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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TAKUHI KRIKORIAN, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	B239635 (Los Angeles County Super. Ct. No. BC463041)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Affirmed.

Vicken O. Berjikian and Freeman M. Butland for Plaintiff and Appellant.

Briskin, Latzanich & Pene and Katherine B. Pene for Defendant and Respondent.

Takuhi Krikorian appeals from an order of the superior court sustaining without leave to amend the demurrer of Los Angeles County Metropolitan Transportation Authority (MTA). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2010, appellant, through counsel, filed a claim for damages with MTA, alleging that she was injured while riding an MTA bus because the bus driver accelerated at an unsafe speed before appellant sat down. Appellant claimed that she broke a rib and injured her left side.

On October 8, 2010, claims examiner Laurie Marquis sent a notice to appellant's lawyer, stating that her claim was rejected by the Board of Directors of the MTA. The notice stated that appellant had six months to file a court action on the claim.

Appellant obtained new counsel, Vicken O. Berjikian, and filed another claim for damages with MTA on November 11, 2010, based on the same incident. MTA did not send appellant a second notice of rejection of her claim.

On May 31, 2011, Marquis sent a letter to Berjikian, stating that the statute of limitations had expired for appellant to file suit against MTA.

On June 7, 2011, appellant filed a complaint against MTA for negligence. MTA filed a demurrer to the complaint. The trial court sustained the demurrer with leave to amend, on the basis that the complaint failed to allege with particularity the facts showing compliance with the claim presentation requirements of the California Tort Claims Act, Government Code section 900 et seq.[1] (See *State of California v. Superior Court* (2004) 32 Cal.4th 1234 (*Bodde*).)

Appellant filed a first amended complaint, alleging that Berjikian was unaware of the prior rejected claim and that MTA, knowing that he was unaware of the prior claim, intentionally did not respond to the new claim. Berjikian did not know about the first claim and the rejection because he had been unable to obtain

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[1] All further statutory references are to the Government Code.

appellant's file from her former counsel despite repeated attempts. The complaint thus alleged that MTA was equitably estopped from asserting the statute of limitations because of its intentional conduct in keeping Berjikian from learning about the prior claim.

The trial court sustained MTA's demurrer to the first amended complaint with leave to amend. The court noted that appellant admitted that she had not complied with the presentation requirement of section 945.4 and thus turned to the question of whether the complaint sufficiently stated a cause of action for equitable estoppel. Although appellant argued that equitable estoppel applied because Marquis should have told Berjikian about the prior rejected claim, the court reasoned that appellant had identified no duty that would have required Marquis to do so. The court further reasoned that appellant had alleged no facts indicating that Marquis or the MTA knew that Berjikian did not know about the prior claim. The court concluded that appellant had failed to allege sufficient facts to state a cause of action for equitable estoppel.

Appellant filed a second amended complaint, which is the operative complaint. The complaint alleged causes of action for the negligence of MTA's employee, negligent operation of a vehicle, and equitable estoppel. Appellant again alleged that Berjikian did not know about the prior rejected claim because he had been unable to obtain appellant's file from her former counsel despite repeated attempts. Appellant further alleged that Marquis knew that Berjikian was unaware of the prior rejected claim and intentionally did not respond to the new claim in order to keep Berjikian "in the dark about the prior claim," so that the statute of limitations would run. She alleged that Marquis knew that Berjikian did not know about the prior rejected claim because Berjikian had filed a new claim, rather than an amended claim, which should have alerted Marquis to Berjikian's lack of

knowledge of the prior claim. The complaint also alleged that appellant "herself was not able to assist [her] new counsel with regard to whether there had been a prior claim and rejection."

The trial court sustained MTA's demurrer to the second amended complaint without leave to amend. Appellant filed a timely notice of appeal.

DISCUSSION

Standard of Review

"On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of the facts alleged in the complaint, as well as those facts that reasonably can be inferred from those expressly pleaded, and the facts of which judicial notice can be taken. We determine de novo whether the complaint states facts sufficient to state a cause of action and does not disclose a complete defense. [Citations.] We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. [Citation.] [¶] It is an abuse of discretion to sustain a demurrer if there is a reasonable probability that the defect can be cured by amendment. [Citation.] The burden, however, is on the plaintiff to demonstrate how the complaint can be amended to state a valid cause of action. [Citation.]" (*Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal.App.4th 154, 161-162.)

Claim Presentation Statutory Scheme

"Under the Tort Claims Act, a plaintiff may not maintain an action for money or damages against a public entity unless first a written claim has been presented to the public entity and rejected in whole or in part or deemed rejected by operation of law. [Citations.] Failure to timely present a claim for money or

damages to a public entity bars a plaintiff from filing a lawsuit against that entity. [Citation.] Before a cause of action may be stated, a plaintiff must allege either compliance with this procedure or circumstances excusing compliance. [Citation.]" (*Sofranek v. County of Merced* (2007) 146 Cal.App.4th 1238, 1246, fn. omitted (*Sofranek*).)

Under section 911.2, subdivision (a), a personal injury claim against a local governmental entity must be presented to the entity within six months after accrual of the cause of action. (*Sofranek*, *supra*, 146 Cal.App.4th at p. 1246.) "Following presentation of a claim for personal injury or death (. . . § 911.2), the public entity must act within 45 days (. . . § 912.4, subd. (a)). If the entity fails to accept or reject the claim within that period, the claim is deemed to have been rejected. (§ 912.4, subd. (c).) If the claim is rejected by the public entity expressly or by operation of law, notice must be sent to the claimant. (. . . § 913.)" (*Him v. City and County of San Francisco* (2005) 133 Cal.App.4th 437, 445 (*Him*).)

Section 945.6, subdivision (a)(1) requires that an action against a public entity be brought within six months of written notice of a claim denial. "If the public entity gives written notice of rejection in the manner specified in section 913, the statute of limitations expires six months from the day the notice of rejection is personally delivered or deposited in the mail. [Citation.] If notice of rejection is not given in compliance with section 913, the statute of limitations runs two years from accrual of the cause of action. [Citations.]" (*Him*, *supra*, 133 Cal.App.4th at pp. 441-442.)

Appellant conceded in her complaint that she did not bring her action within six months after the notice of rejection. Nonetheless, she alleged that equitable estoppel applied to bar the application of the statute of limitations. She contends on appeal that the complaint adequately stated a cause of action for equitable

estoppel. We agree with the trial court that the complaint does not state facts sufficient to state a cause of action and therefore affirm.

Equitable Estoppel

"Estoppel arises out of the rule that '[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.' (Evid. Code, § 623.) The essential ingredients of an estoppel are (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the other party has a right to believe that it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely on the conduct to her injury. [Citation.] Estoppel may not be applied where any one of these elements is missing. [Citation.]" (*Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 384 (*Moore*).)

"'To establish estoppel as an element of a suit the elements of estoppel must be especially pleaded in the complaint with sufficient accuracy to disclose facts relied upon. [Citation.]' [Citation.] Whether equitable estoppel applies is normally a question of fact. [Citation.] However, where the complaint pleads undisputed facts establishing that equitable estoppel does not apply, the issue may be resolved on demurrer. [Citation.]" (*Sofranek*, *supra*, 146 Cal.App.4th at pp. 1250-1251.)

"A public agency is subject to estoppel from the assertion of either the time limits for filing tort claims, or the statute of limitations on a cause of action. [Citations.]" (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.) "'"Mere silence will not create estoppel unless the silent party was under some

obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak . . . .”’ [Citation.]” (*Becerra v. Gonzales* (1995) 32 Cal.App.4th 584, 596 (*Becerra*).)

“‘Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential.’ [Citation.] . . . [¶] Claims of estoppel have been rejected, however, where the plaintiff cannot show calculated conduct or representations by the public entity or its agents that induced the plaintiff to remain inactive and not to comply with the claims-presentation requirements. [Citations.]” (*Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1044-1045 (*Ortega*).)

When the trial court sustained the demurrer to appellant’s first amended complaint, the court pointed out the deficiencies in the complaint. The court noted that appellant had identified no duty that would have required Marquis to tell Berjikian about the prior rejected claim. Nor did the complaint allege any facts indicating that Marquis or the MTA knew that Berjikian did not know about the prior claim. The second amended complaint did not address these deficiencies.

The second amended complaint does not sufficiently allege the element that the party to be estopped was apprised of the facts. (*Moore, supra*, 112 Cal.App.4th at p. 384.) There were no allegations in the complaint to indicate how Marquis would have known that Berjikian was unaware of the prior rejected claim. The complaint alleged that Marquis should have known that Berjikian did not know about the prior rejected claim because Berjikian filed a new claim, not an amended claim. However, this assertion is speculative and fails to adequately allege any facts relied upon by appellant to support her equitable estoppel allegation. (*Sofranek, supra,* 146 Cal.App.4th at p. 1250.)

Nor does the complaint sufficiently allege that Marquis owed a duty to appellant to notify her new counsel of the prior rejected claim. (*Becerra*, *supra*, 32 Cal.App.4th at p. 596.) Appellant contends that Marquis had a duty to respond to her claim, citing the language in section 912.4 that "[t]he board *shall act* on a claim." (§ 912.4, subd. (a), italics added.) Section 913 requires that written notice be given of a rejection; however, the statute does not address whether a *second* notice must be sent when a second, identical claim is made on an incident for which a notice of rejection has already been sent.

Section 910.6 addresses the amendment of a claim. It provides that, "if the claim as amended relates to the same transaction or occurrence which gave rise to the original claim, . . . the amendment '*shall be considered a part of the original claim for all purposes*.' (§ 910.6, subd. (a), italics added.)" (*Sofranek*, *supra*, 146 Cal.App.4th at p. 1246.) A claimant cannot repeatedly submit identical claims on the same incident, restarting the limitations period each time. Thus, the new claim filed by Berjikian should properly be considered a part of the original claim, which would mean that the six-month limitations period set forth in the original notice of rejection applied to the new claim. (*Id.* at p. 1250.)

Moreover, the fact that Berjikian attempted to obtain appellant's file from her prior counsel indicates that Berjikian was aware that appellant had previously hired a lawyer in connection with her claim and thus should have been aware of the possibility that there was a prior claim. There were no allegations to support the vague contention in the complaint that appellant "herself was not able to assist [her] new counsel with regard to whether there had been a prior claim and rejection."

Appellant relies on *Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339 (*Ard*), to argue that her equitable estoppel was not properly resolved at the demurrer stage. *Ard* is distinguishable.

In *Ard*, the public entity filed a demurrer on the ground that the action was time-barred by section 946.6. The plaintiff submitted a declaration in opposition to the demurrer, setting forth facts to support his assertions that he complied with section 946.6 and that the entity was estopped from disputing the timeliness of the action. He requested leave to amend his complaint to allege equitable estoppel, but the trial court did not address his request and sustained the demurrer without leave to amend. On appeal, the court held that the plaintiff should have been given the opportunity to amend his complaint to plead the facts supporting his equitable estoppel allegation. (*Ard*, *supra*, 93 Cal.App.4th at p. 348.) As pertinent here, the court stated that the trial court "made no findings on the question of estoppel, because such a factual determination would have been inappropriate at the demurrer stage. [Citation.]" (*Id.* at pp. 347-348.)

In contrast to *Ard*, where the plaintiff did not have an opportunity to amend the complaint to allege equitable estoppel, appellant received two opportunities to amend her complaint to allege equitable estoppel. Despite being alerted to the deficiencies raised by the trial court when it sustained the demurrer to the first amended complaint, appellant still was unable to allege any facts sufficient to state a cause of action for equitable estoppel. Moreover, the trial court here did not erroneously make a factual determination on estoppel at the demurrer stage. Unlike the plaintiff in *Ard*, who submitted a declaration stating specific facts that supported his allegation of equitable estoppel, there were no facts here for the trial court to purport to decide.

"[F]ailure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." (*Bodde, supra*, 32 Cal.4th at p. 1239.) Appellant did not make any allegations in the second amended complaint that "show calculated conduct or representations by the public entity or its agents that induced [her] to remain inactive and not to comply with the claims-presentation requirements. [Citations.]" (*Ortega, supra*, 64 Cal.App.4th at p. 1045.) Nor has she demonstrated on appeal how the complaint could be amended to state a valid cause of action. We therefore affirm.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.