No. 18-6813

IN THE

SUPREME COURT OF THE UNITED STATES

RASH B. GHOSH,

Petitioner,

v.

CITY OF BERKELEY,

Respondent

On Petition For a Writ of Certiorari
To The California Court of Appeal,
First Appellate District

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED

Following extensive litigation between petitioner and the City of Berkeley, the City filed a motion to have petitioner declared a vexatious litigant, citing Calif. Code of Civil Procedure section 391, which defines a vexatious litigant as someone who repeatedly relitigates, "[a]fter a litigation has been *finally determined* against the person," the validity of the determination against the defendant "as to whom the litigation was *finally determined*," or who relitigates issues "concluded by the *final determination* against the same defendant or defendants as to whom the litigation was *finally determined*. [Italics added.]

The City's motion set forth a table listing 14 "items," including pleadings and papers which, in the City's words, "sought to relitigate the following matters that had already been decided." (CT 11.) The first seven items were filed before the judgment became "finally determined." Six of the remaining items were objections or requests to transfer the case to a different judge. The one remaining item sought to relitigate a ruling, but one item is not "repeatedly" relitigating anything.

The trial court found petitioner to be a vexatious litigant.

Petitioner appealed, arguing that almost all of the 14 pleadings did not qualify as relitigation. The City, in its answering brief, raised for the first time and without presenting any evidence that five other "judgments" qualified as relitigation. The California Court of Appeal based its affirmance on the City's new arguments.

The question presented is, was petitioner deprived of due process of law when the appellate court based its decision on an argument that had never been raised in the trial court?

PARTIES TO THE PROCEEDINGS

Petitioner Rash B. Ghosh was Plaintiff and Cross-Defendant and Appellant below.

Respondent City of Berkeley was the Defendant and Cross-Complainant and Respondent below.

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IN THE UNITED STATES SUPREME COURT

RASH B. GHOSH,

Petitioner,

v.

CITY OF BERKELEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Rash B. Ghosh petitions for a writ of certiorari to the California Court of Appeal, First District, to review its decision affirming the trial court's finding that he is a vexatious litigant, which requires him to post a security bond before filing any new lawsuits.

OPINIONS BELOW

The order of the California Court of Appeal dismissing the appeal appears as Appendix B, and is unreported. The order of the California Supreme Court denying discretionary review appears as Appendix C, and is unreported.

JURISDICTION

The California Supreme Court denied discretionary review of petitioner's state appeal on August 22, 2018. This petition is filed within 90 days of that court's order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

STATUTES INVOLVED

Title 3A of the California Code of Civil Procedure, "Vexatious Litigants," states, in pertinent part (with specific provisions relevant to this case in italics):

§ 391 Definitions

As used in this title, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

(b) "Vexatious litigant" means a person who does any of the following:

* * *

(2) After a litigation *has been finally determined* against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation *was finally determined* or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded *by the final determination* against the same defendant or defendants as to whom the litigation *was finally determined*.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

§ 391.1 Motion for order requiring security: grounds

In any based on a complaint litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security or for an order dismissing the litigation pursuant to subdivision (b) of Section 391.3. The motion for an order requiring the plaintiff to furnish security shall be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he or she will prevail in the litigation against the moving defendant.

§ 391.3 Order to furnish security; amount; dismissal of litigation

(a) Except as provided in subdivision (b), if, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.

(b) If, after hearing evidence on the motion, the court determines that the litigation has no merit and has been filed for the purposes of harassment or delay, the court shall order the litigation dismissed. This subdivision shall only apply to litigation filed in a court of this state by a vexatious litigant subject to a prefiling order pursuant to Section 391.7 who was represented by counsel at the time the litigation was filed and who became in propria persona after the withdrawal of his or her attorney.

(c) A defendant may make a motion for relief in the alternative under either subdivision (a) or (b) and *shall combine all grounds for relief in one motion.*

STATEMENT OF THE CASE

This action arises out of earlier litigation between petitioner and the City of Berkeley, and others. The specific issues involved in the earlier litigation are not material to the present proceedings. In short explanation, the City was instrumental in placing two adjacent buildings owned by petitioner (one of which was his principal residence) into receivership, based on contested allegations that the buildings violated the City's building and zoning codes. The court ordered repairs to be made at petitioner's expense, and petitioner deposited $160,000 with the court to cover the cost of the anticipated repairs. However, no repairs were made. Instead, the court ordered the receiver to sell the property, which he did. Then, instead of returning petitioner's deposit for repairs, the court ordered the money transferred into the escrow fund to offset fees and expenses associated with the sale. Later petitioner found out that the only bidder on the property was a partner in the real estate agency the receiver had retained to sell the property. In the end, petitioner ended up losing his property and losing his $160,000 deposit.

As one might expect under such circumstances, petitioner brought lawsuits against the City and individuals involved in the expropriation of his property. In the case now before the court, petitioner unsuccessfully sought to set aside the judgment against him and his property, and the City moved for the court to declare petitioner a vexatious litigant. The California Code of Civil Procedure provides that if a *pro se* plaintiff-litigant is shown by the defendant to meet certain specified criteria listed in the statute, the plaintiff can be declared a vexatious litigant, subjecting him to dismissal of the litigation he has instituted and requiring him to post a security bond before he can file further actions. The statute requires that

the defendant's motion "shall combine all grounds for relief in one motion." Calif. Code Civ. Proc. § 391.3(c).

Grounds for such a motion include (1) "repeatedly" relitigating the same claims or issues that have been "finally determined" in favor of the defendant, or (2) "repeatedly" filing unmeritorious motions, pleadings or other papers, or engaging in tactics that are frivolous or solely intended to cause unnecessary delay. Calif. Code Civ. Proc. § 391 (b)(2) & (3).

"After a litigation has been finally determined" means when avenues of appeal have been exhausted, and thus "motions for reconsideration and appeal before a judgment is final for all purposes would not support a vexatious litigant finding under section 391, subdivision (b)(2)." *Holcomb v. U.S. Bank Nat. Ass'n*, 129 Cal.App.4th 1494, 1502 (2005). Motions to vacate are part of the same litigation. Id. at 1503 ["we conclude the motion to vacate was not an attempt to relitigate a litigation that was 'finally determined.' "].

The City's Motion Did Not Allege Grounds for Finding Petitioner a Vexatious Litigant.

The City's motion appears to have been an attempt to assert the first ground described by the statute for declaring someone a vexatious litigant, namely, repeatedly relitigating claims or issues that had already been "finally determined" in favor of the defendant. The City's motion set forth 14 specific pleadings and papers which, in the City's words, "sought to relitigate the following matters that had already been decided." (CT 11.)[1] The City concludes its legal argument with the statement, "Ghosh's

[1] Petitioner's references are to the Clerk's Transcript (CT) that was part of the record on appeal in the California Court of Appeal, should the Court deem reference to the record necessary.

pleadings exemplify the definition in Section 391(b)(2) and (3), of a person who relitigates by virtue of repeated meritless motions and pleadings, issues that have already been finally adjudicated against him." (CT 13.)

Here is the City's table of the pleadings it claims support its motion. (CT 11-12):

Pleading	Date	Issue Sought to be Relitigated
1. Opposition to Motion for Order Approving Final Report of Receiver	Nov. 10, 2014	Existence of code violations and nuisance (pp. 2-3, 5)
2. Opposition to Motion for Order Approving Final Report of Receiver; Declaration	Nov. 17, 2014	Order to sell property' condition of property and repair of code violations
3. Motion to Set Aside Order Approving Final Report of Receiver; Memorandum of Points & Authorities; Exhibits; Declaration	Jan. 30, 2015	Approval of final report of receiver
4. Letter to Executive Officer of the Court	June 15, 2015	Order directing receiver to disburse funds (entered April 29, 2015)
5. Letter to Presiding Judge Winifred Smith	July 13, 2015	All issues as of that, including allegations raised in another case against the City
6. Motion to Reconsider Judgment	Aug. 4, 2015	Existence of code violations and nuisance; receivership proceedings
7. Ex Parte Application to Continue Motion for Reconsideration	Aug. 14, 2015	Court's previous denial of City's application for continuance

8. Objection to Judge Presiding at Hearing of August 18, 2015 (Motion to Reconsider)	Sept. 18, 2015	Court rulings on *ex parte* applications for continuance
9. Supplemental Memorandum of Points & Authorities in Support of Objection to [sic.] Motion to Set Aside Order of Discharge of Receiver	Oct. 5, 2015	All proceedings to date in nuisance case, including receivership phase
10. Objection to Judge Ruling on § 473 Motion After He Has Been Disqualified	Oct. 21, 2015	Order striking challenge under CCP § 170.1, entered previous day
11. Motion to Reconsider Order Denying Motion to Vacate/Set Aside	Nov. 2, 2015	Order striking challenge under CCP § 170.1, entered previous day
12. Ex Parte Application to Transfer Case to Department 18	Dec. 17, 2015	Same as above
13. Letter to Judge Colwell (37 pages)	Dec. 21, 2015	Presumed same (not served on City)
14. Reservation for Motion to Vacate/Set Aside	Dec. 30, 2015	Judgment entered July 2015 (presumed)

None of the items had resulted in sanctions or admonishments by the trial court. More important, the statute, as we have said, requires that the claims or issues in question must have previously been "finally determined," that is, when avenues of appeal have been exhausted. *Holcomb v. U.S. Bank Nat. Ass'n, supra*, 129 Cal.App.4th 1494, 1502; *Childs v. PaineWebber Incorporated*, 29 Cal.App.4th 982, 993 (1994) ["finally determined" means "when all avenues for direct review have been

exhausted"]. The time for filing a notice of appeal in California is 60 days after either the court clerk or a party serves a "Notice of Entry" of judgment on the other parties. Rule 8.104(a), California Rules of Court. As the City's Motion states (CT 8), the judgment in this case was entered July 15, 2015. No appeal was taken from the judgment. so this means that the earliest the judgment could be deemed "finally determined" was Monday, September 14, 2015, when petitioner's avenues of appeal expired.

It is immediately apparent that the first seven items alleged in the City's motion did not relitigate matters "finally determined," because they all took place before September 14, 2015, before the judgment was "finally determined." By definition, they were not, and could not be, grounds for a vexatious litigant finding, because "motions for reconsideration and appeal *before a judgment is final* for all purposes would not support a vexatious litigant finding under section 391, subdivision (b)(2)." *Holcomb v. U.S. Bank Nat. Ass'n, supra,* 129 Cal.App.4th, at 1502 [italics added].

Of the remaining seven items, two (Items 8 and 10) are objections (which must be made on penalty of waiver) and one (Item 9) is a set of supplemental points & authorities in support of one of the objections. Two (Items 12 and 13) are an application and a letter asking that the case be transferred to another Department or kept in Judge Colwell's Department. A sixth item (No. 14) is not even a paper that was filed—it is just an entry on the docket showing that petitioner telephoned the court to reserve a place on the motion calendar.[2]

None of these things seek to "relitigate" anything.

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[2] The City conceded in their Respondent's Brief that was filed in the Court of Appeal that this phone call could not be charged against appellant. See Respondent's Brief, p. 11.

Only one item, No. 11, a Motion to Reconsider a previous order denying a motion, could arguably be said to be an attempt to relitigate a matter. That is only one item. One item cannot be said to be "repeatedly" attempting to relitigate a final determination. *Holcomb v. U.S. Bank Nat. Ass'n, supra,* 129 Cal.App.4th, at p. 1505 ["we view the Legislature's use of the adverb 'repeatedly,' as referring to a past *pattern or practice* on the part of the litigant that carries the risk of repetition in the case at hand" (italics added)].

The City Presented No Evidence in Support of Its Allegations.

Not only did the City's motion fail to *allege* that petitioner attempted to "repeatedly relitigate" a claim or issue, the City offered no *evidence* to support its allegations. *Bravo v. Ismaj,* 99 Cal.App.4th 211, 219 (2002) ["We uphold the court's ruling if it is supported by substantial evidence"]. The moving party cannot simply point to a series of motions that the other party has filed; the movant must show *why* the motions had no merit. *Golin v. Allenby,* 190 Cal.App.4th 616, 639 (2010) ["none of the defendants offered any evidence going to the merits of any claims or causes of action" other than pointing to two prior orders in their favor]; *Holcomb v. U.S. Bank Nat. Ass'n, supra,* 129 Cal.App.4th 1494, 1506 ["It is difficult, if not impossible, to make a determination under subdivision (b)(3) simply by resort to a docket sheet."

The City's motion did not offer any alternative grounds why appellants motions and pleadings were "tactics that are frivolous or solely intended to cause unnecessary delay," which is a potential, but different, grounds for a vexatious litigant finding. Calif. Code Civ. Proc. § 391 (b)(3). "Not all failed motions can support a vexatious litigant designation"

Morton v. Wagner, 156 Cal.App.4th 963, 972 (2007), and potential grounds that *could* have been alleged are not grounds for a motion.[3]

"Only the grounds specified in the notice of motion may be considered by the trial court." *Gonzales v. Superior Court*, 189 Cal.App.3d 1542, 1545 (1987). Here all the trial court (and the appellate court, too) had to go on was the 14 items set forth by the City, because the City's Notice of Motion itself does not state any other grounds, or indeed any specific grounds at all for the motion (CT 1-2); the word "grounds" does not appear at all in the Notice of Motion or in the accompanying Points and Authorities. (CT-4-14.)

All the foregoing shortcomings in the City's motion were presented to the Court of Appeal in Appellant's Opening Brief. The City's Respondent's Brief consisted largely of invective directed against petitioner, and was no less vague than was its motion in the trial court, arguing in conclusory terms that Ghosh's "motions and other papers" sought to relitigate unspecified "issues that had been determined in all those final judgments and determinations." (Respondent's Brief, p. 9.)

The City was no more specific with regard to Items 8-11; the City simply says they were "part and parcel" of one of the motions (Item 6, which was filed before the judgment was final). (Respondent's Brief, p. 10.) As to Items 12 and 13, the City made a similar argument, that they were "improper continuations of Appellant's attempt to have the case heard by a judge other than Judge Roesch." (Respondent's Brief, p. 11.)

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[3] Rule 3.1113(b) of the California Rules of court requires the Memorandum of Points and Authorities contain a "discussion" of the law "in support of the position advanced." (See *Cooking Concepts, Inc. v. LV Assocs., Inc.*, 197 Cal.App.4th 927, 934 (2011) [the policy behind rule 3.1113 is to prevent casting the trial court as a tacit advocate for the moving party's theories].)

Something that is "part and parcel" and a "continuation" of other specific items, does not count as "repeatedly" seeking to relitigate a determination—they are all the same thing—mostly objections.

Thus the City's motion should have been denied out of hand, and the trial court's ruling reversed on appeal; it is not even a close question. Petitioner did not meet the statutory criteria of a vexatious litigant.

The Appeal, Decided on New and Different Allegations, Did Not Give Petitioner an Opportunity to Contest the New Grounds.

It is elementary that a litigant cannot adopt a new theory on appeal. "A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*DiCola v. White Brothers Performance Products, Inc., 158* Cal.App.4th 666, 676 (2008); *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal.App.4th 820, 846 (1997) [same].

When the law—even it is only a state law—provides for a procedural right to protect against arbitrary acts by the government, a litigant has a substantial and legitimate expectation that he will not be deprived of his property, particularly his residence, except according to that law, and that right "is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *HIcks v. Oklahoma*, 447 U.S. 343, 346 (1980) [imposition of punishment in criminal case in violation of state law].

The City—perhaps having become aware of the shortcomings of its motion—for the first time in the case switched horses in midstream and argued (Respondent's Brief, p. 8-9) that there were five other judgments, described only in the vaguest of terms, that (they say) would qualify as

judgments being relitigated. One cannot tell from the brief what issues were litigated, let alone determine what was decided. The statute requires that the City's motion "shall combine all grounds for relief in one motion," Calif. Code Civ. Proc. § 391.3(c), but even if one treated the Respondent's Brief as a new motion filed in the Court of Appeal, it does not state "what issues of fact or law" were determined in those other judgments, or even allege that petitioner was acting *pro se*. See Calif. Code Civ. Proc. § 391(b)(2). Nor does the City's brief attempt to say how any of Items 1-14 attempted to relitigate those issues.

One might think the City's disregard of the applicable rules would result in sanctions by the appellate court. Instead the opinion of the Court of Appeal accepted the City's new argument (slip opn., p. 2-3), and relied on it as the *sole* reason for affirming the judgment of the trial court.

The opinion does not explain or suggest how these new judgments meet the criteria of the Code of Civil Procedure, Instead, the opinion (pp. 2-3) merely repeats the City's vague allegations about other judgments. Then the opinion faults appellant for not responding to that argument—an argument raised for the first time on appeal.[4]

Moreover, a reply brief is always optional, see Rule 8.200(a)(3), Calif. Rules of Court ["Each appellant may serve and file a reply brief"]; *Ellerbee v. County of Los Angeles*, 187 Cal.App.4th 1206, 1218, fn. 4 (2010) ["while such briefs may be advisable, they are not required"]), because a Respondent (a party who responds) cannot affirmatively raise new issues

[4] The opinion says appellant "failed to file a reply brief addressing respondent's argument that he repeatedly sought to relitigate matters finally determined in the separate prior proceedings." The Court of Appeal docket shows the court denied appellant's request to file a late reply brief, lodged with the court September 14, 2017, some eight months before oral argument.

for the first time on appeal. Here the City did so and the Court of Appeal treated those new issues as if they were proper for a respondent to raise, stating that the appellant court would "not endeavor to respond to respondent's arguments on appellant's behalf." (Slip opn., p. 2.)

Moreover, the appellate court should have been aware a respondent cannot on appeal make allegations that had never been raised in the trial court, because petitioner pointed out in his opening brief to the appellate court that the City cannot do something like that. He said, at pp. 14-15 of his opening brief [italics added]:

> Fundamental fairness demands that the opposing party be given an opportunity to dispute the moving party's arguments, which cannot be done if he must guess the moving party's theories. This is why *a respondent may not argue a previously unstated theory for the first time on appeal.* "A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." *Ernst v. Searle* 218 Cal. 233, 240-241 (1933).

WHY THE PETITION SHOULD BE GRANTED

By *sua sponte* deciding petitioner's appeal on grounds neither asserted in the trial court nor based on any evidence presented to either the trial or appellate court, the California Court of Appeal deprived petitioner of due process of law and ultimately an opportunity to recover the property he was deprived of. Clearly established law preclude an appellee from raising new issues on appeal, where the appellant was given no notice or opportunity to be heard and present evidence on his behalf in the trial court. *Day v. McDonough*, 547 U.S. 198, 210 (2006) ["Of course, before

acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions"].

The proper place for the City to present grounds for a motion to deprive a litigant of his property and his access to the courts is, in the first instance, the trial court, where a litigant can respond orally and in writing and present rebuttal affidavits and evidence. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); compare *Barry v. Barchi*, 443 U. S. 55, 65 (1979) [no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story"].

It is essential to the rights of all persons that our system of justice be administered fairly, and it is essential that all litigants be given the opportunity to present argument and evidence on their behalf. Here the California Court of Appeal arbitrarily deprived petitioner of a fair hearing on his appeal. When a new issue is raised, it needs a hearing in the trial court, not an appellate court.

The decision of the court was manifestly unjust, and can only be corrected if this Court will grant this petition.

Respectfully submitted,

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