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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID YOST,

Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Defendant and Respondent.

B232920

(Los Angeles County Super. Ct.
No. BC444842)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anthony
Mohr, Judge. Affirmed.

Law Offices of John Michael Jensen and John Michael Jensen for Plaintiff and
Appellant.

Steptoe & Johnson, Edward Gregory, Jason Levin, Jennifer Morrow and Sheri T.
Cheung for Defendant and Respondent.

Plaintiff and appellant David Yost appeals from a judgment of dismissal following an order sustaining a demurrer in favor of defendant and respondent California Public Employees' Retirement System (CalPERS) in this class action lawsuit concerning the calculation of retirement benefits. Yost contends: 1) he substantially complied with the claim presentation requirements of California's Government Claims Act (GCA) (Gov. Code, §§ 900 et seq.);¹ 2) the claim presentation requirements do not apply, because he was seeking the return of property that CalPERS held as a bailee; (3) the claim presentation requirements do not apply, because settlement has been provided for by statute and constitutional provision; 4) CalPERS has a functionally equivalent claims process; and 5) the trial court abused its discretion by denying pre-class certification discovery and leave to amend to substitute a new representative plaintiff. We conclude that Yost was required to comply with the requirements of the GCA and was not excused from compliance. The trial court did not abuse its discretion by denying pre-class certification discovery and leave to amend to substitute a new class representative. Therefore, we affirm.

BACKGROUND

CalPERS

CalPERS administers the retirement system for many public employees in California in accordance with the Public Employees' Retirement Law (§ 20000 et seq.) (PERL). Vested members of CalPERS are covered by a defined benefit retirement plan which provides retirement allowances using a formula based on factors such as final compensation, service credit for years of employment, and an age-based multiplier. (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121.) The member's retirement allowance

¹ All further statutory references are to the Government Code, unless otherwise stated.

is paid from two components: an annuity and a pension. (§ 21350.) A member makes contributions during employment through paycheck deductions, which are converted into an annuity upon retirement. (*In re Marriage of Sonne, supra*, 48 Cal.4th at p. 121.) The member's employer makes contributions to a pension fund. (*Ibid.*) The employer's contributions must be sufficient, in combination with the annuity, to provide the specified benefit under the formula. (*Ibid.*)

CalPERS members can purchase service credit under certain circumstances. (§ 21020 et seq.; e.g., §§ 21022 [service credit for time while the member was laid off], 21023.5 [service credit for time in the Peace Corps or AmeriCorps], 21024 [service credit for time in the United States armed forces], 21029.5 [service credit for time in California National Guard].) Section 20910, enacted in 2003, allows CalPERS members with at least five years of credited state service to elect to make contributions to receive additional retirement service credit of one to five years. (§ 20910, subd. (a).) In order to receive the additional retirement service credit, the member makes contributions as specified in sections 21050 and 21052. (§ 20910, subd. (b).)

Sections 21050 through 21054 standardize the procedure for purchasing service credit. (Stats. 2000, ch. 489, § 18.) The member must contribute "an amount equal to the increase in employer liability, using the pay rate and other factors affecting liability on the date of the request for costing of the service credit." (§ 21052.) The member can make a lump sum payment or installments. (§ 21050.)²

However, when a local safety member retires as a result of an industrial disability, the member is entitled to receive "a disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or

² Section 21050 was amended in 2010 with additional provisions governing installment payments. (Stats. 2010, ch. 197, § 1.) Current section 21050, subdivision (d), expressly states that CalPERS members may cancel installment payments at any time prior to retirement. (§ 21050, subd. (d).)

her service retirement allowance if the allowance, after deducting the annuity, is greater.” (§ 21413.)

The disability retirement allowance for a local safety member retired because of industrial disability “shall be derived from his or her accumulated normal contributions and the contributions of his or her employer.” (§ 21418.) “‘Accumulated normal contributions’ means the sum of all normal contributions standing to the credit of a member's individual account, and interest thereon.” (§ 20012.) Instead of receiving disability retirement, a disabled CalPERS member may elect to withdraw his or her contributions or permit the “contributions to remain in the fund with rights to service retirement.” (§ 21153.)

Alleged Facts

Yost worked as a vocational instructor for the California Youth Authority (CYA). A calculator on the CalPERS web site showed that if he purchased five years of service credit, then his estimated monthly retirement allowance, based on his monthly salary of \$5,631, “may increase” by \$703.88. Yost concluded that this was an increase of 12.5 percent.

In December 2004, CalPERS informed Yost of his right to purchase additional retirement service credit. CalPERS stated that the estimated monthly pension increase as a result of purchasing five years of service credit was \$703.88 if he retired at age 57. The paperwork contained the following statement: “If you RETIRE ON DISABILITY, this additional service credit may not benefit you and cannot be used to qualify for, or change the method of calculating benefits.” It also stated that “[a]n Election to Purchase Service Credit is irrevocable. Once elected, any future changes to the actuarial assumptions or interest rate will not apply to service credit already purchased or an existing payment schedule.”

In February 2005, Yost purchased five years of additional service credit for \$83,171.88. He made a lump-sum payment of \$21,438.25 with funds from his 401(k)

account and elected to pay the balance in 31 monthly installments of \$2,209.79, which would be deducted from his paychecks.

In 2007, Yost was exposed to chemicals in the CYA print shop and could no longer work in that environment. He filed an application for industrial disability retirement and began receiving his industrial disability retirement allowance in February 2008. He had 15 years of service and 5 years of additional retirement service credit. Yost's service retirement allowance based on 20 years of service credit was 51.425 percent of his final salary. However, Yost believed he was entitled to 50 percent of his final compensation as his disability retirement allowance, plus an additional 12.5 percent of his final compensation based on his purchase of five years of additional retirement service credit, for a total of 62.5 percent of his final compensation. CalPERS continued to deduct installment payments of \$154.66 from Yost's retirement checks.

Procedural History

Yost filed a class action lawsuit against CalPERS on September 2, 2010. He sent a letter that day to the general counsel for CalPERS with a copy of the lawsuit, offering to dismiss the complaint if CalPERS provided the benefits requested. CalPERS filed a demurrer. Yost filed an amended complaint on December 10, 2010, alleging a class action for breach of statutory duties, breach of contract, rescission, restitution, breach of fiduciary duties, due process and equal protection violations, equitable and declaratory relief, accounting, and other relief. Yost brought the action on behalf of a class consisting of "[a]ll persons who have purchased, or in the future will purchase, 'Additional Retirement Service Credit' or other 'present value service credit' options from the California Public Employees' Retirement System; who thereafter suffered, or in the future will suffer, an industrial disability; and whose retirement allowances are or will be such that Plaintiffs will not receive all of the benefits that they are entitled to." Yost alleged that class members are entitled to a supplemental benefit based on contributions for additional retirement service credit in addition to the disability benefit. In the

alternative, he claimed restitution of the payments made to purchase additional retirement service credit. Yost alleged that he had demanded CalPERS pay him a larger pension or return his payment for additional retirement service credit, but CalPERS refused. Yost claimed that filing and serving his complaint on CalPERS complied with any government claim presentation requirements. He noted that he was seeking to conduct discovery in a separate motion and requested leave to amend to add additional class representatives.

CalPERS filed a demurrer to the amended complaint on the ground that Yost had failed to comply with the claim presentation requirements of the GCA. Yost opposed the demurrer. A hearing was held on March 16, 2011. The trial court sustained the demurrer without leave to amend. The court found that it would be inappropriate to allow Yost to conduct discovery and amend the complaint. The claim presentation requirement is a precondition to filing a lawsuit. The court found that permitting discovery and amendment would undermine the purpose behind the strict presentment requirements. To allow discovery would permit Yost to conduct “a fishing expedition” that would burden CalPERS, which was the result that was to be avoided by presentment of the claim in the first place.

Yost filed a notice of appeal on May 10, 2011, from the order sustaining the demurrer. The court entered a judgment of dismissal on June 17, 2011. In the interests of justice, we deem the premature appeal to be taken from the judgment.³

³ After appellant’s opening brief and respondent’s brief had been filed in the instant appeal, the trial court found Yost’s case to be related to three other cases against CalPERS: *Robert Marzec et al. v. CalPERS*, Los Angeles Superior Court Case No. BC461887 (*Marzec*); *Jeffrey E. Andert et al. v. CalPERS*, Los Angeles Superior Court Case No. BC480695; and *Randy Slaughter v. CalPERS*, Los Angeles Superior Court Case No. BS136503. Yost has represented to this appellate court that the claims in *Marzec* and *Yost* are similar in nature, but that the named plaintiffs in *Marzec* filed claims with the Victim Compensation and Government Claims Board, which were deemed denied, prior to filing their action in superior court.

DISCUSSION

Standard of Review

“A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]’ [Citation.] Thus, the standard of review on appeal is de novo. [Citation.] ‘In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]’ [Citations.]” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.)

Claim Presentation Requirements

The GCA “establishes certain conditions precedent to the filing of a lawsuit against a public entity.” (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1237.) The parties agree that CalPERS is a state agency. (§ 20002 [CalPERS is a unit of the State and Consumer Services Agency].) “[A]ll claims for money or damages against the state” which meet the following criteria must be presented to the Victim Compensation and Government Claims Board (VCGCB): “(1) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision. [¶] (2) For which the appropriation made or fund designated is exhausted. [¶] (3) For money or damages on express contract, or for an injury for which the state is liable. [¶] (4) For which

settlement is not otherwise provided for by statute or constitutional provision.” (§ 905.2, subd. (b).)

“Claims for personal injury must be presented not later than six months after the accrual of the cause of action, and claims relating to any other cause of action must be filed within one year of the accrual of the cause of action. (§ 911.2, subd. (a).) Timely claim presentation is not merely a procedural requirement, but is a condition precedent to the claimant’s ability to maintain an action against the public entity. [Citation.] ‘Only after the public entity’s board has acted upon or is deemed to have rejected the claim may the injured person bring a lawsuit alleging a cause of action . . . against the public entity.’ [Citation.]” (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591.) A claimant cannot institute civil litigation before the public entity has denied or rejected the claim. (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 832.)

“The purpose of the claims statutes is not to prevent surprise, but ‘to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity’s actual knowledge of the circumstances surrounding the claim.’ (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.) The claims statutes also ‘enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future.’ (*Baines Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App.4th 298, 303[;] see *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123 [(*Minsky*)].)” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 (*Stockton*).)

“[T]o satisfy the governmental claim requirements as a prerequisite to filing a putative class action lawsuit, a claim by the class representative for himself and others similarly situated can be found sufficient to support an action on behalf of the others in the class without the necessity for each individual to file a claim, provided the filed claim is sufficient to satisfy the statutory purposes.” (*California Restaurant Management Systems v. City of San Diego, supra*, 195 Cal.App.4th at p. 1592.)

It is undisputed that Yost has never presented a claim to the VCGCB. Moreover, it is clear that service of Yost's complaint on CalPERS' general counsel did not satisfy the requirement to present the claim prior to initiating litigation. To consider service of the complaint to be "substantial compliance" with the claims presentation statute would render the statute meaningless.

Specific Property

Yost contends the claim requirements of the GCA do not apply in this case, because he is seeking the return of personal property held by CalPERS as a bailee. We disagree.

Section 905.2, subdivision (b)(3) provides that the claim presentation requirements apply to "all claims for money or damages against the state". . . "[f]or money or damages on express contract, or for an injury for which the state is liable." The plain meaning of the requirement to present "all claims for money or damages" includes contract claims. (*Ibid.*; *Stockton, supra*, 42 Cal.4th at p. 738.) All claims against the state "[f]or money or damages on express contract" must be presented to the VCGCB. (§ 905.2, subds. (a), (b)(3).) "Section 910, governing the contents of claims against both the state and local entities, requires specification of the 'date, place and other circumstances of the occurrence *or transaction* which gave rise to the claim asserted' (§ 910, subd. (c), italics added), and a 'general description of the *indebtedness, obligation, injury, damage or loss* incurred' (§ 910, subd. (d), italics added.)" (*Stockton, supra*, 42 Cal.4th at p. 738.)

"The California Supreme Court in *Minsky, supra*, 11 Cal.3d 113, held that an action for specific recovery of money taken from an arrestee and held by the city as a bailee was not a 'claim[] for money or damages' within the meaning of the statute. (*Id.* at p. 117.) The plaintiff in *Minsky* alleged that the police had taken \$7,720 from his possession upon his arrest, held the money as evidence, and later converted the money by transferring it to a public pension fund. (*Id.* at pp. 117-118.) He alleged counts against

the city for conversion and money had and received. (*Id.* at p. 119, fn. 6.)” (*City of Los Angeles v. Superior Court* (2008) 168 Cal.App.4th 422, 427-428.)

“*Minsky, supra*, 11 Cal.3d 113, concluded that the [GCA] was not intended to apply to actions for specific recovery of property. ([*Id.*] at p. 121.) *Minsky* stated: ‘[W]e find that the government in effect occupies the position of a bailee when it seizes from an arrestee property that is not shown to be contraband. [Citation.] The arrestee retains his right to eventual specific recovery, whether he seeks to regain tangible property like an automobile, ring, wallet or camera, or whether he seeks to recover a specific sum of money which, under general constructive trust principles, is traceable to property within the possession of the defendant. [Citations.] Although the instant complaint does not expressly seek specific recovery of the money in question, it does contain a general prayer for any such relief as the court may deem just and proper, and under established California authority, the facts alleged by the complaint are sufficient to support a claim for specific recovery of the sums seized and allegedly wrongfully withheld from plaintiff. [Citation.] As such, we hold that noncompliance with the claims statutes erects no bar to the instant action.’ (*Id.* at pp. 121–122.)

“*Minsky, supra*, 11 Cal.3d 113, stated that the [GCA] was inapplicable even if the money was no longer traceable to property still in the city's possession and therefore was ‘not strictly available for specific recovery’ ([*Id.*] at p. 121, fn. 14[.]) *Minsky* stated that the ‘initial exemption of the action from the claims statute is not lost simply because the city takes the further wrongful step of disposing of the bailed property. The city cannot be permitted to invoke the claims statute, originally not available to it, by virtue of a later wrongful dissipation of the property. To so hold would be in effect to allow the local entity to profit by its own wrong, penalizing a plaintiff who, in light of the specific recovery remedy apparently available to him, justifiably did not file a claim.’ (*Id.* at p. 122, fn. 14; accord, [*Stockton, supra*,] 42 Cal.4th [at p.] 742.)” (*City of Los Angeles v. Superior Court, supra*, 168 Cal.App.4th at p. 428.)

“*Minsky, supra*, 11 Cal.3d 113, stated further: ‘[T]he purposes of the claims statutes indicate that they do not apply to cases in which an owner seeks the return of

private property held as bailee by the government and wrongfully retained. So long as the policies of the claims statutes are effectuated, they should be given a liberal construction to permit full adjudication on the merits. [Citation.] The policy underlying the claims statutes is to afford prompt notice of claims to governmental entities. [Citations.] The courts and commentators have considered prompt notice important for several reasons: to allow (1) early investigation of the facts, (2) informed fiscal planning in light of prospective liabilities, (3) settlement of claims before the initiation of costly civil litigation, and (4) avoidance of similarly caused future injuries or liabilities. [Citations.] None of these reasons apply to the governmental entity owing an affirmative statutory duty to hold private property for eventual return to the lawful owner.’ (*Minsky, supra*, 11 Cal.3d at pp. 123–124.)” (*City of Los Angeles v. Superior Court, supra*, 168 Cal.App.4th at pp. 428-429, fn. omitted.)

“The California Supreme Court in *Stockton, supra*, 42 Cal.4th 730, rejected the argument that *Minsky, supra*, 11 Cal.3d 113, stood for the proposition that all restitution claims are exempted from the [GCA] requirements. (*Stockton, supra*, 42 Cal.4th at pp. 742–743.) *Stockton* stated: ‘The *Minsky* rationale is that a claim for specific property effectively held by the government as a “bailee” for the claimant is not one for “money or damages” under the [GCA]. (*Minsky, supra*, 11 Cal.3d at p. 121.) The *Minsky* court’s reference to “general constructive trust principles” must be understood in that context. (*Ibid.*) Subsequent cases have limited the *Minsky* exception to situations in which the defendant had a duty to return seized property, enforceable by way of mandamus. [Citations.] When a claim for “money or damages” is not based on a governmental obligation to return specific property, it is subject to the claim requirements.’ (*Stockton, supra*, 42 Cal.4th at p. 743, fn. omitted; see also *TrafficSchoolOnline, Inc. v. Clarke* (2003) 112 Cal.App.4th 736, 742 [‘*Minsky* and the cases relying upon it have not been applied outside the bailee context’].)” (*City of Los Angeles v. Superior Court, supra*, 168 Cal.App.4th at p. 429, fn. omitted.)

In this case, Yost’s class action seeks an additional retirement allowance for class members, or alternatively, restitution of contributions paid to CalPERS for the additional

service credit. The gravamen of the complaint is money or damages on an express contract. Unlike in *Minsky, supra*, 11 Cal.3d 113, CalPERS did not seize money from the class members and hold it for them as a bailee, and CalPERS was not under any obligation to return the specific property. Because Yost's claim for monetary relief is not based on an obligation to return specific property held by CalPERS as a bailee, we conclude the claim is a claim for "money or damages" within the meaning of section 905.2 and is subject to the requirements of the GCA.

Settlement Provided for by Statute

Yost also contends that the claim presentation requirements do not apply in this case, because settlement of his claim has been provided for by statutory and constitutional provisions. Specifically, Yost contends section 21420 provides for settlement of his claim. This is simply incorrect. Section 21420 provides for CalPERS members who retire for industrial disability to receive an annuity for certain types of contributions. It does not provide for settlement of claims against CalPERS. The fact that statutory and constitutional provisions may provide a basis for recovery does not transform them into provisions for the settlement of claims. Under Yost's interpretation, the GCA would not apply to any claims.

Functionally Equivalent Claim Process

Yost contends that he was excused from compliance with the GCA, because CalPERS has a comprehensive claim administration process that is functionally equivalent to the claim presentation requirements of the GCA. We do not need to determine whether CalPERS' administrative process is functionally equivalent, however, because Yost did not file an administrative claim to initiate CalPERS' administrative process. Whether CalPERS' administrative process would have been functionally equivalent is irrelevant.

Denial of Discovery and Leave to Amend

Yost contends that the trial court abused its discretion by denying pre-class certification discovery in order to identify a new class representative and leave to amend to substitute the new named plaintiff. We find no abuse of discretion.

Under Code of Civil Procedure section 473, subdivision (a)(1), “The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party” In general, courts liberally allow amendments to a complaint to allow a plaintiff who lacks standing to substitute another plaintiff as the real parties in interest. (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273.) “Leave to amend a complaint is thus entrusted to the sound discretion of the trial court. ‘. . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court’s order will yet not be reversed unless, as a matter of law, it is not supported by the record.’ [Citation.]” (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 506.) Review of discovery rulings is also governed on appeal by the abuse of discretion standard. (*First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1573.)

In this case, the trial court correctly noted that the claimant was required to present a claim against the state prior to filing a lawsuit, which would have allowed the state entity to evaluate the dispute and possibly settle without costly litigation. To allow Yost to conduct discovery into potential plaintiffs would directly contravene the purposes of the GCA, because the state entity would be forced to engage in further litigation and lose the option to evaluate and settle the case prior to litigation. This reasoned determination is not an abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondent California Public Employees' Retirement System is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.