made in 1996 (for fiscal years 1990-1991 through 1995-1996, in the amount of \$132,579 [principal and penalties]). A similar payment had been made in 1991 for fiscal years 1984-85 through 1989-1990, in the amount of \$74,848 (principal and penalties).

According to the receiver, the Westoaks Investment #27 limited partners and note holders who contributed to the payment of the above described tax principal and penalties were, in turn, granted by the court a first priority lien on the real property owned by Westoaks Investment #27, together with interest at the rate of 12%. The lien was to be repaid when the property was sold. The lien granted by the court in 1996 extended to all of the limited partners and note holders who had advanced money for the payment of the tax principal and penalties, whether in 1991 or 1996. Thereafter, the \$44,989 in taxes and penalties, accruing from approximately 1996 through April 1999, was paid from the proceeds of the sale of Westoaks Investment #27's real property, as was the 1996 judicial lien. Tax delinquency penalties paid to Ventura by Westoaks Investment #27 in 1991, 1996 and 1999 totaled over \$90,000.⁵

⁵ Gross receipts from the sale of Westoaks Investment #27's real property totaled \$5,208,544. In a December 2000 order of the court, the receiver was directed to disburse to the approved Westoaks Investment #27 claimants, whether they were limited partners of Westoaks Investment #27 or note holders, an amount which would represent a 100 per cent recovery of the principal investment they made in Westoaks Investment #27. There were approximately 140 approved claims.

In his motion for tax penalty relief, the receiver asserted that the undisputed fraud of the PFG defendants would support the court's cancellation of the tax delinquency penalties on behalf of the victim investors, and that Westoaks Investment #27's "inability to make timely payments was due to reasonable cause and circumstances beyond its control and occurred notwithstanding the exercise of ordinary care in the absence of willful neglect." According to the receiver, Westoaks Investment #27 purchased its real property (approximately 393 acres of land in Ventura) in the late 1970's or early 1980's, and thereafter, Phillips had granted to various lenders deeds of trust on one or more "lots" of land in that acreage to secure promissory notes that totaled \$3,800,000, as of March 28, 1990, in *recorded* debt (over 100 recorded deeds of trust). There were also unrecorded deeds of trust that encumbered that property. The receiver asserted that because of the fraudulent activities of the general partner⁶ and his unilateral control of Westoaks Investment #27, the limited partners and holders of deeds of trust had no reason to know or believe that the property taxes were not being paid, nor that the encumbrances on the property were of such magnitude that an attempted sale of the property by the receiver in 1990 could not be timely accomplished.

In December 2003, the receiver reported that as of October 2003 Westoaks Investment #27 had on deposit \$270,742, and a final distribution "will include the distribution of surplus funds in excess of the original capital investments by the noteholders and limited partners, respectively. The distribution may be characterized either as interest or profit on their respective investments."

⁶ In his moving papers, the receiver included a lengthy declaration setting out how those fraudulent activities were carried out.

On April 1, 2004, the trial court issued an order requiring Ventura to show cause why the court should not grant the receiver's request to cancel, under section 4985.2, subdivision (c), the delinquency penalties paid to Ventura on behalf of Westoaks Investment #27. Subsequently, another show cause hearing for relief from tax penalties, also directed at Ventura, was set pursuant to a request by a private attorney acting on behalf of defendant Westoaks Investment #58 and an entity called Joint Venture 58, which had paid tax penalties on behalf of Westoaks Investment #58.⁷ Like the receiver's motion, Westoaks Investment #58's motion was based on the fraudulent scheme practiced by the PFG defendants, and it relied on section 4985.2 for statutory authority.⁸

⁷ Joint Venture 58 and Westoaks Investment #58 are sometimes referred to collectively herein as Westoaks Investment #58. Asserting that Westoaks Investment #58 was dismissed from this case, Ventura challenged the right of that limited partnership to bring a motion for section 4985.2 relief. However, the record does not indicate that Westoaks Investment #58 was dismissed. It only indicates that Westoaks Investment #58 was released from the receivership in September 1992.

⁸ According to a declaration filed by an Edward E. Klenner in support of Westoaks Investment #58's motion for cancellation of tax delinquency penalties, Westoaks Investment #38 was formed in 1982 and in 1983 it purchased, with \$350,000 obtained from a bank, certain real property, giving the bank a promissory note for that amount which was secured by a deed of trust on the property. Then Westoaks Investment #58 was formed to raise money to pay off the bank loan, and a promissory note and deed of trust on Westoaks Investment #38's property was given in favor of Westoaks Investment #58. Later, Joint Venture 58 was formed to raise money to pay the delinquent taxes and penalties on the land that was securing Westoaks Investment #58's promissory note/deed of trust (Westoaks Investment #38's land), and Westoaks Investment #58 assigned its note and deed of trust to Joint Venture 58. Sufficient money was raised and the delinquent taxes and penalties (totaling \$268,080) were paid in April 1996. When Westoaks Investment #38 could not pay off its note to Westoaks Investment #58, the Westoaks Investment #38 land securing that note was sold at a trustee's sale and a trustee's deed was recorded in favor of Joint Venture 58 in August

6. *The Trial Court's Rulings Respecting Ventura*

On July 13, 2004, the trial court granted the motions to cancel the tax penalties imposed by Ventura on Westoaks Investment #27 and Westoaks Investment #58. The court found, among other things, that (1) “The investors did not know about the conduct of the defendant until after the filing of this action. The investors were actively engaged in attempting to assist the Court in its control and management of the affected assets, directly and through the receivership.”; (2) “The investors/limited partners in the limited partnerships subject to this action did not learn of the property tax delinquencies affecting their limited partnerships until after the filing of this action and were active and vigorous in their efforts with the County of Ventura to seek relief from impending tax sales. The receivership lacked the cash resources with which to timely pay the real property taxes as those taxes came due.”; (3) “Ventura County did not provide direct relief deferring the tax sales of real property held by Westoaks Investment #27 and Westoaks Investment #38 in 1991, and Ventura County did not advise the Court or the receiver of availability of relief under [Revenue and Taxation Code] § 4985.2.”; and (4) “In order to save their respective real properties from tax sales, the investors/limited partners of Westoaks Investment #27 and Westoaks Investment #58 (successors to real property owned by Westoaks #38) advanced the delinquent and defaulted taxes and all penalties that had accrued from approximately 1984.”

1997. To recoup the investments of the limited partners of Westoaks Investment #58 and the joint venture partners of Joint Venture 58, the land was sold in May 2003 for \$1,345,000.

Concluding that it had independent authority, under section 4985.2, subdivision (c), to cancel the tax delinquency penalties, and “broad powers over administration and protection of the property subject to the receivership pursuant to Gov. Code § 13975.1,” the court cancelled tax delinquency penalties in the sums of \$144,861 on behalf of Westoaks Investment #27, and \$140, 736 on behalf of Westoaks Investment #58.

The order canceling such penalties was signed and filed on July 30, 2004. Thereafter, this timely appeal was filed by Ventura.

DISCUSSION

1. *Section 4985.2, Subdivision (c) Does Not Authorize Courts to Make Orders Respecting Cancellation of Delinquency Tax Penalties*

The primary issue in this appeal is whether subdivision (c) of section 4985.2 was intended to give authority to courts to issue orders canceling tax delinquency penalties. Stated another way, the issue is whether (1) subdivision (c) of section 4985.2, in and of itself, authorizes courts to order the cancellation of such penalties, or (2) the only authority that subdivision (c) provides is to authorize auditors and tax collectors to cancel delinquency penalties when ordered to do so by a court that has based its cancellation order on some other statute or on another provision of section 4985.2. Construction of a statute is a question of law. It therefore warrants our de novo review on appeal. (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 491.)

Citing *Edison California Stores v. McColgan* (1947) 30 Cal.2d 472, 476, Westoaks Investment #58 argues that when a tax statute is ambiguous, the ambiguity

must be resolved in favor of the taxpayer rather than the government. However, we do not perceive that a ruling by this court that subdivision (c) of section 4985.2 was never intended to give courts independent authority to order the cancellation of tax delinquency penalties is a ruling in favor of the taxing authority of government. The construction of subdivision (c) relates to the extent of judicial authority granted by that statutory subdivision with respect to certain taxation issues, not with the authority of government to tax.

Ventura's contention that subdivision (c) of section 4985.2 was only intended by the Legislature to authorize auditors and tax collectors to cancel penalties pursuant to court orders issued under some other statute or under another subdivision of section 4985.2 is supported by the legislative history of the 1990 senate bill (Senate Bill 2791) that added subdivision (c) to section 4985.2. That history includes a May 23, 1990 memo from the office of San Diego's county counsel that is addressed to all counties in the state. Attached to the memo is a proposed amendment to Senate Bill 2791. That proposed amendment is essentially the language of subdivision (c) of section 4985.2. The San Diego memo notes that in bankruptcy cases, the bankruptcy court has the authority to determine tax liability and does not always give San Diego County all of the penalties claimed by the county, but the county will nevertheless be ordered to expunge its tax lien after payment. The memo states that expunging a tax lien in those circumstances will result in a cancellation of some penalties, which according the memo, "the auditor has no statutory authority to do." The memo goes on to state that the proposed amendment to section 4985.2 "will allow the auditor to cancel

penalties (which will result in the lien being expunged) when less than the full amount is ordered to be paid.” The addition of subdivision (c) to Senate Bill 2791 came in the June 12, 1990 amendment of that bill, which was approximately three weeks after San Diego’s county counsel’s office sought such an addition.⁹

In addition to the San Diego memo, Ventura cites to other papers in the legislative history to support its position that section 4985.2, subdivision (c) does not independently authorize courts to cancel tax delinquency penalties. They are letters from the County Supervisors Association of California and the California Association of County Treasurers and Tax Collectors to various state legislators wherein Senate Bill 2791 is described as one which makes technical and minor *administrative* changes to the Revenue and Taxation Code.

Interestingly, Westoaks Investment #27 cites to a senate digest analysis of Senate Bill 2791 which states: “Current law *allows* the auditor to cancel penalties only when (1) failure to pay timely is due to reasonable cause, or (2) there was an inadvertent error in the amount paid. This bill provides a third exception: when cancellation of penalties is ordered by a local, state or federal court.” (Italics added.) The digest then references the memo of the San Diego county counsel’s office. This use of the word “allows” in the senate digest analysis and its reference to the San Diego county counsel’s memo supports Ventura’s contention that the addition of subdivision (c) to section 4985.2 was only meant to authorize/allow county auditors and tax collectors to follow court orders

⁹ Arguably, cases other than bankruptcy matters could result in a court order that effectively requires the cancellation of delinquency penalties in whole or in part.

to cancel tax penalties. Also of interest is Westoaks Investment #58's citation to a senate rules committee memo which states that Senate Bill 2791 "[w]ould *acknowledge* the cancellation of property taxes ordered by a local, state or federal court." (Italics added.) Such reference to an "acknowledgement" of court orders supports Ventura's position that subdivision (c) does *not* enable a court to make an independent order canceling a tax delinquency penalty absent the authority of some other statute or the other provisions of section 4985.2.

Westoaks Investment #58 is correct when it asserts that the legislative history on the addition of subdivision (c) to section 4985.2 is "meager." When we follow that meager history, however, we find that it leads directly from the May 23, 1990 San Diego county counsel memo to the June 12 amendment of senate bill 2791 which added subdivision (c). Further, when we combine that history with the fact that subdivision (c) does not provide a court with standards or specifics as to when and under what circumstances it would be appropriate to permit a cancellation of penalties (such as a specific time frame for seeking penalty relief from a court, and specific factors or circumstances that would warrant cancellation by a court of tax delinquency penalties),¹⁰ we can only conclude that subdivision (c) was meant to do no more than give county tax officials the legal permission to comply with court orders issued

¹⁰ The trial court in this case recognized the problem created by the absence of such guidelines in subdivision (c) of section 4985.2. Prior to ruling on the motions for tax penalty relief, it directed Ventura, Westoaks Investment #27 and Westoaks Investment #58 to brief the question as to what criteria a court should use in determining whether to cancel tax penalties under subdivision (c).

pursuant to authority *other than subdivision (c)*. That subdivision was *not* meant to provide courts with the independent authority to make otherwise unauthorized tax delinquency penalty relief orders. Moreover, even if Westoaks Investment #58 is correct in its assertion that San Diego county counsel’s office was wrong when it stated that county auditors lacked statutory authority to obey court orders directing cancellation of penalties, that does not change our analysis as to what was *intended by the Legislature* when it added subdivision (c) to section 4985.2. It is the intent of the Legislature that is our first concern. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121.)¹¹

¹¹ We decline Westoaks Investment #27 and Westoaks Investment #58’s invitation to find that the trial court was invested with authority, under section 13975.1 of the Government Code, to issue the order granting their requests that the tax delinquency penalties imposed by Ventura be cancelled. Section 13975.1 is found in the portion of the Government Code that addresses the government of the State of California, specifically, the Executive Department of the state.

Subdivision (a) of section 13975.1 states that it “applies to every action brought in the name of the people of the State of California by the Commissioner of Corporations . . . when enforcing provisions of those laws administered by the Commissioner of Corporations which authorize the Commissioner of Corporations to seek a permanent or preliminary injunction, restraining order, or writ of mandate, or the appointment of a receiver, monitor, conservator, or other designated fiduciary or officer of the court.”

Lacking any case authority interpreting section 13975.1 to support their position, Westoaks Investment #27 and Westoaks Investment #58 contend that the trial court’s order can be supported by provisions in subdivisions (e) and (f) of section 13975.1. Those provisions state: “(e) The court has jurisdiction of all questions arising in the receivership proceedings and may make any orders and judgments as may be required, including orders after noticed motion by the receiver to avoid transfers as provided in [certain provisions of section 13975.1]. [¶] (f) This section is cumulative to all other provisions of law.”

Westoaks Investment # 27 and Westoaks Investment #58’s interpretation of subdivisions (e) and (f) of section 13975.1 is too broad. Giving a court authority to

Nevertheless, we do not agree with Ventura that the three subdivisions of section 4985.2 provide county auditors and tax collectors with *discretion* whether to cancel delinquency penalties. Certainly, for example, we do not read subdivision (c) as a grant of discretionary authority to county auditors and tax collectors to ignore a court order.

“make any orders and judgments as may be required” in a receivership proceeding does not dispense with the need for the court to exercise such authority in step with the substantive and procedural directives of statutes that address the requirements of the receivership. In that respect, its limitations are like those of section 4985.2.

Nor do we agree that Corporations Code section 25530 provides a means for validating the order canceling penalties paid to Ventura. Section 25530 is contained in the Corporate Securities Law of 1968 (Corp. Code, § 25000 et seq.). Section 25530 is a broadly worded statute which gives the Commissioner authority to bring suits in the name of the people of the state to enforce compliance with the Corporate Securities Law of 1968 and enjoin acts and practices that constitute violations of that law. Subdivision (b) of section 25530 states: “If the commissioner determines it is in the public interest, the commissioner may include in any action authorized by subdivision (a) a claim for ancillary relief, including but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action, and the court shall have jurisdiction to award additional relief.” On its face, this appears to authorize penalizing persons who violate the Corporate Securities Law of 1968. It addresses claims for restitution, disgorgement and damages. No suggestion is made that Ventura has violated that law. Moreover, the only case cited by Westoaks Investment #27 or Westoaks Investment #58 in support of applying section 25530 to validate the trial court’s order canceling the tax delinquency penalties imposed by Ventura is *People v. Martinson* (1986) 188 Cal.App.3d 894, a civil suit in which two defendants were found to have violated the Corporate Securities Law of 1968 and were required to disgorge their sales commissions. In the instant case, it was the general partner of the various limited partnerships who was alleged to have violated securities laws, but it is Ventura whom Westoaks Investment # 27 and Westoaks Investment #58 contend should disgorge the delinquency penalties. The contention lacks logic. A similar problem rests with the contention of Westoaks Investment #27 and Westoaks Investment #58 that the trial court’s broad power to do equity will support the order canceling the delinquency penalties.

Nor do we find that subdivisions (a) and (b) give the auditor or tax collector discretion to deny cancellation of penalties if and when the taxpayer's proof has established the factual predicates set out in subdivisions (a) and (b). If the taxpayer presents such conclusive proof but the official refuses to make the corresponding subdivision (a) or (b) finding, or if the corresponding finding is made but the official then refuses to exercise the authority granted by section 4985.2 to cancel the penalties, that would be grounds for a Code of Civil Procedure section 1085 petition for traditional mandamus.

While it is true that the introductory paragraph of section 4985.2 states that penalties "may" be cancelled rather than "shall" be cancelled, we read such use of the word "may" as simply providing a previously non-existent statutory authority to effect a cancellation. Section 4985.2 should not be read to include a discretion to deny cancellation where the predicate facts have been established.

The Legislative Counsel's digest for the legislation that added section 2617.5 to the Revenue and Taxation Code (section 2617.5 was section 4985.2's predecessor statute and was added to the Revenue and Taxation Code by Stats. 1976, ch. 431, § 1, p. 1103) stated: "Under existing law a 6-percent penalty is imposed on property taxes which are not paid prior to becoming delinquent; and there is no provision for the cancellation of a penalty. [¶] This bill would authorize the tax collector or the auditor to cancel a delinquent penalty on the property, with the approval of the board of supervisors on a finding that the delinquency was due to reasonable cause and circumstances beyond the assessee's control, and occurred notwithstanding the exercise

of ordinary care and in the absence of willful neglect, provided the payment is made within 90 days of the first delinquency date or within 30 days after the second delinquency date.” Thus, the predecessor to section 4985.2 was enacted simply to authorize cancellation of penalties under specific circumstances, because prior to its enactment, there was no authority for such cancellation even under the very equitable circumstances addressed in subdivisions (a) and (b). Enactment of that predecessor statute solved a problem similar to that recognized by the San Diego county counsel’s office—that sometimes penalties should be cancelled but the auditor or tax collector needs statutory authorization to effect such cancellation.¹²

¹²

Requirements in former section 2617.5 (and in early versions of its successor statute, section 4985.2), that (1) taxpayers file a claim with the board of supervisors to obtain a cancellation of tax delinquency penalties, and (2) such request for relief be filed within a specified number of days after the penalty was paid were deleted by amendments to section 4985.2. This left section 4985.2 without any explicit procedural directive as to how a taxpayer would seek the relief afforded by that statute.

Ventura contends that Westoaks Investment #s 27 and Westoaks Investment #58 were required to abide by the time parameters set out in section 5097 for filing a claim for a refund of taxes. (Under section 5107, the use of the word “taxes” in section 5097 includes refunds of taxes, penalties, interest and costs). We do not agree that Westoaks Investment # 27 and Westoaks Investment #58 were required to comply with such time parameters.

Westoaks Investment #27 and Westoaks Investment #58 seek a cancellation of tax *delinquency penalties* under section 4985.2, whereas section 5097 (setting out a time for filing a claim for refund) and its companion statute 5096 (setting out the grounds for filing a claim for refund) do not address delinquency penalties. The fact that section 5096 begins with the words “[a]ny taxes paid before or after delinquency shall be refunded” does not alter this analysis. The grounds for refund of penalties stated in section 5096 are similar to those for cancellation of penalties stated in section 4986, which also do not include delinquency penalties. Again, it is section 4985.2 that addresses penalties paid because of tax delinquency.

Samarkand of Santa Barbara, Inc. v. County of Santa Barbara (1963) 216 Cal.App.2d 341, 359, cited by Ventura, does not support its position. Under

2. *Further Trial Court Proceedings Under Section 4985.2, Subdivisions (a) and (b) Are Required*

Central to relief under subdivisions (a) and (b) of section 4985.2 are the required findings about the taxpayer and the timeliness of the payment of the delinquent taxes. Because the matter of such relief has already come before the trial court, and because section 4985.2 currently has no procedural directives for how a party seeking such relief is to proceed and it does not appear that Ventura has developed any procedures for its taxpayers, it would not be unwarranted for the motion papers which Westoaks Investment # 27 filed with the court to have the delinquency penalties cancelled be deemed a written request to Ventura for section 4985.2 cancellation relief.¹³ The request should be considered and decided by Ventura. Thereafter, if Westoaks Investment #27's request for cancellation is denied by Ventura, it can file a petition for a writ of mandate if it believes such a petition is warranted.

Westoaks Investment #58 is a different matter. It has already (in August and October 2003) filed a request with Ventura (specifically with Ventura's treasurer-tax collector) for cancellation of delinquency penalties under section 4985.2, and its

sections 4986 (cancellation) and 5096 (refunds), an *erroneous* charge, levy and collection of taxes, penalties and costs will merit cancellation and refund. In *Samarkand*, a statute stated that penalties on property to which a certain welfare exemption was available would be cancelled *as if they had been levied or charged erroneously*, and if they were paid, they would be refunded *as if they had been erroneously collected*. Here, Ventura has not cited any statute which states that penalties cancelled under section 4985.2 will be cancelled as if they were levied or charged erroneously.

¹³ We make no ruling as to how section 4985.2 should operate procedurally with respect to any other party claiming relief under it.

requests were denied in September and November of that year. Can the instant case be considered a suit for traditional mandamus? Arguably it can. However, the trial court acted outside of its jurisdiction when it determined that it could decide the issues in this case under subdivision (c) of section 4985.2; that is, when it determined it has “independent authority to cancel any penalty, costs, or other charges resulting from tax delinquency for real property taxes pursuant to . . . § 4985.2 (c) and broad powers over administration and protection of the property subject to the receivership pursuant to Gov. Code § 13975.1.” The only power which the trial court has with respect to the decision of Ventura to deny Westoaks Investment #58 section 4985.2 relief is to decide Westoaks Investment #58’s motion as a petition for traditional mandamus by determining whether, *solely under the parameters for relief set out in subdivisions (a) and (b) of section 4985.2*, such relief should have been granted to Westoaks Investment #58. The answer to this question will require at least in part, a determination as to whether, and to what extent, the acts of the general partner are, or should be, deemed to be the acts of the limited partnership.¹⁴ This will involve legal and factual issues which should be addressed in the first instance by the trial court.

3. *Ventura Waived Its Right to Assert a Joinder Error*

Ventura contends it is an indispensable party in this case and should have been officially joined under the provisions of Code of Civil Procedure section 389 rather than directed to appear by means of an order to show cause. However, given Ventura’s

¹⁴ We observe that a “balancing of equities” test is not an option under section 4985.2.

participation in the litigation of the right of Westoaks Investment #27 and Westoaks Investment #58 to a refund of tax penalties, we find Ventura has waived its right to assert joinder error.

In his March 2004 motion to have tax penalties imposed by Ventura cancelled, the receiver noted that Ventura was not currently a party to this suit, and he asserted that an issuance of an order to show cause to Ventura “is a proper method for the Court to obtain personal jurisdiction over [Ventura] in the exercise of its subject matter jurisdiction herein.” The same presentation was made in the receiver’s points and authorities, with the receiver setting out his analysis of the use of the order to show cause procedure, in lieu of a summons and complaint, for nonparties, and citing various authorities to support his position.

The issuance and serving of the order(s) to show cause on Ventura acted “as a citation or summons, giving the court personal jurisdiction” over Ventura. (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 8, fn. 6.) Thereafter, Ventura responded by making a general appearance.

The first court filing by Ventura in response to the order to show cause directed at it was its motion for change of venue. In that motion, Ventura identified itself at least 9 times as a cross-defendant, and it identified Westoaks Investment #27 and Westoaks Investment #58 as cross-complainants at least 15 times. Additionally, in that motion, Ventura argued: “A motion to transfer venue because the action was filed in a wrong court is timely if the motion is made at or before the time the defendants’ responsive pleading is due. Had cross-complainants proceeded properly by filing a complaint or

petition, cross-defendants would have had 30 days to bring a motion to change venue. The order to show cause, however, required cross-defendants to respond by April 19, 2004, or within only 13 days of service of the order.” It is true that Ventura stated in its motion for a change of venue that the trial court should not have issued an order to show cause but rather should have raised the matter of tax penalties refund by means of a complaint or a petition since, Ventura argued, it was not already a party to this suit. However, that assertion was made in support of Ventura’s contention that the claim asserted by Westoaks Investment #27 and Westoaks Investment #58 constitutes an action or a special proceeding and thus was subject to a motion for change of venue. The reasonable inference is that Ventura’s focus was the venue issue and not the absence of a cross-complaint being filed against it. That inference is supported by Ventura’s argument that the trial court “should sever the action or proceeding against [Ventura] from the main action, and transfer it to the County of Ventura or a neutral county.”

Likewise, in its points and authorities filed in opposition to the motions by Westoaks Investment #27 and Westoaks Investment #58 for cancellation of tax penalties, Ventura identified itself as a respondent and as a cross-defendant, and the only assertion made by Ventura that the court was proceeding improperly was Ventura’s position that the venue should be changed from Los Angeles County. The same is true for the papers Ventura filed with respect to its request for a statement of decision – Ventura referred to itself as a respondent and did not assert that it should have been formally joined as a party to the action by means of a cross-complaint. These are

matters indicating a general appearance by Ventura, not a special appearance. Nowhere in its papers did Ventura indicate a special appearance status.

It is true that at the July 12 hearing Ventura stated that absent a cross-complaint, it is not a party to this case and therefore the court would have not authority to order it to pay money because it did not have the status of a defendant. It is also true that thereafter, when Ventura filed its written objections to the order prepared for the court's signature, Ventura raised its "nonparty" status as a defense to the order. It also raised a "nonparty" argument in its motion to vacate the "judgment," asserting that it was an indispensable party that had not been joined to the case and therefore the "judgment" should be vacated.¹⁵ However, it is clear to this court that by the time of the July 12 hearing, the ship had already sailed on Ventura's right to object to the means by which it was brought into this case. Ventura's actions prior to that time amount to a general appearance which acts as a waiver of any objections it might have had to how it came to be a litigation figure in this case. Assuming arguendo that Ventura is an indispensable party in this case, it is simply not fair for Ventura to initially litigate its position on the issue of cancellation of tax penalties in the trial court and then later assert that it should

¹⁵ On August 16, Ventura filed a motion to vacate what it termed the court's July 30 "judgment," and have a new and different "judgment" entered, citing Code of Civil Procedure section 663. The motion was opposed by the receiver and by Westoaks Investment #58 and Joint Venture #58. They argued, among things, that the judgment in this case was entered in 1996, that the July 30, 2004 order is not a judgment and thus section 663 is not applicable, and that a motion for reconsideration under Code of Civil Procedure section 1008 should have been filed to challenge the July 30 order. They also challenged the substantive merits of the motion to vacate. The motion was heard and denied on September 15.

not have been there in the first place because it is an indispensable party and was not officially joined under the provisions of section 389.¹⁶

4. *Ventura's Motion for Change of Venue Was Not Improperly Denied*

Prior to filing written opposition to the motions for cancellation of tax penalties, Ventura filed a motion for a change of venue of the portion of the case concerning it, seeking to have that portion moved to Ventura or to a "neutral county." The motion was filed in April 2004 and set for May 12, the original date of the hearings on the orders to show cause directed to Ventura and Los Angeles. Westoaks Investment #58 opposed the motion for change of venue, and the receiver, on behalf of Westoaks Investment #27, joined in that opposition.

Code of Civil Procedure section 397 provides that a court may change venue "[w]hen the court designated in the complaint is not the proper court." Here, the Commissioner brought the case in the Los Angeles County Superior Court.

¹⁶ The record shows that in early 1991, the court ordered the receiver to notify Ventura that the court was intending to enjoin Ventura, for a period of short duration, from conducting a tax sale of the property held by Westoaks Investment #27 (and the property held by Westoaks Investment #38, which was property that Westoaks Investment #58 later acquired). The receiver was directed to advise Ventura that no injunction would issue if Ventura presented authority to the court showing that the court was prohibited from issuing such an injunction. Such authority was presented by Ventura in a letter to the court and the court declined to issue the injunction. Given our finding that Ventura appeared in this case after it was served with the motions for relief from delinquency penalties, we need not and do not address the issue whether, by merely filing a three-page letter in March 20, 1991 to address the trial court's inquiry whether Ventura could lawfully be enjoined from conducting a tax sale of receivership property, Ventura made an appearance in this case at that time. Contrary to Westoaks Investment #27's appellate brief, the court did not issue an order to show cause to Ventura as a means of gaining Ventura's opinion on the matter of the proposed injunction.

“Venue is determined based on the complaint on file at the time the motion to change venue is made.” (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482.) The complaint on file when Ventura moved to change venue is the original complaint. When this case was filed, that is under the original complaint, no tax penalty relief from either Los Angeles or Ventura was sought. Rather, the thrust of the suit was the need for a receiver to marshal the assets of the various defendants and take control of the assets and preserve them, and the need for an equitable distribution of the assets to the defrauded investors and others entitled to relief. Therefore, Code of Civil Procedure venue sections 393 (addressing, among other things, the recovery of a penalty imposed by statute) and 394 (addressing actions against a county, city and county, city or local agency) were not implicated by the original complaint.

Regarding proper venue, the complaint specifically alleges that the defendants transact business in Los Angeles County and other counties, and that alleged violations of law occur within Los Angeles County. Moreover, both counties (Ventura and Los Angeles) were alleged to be the residence or principal place of business of various defendants. Additionally, while the alleged Ponzi scheme was based on sales of securities, the scheme involved property in both counties. Given these allegations in the complaint, venue was proper in Los Angeles. (Code Civ. Proc., §§ 395, 392, 395.5.)

Code of Civil Procedure section 397 provides “general grounds” on which venue may be changed. Besides those cases where the court designated in the complaint is not the proper court (which we have already determined is not the case here), venue may also be changed when (1) “there is reason to believe that an impartial trial cannot be had

therein,” (2) “the convenience of witnesses and the ends of justice would be promoted by the change,” (3) “from any cause there is no judge of the court qualified to act,” or (4) in certain family law matters. We do not find that any of these circumstances are applicable here. This is not a family law matter, and there are judges in Los Angeles who are qualified to hear this case. Moreover, it is not apparent to this court that the convenience of witnesses or the ends of justice would be promoted by transferring the case to Ventura, nor that Ventura would not be given an impartial hearing in Los Angeles.

Likewise, Ventura’s reliance on section 396b of the Code of Civil Procedure is misplaced because that statute addresses cases which are filed in a court “*other than* the court designated as the proper court for the trial thereof, under this title, . . .” (Italics added.) As already noted, this case was properly filed in Los Angeles. Likewise unavailing is Ventura’s contention that if the case was not transferred to Ventura, it should have been transferred to a “neutral court.” Aside from the reasons we have articulated as to why transfer of the case was not required, it has been held that when the State of California is a litigant and “taxpayer prejudices exist in favor of state agencies, there are no ‘neutral’ counties to which a suit may be transferred.” (*Westinghouse Electric Corp. v. Superior Court* (1976) 17 Cal.3d 259, 267, fn. 4.)

Lastly, we address Ventura’s assertion that the trial court denied a change of venue “solely on the grounds that [Ventura] did not challenge venue during an unrelated proceeding in the court in 1991.” Ventura cites to a page in the reporter’s transcript where the court observed that in 1991, when the court asked Ventura for its position on

the question whether the court could enjoin the collection of taxes, Ventura only responded that the court could not issue such an injunction, and Ventura did not raise the matter of a change of venue at that time. We note that in its order granting the requested section 4985.2 relief from Ventura, the court stated: “The motion of Ventura County for change of venue is denied. Ventura County is estopped from asserting objections to jurisdiction and venue.” It is not clear to this court that the court denied the motion for change of venue on the grounds that a change of venue was not requested by Ventura in 1991. However, even if that was the reason the change of venue was denied in 2004, and assuming arguendo such a reason would not support the trial court’s ruling, that is not grounds for reversal. In examining the validity of an order, we do not rely on the trial court’s analysis to determine whether the order should be affirmed. Rather, if the order is correct on any theory of law, we will affirm it. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19, disapproved on another point of law in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 944.) Here, we have shown that venue is Los Angeles is proper.

5. *Ventura’s Position on the Need for Discovery Was Not Timely Stated*

Ventura asserts the trial court improperly denied it time to conduct discovery. We agree that Ventura had a right to sufficient time to conduct discovery on the factual matters on which Westoaks Investment #27 and Westoaks Investment #58 rested their claims for relief under section 4985.2. Rather than being in the nature of a anti-SLAPP statute special motion to strike where only prima facie presentations are necessary (Code Civ. Proc., § 425.16), the orders to show cause directed at Ventura were in the

nature of a summary judgment motion in that the parties had to present their complete case because a complete decision on the merits of the relief requested by Westoaks Investment #27 and Westoaks Investment #58 could be made by the trial court and thus the ability to fully address the underlying factual issues was at stake.

While trial courts do have discretion in ruling on requests for a continuance (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984), here, there would have been an abuse of that discretion if the trial court, at the May 12, 2004 hearing, *actually denied* Ventura time for discovery. On the other hand, if at the May 12 hearing, Ventura did not raise the issue of the need for discovery, then Ventura waived the matter since it should have secured a ruling on its asserted need for time to take discovery. It cannot really be said that the trial court denied a request for a continuance to take discovery if Ventura did not address that request to the court.

At the May 12 hearing, the court made it clear that it was going to continue the matter for *two months* because it wanted (a) briefing on the question what criteria a court should use when determining whether to grant the type of relief that Westoaks Investment #27 and Westoaks Investment #58 were requesting under section 4985.2; (b) the receiver to meet and confer with Los Angeles and with Ventura to determine if settlements could be made; (c) the receiver to confer with Chicago Title regarding a claim being made against that company; and (d) the treasurer-tax collector of Los Angeles County to submit a declaration on a certain matter.

A review of the reporter's transcript for that hearing shows that Ventura never broached the subject of a continuance for discovery. The attorney who appeared on

behalf of Ventura, Leroy Smith, questioned the court about several matters, including (1) whether the court was ruling on Ventura's motion for change of venue and whether Ventura would be waiving its motion for change of venue if it filed a brief on the substantive merits of Westoaks Investment # 27 and Westoaks Investment #58's motions for relief (the court answered "no" to both inquiries); (2) whether the court was ruling that Ventura is a party to this case; and (3) whether Ventura could be given copies of the papers filed by the receiver and Los Angeles on the issue of relief from tax penalties on the Reyes Adobe property. Attorney Smith and the court also discussed whether Smith felt it was necessary for him to be at the July 13 hearing because he was scheduled to be on vacation that day, and Smith indicated it would not be a problem for Ventura if another attorney appeared on the 13th. Additionally, Smith indicated that the briefing schedule set by the court provided him with sufficient time to submit the additional briefing that the court was requiring. However, Mr. Smith never addressed the matter of conducting discovery so that Ventura could verify the facts on which Westoaks Investment #27 and Westoaks Investment #58 were basing their claim for relief. Mr. Smith kept silent on that matter even though the court indicated its belief that contrary to the position taken by Los Angeles and Ventura, the court *did* have authority under section 4985.2 to grant such relief if it was factually warranted. In other words, having been informed by the court that the court had concluded that Ventura and Los Angeles were wrong on that issue of law, and having been told that the court wanted additional briefing on the question what criteria the court should use in determining whether to grant such relief because the court had determined that there

were substantial equities on both sides that needed to be weighed, which would address the factual matters in the case, Ventura never raised the issue of a continuance to conduct discovery on the assertions of fact presented by Westoaks Investment #27 and Westoaks Investment #58 in their papers (declarations, exhibits, etc.).

Failure to make the request for additional time to conduct discovery resulted in a waiver of Ventura's claimed right to a six-month continuance to obtain discovery. Ventura's claims on appeal that it "had no reason to believe that [it] would have to initiate discovery prior to the July 13, 2004, hearing" simply are not persuasive. Orders to show cause are routinely decided on declarations, it being within the discretion of the trial court whether to allow oral testimony. (*Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1120-1121.) Ventura's assertion that the trial court "did not state that it intended to try [the] factual allegations on July 13, 2004, nor was any trial date set" is thus without legal consequence in this appeal. Given the nature of factual presentations in orders to show cause, if Ventura needed to take discovery in order to be able to present the facts of its case to the trial court, it should have addressed the need for a continuance for discovery purposes.

It is true that through a series of letters between the receiver and Ventura, written between May 19 through May 27, it became clear that neither side felt it was required to produce evidence requested by the other. It is also true that in Ventura's points and authorities filed in opposition to the motions by Westoaks Investment #27 and Westoaks Investment #58 for cancellation of tax penalties, Ventura requested that if the trial court determined section relief was legally available to Westoaks Investment #27 and

Westoaks Investment #58, then the court grant a continuance of *six months* to enable the parties to “conduct reciprocal discovery” and upon completion of the discovery, conduct a further hearing on the factual issues regarding the grounds asserted by Westoaks Investment #27 and Westoaks Investment #58 for the relief, and “affirmative defenses reserved by [Ventura].” However, the discovery impasse was apparent just two weeks after the May 12 hearing, and Ventura’s points and authorities were filed six weeks after the May 12 hearing. If Ventura believed it needed discovery to meet the factual basis of the section 4985.2 motions, it should have made a motion immediately after learning that it would not receive information from the receiver through informal discovery requests. It was not reasonable to let nearly seven weeks pass between the abovementioned series of impasse letters and the July 13 continued hearing and then ask for a continuance. Moreover, at that hearing, Ventura never actually asked for a continuance for discovery purposes. Rather, it mentioned discovery in passing in connection with its comment that if it really were a defendant in this proceeding, it would have a right to discovery.

6. *Ventura’s Claim of Unfair Surprise At the Hearing Is Without Merit*

We do not find merit in Ventura’s assertion that it was unfairly surprised at the July 13 hearing by the court’s consideration of certain documents. In 1991, Ventura wrote a letter to the court in this case stating Ventura’s position that the court could not enjoin Ventura from collecting property taxes on Westoaks Investment #27 and Westoaks Investment #38, including conducting a tax sale. That letter appears at least once in the record, including in the receiver’s moving papers filed on March 4, 2004.

At the July 13 hearing, Ventura's attorney stated he could not address that letter or matters and proceedings surrounding it because he had no personal knowledge of it. However, the court observed that the letter was signed by Lawrence Matheney in his position of assistant county counsel, and that Matheney was, at the time of the July 13 hearing, Ventura's treasurer-tax collector, and therefore Ventura's attorney should have discussed the events of the 1991 issues with Matheney. The court also observed that Ventura's attorney was raising an inability to address the letter at the July 13 hearing, which was the *second* hearing in these current matters (that is, the second hearing on the section 4985.2 request for relief). We do not find that Ventura has made a case for reversible error.

Ventura also complains that it was given new documentary evidence at the July 13 hearing. However, from the reporter's transcript pages cited by Ventura, it is not clear what that document is, and Ventura's appellate brief is not forthcoming in telling this court what the document is and its significance. This inadequate presentation constitutes a waiver of the issue.

Ventura also asserts that at the July 13 hearing, the receiver argued a theory of the case using the abovementioned 1991 letter, which Ventura describes, in its appellate brief, as a theory involving Ventura's tax collector's "alleged 'course of conduct'." Ventura states this theory "was not mentioned in [the receiver's] moving papers." However, the receiver also submitted reply papers (indeed, more than one set of reply papers), and Ventura does not state that this "new" theory was not addressed in those. Nor does Ventura state that the "new" theory was not addressed in any of Westoaks

Investment #58's court papers. Again, we do not recognize inadequate appellate presentations as a basis for appellate relief.

Likewise without merit is Ventura's assertion that the court committed reversible error when it refused to allow Ventura a brief recess to review a "recapitulation" presented to the court by the receiver, which Ventura had never been shown prior to the hearing. The record shows that at the July 13 hearing, counsel for Ventura, John Polich, stated that the receiver and Westoaks Investment #58 were seeking cancellation of both delinquency penalties and redemption penalties, and that section 4985.2 only addresses delinquency penalties. The court asked Polich what amount of money was represented by each of those two categories, and Polich stated he had not "broken it down" prior to the hearing. Polich added that he had with him at the hearing some statements that he could use to quantify the matter for the court and he could do that at the hearing if the court would give him "a few minutes." At that point, the receiver indicated that he had prepared a summary of what principal and penalties had been paid to Ventura, that he had made the summary using raw data given to him by Ventura, and that the summary should have been included with Westoaks Investment #27's reply papers. He added that he had given "counsel" a copy of his summary, by which he apparently meant he had given Polich a copy. From this review of the record, we see that Polich did not request "a few minutes" to review the receiver's summary but rather "a few minutes" to review his own papers. Moreover, Ventura has not cited to the record to support its assertion that this request was "ignored."

In short, Ventura has not presented a case that the trial court abused its discretion by denying Ventura “time to prepare a defense.” Nor do we find persuasive Ventura’s contention that a continuance was mandatory under section 396b, subdivision (e). That subdivision states: “If the motion to transfer [venue] is denied, the court shall allow the defendant time to move to strike, demur, or otherwise plead if the defendant has not previously filed a response.”

7. *Ventura Has Not Demonstrated Prejudicial Error in the Trial Court’s Evidentiary Rulings*

In support of Westoaks Investment #27’s section 4985.2 request for relief, the receiver submitted his own declaration. In support of its request for section 4985.2 relief, Westoaks Investment #58 submitted a declaration from Edward Klenner, an investor and limited partner of Westoaks Investment #58. Ventura filed written evidentiary objections to both of those declarations. However, it does not appear that Ventura requested a ruling on its objections. Rather, in the very last minute of the July 13 hearing, after the trial court had heard all of the presentations, had indicated its rulings on the various motions, and had directed the receiver to prepare and file a proposed order by July 20 and the parties to file any written objections to the order by July 23, *the attorney representing Westoaks Investment #58* inquired of the court as to the evidentiary objections that Ventura made to those two declarations. The court responded by saying: “I don’t have to rule on the specific objections. This is not a motion for summary judgment.” Ventura’s attorney, Mr. Polich, said nothing in response to the court’s statement. Later, in its July 30, 2004 written order granting the

motions to cancel delinquency penalties, the court stated that Ventura's evidentiary objections to Klenner's and the receiver's declarations were overruled.

Now on appeal, Ventura contends that when the court overruled its written objections, it did so on the grounds that the rules of evidence do not apply to the section 4985.2 proceedings, and that this constitutes trial court error. There are at least two reasons to reject Ventura's assertion of error. First, Ventura did nothing to further its evidentiary objections. Ventura did not raise them at the hearing, and when Westoaks Investment #58's attorney raised them, Ventura did not object to the trial court's response. Second, in its written order, the court did not say it was overruling Ventura's objections because rules of evidence do not apply to section 4985.2 hearings. We read the court's remark at the hearing to mean that the court believed it was not required to give specific rulings, on the record, to each and every one of Ventura's objections.

Whether the court was procedurally correct, we find that Ventura's failure to pursue its evidentiary objections if it disagreed with the court amounts to a waiver of them.

Ventura also asserts trial court error with respect to oral evidentiary objections it made at the July 13 hearing. Ventura contends the trial court "ignored" those objections. One objection was made when the trial court noted that whereas Los Angeles settled with the receiver over applying section 4985.2 to this case, Ventura did not settle with the receiver. Ventura's attorney objected "to the relevance of other proceedings to this action." The court responded that it was *not* another proceeding since the receiver's motion for section 4985.2 relief was "a motion directed to two taxing authorities." At that point, Mr. Polich changed gears and stated that he was

actually referring to “the proceeding [the receiver] referred to, which was separate, a different case” The court responded: “There’s no evidence of what happened in Kern County or this other case. I’m interested in what happened in this proceeding.” Given this discussion, we cannot say that the trial court did not address Polich’s evidentiary objection.

Nor are we persuaded, by Ventura’s appellate contention, that at the July 13 hearing it was not able to “raise evidentiary objections to the Receiver’s factual narrative” and that this constitutes reversible error. At the July 13 hearing, Polich objected to “the procedure by which this particular matter is being adjudicated today.” Polich argued that at the hearing, the receiver gave a statement to the court “which is not legal argument but, rather, testimony as to factual issues, determinative factual issues in this matter with respect to the bad faith or lack thereof or good faith of the defendant parties in this case.” Polich contended that “if this were an ordinary court proceeding,” the receiver would have made such statement under oath and Polich could have made evidentiary objections to it.

On appeal, Ventura asserts that it was “the procedures imposed by the court” that prevented him from “rais[ing] evidentiary objections to the Receiver’s factual narrative.” However, Ventura does not cite to the record to support its contention that the court imposed a procedure that prevented Ventura from challenging factual statements made by the receiver. Moreover, at the hearing, when Polich stated that the receiver had “testified about his lack of money and inability to pay the taxes as they were becoming due,” the court responded “I don’t think he was testifying.” Polich

responded: “My mistake, Your Honor.” The court replied: “Wasn’t that an argument? Okay. I just wanted to make sure we were on the same wavelength.” Clearly the trial court accepted the receiver’s remarks as argument, not as testimony. Like many of Ventura’s other asserted errors, this one’s death on the vine is not from lack of fertilizer.

8. *Denial of Ventura’s Request for a Statement of Decision Was Not Erroneous*

On July 23, Ventura filed a request for a statement of decision, however no statement of decision was issued by the court.

Code of Civil Procedure section 632 provides that a court “shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision.”

Here, two questions arise with respect to section 632. First, can section 632 be applicable to this case, given that the statute addresses trials, and the order from which Ventura has appealed resulted from hearings on a motion and orders to show cause, not from a trial? Generally, a trial court is not required to issue a statement of decision following a motion, however exceptions to that rule have been made. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660, 661 [where the court determined that under the facts of that case, a statement of decision should have been

issued “pursuant to appellant’s timely request therefore” after the trial court issued an order granting a motion to amend a judgment to add the appellant as a defendant and a judgment debtor under an alter ego theory].) Second, assuming *arguendo* that section 632 is applicable to the hearings in the instant case, was Ventura’s request for a statement of decision timely?

Ventura has not demonstrated that its request for a statement of decision was timely, and therefore, on that basis alone, we find that denial of a statement of decision was not an error, and we need not address the aspect of the necessity of a statement of decision had a timely request been made. Ventura made a request for a statement of decision on July 23. The hearings on the issue of cancellation of tax penalties were held on May 12 and July 13. The reporter’s transcript for the May 12 hearing is 18 pages long, and a reading of it clearly demonstrates that the hearing took only a few minutes, certainly no longer than 15 minutes. While the reporter’s transcript shows that the July 13 hearing was conducted in both the morning and afternoon sessions, Ventura does not provide evidence that it took more than eight hours. Therefore, assuming the facts of this case would otherwise warrant requiring a statement of decision, Ventura has not demonstrated that its request was timely under section 632’s requirement that the request for a statement be made “prior to the submission of the matter for decision.”

DISPOSITION

The order from which Ventura has appealed is reversed and the cause is remanded for further proceedings consistent with the views expressed herein. Ventura,

Westoaks Investment #27 and Westoaks Investment #58 will all bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.