Filed 11/6/17 Richards v. County of Ventura CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HARRY DANIEL RICHARDS, Plaintiff and Appellant, v. COUNTY OF VENTURA, Defendant and Respondent.	2d Civ. No. B277214 (Super. Ct. No. 56-2015-00467676-CU-WT-VTA) (Ventura County)

Plaintiff Harry Daniel Richards appeals a judgment dismissing his age discrimination action against defendant County of Ventura (County). The trial court sustained a demurrer to his complaint without leave to amend. The court ruled his California Fair Employment and Housing Act (FEHA) age discrimination action was barred because he did not file a complaint with the Department of Fair Employment and Housing (DFEH) within the one-year statute of limitations period. (Gov. Code, §§ 12900 et seq., 12960, subd. (d).[1])

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

We conclude, among other things, that Richards has not shown the statute of limitations was tolled because of his attorney's medical condition (*Lewis v. Superior Court* (1985) 175 Cal.App.3d 366), or that equitable tolling applied because of his attorney's mistake. We affirm.

FACTS

Richards was employed by the County as a deputy chief information officer. He was 63 years old. On November 14, 2014, his employment was terminated.

Richards claimed his termination was the result of age discrimination. He retained attorney Joshua A. Burt.

On May 19, 2015, Richards filed a lawsuit against the County for damages, alleging age discrimination and other causes of action. He subsequently filed three amended complaints.

In his fourth amended complaint, Richards alleged causes of action against the County for 1) age harassment 2) age discrimination, and 3) retaliation in violation of FEHA. He alleged he filed a FEHA complaint with DFEH on February 5, 2016.

The statute of limitations to file a complaint with DFEH expired on November 15, 2015. Richards alleges the statute of limitations was tolled because 1) on May 5, 2014, his attorney Burt "was struck down with a very serious and unexpected illness"; 2) Burt "made errors in judgment due solely to severe pain and . . . confusion caused by the various medications his physicians prescribed"; 3) Burt "vividly remember[s] preparing the DFEH complaint online and submitting the forms electronically," on December 17, 2014; 4) "[h]owever, there is no record of [the Dec. 17th] submission and counsel must admit that a mistake must have occurred during the process"; and 5) "[t]he

continued use of painkillers clearly clouded counsel's memory." Burt represented Richards throughout this litigation.

Richards attached as an exhibit to the complaint the declaration of Burt's doctor, Benito A. Pedraza. Richards incorporated by reference the statements in that declaration as allegations of the complaint. Pedraza declared that between "January [and] early April 2015," Burt's "medications made it very difficult for [Burt] to keep up on his workload and meet deadlines." As of June 2015, "Burt's pain is well controlled by his current medications, which *do not have any of the negative side effects that would interfere with [Burt's] ability to practice law*." (Italics added.)

The County filed a demurrer alleging, among other things, that: 1) Richards did not file a DFEH complaint within the one-year statute of limitations (§ 12960, subd. (d)), and 2) he "fails to allege facts sufficient to establish equitable tolling."

The trial court sustained the demurrer without leave to amend. It ruled that 1) Richards did not timely file the DFEH complaint within the one-year statute of limitations, 2) Richards "[did] not allege facts indicating that any of the statutory extensions to the 1-year deadline in § 12960(d) are applicable," and 3) the statute of limitations was not equitably tolled because of Richards's attorney's medical condition. (*Lewis v. Superior Court*, *supra*, 175 Cal.App.3d 366.)

DISCUSSION

Richards contends the equitable tolling doctrine should apply to extend the limitations period given the facts of this case.

"[A] demurrer assumes the truth of the complaint's properly pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts." (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20.) "On appeal, '[w]hen a

demurrer [has been] sustained, we determine whether the complaint states facts sufficient to constitute a cause of action.'" (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.) Where a cause of action is filed beyond the statute of limitations deadline, the plaintiff must plead sufficient facts to show why the limitations bar is not applicable. (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900.) A demurrer is properly sustained where the plaintiff does not timely file a claim which is the prerequisite for the filing of the action. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

Richards alleged he was fired on November 14, 2014, "solely based on [his] age" in violation of FEHA. (§§ 12900 et seq., 12960.) "The timely filing of an administrative complaint [with the DFEH] is a prerequisite to the bringing of a civil action for damages under the FEHA." (*Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 492.) The statute of limitations to file a DFEH complaint is one year. (*Ibid.*; § 12960, subd. (d).) The trial court ruled Richards's failure to file the DFEH complaint by November 14, 2015, within the one-year statute of limitations, barred this action.

Tolling of the Statute of Limitations

Statutes of limitations are seldom tolled. But "in special situations," the doctrine of equitable tolling may be applied "to soften the harsh impact of " these limitations periods by suspending or extending them. (*Addison v. State of California* (1978) 21 Cal.3d 313, 316.) "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99.) It has been applied by both federal and state courts. (See, e.g., *Irwin v. Dept. of Veterans Affairs* (1990) 498

U.S. 89; *McCloud v. State of Arizona* (Ariz. Ct.App. 2007) 170 P.3d 691, 697, 698.)

The most common type of equitable tolling involves suspending the statute of limitations for one case while the plaintiff pursues an alternative remedy in another case. For example, in *Addison*, the plaintiff had multiple federal and state causes of action. Instead of simultaneously filing in both federal and state court, he elected to first file in federal court. Our Supreme Court held the filing in federal court tolled the statute of limitations for an untimely filed subsequent state court action. In *McDonald*, an employee had multiple remedies to pursue a discrimination case. He elected to first pursue an internal administrative remedy to challenge the discrimination. The court ruled a FEHA limitations period was subject to equitable tolling because of the litigation in the first case.

Richards relies on the *Addison* and *McDonald* cases, but the reason for tolling in those cases is not present here.

Richards alleges his rights were violated on a specific date. Courts have generally declined to apply equitable tolling where a plaintiff knows his or her rights were violated and does not timely file an administrative claim--the prerequisite to the filing of the lawsuit. (*J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 658 [no equitable tolling for plaintiff who "simply failed to comply with the claims statutes"]; *State of California v. Superior Court*, *supra*, 32 Cal.4th 1234, 1239; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293; *Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109; *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1084-1086; see also *Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1417 ["the equitable

tolling doctrine is inapplicable once the employee is on notice that his or her rights had been violated"].)

Richards filed this action without filing the DFEH complaint. The timely filing of that administrative complaint is a requirement to pursue a FEHA case. (*Romano v. Rockwell International, Inc.*, *supra*, 14 Cal.4th at p. 492.) In *Bjorndal*, the court held the equitable tolling doctrine does not "allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit." (*Bjorndal v. Superior Court*, *supra*, 211 Cal.App.4th at p. 1109; see also *J.M. v. Huntington Beach Union High School Dist.*, *supra*, 2 Cal.5th at p. 657 ["it is not 'reasonable' to pursue a court action when the claims filing requirements have not been satisfied"].) In *Acuna*, the court held a FEHA plaintiff "cannot revive . . . expired claims by filing a new DFEH complaint" after the limitations period has expired. (*Acuna v. San Diego Gas & Electric Co.*, *supra,* 217 Cal.App.4th at p. 1417.)

The Lewis Equitable Tolling Doctrine

Richards contends that his attorney's medical condition requires tolling under *Lewis v. Superior Court*, *supra*, 175 Cal.App.3d 366.

In *Lewis*, the physical incapacity of plaintiff's lawyer made it impossible for him to file a complaint within the limitations period. Four days before the running of that period, Lewis's counsel was seriously injured when he was hit by a car. He had "severe, life-threatening injuries to his head and body that totally disabled him mentally and physically beyond the March 17, 1984, deadline for filing the plaintiff's [lawsuit]." (*Lewis v. Superior Court*, *supra*, 175 Cal.App.3d at p. 370.) He was in the hospital for a month and did not return to his law practice until a month after the March 17th filing deadline. The lawyer did not regain

consciousness until five days after the statute of limitations had run.

The Court of Appeal held that because it was impossible for Lewis's lawyer to file within the limitations period, a rare equitable tolling exception to the statute of limitations was appropriate. It said, "There are compelling reasons for recognition of an *exception of impossibility in the present case*." (*Lewis v. Superior Court*, *supra*, 175 Cal.App.3d at p. 378, italics added.)

Insufficient Allegations of Attorney Incapacity Under Lewis

Here the trial court ruled that the *Lewis* impossibility exception did not apply because Richards did not plead it was impossible for his counsel to file the DFEH complaint "prior to the November [14,] 2015," limitations deadline. The trial court did not err.

Richards's case is not analogous to *Lewis*. In *Lewis*, at the deadline to file the complaint, the attorney was in the hospital and unconscious. Here, at the November 15, 2015, DFEH deadline, Richards's attorney was not disabled. He was practicing law. Several months before the November 15th deadline, Burt had recovered from his medication complications. In paragraph 30 of the complaint, Richards alleged, "Not until May 2015 did counsel's physicians change counsel's treatment to exclude any painkilling medications that cause any negative side effects that impacted his ability to work."

Richards alleged that Burt's doctor had determined that, as of June 2015, "Burt's pain is well controlled by his current medications, which *do not have any of the negative side effects that would interfere with [Burt's] ability to practice law*." (Italics added.) Consequently, from June through the November 15th DFEH deadline, Burt did not have a medical condition that

prevented him from timely filing the DFEH complaint. A special condition may authorize an equitable tolling exception, but "[o]nce the condition is lifted, the statute of limitations will continue to run." (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1305.) "'The fact that counsel became ill does not excuse the period of time when [counsel] was not ill.'" (*Gibbons v. United States* (8th Cir. 2003) 317 F.3d 852, 855.)

Richards also alleged that Burt's doctor determined there was a period during which the "medications impacted [Burt's] ability to focus." That was from "January through early April 2015," several months prior to the DFEH deadline. Burt's doctor said the "medications made it very difficult for [Burt] to keep up on his workload and meet deadlines" during that four-month period. But that does not show that timely filing of the DFEH complaint was impossible. (*Lewis v. Superior Court*, *supra*, 175 Cal.App.3d at p. 378; see also *Goldman v. Palmtag* (1915) 169 Cal. 170, 171 [counsel's four-month illness was not a sufficient excuse where he was able to practice during the remaining relevant period].)

The County notes Richards did not allege the type of severe attorney incapacity present in *Lewis* or the type found in other equitable tolling cases. (See, e.g., *McCloud v. State of Arizona*, *supra*, 170 P.3d at pps. 697, 698 [equitable tolling is appropriate for extraordinary circumstances and "rare cases" of "near-total disability," such as mental illness preventing an attorney from practicing law or a stroke with debilitating illness leading to death]; *Robertson v. Simpson* (6th Cir. 2010) 624 F.3d 781, 785 ["extraordinary circumstance" such as "mental incapacity of his or her attorney"]; *Cantrell v. Knoxville Community Dev. Corp.* (6th Cir. 1995) 60 F.3d 1177, 1180, fn. 1 [attorney's mental state requiring his removal from the active practice of law]; *United*

States v. Cirami (2nd Cir. 1977) 563 F.2d 26, 31 [attorney's "mental disorder" with bar association "charges" involving his "inability" to properly practice law]; *Dahlman v. AARP* (D.D.C. 2011) 791 F.Supp.2d 68, 78 [disability making it impossible for plaintiff, an attorney, "'to engage in rational thought'"]; *Fogg v. Carroll* (D. Del. 2006) 465 F.Supp.2d 336, 345 [an attorney's "fatal illness"]; see also *United States v. Marcello* (7th Cir. 2000) 212 F.3d 1005, 1010 ["the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule"].)

In addition, state laws authorizing tolling for an attorney's disability also apply to cases of such severe incapacity that it requires the attorney's removal from the practice of law. (*Grell v. Laci Le Beau Corp.*, *supra*, 73 Cal.App.4th at p. 1305 ["tolling due to the disability of plaintiff's lawyer whose practice has been taken over by the court because of the attorney's incapacity to perform"]; *Winney v. County of Saratoga* (N.Y. App. 1998) 676 N.Y.S.2d 356, 357 [applies where "attorney's disability effectually prevents him or her from practicing law"].)

Judicial Notice

The County and Richards have filed requests for judicial notice of court records from other cases where Burt is counsel of record. We grant these requests. On a demurrer we do not assume the truth of pleaded "contentions or assertions contradicted by judicially noticeable facts." (*Evans v. City of Berkeley*, *supra*, 38 Cal.4th at p. 20.)

The County notes that Burt represented a plaintiff in a federal court civil case. On October 13, 2014, Burt filed an opposition to an "OSC re dismissal" stating, "Counsel is *now back to work full time and will be able to prosecute the case fully*." (Italics added.) That was more than a year prior to the DFEH

complaint deadline. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 [the court may take notice of conflicting representations a person makes in different actions]; *Knight v. Pacific Gas & Electric Co.* (1960) 178 Cal.App.2d 923, 930.)

Richards has presented four minute orders from other cases. He claims they show Burt obtained relief from dismissals due to his illness. The relevance of three of these minute orders is diminished because they do not contain sufficient dates, procedural facts or case history information. One minute order, however, is sufficiently extensive. It reflects that the Ventura County Superior Court in an action involving different parties granted relief to parties represented by Burt from a dismissal. The court noted his illness during the period of January through April 2015. But the court also found that, as of the date of the minute order (*July 15, 2015*), Burt submitted a declaration showing that he is currently "*working full time without impairment*." (Italics added.) This was several months before the DFEH complaint deadline.

The County also notes that in the current case Burt was actively practicing law from May 19, 2015, *through* the November DFEH deadline. The record reflects that in that period: 1) Burt filed the complaint (May 19, 2015); 2) he filed a proof of service (June 1, 2015); 3) he filed a first amended complaint (July 21, 2015); 4) he filed a stipulation for an amendment (Aug. 19, 2015); 5) he obtained an order granting leave to file an amended complaint (Aug, 21, 2015); 6) he filed a second amended complaint (Aug. 21, 2015); 7) he appeared at an OSC hearing (Oct. 16, 2015); 8) he filed a stipulation to file a third amended complaint (Nov. 10, 2015); and 9) he filed a "case management statement" (Nov. 17, 2015). Burt's October 16, 2015, court appearance at the OSC hearing occurred one month before the

DFEH complaint deadline. (*Knight v. Pacific Gas & Electric Co.*, *supra*, 178 Cal.App.2d at p. 930 [attorney's nine-month illness was not a justifiable excuse for delay where he was practicing law during that period].)

An Attorney's Mistake as a Ground for Equitable Tolling

Richards alleged Burt had a mistaken memory about having filed a DFEH complaint in December 2014. But that is not an allegation of incapacity under *Lewis*. Burt did not have a medical condition at the time of the DFEH deadline that made it impossible for him to practice law.

The County claims: 1) "[p]hysical incapacity is far different from forgetfulness"; 2) counsel's case file should "have revealed that [Burt] had not received a [DFEH] right-to-sue letter"; and 3) consequently, the "failure to timely file a DFEH complaint here is a matter of inadvertence, neglect or *mistake*, not incapacity." (Italics added.) We agree.

At the end of the complaint's "facts relevant to *equitable tolling*," Richards alleged "plaintiff's *counsel's mistake is excusable* . . . ." (Italics added.) He said "a mistake must have occurred during the process." He alleged Burt had a mistaken memory about having filed a DFEH complaint due to his use of medications. But to complete the administrative process, Burt also needed a right to sue letter.

The County correctly notes that 1) a right to sue letter is so critical to a FEHA case that its absence from an attorney's file should trigger a prompt inquiry about a problem, and 2) Richards did not allege sufficient facts to show why the mistake could not have been discovered with *reasonable diligence* during the *several months* prior to the DFEH complaint deadline when Burt was actively litigating on Richards's behalf. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808; *Addison v. State of*

California, *supra*, 21 Cal.3d at p. 319 [equitable tolling requires showing of prompt and reasonable conduct]; *Gibbons v. United States*, *supra*, 317 F.3d at p. 855 [no relief where there was "no persuasive explanation for [counsel's] failure to take appropriate measures"]; *Valverde v. Stinson* (2d Cir. 2000) 224 F.3d 129, 134 [equitable tolling requires a showing of reasonable diligence].)

Richards did not allege that Burt's mistaken memory about filing the DFEH complaint prevented Burt from representing him, making court appearances or filing documents. He did not allege that it prevented Burt from reviewing his client's case file.

Equitable tolling applies for extraordinary circumstances. It does "not extend" to "a garden variety claim of excusable neglect." (*Irwin v. Department of Veterans Affairs*, *supra*, 498 U.S. 89, 96; *Tannhauser v. Adams* (1947) 31 Cal.2d 169, 178 [equitable tolling not applicable in a case involving attorney "neglect"]; *Lewis v. Superior Court*, *supra*, 175 Cal.App.3d at p. 378.) Nor does it generally apply to cases involving "[a]ttorney miscalculation" (*Lawrence v. Florida* (2007) 549 U.S. 327, 336) or "delay due to attorney neglect." (*Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298, 306, overruled on another ground in *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 634; *Todd v. County of Los Angeles* (1977) 74 Cal.App.3d 661, 666 [no relief for "'excusable neglect'" because of attorney's failure to timely act].)

Moreover, an attorney's mistake is not a ground for relief where the attorney does not file within the statute of limitations period. (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372; *Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25, 31-32; *Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, 933; *Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, 1563;

Kupka v. Board of Administration (1981) 122 Cal.App.3d 791, 794-795.)

Not Granting Leave to Amend

The trial court sustained the demurrer without leave to amend. Granting leave to amend is within the trial court's sound discretion. (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.) This was Richard's *fourth amended complaint*. The court previously granted him "leave to amend so as to have an opportunity to attempt to plead around the time-bar." He has not shown how he could amend to state a cause of action that would not be barred by the statute of limitations. He has not shown an abuse of discretion. We have reviewed Richards's remaining contentions and we conclude he has not shown grounds for reversal.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded in favor of respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Rocky J. Baio, Judge

Superior Court County of Ventura

The Law Office of Joshua A. Burt, Joshua A. Burt for Plaintiff and Appellant.

Leroy Smith, County Counsel, Andrew Gschwind, Assistant County Counsel, for Defendant and Respondent.