Michal Wawrzynski v. City of San Diego

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Wawrzynski v. City of San Diego

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Michal Wawrzynski appeals the judgment entered after the trial court sustained a demurrer without leave to amend and later granted a motion for summary judgment filed by the City of San Diego (the City) in response to Wawrzynski's third amended complaint challenging the City's recently enacted regulations of the pedicab business. On appeal, Wawrzynski contends the regulations are preempted by state law, effectuate uncompensated takings of his property and violate his procedural due process rights. We affirm the order sustaining the demurrer without leave to amend, reverse the summary judgment and remand for further proceedings consistent with this opinion.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The City's Regulations of the Pedicab Business

The City has regulated the pedicab[1] business since 2000. (See San Diego Mun. Code, § 83.0101 et seq.) In 2007, the City received numerous complaints about pedicabs, including "oversaturation" in the downtown area and associated traffic congestion. Members of the City's police and traffic engineering departments therefore undertook a comprehensive review of pedicab business regulations.

As part of the review process, City employees met with pedicab business owners in late 2007 to discuss potential solutions to the oversaturation problem in downtown San Diego. City employees also gathered information concerning hotel occupancy rates in downtown San Diego at various times of the year. Based on the information obtained, City employees determined the maximum allowable number of pedicabs in downtown San Diego should be 250.

In June 2008, one of the police officers participating in the review of the pedicab business regulations compiled a list of all licensed pedicab business owners and inspected their fleets. Based on the results of that inspection, City employees determined they equitably could limit the number of pedicabs in downtown San Diego to achieve the desired target (250) through a combination of (1) pro rata reduction in the number of permits issued to previously licensed pedicab owners to 40 percent of the number held as of July 31, 2008, for a total of 215 permits; and (2) issuance of the remaining 35 permits by lottery to qualified new entrants into the business.

After completion of the review process, City employees met with the City's deputy director of transportation engineering operations to discuss their proposed solution to the pedicab congestion problem in downtown San Diego. Over the next several months, the deputy director met with representatives of the city attorney's office, the police department and the mayor's office to obtain input on and approval of proposed new regulations. In September 2009, the new pedicab business regulations were presented to and approved by the city council.

As pertinent to this appeal, the new regulations (1) designate downtown San Diego as a restricted pedicab zone and require an owner to obtain a pedicab restricted zone decal for each pedicab operated there (San Diego Mun. Code, §§ 83.0113, subds. (a), (b)(1), 83.0114, subd. (b), 83.0115, subd. (a)); (2) authorize the city council to set by resolution the number of pedicab restricted zone decals to be issued (id., § 83.0114, subd. (a)); and (3) provide for annual renewal of decals (id., § 83.0119). By resolution, the city council limited the number of pedicab restricted zone decals that could be issued each year to 250.

B. The Effect of the City's Regulations on Wawrzynski's Business

According to a declaration Wawrzynski submitted in opposition to the City's motion for summary judgment, he has owned and operated a "comparatively small" pedicab business in San Diego since 2006. Between 2006 and 2009, he invested "large sums of money" in the business by buying, insuring and obtaining permits for pedicabs. Beginning in 2010, the City refused to issue Wawrzynski more than four pedicab restricted zone decals. He currently has 12 pedicabs for which he has not been able to obtain such decals. According to Wawrzynski, the City's refusal to issue pedicab restricted zone decals for those 12 pedicabs has deprived them of any "legal, economically viable use" and has had "a devastating economic impact" on his business.

C. Wawrzynski's Lawsuit Against the City

Wawrzynski sued the City for damages, as well as declaratory and injunctive relief, based on the adverse impact the new pedicab regulations allegedly had on his business. In the causes of action at issue on this appeal, Wawrzynski alleged: (1) the regulations effected takings of his property for public use without compensation, in violation of the federal and state Constitutions; (2) the regulations are preempted by state law; (3) the City's refusal to issue him as many pedicab decals as it

has in the past, without prior notice and hearing, violated his procedural due process rights; and (4) the lottery by which 35 pedicab restricted zone decals were issued to new entrants into the pedicab business provided no notice or opportunity for a hearing, in violation of his procedural due process rights.

The City demurred to Wawrzynski's preemption and due process claims (9th, 11th & 12th causes of action), among others, and the trial court sustained the demurrer as to those claims without leave to amend. The City subsequently moved for summary judgment (or, alternatively, for summary adjudication) on Wawrzynski's takings claims (third - sixth causes of action), among others. The court granted the motion for summary judgment and entered a judgment against Wawrzynski.[2]

DISCUSSION

Wawrzynski argues the trial court erred when it sustained the City's demurrer to his claims based on preemption and due process violations and when it granted the City's motion for summary judgment on his takings claims. He also contends erroneous evidentiary rulings and judicial bias require reversal. As we shall explain, we conclude the trial court erroneously ruled against Wawrzynski on two of his takings claims, but otherwise correctly disposed of the case.

A. The Trial Court Properly Sustained the City's Demurrer Without Leave to Amend

Wawrzynski challenges the trial court's order sustaining without leave to amend the City's demurrer to his claim that Vehicle Code section 39001, subdivision (c) preempts the City's regulations concerning the renewal of pedicab decals (ninth cause of action), and to his claims that the City's chosen method of allocating pedicab restricted zone decals violated his federal constitutional right to due process of law (11th & 12th causes of action). After setting forth the standard of review, we shall explain why we reject Wawrzynski's challenge.

1. Standard of Review

A demurrer tests the legal sufficiency of the factual allegations of a complaint to state a cause of action. (McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415.) On review of an order sustaining a demurrer without leave to amend, we assume the truth of all properly pleaded and implied allegations of fact (Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081), but not of any contentions or conclusions of fact or law (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125). If the complaint does not state a cause of action, and the plaintiff does not show how the defects can be cured, we must affirm if any of the grounds of demurrer is well taken. (Hendy v. Losse (1991) 54 Cal.3d 723, 742.) On the other hand, if the complaint does state a cause of action, or the plaintiff shows a reasonable possibility the defects can be cured by amendment, we must reverse. (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967.)

2. Analysis

a. Preemption Claim

Wawrzynski contends the trial court erred in sustaining without leave to amend the City's demurrer to his ninth cause of action, which alleged that Vehicle Code section 39001, subdivision (c) preempts the City's regulation regarding annual renewal of pedicab decals. We disagree.

A municipal ordinance is preempted if it conflicts with state law -- i.e., if it duplicates, contradicts, or enters an area fully occupied by state law. (Cal. Const., art. XI, § 7; O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, 1067.) There is no preemption, however, when a statute and a municipal ordinance regulate different subjects. (Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 295.)

Here, the statute Wawrzynski relies on for his preemption argument, Vehicle Code section 39001, subdivision (c), pertains to the renewal of bicycle licenses every three years by residents of cities or counties with ordinances requiring a license to ride a bicycle on a public roadway. The municipal regulations challenged on this appeal require renewal of pedicab decals every year by operators of pedicabs. (San Diego Mun. Code, § 83.0119.) Thus, the municipal regulations pertain specifically to the business licensing of pedicab operators, a matter in no way addressed by Vehicle Code section 39001, subdivision (c). Because there is no conflict between the statute and the regulations, the regulations are not preempted, and the trial court correctly sustained the City's demurrer without leave to amend. (See, e.g., Live Oak Publishing Co. v. Cohagan (1991) 234 Cal.App.3d 1277, 1283 (Live Oak Publishing Co.) ["If there can be no liability as a matter of law the demurrer should be sustained without leave to amend."].)

b. Federal Procedural Due Process Claims

Wawrzynski also argues the trial court erred in sustaining without leave to amend the City's demurrer to his 11th and 12th causes of action, which alleged the City's pro rata reduction in the number of pedicab restricted zone decals issued to previously licensed pedicab operators and its issuance of 35 such decals to new entrants by lottery violated his federal procedural due process rights. Again, we disagree.

The federal Constitution prohibits the City from depriving any person of property "without due process of law." (U.S. Const., 14th Amend., § 1; see Avery v. Midland County (1968) 390 U.S. 474, 480 ["a State's political subdivisions must comply with the Fourteenth Amendment"].) Due process generally requires notice and hearing before an owner is deprived of property. (E.g., United States v. James Daniel Good Real Property (1993) 510 U.S. 43, 48.) "It is equally well settled, however, that only those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements." (Horn v. County of Ventura (1979) 24 Cal.3d 605, 612; see also Bi-Metallic Inv. Co. v. State Bd. of Equalization (1915) 239 U.S. 441,

445 ["Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption."].) Here, the City's decisions concerning allocation of pedicab restricted zone decals constituted legislative acts -- the adoption of broad, generally applicable rules based on public policy -- rather than adjudicative acts -- the application of existing rules to the facts of an individual case. (See Horn, at p. 613.) Hence, the procedural requirements of due process did not apply.

Moreover, procedural due process protections extend only to property interests to which a person has "a legitimate claim of entitlement" based on "existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Board of Regents v. Roth (1972) 408 U.S. 564, 577; accord, Ryan v. California Interscholastic Federation-San Diego Section (2001) 94 Cal.App.4th 1048, 1059, 1061.) Wawrzynski has not identified any existing state law rule that entitles him to receive each year the same number of pedicab decals the City has issued him in the past. Indeed, he has no such entitlement. As another Court of Appeal held more than 40 years ago in an analogous case concerning the issuance of taxicab certificates to previously certificated operators, "[t]he use of streets by taxicabs is a privilege that may be granted or withheld without violating either due process or equal protection." (See Luxor Cab Co. v. Cahill (1971) 21 Cal.App.3d 551, 558 (Luxor Cab Co.).)

Accordingly, the trial court correctly sustained without leave to amend the City's demurrer to Wawrzynski's claims that its decisions regarding the allocation of restricted pedicab zone decals violated his federal due process rights. (See, e.g., Live Oak Publishing Co., supra, 234 Cal.App.3d at p. 1283 ["If there can be no liability as a matter of law the demurrer should be sustained without leave to amend."].)

B. The Trial Court Erroneously Granted the City's Motion for Summary Judgment

Wawrzynski argues the summary judgment must be reversed because the trial court erroneously ruled all four of his takings claims had no merit. As we shall explain, we agree the court erred in granting summary judgment, because as to Wawrzynski's claims based on the taking of his pedicabs, the City did not sustain its initial burden to show that there was no triable issue of fact and that it was entitled to judgment as a matter of law. We conclude, however, that the court correctly ruled the claims based on the taking of Wawrzynski's pedicab decals had no merit, and the City was thus entitled to summary adjudication on those claims.

1. Standard of Review

A defendant may move for summary judgment on the ground the "action has no merit," i.e., as to each cause of action at issue, the plaintiff cannot establish an essential element or the defendant has a complete defense. (Code Civ. Proc., § 437c, subds. (a), (o)(1) & (2).) To prevail on a motion for summary judgment, the defendant must show that there are no triable issues of material fact, and

that under the applicable law the plaintiff cannot prevail on any asserted cause of action. (Id., subd. (c); Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.) If the defendant fails to make this showing with respect to at least one cause of action, the motion must be denied. (Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal.App.4th 1194, 1224; Mission Ins. Group, Inc. v. Merco Construction Engineers, Inc. (1983) 147 Cal.App.3d 1059, 1064.) On appeal from a summary judgment in favor of a defendant, we review de novo the record that was before the trial court when it ruled on the motion, resolving any doubts in the evidence in favor of the plaintiff. (Hughes v. Pair (2009) 46 Cal.4th 1035, 1039.)

2. Regulatory Takings Claims

The City's motion for summary judgment targeted, among other claims (see fn. 2, ante), the four takings claims Wawrzynski asserted based on the allegedly devastating effect of the new pedicab regulations on his business. In those claims, Wawrzynski alleged the regulations amounted to takings of his pedicabs in violation of the federal and state Constitutions (third & fourth causes of action) and of his property interest in continued receipt of the same number of pedicab decals he had been issued in the past (fifth & sixth causes of action). The trial court considered these claims collectively, ruling that they all had no merit because Wawrzynski "failed to offer admissible evidence that he was unfairly singled out, or that the regulation has deprived him of all economically beneficial use of his pedicabs." After setting forth the general legal principles that govern takings claims of the type asserted by Wawrzynski, we shall explain why the trial court's ruling was partially in error.

a. General Legal Principles

"The state and federal Constitutions prohibit government from taking private property for public use without just compensation." (Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal.4th 761, 773 (Kavanau).)[3] Both Constitutions protect from uncompensated takings not only real property but also personal property. (See, e.g., Phillips v. Washington Legal Foundation (1998) 524 U.S. 156, 160 [interest income]; Andrus v. Allard (1979) 444 U.S. 51, 64 (Andrus) [avian artifacts]; Yancey v. United States (Fed.Cir. 1990) 915 F.2d 1534, 1541 (Yancey) [turkey flock]; City of Oakland v. Oakland Raiders (1982) 32 Cal.3d 60, 67 [contract rights]; Bronco Wine Co. v. Jolly (2005) 129 Cal.App.4th 988, 1030, 1037 (Bronco Wine Co.) [brand names for wine]; Sutfin v. State of California (1968) 261 Cal.App.2d 50, 52, 53 (Sutfin) [motor vehicles].) Further, a prohibited taking may take the form of a physical appropriation or invasion of property (Loretto v. Teleprompter Manhattan CATV Corp. (1982) 485 U.S. 419, 421 (Loretto) [permanent physical occupation by cable television lines]; Armstrong v. United States (1960) 364 U.S. 40, 46, 48-49 [seizure of boat hulls on which claimants held liens]; Sutfin, at p. 52 [damage to motor vehicles]), or a regulation of the use of property that "goes too far" (Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 415 (Pennsylvania Coal Co.); accord, Kavanau, at pp. 773-774; Bronco Wine Co., at p. 1030).

A regulation goes too far if it "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property," in which case a total regulatory taking occurs. (Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 538 (Lingle), quoting Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1019 (Lucas); see Maritrans Inc. v. U.S. (Fed.Cir. 2003) 342 F.3d 1344, 1353 [applying Lucas test to personal property]; but see Hawkeye Commodity Promotions, Inc. v. Vilsack (8th Cir. 2007) 486 F.3d 430, 441 ["it appears that Lucas protects real property only"].) A property regulation also goes too far if it "imposes upon the owner such unreasonable economic loss as to amount to a de facto appropriation of the property," in which case a partial regulatory taking occurs. (Twain Harte Associates, Ltd. v. County of Tuolumne (1990) 217 Cal.App.3d 71, 83 (Twain Harte); see also Franklin Memorial Hospital v. Harvey (1st Cir. 2009) 575 F.3d 121, 127 [taking occurs if regulatory action is functional equivalent of governmental appropriation or ouster]; Yancey, supra, 915 F.2d at p. 1540 [taking occurs if restriction on productive use of property is " 'sufficiently severe' "].)

In a case alleging a partial regulatory taking, i.e., "regulatory action that diminishes but does not destroy the value of property by restricting its use," an "ad hoc factual inquiry is made." (Bronco Wine Co., supra, 129 Cal.App.4th at p. 1035; accord, Lingle, supra, 544 U.S. at pp. 538-540; Yancey, supra, 915 F.2d at p. 1539.) Three factors have particular significance in this inquiry: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 124 (Penn Central); accord, Yancey, at p. 1539; Garcia v. Four Points Sheraton LAX (2010) 188 Cal.App.4th 364, 390.)

Finally, if a regulation of property causes either a total or a partial regulatory taking, a "property owner may bring an inverse condemnation action." (Kavanau, supra, 16 Cal.4th at p. 773; accord, Sutfin, supra, 261 Cal.App.2d at p. 53 ["recovery may be had through inverse condemnation for the taking or damaging of private property for public use, whether said property be real or personal"].) If the owner "prevails, the regulatory agency must either withdraw the regulation or pay just compensation." (Kavanau, at p. 773.)

b. Taking of Pedicabs

In his first set of takings claims (third & fourth causes of action), Wawrzynski alleged that almost all of the business for pedicab owners comes from operating in downtown San Diego, and that the new pedicab regulations have "resulted in a permanent and substantial interference with [the] use and enjoyment of [12 of his] pedicabs," in that he "will be unable to legally rent out [those] pedicabs, and may be forced to close down his business." Such allegations of a substantial impairment of the profitable use of property "suffice[] to allege economic deprivation so severe as to constitute a 'taking.' " (Twain Harte, supra, 217 Cal.App.3d at p. 85.) Therefore, to obtain summary judgment against Wawrzynski, the City "had to present sufficient undisputed facts to establish the [City's pedicab business regulations] did not impose on [Wawrzynski] economic deprivation so onerous as to constitute, in practical effect, an appropriation of [his] property." (Ibid.)

The City, however, submitted no evidence to show the new pedicab business regulations did not, as a practical matter, appropriate several of Wawrzynski's pedicabs by depriving him of all (or at least a substantial part) of their economically beneficial use. Neither the separate statement of undisputed material facts nor the declarations the City submitted in support of its motion for summary judgment even mentioned either the economic impact of the regulations on Wawrzynski's ability to use his pedicabs or the extent of the interference of the regulations with his distinct investment-backed expectations. (See Lingle, supra, 544 U.S. at p. 540 [ad hoc inquiry for regulatory taking "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests"]; accord, Penn Central, supra, 438 U.S. at p. 124.) Instead, the City's separate statement and supporting declarations discussed exclusively the circumstances leading up to and including the City's enactment of the pedicab regulations challenged by Wawrzynski, with an emphasis on how the new regulations substantially advance the public safety interests that led to their enactment. But, this showing was not sufficient to defeat Wawrzynski's takings claims because the United States Supreme Court has held that whether government regulation of private property " 'substantially advance[s] legitimate state interests' " "is not a valid takings test, and indeed conclude[d] that is has no proper place in [its] takings jurisprudence." (Lingle, at pp. 531, 548; see also Yancey, supra, 915 F.2d at p. 1540 ["the Government's proper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking"].)

Accordingly, since the City failed to meet its initial burden in moving for summary judgment to show that Wawrzynski cannot prove the new regulations have caused economic harm sufficient to support his third and fourth causes of action, the burden never shifted to him to produce evidence substantiating those claims. (See Code Civ. Proc., 437c, subd. (p)(2) [once defendant shows plaintiff's claim has no merit, burden shifts to plaintiff to show existence of triable issue of material fact]; Bacon v. Southern Cal. Edison Co. (1997) 53 Cal.App.4th 854, 858 [burden does not shift to plaintiff until defendant shows plaintiff cannot establish essential element of claim].) The trial court therefore erred in granting the City's motion for summary judgment on the ground that Wawrzynski "failed to offer admissible evidence that he was unfairly singled out, or that the regulation has deprived him of all economically beneficial use of his pedicabs."

The City advances several purely legal grounds upon which it contends we may affirm the summary judgment. None is persuasive.

The City first argues that enactment of the pedicab business regulations did not amount to a taking of Wawrzynski's property as a matter of law because the City was merely "abating a public nuisance." (See, e.g., Scott v. City of Del Mar (1997) 58 Cal.App.4th 1296, 1305-1306 [government may abate nuisance without having to pay owner compensation for a taking].) We disagree. Because the operation of pedicabs on city streets is expressly authorized by the San Diego Municipal Code, such operation cannot itself possibly constitute a public nuisance. (Civ. Code, § 3482; Pekarek v. City of San Diego (1994) 30 Cal.App.4th 909, 917-918; Wheeler v. Gregg (1949) 90 Cal.App.2d 348, 370.)

Moreover, the traffic congestion the regulations were designed to relieve (see San Diego Mun. Code, § 83.0101) also cannot constitute a public nuisance because such congestion is "of a temporary nature" and is "incidental to the use for which the street is primarily intended." (People v. Amdur (1954) 123 Cal.App.2d Supp. 951, 959.)

The City next argues no taking has occurred because the pedicab regulations are merely business regulations validly enacted pursuant to its police power to protect the health, safety, and welfare of residents and visitors. "But simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights." (Dolan v. City of Tigard (1994) 512 U.S. 374, 392.) Nor does the City's reliance on the police power defeat Wawrzynski's takings claims, for "the Government's proper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking." (Yancey, supra, 915 F.2d at p. 1540; accord, Massingill v. Department of Food & Agriculture (2002) 102 Cal.App.4th 498, 507 ["Our conclusion that [a statute] is a valid exercise of the police power . . . does not resolve the issue whether it has resulted in a compensable taking under the federal or state Constitution."].)[4] Rather, as previously noted, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (Pennsylvania Coal Co., supra, 260 U.S. at p. 415.) To determine whether a challenged regulation has gone "too far," a court must conduct an ad hoc factual "inquiry [that] turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." (Lingle, supra, 544 U.S. at p. 540; accord, Penn Central, supra, 438 U.S. at p. 124.) The City, however, submitted no evidence in support of its motion for summary judgment that would allow such an inquiry to be made.

In a related argument, the City contends that "in the exercise of its police power, a governmental entity can render businesses worthless and not be forced to pay compensation." For this assertion, the City relies heavily on a portion of the following sentence from Lucas, supra, 505 U.S. at pages 1027-1028: "And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he [i.e., a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." We consider the City's reliance on Lucas to be misplaced, for at least three reasons.

First, we note that in its briefing the City stopped its quotation from Lucas, supra, 505 U.S. at pages 1027-1028, after the word "worthless," deleting the immediately following parenthetical qualifier, which limited the statement to property whose only economically productive use is sale or manufacture for sale. The qualifier, which the Lucas court considered important enough to include in its opinion, renders the rest of the sentence of questionable applicability to this case, because sale or manufacture for sale is not the only (or even the primary) economically productive use of Wawrzynski's pedicabs. Second, the City ignores the context in which the Lucas court made the quoted statement, namely, how takings jurisprudence "has traditionally been guided by the

understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights'[5]that they acquire when they obtain title to property." (Id. at p. 1027.) Indeed, the only case cited by the Lucas court in support of the quoted statement held that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety . . ." under the Penn Central ad hoc analysis. (Andrus, supra, 444 U.S. at pp. 65-66.) Specifically, the Andrus court held the destruction of the right to sell personal property, "unaccompanied by any physical property restriction," was not a taking when the owner retained the rights to possess, transport, donate and devise the property and had other potential means of deriving economic benefit from the property. (Id. at p. 66.) Here, however, the pedicab regulations do physically restrict Wawrzynski's use of the majority of his pedicabs by prohibiting their operation in downtown San Diego. And, the record contains no information about the other strands of the bundle of property rights he retains or other economic benefits he might be able to derive from the pedicabs, which information is needed to conduct the required Penn Central analysis. Third, "[t]he comment in Lucas concerning personal property is dictum, and not dispositive in any event. It may be more difficult to assert a claim in the personal property context, but it is not impossible under current case law." (Maritrans Inc. v. United States (1998) 40 Fed.Cl. 790, 799, fn. omitted.)

In short, the Lucas dictum partially quoted by the City does not by itself defeat Wawrzynski's takings claims as a matter of law. Although Wawrzynski undoubtedly faces an uphill battle under existing case law, an ad hoc factual inquiry nevertheless must be undertaken to determine whether the pedicab regulations have imposed "such unreasonable economic loss as to amount to a de facto appropriation of [his] property." (Twain Harte, supra, 217 Cal.App.3d at p. 83.)

The City's final legal argument is that the new pedicab business regulations do not constitute a taking because they do not totally prohibit the operation of pedicabs, but merely restrict the number that may legally operate in certain areas. Denial of all productive use of property is not required for a regulatory taking, however. (E.g., Palazzolo, supra, 533 U.S. at p. 617.) A regulation "may effect a taking though, as is true here, it does not involve a physical invasion and leaves the property owner some economically beneficial use of his property." (Kavanau, supra, 16 Cal.4th at p. 774.) In such cases, "[o]ur state and federal Supreme Courts have both unequivocally advocated the ad hoc, factor-based approach for analyzing regulatory takings claims. [Citations.] The City attempts to resist [Wawrzynski's] regulatory takings claim by advancing per se rules that are simply inconsistent with the ad hoc analysis that applies to regulatory takings claims." (Cwynar v. City and County of San Francisco (2001) 90 Cal.App.4th 637, 666.)

In sum, as to Wawrzynski's third and fourth causes of action, the City did not "show that there is no triable issue as to any material fact and that [it] is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Therefore, the City's "motion for summary judgment should have been denied because it did not refute tenable pleaded theories." (Hawkins v. Wilton (2006) 144 Cal.App.4th 936, 942; see also Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal.App.4th 1135, 1170

[defendants not entitled to summary adjudication of takings claim when they presented no evidence to show plaintiffs could not establish essential element of claim]; Twain Harte, supra, 217 Cal.App.3d at p. 88 [county not entitled to summary judgment on takings claim when it did not show zoning ordinance did not cause owners severe economic harm].)

c. Taking of Pedicab Decals

Although we must reverse the summary judgment because the City did not show that Wawrzynski's third and fourth causes of action had no merit, we address the trial court's disposition of Wawrzynski's fifth and sixth causes of action because the City alternatively moved for summary adjudication of those claims. (See Code Civ. Proc., § 437c, subd. (f)(2) [summary adjudication may be sought as alternative to summary judgment].) In those causes of action, Wawrzynski alleged the City's pedicab business regulations substantially reduced the number of decals he has been issued to operate pedicabs in downtown San Diego and thereby caused "a permanent and substantial interference with [his] use and enjoyment of" the previously issued decals, in violation of the state and federal Constitutions. In its order granting the City's motion for summary judgment, the trial court agreed with the City that pedicab decals do not create property interests that can be the subject of an inverse condemnation claim. This ruling was correct.

To recover for an uncompensated taking, a plaintiff must plead and prove, among other elements, that the government appropriated or invaded a valuable property right possessed by the plaintiff. (Selby Realty Co. v. City of Buenaventura (1973) 10 Cal.3d 110, 119-120; Bronco Wine Co., supra, 129 Cal.App.4th at p. 1030; Fresno Police Officers Assn. v. State of California (1987) 190 Cal.App.3d 413, 417.) There is no vested or constitutionally protected right to use the public streets to operate a private business. (E.g., Cotta v. City and County of San Francisco (2007) 157 Cal.App.4th 1550, 1560; Sievert v. City of National City (1976) 60 Cal.App.3d 234, 236; Luxor Cab Co., supra, 21 Cal.App.3d at p. 558.) In particular, "[a] license or permit to engage in the taxicab business, issued by the city pursuant to its police power, does not convey a vested property right." (O'Connor v. Superior Court (1979) 90 Cal.App.3d 107, 114.) Further, "to be a protectible property interest, the interest must be more substantial than a mere unilateral expectation of continued rights or benefits." (San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal.App.4th 517, 532.)

Under the foregoing principles, the City's prior issuance of decals allowing Wawrzynski to operate pedicabs on the streets of downtown San Diego conferred no protected property right to continued issuance of the same number of decals each year. The City was therefore entitled to an order summarily adjudicating the fifth and sixth causes of action against Wawrzynski. (See Code Civ. Proc., § 437c, subds. (f)(1), (o)(1); Intrieri v. Superior Court (2004) 117 Cal.App.4th 72, 81 ["When a cause of action lacks merit as a matter of law, summary adjudication is proper."].)

C. Reversal Is Not Required Based on Erroneous Evidentiary Rulings or Judicial Bias

Finally, we address Wawrzynski's two remaining arguments for reversal: certain evidentiary rulings were erroneous, and the trial court ruled against him out of bias in favor of the City. Neither has merit.

Wawrzynski challenges the trial court's orders striking one of the declarations he submitted in opposition to the City's motion for summary judgment, overruling his objections to some of the evidence submitted by the City, and sustaining the City's objections to some of the evidence he submitted. None of the evidence that was the subject of these rulings has any bearing on our holdings that summary judgment must be reversed (because the City submitted no evidence showing that Wawrzynski cannot prove economic deprivation sufficient to support his third and fourth causes of action), and that the City is entitled to summary adjudication on the fifth and sixth causes of action (because those claims fail as a matter of law). Therefore, we need not, and do not, consider the challenged evidentiary rulings. (See, e.g., Shaw v. County of Santa Cruz (2008) 170 Cal.App.4th 229, 259 [declining to resolve issues raised by appellant but unnecessary to appellate decision].)

As purported support for his claim of judicial bias, Wawrzynski's counsel rails against the trial judge (Hon. Timothy B. Taylor), asserting he "is by far the most pathetic excuse of a judge Plaintiffs' counsel has ever seen." This and other intemperate statements in Wawrzynski's briefing (e.g., "Taylor chose to rant and rave about Plaintiff's objections and deny every single one, while admit [sic] most of Defendants' [sic] frivolous objections"; "Proceedings should also be commenced to remove Taylor from public office") indicate that Wawrzynski (or at least his counsel) believes the trial judge is incompetent and ruled against him out of bias. This claim of error has been forfeited, however, because Wawrzynski did not raise it in the trial court. (E.g., People v. Farley (2009) 46 Cal.4th 1053, 1110 (Farley); Moulton Niguel Water Dist. v. Colombo (2003) 111 Cal.App.4th 1210, 1218 (Moulton Niguel).) In any event, Wawrzynski's claim of judicial bias has no merit, for at least three reasons.

First, a trial court's rulings against a party, even when numerous and erroneous, do not establish judicial bias. (Farley, supra, 46 Cal.4th at p. 1110; Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 795-796.) Second, although Wawrzynski obviously disagrees with the reasons the trial court stated for overruling his evidentiary objections, "[w]e will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (Moulton Niguel, supra, 111 Cal.App.4th at p. 1219.) Third, the allegations in Wawrzynski's brief (e.g., "Taylor is by far the most pathetic excuse of a judge Plaintiff's counsel has ever seen"; "Taylor might have removed or neglected some of Plaintiff's documents, or pressured others to do so"; "He appears to be part of the San Diego ruling class") do not establish bias. We will not respond to each of these charges. Suffice it to say that we have reviewed the record and found nothing that suggests "a reasonable person would entertain doubts concerning the judge's impartiality" (Christie v. City of El Centro (2006) 135 Cal.App.4th 767, 776) or that " 'would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal' " (Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal.App.4th 994, 1008).

Finally, we must admonish Wawrzynski's counsel about the inappropriate statements in his briefs attacking the trial judge personally. We remind counsel he is an officer of the court and has a duty "[t]o maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code, § 6068, subd. (b); see People v. Massey (1955) 137 Cal.App.2d 623, 626.) When briefing an appeal, an attorney should not launch an "ad hominen attack" on the trial judge; "[i]t is unseemly, and unpersuasive." (Niles Freeman Equipment v. Joseph (2008) 161 Cal.App.4th 765, 794-795.) Counsel's "personal attacks are inexcusable" (Fink v. Shemtov (2010) 180 Cal.App.4th 1160, 1176), and we condemn his lack of professionalism.

DISPOSITION

The order sustaining without leave to amend the City's demurrers to the 9th, 11th and 12th causes of action is affirmed.

The judgment and order granting the City's motion for summary judgment are reversed. The matter is remanded to the trial court with directions to deny the City's alternative motion for summary adjudication as to Wawrzynski's third and fourth causes of action for uncompensated takings of his pedicabs in violation of the federal and state Constitutions, and to grant that motion as to all other causes of action that were the subject of the motion.

The parties shall bear their own costs on appeal.

WE CONCUR: BENKE, Acting P.J. MCDONALD, J.

1. A pedicab is defined, somewhat incongruously, as "(a) A bicycle that has three or more wheels, that transports, or is capable of transporting, passengers on seats attached to the bicycle, that is operated by a person, and that is used for transporting passengers for hire; or (b) A bicycle that pulls a trailer, sidecar, or similar device, that transports, or is capable of transporting, passengers on seats attached to the trailer, sidecar, or similar device, that is operated by a person, and that is used for transporting passengers for hire." (San Diego Mun. Code, § 83.0102, italics omitted.)

2. The trial court also sustained without leave to amend a demurrer to another cause of action, and its order granting the City's motion for summary judgment disposed of five additional causes of action. Because Wawrzynski has not raised any claims of error regarding the court's disposition of these causes of action, he has abandoned any such claims. (See, e.g., Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal.App.4th 1171, 1177.)

3. The federal Constitution provides: "[N]or shall private property be taken for public use, without just compensation." (U.S. Const., 5th Amend.; see Palazzolo v. Rhode Island (2001) 533 U.S. 606, 617 (Palazzolo) [takings clause applies to states through 14th Amend.].) The state Constitution provides: "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid . . ." to the owner. (Cal. Const., art. I, § 19, subd. (a).)

4. If we were to accept the contention that there is an exception to the requirement to pay just compensation whenever

the City regulates property under its police power, it would "become[] the exception which swallows the rule, an intolerable result." (Morton Thiokol, Inc. v. United States (1984) 4 Cl.Ct. 625, 630.)

5. The strands in the bundle of rights that make up property generally include the right to exclude others from the property, and the rights to possess, use and dispose of it. (Loretto, supra, 458 U.S. at pp. 433, 435.)