CITY OF RIVERSIDE, Plaintiff and Appellant, v. VALLEY OUTDOOR, INC., Defendant and Appellant.

E036258

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

2005 Cal. App. Unpub. LEXIS 8211

September 13, 2005, Filed

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PRIOR HISTORY: APPEAL from the Superior Court of San Bernardino County, No. SCVSS115579. Keith D. Davis, Judge.

DISPOSITION: Reversed and remanded with directions.

COUNSEL: Gregory P. Priamos, City Attorney, James E. Brown, Supervising Deputy City Attorney; Bell, Orrock & Watase, Michael A. Bell; Greines, Martin, Stein & Richland, Timothy T. Coates and Alan Diamond for Plaintiff and Appellant.

Van Etten Suzumoto & Becket, Eliot G. Disner and Darrel C. Menthe for Defendant and Appellant.

JUDGES: RICHLI J.; HOLLENHORST Acting P.J., GAUT J. concurred.

OPINION BY: RICHLI

OPINION:

This action concerns five billboards built and maintained by Valley Outdoor, Inc. (Valley). The billboards violated a city ordinance governing signs. Valley, however, filed an action against the City of Riverside (the City) in federal court for a declaration that the sign ordinance violated the First Amendment and to enjoin **[*2]** the City from enforcing it against Valley's billboards.

Shortly thereafter, in a case to which Valley was not a party, this court held that portions of the sign ordinance violated the First Amendment (although we upheld other portions). When the City, attempting to comply with our opinion, amended the sign ordinance, Valley promptly amended its federal complaint so as to challenge the amended sign ordinance.

The federal court entered judgment in favor of the City. It ruled that the City was entitled to remove the billboards because Valley had built them without first obtaining permits or inspections, as required. It further ruled that, in light of this conclusion, it did not need to consider Valley's claims

that: (1) the amended sign ordinance was unconstitutional in other respects, (2) a permit application would have been futile, or (3) the City had a practice of accepting late-filed permit applications.

Valley appealed the federal judgment to the federal Court of Appeals for the Ninth Circuit (Ninth Circuit). In connection with that appeal, Valley sought a stay preventing the City from requiring the removal of the billboards while the appeal was pending. Both the federal court **[*3]** and the Ninth Circuit refused to issue such a stay (although the federal court did enjoin the City from requiring the removal of the billboard foundations).

The City then filed this action in state court to require Valley to remove the billboards. Moreover, the City filed a motion for a preliminary injunction requiring the removal of the billboards (except for the foundations) before trial. The trial court ruled that, by virtue of the collateral estoppel effect of the federal judgment, the City was entitled to a preliminary injunction. However, it also ruled that, in light of the possibility that the Ninth Circuit might reverse the federal judgment, it would not require the removal of the billboards. Instead, it enjoined Valley from displaying any commercial advertising on them.

Both sides appeal. Valley contends the trial court erred by issuing any injunction at all; it argues that the federal judgment did not resolve all of its challenges to the enforcement of the amended sign ordinance, that it was likely to succeed on the merits of those challenges, and that an injunction was barred by laches. The City contends the trial court erred by refusing to require the removal of the billboards. **[*4]**

We will hold that, under the doctrine of collateral estoppel, the federal court's rulings required the trial court to issue the injunction the City was seeking. Valley has already litigated all of the factual and legal claims it is raising here, and lost. Although the federal court stopped short of ordering removal of the billboards, it clearly ruled that the City was entitled to their removal. Accordingly, we will reject Valley's appeal and we will uphold the City's.

I

FACTUAL BACKGROUND

A. *The Original Sign Ordinance*.

In 1987, the City adopted an ordinance governing signs (original sign ordinance). It was codified as chapter 19.76 of the Riverside Municipal Code. It prohibited all "off-premises" signs, subject to certain exceptions. (Former Riverside Mun. Code, § 19.76.020(A)(3).) One such exception was that billboards were permitted in two specified zones, but only if they met certain square footage, height, and location restrictions. (Former Riverside Mun. Code, § 19.76.020(B)(2).) For example, a billboard could not be located within 750 feet of a freeway. (Former Riverside Mun. Code, § 19.76.020(B)(2)(a)(vii).)

The original sign ordinance required a permit **[*5]** for the erection, construction, or installation of almost any sign. (Former Riverside Mun. Code, § 19.76.210(1).) It established a permit fee. (Former Riverside Mun. Code, § 19.76.210(4).) If construction was begun before a permit was obtained, a higher permit fee applied. (Former Riverside Mun. Code, § 19.76.210(5).)

Like other structures, a sign had to have design review approval before a permit would issue (Riverside Mun. Code, §§ 19.62.020(B), 19.62.030, 19.62.040; former Riverside Mun. Code, § 19.76.210(1)) and had to be built in accordance with the Uniform Building Code. (Former Riverside Mun. Code, § 19.76.210(16).) Moreover, an electrical sign had to be installed in accordance with the Uniform Electrical Code. (Former Riverside Mun. Code, § 19.76.210(17).)

B. *The Construction of the Billboards*.

On October 19, 1999, we issued our tentative opinion in *City of Riverside v. Outdoor Media Group, Inc.*, Case No. E022351 (*OMG*). We proposed to hold that the ban on off-premises signs in the original sign ordinance violated the First Amendment and, hence, that the exceptions to the ban also violated the First Amendment. However, we proposed to hold that the remaining **[*6]** portions of the ordinance were severable and enforceable. n1 The ban on billboards within 750 feet of a freeway was one of the portions we struck down; the permit requirement was one of the portions we upheld.

n1 We take judicial notice of the date on which we issued our tentative opinion. (*Evid. Code, §§ 452*, subd. (d)(1), 459, subd. (a).) In addition, we accept Valley's representation that the tentative opinion was substantially similar to the final opinion, because it is not crucial to our decision and because the City does not appear to dispute it.

On January 8, 2000, Valley began building five billboards. It did not apply for permits because it knew that the billboards violated the original sign ordinance, and therefore the City would refuse to issue them.

On January 10, 2000, Valley filed an action against the City in federal court, challenging the original sign ordinance on First Amendment grounds.

On January 13, 2000, we filed our final opinion in *OMG.* It was essentially the **[*7]** same as our tentative opinion.

On January 20, 2000, an officer of Valley went to the City's Office of Building and Safety with the intention of applying for "all necessary permits" for the billboards. A City official, however, refused to accept the application, on the ground that billboards were not allowed within 750 feet of a freeway.

On February 1, 2000, in response to our opinion in *OMG*, the City amended the original ordinance. The amendments, however, were not due to go into effect until March 2, 2000. Valley soon amended its federal complaint so as to challenge the amended sign ordinance on First Amendment grounds.

Meanwhile, by February 20, 2000, the billboards were complete. On February 25, 2000, an officer of Valley submitted design review permit applications for the billboards. He was told that, if the City needed any further information, it would send a "correction letter." Nevertheless, in a notice mailed on March 1, 2000 (and hence not received until March 2 or later), the City rejected the applications on the ground that they did not adequately specify the color and material of the supporting columns. It invited Valley to reapply. In Valley's view, the City was **[*8]** simply stalling until the amended sign ordinance could go into effect.

On March 3, 2000, the City posted stop-work notices on the billboards, citing the fact that they had been built without permits. On or about May 14, 2000, the City served Valley with notices ordering it to remove the billboards, citing several grounds, including that they had been built without permits.

C. *The Federal Court's Rulings.*

On July 10, 2000, the federal court issued a preliminary injunction enjoining the City from compelling Valley to remove the billboards.

On October 21, 2003, the date set for trial, the City brought a motion in limine to preclude any evidence or argument that it had "improperly, unlawfully or unconstitutionally handled or refused to accept or process permit applications and/or design[] approval applications allegedly submitted to

the City . . . ." It argued that this issue was irrelevant because Valley admitted building the billboards without permits, and the City was entitled to remove them for that reason alone.

In opposition, Valley argued that the City had a practice of allowing late-filed permit applications. It also claimed the City had rejected its permit applications **[*9]** as a covert way of continuing to enforce the unconstitutional provisions of the original sign ordinance. Valley specifically argued "that applying for a permit would have been a futility and that [it] should be excused from doing so."

The federal court granted the motion in limine. It reasoned, essentially, that the City's permit requirement had not been struck down in *OMG* and did not violate the First Amendment. Hence, based on Valley's admission that it had finished the billboards before even applying for permits, the City could require removal of the billboards, based on the permit requirement, without violating the First Amendment. The federal court concluded that whether (1) the City had improperly processed Valley's permit applications, or (2) the City had a practice of accepting late-filed permit applications were irrelevant to the City's right to removal of the billboards.

The federal court also ruled that, once it had granted the motion in limine, the City was entitled to judgment as a matter of law. It indicated that it would modify the existing preliminary injunction, pending any appeal, so as to require Valley to remove the billboards down to the foundations, while **[*10]** preventing the City from requiring Valley to remove the foundations -- the most expensive part.

Accordingly, on November 5, 2003, the federal court entered judgment in favor of the City and modified the preliminary injunction pending appeal.

Valley filed a motion for new trial, arguing, among other things, that the federal court had erred by failing to consider (1) its constitutional challenges to the amended ordinance, (2) the availability of a late-filed permit, and (3) whether a permit application would have been futile.

On December 22, 2003, the federal court denied the new trial motion. It commented, "I narrowly . . . decided this case . . . on the basis that [Valley was] barred . . . from introducing any evidence . . . that the city improperly refused to accept its post-construction permit applications. . . . We never got to the content . . . . Never got to the constitutional validity of the new ordinance with regard to content regulation. . . . But I don't think we needed to do that based upon the fact that there was never a permit obtained . . . ."

On January 7, 2004, Valley filed a notice of appeal. At the same time, it asked the Ninth Circuit for an emergency stay pending **[*11]** appeal. It argued again that the federal court had erred by failing to consider (1) its constitutional challenge to the amended ordinance and (2) the availability of a late-filed permit.

On January 15, 2004, the Ninth Circuit denied Valley's motion for a stay. Sua sponte, however, it ordered "a limited remand . . . to the district court for the sole purpose of adjudicating any issues between the parties in respect to the removal of nonconforming structures pending appeal."

On February 23, 2004, at the hearing on the limited remand, Valley asked the federal court to enjoin the City from requiring removal of the billboards. As a fallback, however, it asked the court *not* to order *it* to remove the billboards. It noted that its complaint merely sought an order *preventing* the City from removing the billboards; the City had never cross-complained for an order affirmatively *requiring* their removal.

The federal court refused to enjoin the City from removing the billboards; it reasoned that the Ninth Circuit had already refused to do so. However, it accepted Valley's fallback argument: "The only thing I can do is the lawsuit would be dismissed and the City could go ahead with **[*12]** its abatement proceeding, according to its local ordinances and state law." It therefore further modified

the existing injunction so that it enjoined only the City, and then only from removing the foundations of the billboards. n2

n2 Our record does not contain any written order modifying the injunction to conform to this oral ruling. Nevertheless, there seems to be no dispute that the injunction was effectively modified.

The federal court concluded: "The City can institute its abatement proceedings and whatever defenses [Valley] may have, [Valley] may raise." It observed, however: "Based upon this record . . . the Superior Court Judge will order . . . immediate abatement and whether or not he stays it pending the Ninth Circuit ruling, that's going to be up to the Superior Court Judge."

II

PROCEDURAL BACKGROUND

The City filed this action against Valley. It alleged, among other things, causes of action for abatement of the billboards as a public nuisance, on the grounds that (1) they had been built **[*13]** without building, electrical, or use permits and without structural or electrical inspections, and (2) they violated the amended sign ordinance. The City also filed a motion for a preliminary injunction requiring Valley to remove the billboards.

At the hearing on the motion, the trial court indicated that it would grant a preliminary injunction. It agreed with the City's contention that the federal judgment was collateral estoppel on the merits. It then commented: " . . . I am reluctant to fashion an order today that would allow the actual physical tear[-]down of the billboards. And the reason I am reluctant is there still is the pending appeal before the Ninth Circuit. And I am reluctant to have anyone go through the time, trouble, and expense of having that done when there is the possibility, however remote, that the Ninth Circuit may in fact reverse [the federal court]'s ruling. If that happens, obviously the billboards need to be replaced at some significant cost and I am concerned about that.

" . . . Can I not simply order that until the Ninth Circuit has finally determined this matter that there simply be no advertising permitted on the billboards and that instead they **[*14]** be used for public service announcements or other noncommercial usage?"

Counsel for the City responded: " . . . I do think this Court is empowered to, and really should, order the removal of the signs above the foundations. . . . If the Court says it is doing this because it is waiting for the appeal, you really aren't giving full faith and credit, full . . . collateral estoppel [effect] to the federal judgment."

Counsel for Valley also opposed the trial court's proposed approach: "So what the Court is doing is saying in effect we are going to resolve the city's problems by taking down the content when the content isn't the real issue in the case and never has been." He added, "I would respectfully request that the Court leave the signs as is, leave the constitutionally protected content on there."

The trial court responded, " . . . I haven't heard anything to turn me around from my tentative." Accordingly, it issued a preliminary injunction enjoining Valley from using the billboards to display "any commercial message, advertisement, or visible copy . . . ."

The City filed an extraordinary writ petition in this court. We denied it, stating, "Petitioner has failed to establish **[*15]** irreparable harm."

III

DISCUSSION

"The appellate standard for reviewing preliminary injunctions is well established. In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction. [Citation.] 'Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. [Citations.]' [Citation.]" (*Hunt v. Superior Court (1999) 21 Cal.4th 984, 999,* quoting *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286, 219 Cal. Rptr. 467.)*

"But 'where the "likelihood of prevailing on the merits" factor depends upon a question of law . . . the standard of review is not abuse of discretion but whether the superior court correctly interpreted and applied [the] law, which we review de novo.' [Citation.]" (*Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 433,* quoting *Efstratis v. First Northern Bank (1997) 59 Cal.App.4th 667, 671-672.)* **[*16]** On this record, the application of collateral estoppel presents a question of law. (See *Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 296-297, 224 Cal. Rptr. 791.)*

A. *Likelihood of Success on the Merits*.

The trial court ruled that the City had shown a likelihood of success on the merits based on collateral estoppel. Valley contends this was error. It additionally contends the City failed to show a likelihood of success on the merits independent of collateral estoppel. Because we will conclude, below, that the trial court applied collateral estoppel correctly, we will not consider Valley's additional contention.

"In general, collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding. [Citations.] 'Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must **[*17]** be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.]" (*Gikas v. Zolin (1993) 6 Cal.4th 841, 848-849,* quoting *Lucido v. Superior Court (1990) 51 Cal.3d 335, 341, 272 Cal. Rptr. 767.)*

"California follows the rule that the preclusive effect of a prior judgment of a federal court is determined by federal law . . . . [Citations.]" (*Butcher v. Truck Ins. Exchange (2000) 77 Cal.App.4th 1442, 1452;* accord, *Younger v. Jensen (1980) 26 Cal.3d 397, 411, 161 Cal. Rptr. 905.)* Subject to one exception, however, federal principles of collateral estoppel are substantially the same as the state principles set forth above. (See generally *Arizona v. California (2000) 530 U.S. 392, 413 [120 S. Ct. 2304, 147 L. Ed. 2d 374; U.S. v. Mendoza (1984) 464 U.S. 154, 158 [104 S. Ct. 568, 78 L. Ed. 2d 379].)* The one exception is that, under state law, a decision is not final until it has been affirmed on appeal or the time to take an appeal has passed. Under federal law, by contrast, a decision **[*18]** is final unless and until it is reversed on appeal. (*Lumpkin v. Jordan (1996) 49 Cal.App.4th 1223, 1230-1231.)* Thus, even though Valley's appeal to the Ninth Circuit is still pending, the federal court's judgment is sufficiently final to have collateral estoppel effect.

In the federal action, Valley claimed that requiring it to remove the billboards, based on either the original sign ordinance or the amended sign ordinance, would violate the First Amendment. In response, the City claimed that the permit requirement was constitutional, that Valley had failed to comply with it, and that it was therefore entitled to require removal of the billboards.

The whole point of the City's motion in limine was that, because it could constitutionally require Valley to remove the billboards based on the violation of the permit requirement, Valley's other contentions were irrelevant. These included the contentions Valley raised in opposition to the motion in limine, including that: (1) portions of the original sign ordinance and the amended sign ordinance, other than the permit requirement, were unconstitutional; (2) the City had processed Valley's permit applications improperly **[*19]** and in "bad faith"; and (3) the City had a practice of accepting late-filed permit applications. Thus, by granting the City's motion in limine and entering judgment for the City, the federal court actually and necessarily rejected each of these contentions. n3

n3 In its reply brief, Valley argues that, if the federal judgment is collateral estoppel, the City's present claims necessarily were compulsory counterclaims in the federal action and are therefore barred. (See *Fed. Rules Civ. Proc., rule 13(a).*) It is unclear whether this is an argument or just a rhetorical flourish. To the extent that it is an actual argument that the City's claims are barred as compulsory counterclaims, we deem it waived, because it was not raised in Valley's opening brief (*Dieckmeyer v. Redevelopment Agency of Huntington Beach (2005) 127 Cal.App.4th 248, 260)* and because it is not stated under a separate heading or subheading or supported by citation to legal authority as required by *California Rules of Court, rule 14(a)(1)(B).*

[*20]

Valley argues that there were at least five significant issues that were neither actually litigated nor necessarily decided in the federal case. We will discuss these seriatim.

First, Valley argues that the federal court did not rule on its constitutional challenges to the amended sign ordinance. It is true that it did not rule on the constitutionality of any portion of the amended sign ordinance *other than* the permit requirement. It did rule, however, that the permit requirement was constitutional, that the City was entitled to remove the billboards because they violated the permit requirement, and therefore that Valley's other constitutional challenges to the amended sign ordinance were irrelevant. Each of these determinations is collateral estoppel here.

Valley relies on the federal court's comment that "the City can institute its abatement proceedings and whatever defenses [Valley] may have, [Valley] may raise." The federal court did not mean, however, that it was carving out all of Valley's defenses from its ruling. It evidently believed it had adjudicated all of Valley's defenses, as appears from its comment that "based upon this record . . . the Superior Court Judge **[*21]** will order . . . immediate abatement . . . ."

In its reply brief, Valley tries to recharacterize its federal action as a purely facial challenge to the sign ordinances and the federal court's judgment as a ruling that Valley lacked standing to bring such a facial challenge. Thus, it suggests that it can still challenge the sign ordinances as applied to its billboards. This is nonsense.

The federal court never discussed, mentioned, or even so much as alluded to standing.

It ruled that the sign ordinances could constitutionally be applied to Valley because Valley had violated the permit requirement. This was, almost by definition, the rejection of an as-applied challenge. Indeed, in seeking a stay from the Ninth Circuit, Valley argued, "The amended ordinance is unconstitutional as applied." (Capitalization omitted.)

Second, Valley argues that the federal court did not decide whether the permit requirement was excused based on futility. The record belies this claim. In opposition to the City's motion in limine, Valley specifically argued futility; it even made an offer of proof of the facts underlying its futility claim. By granting the motion, the federal court necessarily ruled **[*22]** that, even *if* a permit appli-

cation would have been futile, the City was entitled to removal of the billboards. Again, this aspect of its ruling is collateral estoppel here.

At one point, Valley claims the federal court refused to reach the futility issue solely because Valley had failed to specify it in a pretrial conference order. (See *Fed. Rules Civ. Proc., rule 16.*) Not so. The federal court's discussion of the futility defense demonstrates that it considered it and squarely rejected it. Although Valley does not cite any portion of the record supporting its assertion (see *Cal. Rules of Court, rule 14(a)(1)(C)*), it seems to be referring to a statement the federal court made in its order denying Valley's motion for new trial. However, this was merely one of two alternative grounds the federal court gave for rejecting the futility defense as a basis for a new trial; it went on to reject the futility defense -- again -- on the merits.

Third, Valley argues that the federal court did not decide whether the City's handling of its permit applications was unreasonable or improper. The very point of the motion in limine, **[*23]** however, was to preclude evidence of this. Again, Valley made an offer of proof of the facts underlying this assertion. And, again, the federal court decided that the reasonableness or unreasonableness of the City's permit handling was irrelevant. Valley is bound by this ruling.

Fourth, Valley argues that the federal court did not decide whether it was constitutional for the City to remove a billboard based solely on the failure to obtain a permit. We disagree. That is precisely what the federal court did decide.

Fifth and finally, Valley argues that the federal court did not decide whether the City violated equal protection by granting variances to other billboard operators but not to Valley. In its federal complaint, however, Valley alleged, similarly, that the City had violated equal protection by discriminating against it, and in favor of its competitors, based on its exercise of its First Amendment rights. Thus, by entering judgment against Valley, the federal court necessarily ruled that this was not a defense to removal of the billboards.

In a footnote, Valley argues that the pendency of the federal appeal is relevant to the likelihood of success on the merits. Although by **[*24]** no means fleshed out, the argument seems to be that the possibility that the Ninth Circuit *might* reverse the federal court's judgment lessens the likelihood that the City will ultimately prevail in state court.

Although we have found no authority directly on point (and certainly Valley cites none), we believe this approach would be inconsistent with the principle that a federal judgment is final for all res judicata purposes even if it is still subject to reversal on appeal. (See *Lumpkin v. Jordan , supra, 49 Cal.App.4th at pp. 1230-1231;* see generally *Stoll v. Gottlieb (1938) 305 U.S. 165, 170 [59 S. Ct. 134, 83 L. Ed. 104].)*

The Supreme Court has declared: "

We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force." (*Deposit Bank v. Bd. of Councilmen of Frankfort (1903) 191 U.S. 499, 511 [24 S. Ct. 154, 48 L. Ed. 276].)*

"It would undermine the foundation of the principle upon which [collateral estoppel] is based if the court **[*25]** might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large." (*Id. at pp. 510-511.)*

Here, if the trial court has been asked to treat the federal judgment as collateral estoppel for purposes of a final judgment, including a permanent injunction requiring removal of the billboards, it would have had to do so. The federal judgment should be no less conclusive merely because the issue before the trial court was the likelihood that the City would obtain a final judgment, rather than the final judgment itself.

Moreover, we see no way the trial court could consider the *fact* of the federal appeal without considering the *merits* of the federal appeal. Otherwise, how could it decide how *much* to discount the City's likelihood **[*26]** of success? It would have to inquire into the merits of the federal court's reasons for its judgment. Thus, it would usurp the Ninth Circuit's prerogative of reviewing that judgment. The Supreme Court has told us that a federal judgment is deemed final, despite the possibility of reversal on appeal, precisely to preclude any such inquiry.

We therefore conclude that the federal judgment conclusively established, for purpose of a preliminary injunction, that the City would prevail on the merits.

B. *The Relative Interim Harm to the Parties.*

Valley also contends that the balance of harms weighed against the issuance of any injunction. The City responds, among other things, that just as the federal court's judgment is collateral estoppel on the merits, the federal court's denial of an injunction pending appeal is collateral estoppel on the balance of harms.

When the federal court refused to grant Valley an injunction pending appeal (except as to the billboard foundations), it found that:

1. "[Valley] has not simply shown no likelihood of success on the merits, but has actually lost on the merits of [its] claim . . . and [the City] has shown not simply a strong likelihood **[*27]** of success on the merits, but actual success on the merits . . . ."

2. "The City has demonstrated irreparable harm in that the City has a substantial public interest in the enforcement of valid City regulations and laws concerning billboards . . . ."

3. "In contrast, [Valley] has failed to demonstrate any likelihood of irreparable harm . . . . [Valley] has no right to continue to earn income from, or engage in, an unlawful activity, especially an activity that creates a potential public safety hazard and, in any event, the purely economic harm articulated by [Valley] would be fully redressable through any damage award . . . ."

Thus, the federal court did in fact adjudicate the balance-of-harms issue against Valley. Valley argues: "It is a fallacy to assert . . . that if X is not entitled to an injunction against Y, then *a fortiori* Y is entitled to an injunction against X." But Valley's syllogism is incomplete. The federal court decided that Valley was not entitled to an injunction against the City *because* the balance of harms favored the City. Here, to determine whether the City was entitled to an injunction, the trial court likewise had to decide whether the balance **[*28]** of harms favored the City. This was identical to the issue already decided by the federal court. Of course, the balance of harms, by itself, did not necessarily mean that the City was entitled to an injunction. When coupled with the City's likelihood of success on the merits, however, it did.

Valley notes that this court denied the City's petition for a writ of mandate because the City had not shown irreparable injury. It argues that this finding should be collateral estoppel against the City. However, subject to exceptions not applicable here (see, e.g., *Abraham v. Workers' Comp. Appeals Bd. (2003) 113 Cal.App.4th 1082, 1089-1090),* an order summarily denying an extraordinary writ petition is not collateral estoppel. (*Carretti v. Italpast (2002) 101 Cal.App.4th 1236, 1241-1242; Lomes v. Hartford Financial Services Group, Inc. (2001) 88 Cal.App.4th 127, 132, fn. 2.)*

Valley does not argue that the federal court's denial of an injunction pending appeal was not final for purposes of collateral estoppel. Thus, we believe it has waived any such argument. Nevertheless, if only out of an excess of caution, we will address it.

Under federal **[*29]** law, "'"finality" for purposes of issue preclusion is a more "pliant" concept than it would be in other contexts.' [Citation.]" (*Henglein v. Colt Industries Operating Corp. (3d Cir. 2001) 260 F.3d 201, 210,* cert den. *(2002) 535 U.S. 955 [122 S. Ct. 1358, 152 L. Ed. 2d 354],* quoting *Dyndul v. Dyndul (3d Cir. 1980) 620 F.2d 409, 412.)* The federal courts follow *section 13 of the Restatement Second of Judgments* (e.g., *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation (7th Cir. 2003) 333 F.3d 763, 767; RecoverEdge L.P. v. Pentecost (5th Cir. 1995) 44 F.3d 1284, 1295),* which states that "for purposes of issue preclusion (as distinguished from [claim preclusion]), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."

In practice, "this may mean '"little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."' [Citation.]" (*In re Nangle (8th Cir. 2001) 274 F.3d 481, 485,* **[*30]** quoting *John Morrell & Co. v. Local Union 304A of United Food and Commercial Workers, AFL-CIO (8th Cir. 1990) 913 F.2d 544, 563,* quoting *Lummus Company v. Commonwealth Oil Refining Company (2d Cir. 1961) 297 F.2d 80, 89.)*

In determining whether a decision is "sufficiently firm," the federal courts consider "a number of factors . . . :

"(1) whether the prior decision was 'adequately deliberated and firm' and not 'avowedly tentative';

"(2) whether the parties were fully heard;

"(3) whether the court supported its decision with a reasoned opinion;

"(4) whether the court's prior decision was subject to appeal or was in fact reviewed on appeal. [Citation.]" (*Greenleaf v. Garlock, Inc. (3d Cir. 1999) 174 F.3d 352, 358.)*

As a general rule, "the granting or denial of a preliminary injunction is . . . not based on a final decision on the merits and is not a final judgment for the purposes of collateral estoppel. [Citation.]" (*Medtronic, Inc. v. Gibbons (8th Cir. 1982) 684 F.2d 565, 569.)* Nevertheless, the general rule does not apply, and the grant or denial of a preliminary injunction may be given collateral estoppel **[*31]** effect, "if the circumstances make it likely that the findings are accurate [and] reliable. [Citations.]" (*Commodity Futures Trading Com'n v. Board of Trade (7th Cir. 1983) 701 F.2d 653, 657.)* "Preclusion would seem to be particularly appropriate in a second action seeking the same injunctive relief. [Citations.]" (*Hawksbill Sea Turtle v. Fed. Em. Management Agency (3d Cir. 1997) 37 V.I. 526, 126 F.3d 461, 474, fn. 11.)*

For example, in *Walsh v. Intern. Longshoremen's Ass'n, AFL-CIO (1st Cir. 1980) 630 F.2d 864,* in administrative proceedings before the National Labor Relations Board (NLRB), several shippers had charged a longshoremen's union with unfair labor practices. (*Id. at p. 866.)* Under section 10(l) of the National Labor Relations Act (*29 U.S.C. § 160(l)*) (section 10(l)), when an unfair labor practice charge was pending before the NLRB, a regional director of the NLRB could file a petition in federal court for a preliminary injunction against the charged practices. The district court would determine only whether there was reasonable cause to believe that the charged unfair labor **[*32]** practice had occurred. Moreover, any such preliminary injunction would be effective only until the NLRB adjudicated the charges. Hence, ordinarily, the grant or denial of a preliminary injunction under section 10(l) was not final and not collateral estoppel. (*Walsh*, at p. 868.)

In *Walsh*, however, because several shippers were involved, several regional directors brought separate section 10(l) actions against the same union. (*Walsh v. Intern. Longshoremen's Ass'n, AFL-CIO, supra, 630 F.2d at pp. 866-867.)* In the first one of them to go to a decision, the district court denied a preliminary injunction on the ground that the NLRB lacked jurisdiction. (*Id. at p. 866.)* Later, in *Walsh*, the district court refused to treat the earlier ruling as collateral estoppel. (*Id. at p. 867.)*

The Court of Appeals held that the first denial of a preliminary injunction should have been treated as collateral estoppel in the second. (*Walsh v. Intern. Longshoremen's Ass'n, AFL-CIO, supra, 630 F.2d at pp. 867-875.)* Thus, it held, among other things, that the first denial was sufficiently final for this purpose:

"The **[*33]** limited effect of a section 10(l) decision flows naturally from the limited role of the district court in hearing the petition. The court does not decide whether an unfair labor practice has occurred; that decision is for the Board, subject to review by the court of appeals. . . .

"But the district court in a section 10(l) proceeding does decide the limited issue of whether there is reasonable cause to believe that a violation has occurred so that injunctive relief is warranted. We have been offered no persuasive reason to view that decision on that narrow issue as anything but a final decision for purposes of res judicata. In our view, the policies underlying the rule of res judicata apply as well to decisions on section 10(l) as to other decisions. The parties in a section 10(l) proceeding have 'full and fair opportunity to litigate' the narrow issue which is placed before the district court [citation]. . . . The party against whom the petition is decided may appeal to the court of appeals . . . [citation].

"Once the Board has been afforded this opportunity to have its petition heard and adjudicated in the district court and to appeal the denial of relief to the court of appeals, **[*34]** we see no reason to permit it to bring a second petition against the same respondent based on the same underlying charge. This type of repetition, which would be as expensive and vexatious to the respondent as any other type of litigation, is exactly what the rule of res judicata is designed to prevent." (*Walsh v. Intern. Longshoremen's Ass'n, AFL-CIO, supra, 630 F.2d at pp. 868-869,* quoting *Montana v. U.S. (1979) 440 U.S. 147, 154 [99 S. Ct. 970, 59 L. Ed. 2d 210];* see also *Avitia v. Metropolitan Club of Chicago, Inc. (7th Cir. 1991) 924 F.2d 689, 690-693* [denial of plaintiffs' first motion for preliminary injunction was collateral estoppel and required denial of plaintiffs' second motion for preliminary injunction].)

For purposes of finality, this case is on all fours with *Walsh*. Admittedly, in one sense, the federal court's ruling denying an injunction pending appeal was tentative, because it was intended to be effective only as long as Valley's appeal is pending in the Ninth Circuit. Similarly, however, in *Walsh*, the ruling denying a preliminary injunction was intended to be effective only as long as the administrative **[*35]** charges were pending before the NLRB. In both instances, on the issue of *whether to issue an injunction* -- including the subissue of the balance of harms -- the rulings were final. Absent changed circumstances, Valley could not keep going back to the federal court and filing new motions for an injunction pending appeal.

Moreover, the parties were fully heard. The federal court supported its decision with a reasoned opinion. Finally, although the federal court's order was not technically appealable (*Shiley, Inc. v. Bentley Laboratories, Inc. (Fed.Cir. 1986) 782 F.2d 992, 993;* 16A Wright & Miller, Federal Practice & Procedure (1999) § 3954, pp. 295-296), it was effectively reviewable by way of a motion in the Court of Appeals. (*Fed. Rules App.Proc., rule 8(a)(2)(A)(ii)*, 28 U.S.C.; *Shiley, Inc.*, at p. 993; see, e.g., *Matter of Miranne (5th Cir. 1988) 852 F.2d 805.)*

Thus, the federal court's denial of an injunction pending appeal was collateral estoppel; it conclusively adjudicated the issue of the balance of harms in favor of the City.

C. *Laches*.

Valley contends a preliminary injunction was barred **[*36]** by laches. "Laches is an equitable defense to the enforcement of a stale claim and requires a showing of unreasonable delay plus either the plaintiff's acquiescence in the act complained of or prejudice to the defendant resulting from the delay. [Citation.]" (*People v. Koontz (2002) 27 Cal.4th 1041, 1087-1088.)* "

Generally, a trial court's laches ruling will be sustained on appeal if there is substantial evidence to support the ruling. [Citation.]" (*Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 67.)*

"'A delay in bringing suit will be excused where there exists an actual and substantial impediment thereto. . . .' [Citation.]" (*Lubin v. Lubin (1956) 144 Cal. App. 2d 781, 794.)* Here, the City had a cast-iron excuse for the supposed delay -- the federal court had *enjoined* it from compelling Valley to remove the billboards. Valley suggests that the City should have filed a counterclaim for removal of the billboards in the federal action and that its failure to do so constituted unreasonable delay. The City, however, was actively defending the federal action. Valley could not possibly have been under any illusion that the **[*37]** City was somehow acquiescing in the existence of the billboards. Unless and until the federal injunction was lifted, there was no reason for the City to do anything more. At a minimum, the trial court could so find.

D. *The Scope of the Preliminary Injunction*.

The City contends the trial court erred by granting an injunction that merely prohibited Valley from displaying commercial advertising on the billboards. It claims it was entitled to an injunction that would have required Valley to remove the billboards (except for the foundations, as the City is still subject to the federal court's injunction prohibiting it from requiring the removal of the foundations).

The trial court found that the City had shown a likelihood of success on the merits, based on collateral estoppel. As we held in part III.A, *ante*, we agree. It nevertheless refused to require removal of the billboards, due to what it called "the possibility, however remote," that the Ninth Circuit might yet reverse the federal judgment. It is not clear whether it believed this affected the likelihood of success on the merits, the balance of harms, or both.

As we also held in part III.A, *ante*, the possibility that **[*38]** the federal judgment might be reversed on appeal was irrelevant to the likelihood of success on the merits. Under federal law, the federal judgment was final and entitled to full collateral estoppel effect. Moreover, as we held in part III.B, *ante*, the federal court's ruling that the balance of harms favored the City was likewise final and entitled to full collateral estoppel effect. The trial court was not free to redetermine this issue.

To the extent that the trial court *did* redetermine the balance of harms issue, it erred. The City wanted an injunction to prevent the harm to the public interest that results from the construction of a sign, or any other structure, without a permit. An injunction leaving the billboards in place, while prohibiting Valley from displaying commercial advertising on them, in no way lessened this harm. On the other hand, the harm Valley claimed it would suffer from an injunction was that it could not display any advertising, to the detriment of its First Amendment rights as well as its finances. An injunction prohibiting commercial advertising did not significantly lessen this harm.

We also note that, although the trial court purported to rely **[*39]** on the federal judgment, the federal judgment determined that the City was entitled to remove the billboards; it in no way determined that the City was entitled to prohibit Valley from displaying commercial advertising on them. The whole thrust of the federal court's ruling was that the permit requirement was a content-neutral rule of general application; hence, penalizing Valley for failing to comply with it did not violate the First Amendment. By contrast, an injunction prohibiting Valley from displaying commercial adver-

tising *is* content-based and *does* single out Valley for peculiar treatment. The trial court's injunction raised substantial First Amendment issues that the federal judgment had in no way resolved.

Valley argues that a higher standard of review applies to a mandatory preliminary injunction. Of course, the injunction the trial court actually issued was a prohibitory injunction. The injunction the City was seeking, however, was a mandatory injunction. (*Kettenhofen v. Superior Court (1961) 55 Cal.2d 189, 191, 10 Cal. Rptr. 356* [injunction requiring removal of fence].)

"""[A] preliminary *mandatory* injunction is rarely granted, and is **[*40]** subject to stricter review on appeal.'" [Citation.] The granting of a mandatory injunction pending trial "'is not permitted except in extreme cases where the right thereto is clearly established.'" [Citation.]' [Citation.]" (*Teachers Ins. & Annuity Ass'n v. Furlotti (1999) 70 Cal.App.4th 1487, 1493,* quoting *Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th 618, 625,* quoting *Board of Supervisors v. McMahon (1990) 219 Cal. App. 3d 286, 295, 268 Cal. Rptr. 219.)* The City, however, established its likelihood of success on the merits as a matter of law. It likewise established that the balance of harms was in its favor as a matter of law. Thus, even under this higher standard, the City was entitled to the injunction it was seeking.

The usual vice of a mandatory injunction is that "the plaintiff . . . obtains by the order the complete relief which he had sought in the action itself. The injunction does not tend to maintain the status quo but to coerce the defendant into performing an act in advance of trial which upon trial might not have been decreed." (*Fretz v. Burke (1967) 247 Cal. App. 2d 741, 746, 55 Cal. Rptr. 879.)* **[*41]** Here, however, the City has already fully litigated an action to judgment, in which it was found to be entitled to require removal of the billboards. Indeed, at one point, the federal court itself issued a permanent injunction requiring removal of the billboards; later, it dissolved it, but only because the City had not filed a cross-complaint for injunctive relief, not because the City was not entitled to it. Thus, the policies militating against a mandatory injunction do not apply.

We conclude that the City was entitled to an injunction requiring Valley to remove the billboards (except the foundations). By granting a different and lesser injunction, the trial court erred. We will reverse, and we will remand with directions to issue the injunction the City was seeking.

IV

DISPOSITION

The order appealed from is reversed. On remand, the trial court is directed to issue a preliminary injunction requiring Valley, within 30 days from the date of the issuance of our remittitur, to remove all portions of the billboards other than the foundations. The trial court shall do so with no further hearing, except that, on a suitable motion or other application, and for good cause shown, **[*42]** it may shorten or extend this 30-day period. However, if either the federal court's judgment or its order concerning an injunction pending appeal is reversed, modified, or vacated, these directions shall not be binding, and instead the trial court shall conduct any further proceedings in accordance with any relevant final federal judgment or order then in effect, as well as with the views expressed in this opinion. The City is awarded costs on appeal against Valley.

RICHLI, J.

We concur:

HOLLENHORST, Acting P.J.

GAUT, J.