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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

S. JACKSON,

Plaintiff and Appellant,

v.

CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Defendant and Respondent.

B275223
(Los Angeles County Super. Ct. No. BC573969)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

S. Jackson, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Jonathan L. Wolff, Chief Assistant Attorney General, Kristin G. Hogue, Senior Assistant Attorney General and Joel A. Davis, Deputy Attorney General, for Defendant and Respondent.

After appellant S. Jackson initiated an action against the California Employment Development Department (EDD) and its former director, Pam Harris, the State of California, acting by and through the EDD (State), demurred to appellant's first amended complaint. The trial court sustained the demurrer without leave to amend, concluding that there was no contract, and that appellant's claim would be time-barred had a contract existed. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In February 2015, appellant, acting in propria persona, filed her original complaint against the EDD and Harris, asserting a claim for breach of contract, together with common counts. The complaint alleged that the EDD and Harris "deliberately and fraudulently intercepted and withheld funds . . . without just cause, legal authorization, [and] due process[,] and without any intention of ever honoring the [pertinent] contract." The complaint sought $5,000,000 in damages, as well as prejudgment interest, $300,000 in attorney fees, and $100,000 in miscellaneous fees.

The State demurred to the complaint, contending that it failed to allege the existence of a contract, and that appellant had not complied with the claim presentation requirements of the Government Claims Act (Gov. Code,

§ 810 et seq.).[1] On the date set for the hearing on the demurrer, appellant filed an opposition but did not initially appear at the hearing. The trial court sustained the demurrer without leave to amend. The minute order from the hearing states that the demurrer was unopposed, and that appellant made a late appearance after the ruling.

In August 2015, after a judgment had been entered in favor of the EDD and Harris, appellant filed a motion for a new trial, contending she had been denied an opportunity to oppose the demurrer. The court granted the motion, vacated the judgment, and sustained the demurrer to the complaint with leave to amend.

On December 2015, appellant filed her first amended complaint (FAC), which asserted a single breach of contract claim for $7,261,565 in damages, including interest and certain penalties. The State demurred on the grounds that the FAC failed to allege the existence of a contract and that its cause of action was untimely under the Government Claims Act. The trial court sustained the demurrer to the FAC without leave to amend, and designated its order as a judgment of dismissal. This appeal followed.[2]

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[1] Although that legislation is often denominated "'the Tort Claims Act,'" our Supreme Court has endorsed the designation we have applied. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 741-742.)

[2] The parties disagree regarding the identity and proper designation of the respondent or respondents. Appellant identifies the EDD and Harris as respondents; the

(*Fn. is continued on the next page.*)

DISCUSSION

Appellant contends the trial court erred in sustaining the demurrer without leave to amend. As explained below, we disagree.

A. *Standards of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted (*Cantu*).) "Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Id.* at p. 879, fn. 9.)

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responding party identifies itself as the State of California, acting by and through the EDD, and maintains that Harris was neither served with process nor appeared in the action. It is unnecessary to resolve this dispute in view of our conclusion that the demurrer to the FAC was properly sustained without leave to amend.

Under the first standard of review, "we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]" (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.)

Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. (*Cantu*, *supra*, 4 Cal.App.4th at p. 890.) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Ibid*.)

B. *Facts*[3]

The following facts are alleged in the FAC and its accompanying documents or admitted by appellant: In

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[3] Because documents constituting the "foundation" of appellant's claim are incorporated into the FAC, we set forth the alleged facts in light of those documents. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 430, p. 564.) Additionally, for purposes of evaluating the FAC, we treat as judicial admissions facts that appellant has acknowledged in opposing the demurrer to the FAC. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 560-562.)

December 2012, the EDD notified appellant that she was liable for a $563 overpayment of unemployment insurance benefits in early 2010 (Unemp. Ins. Code, § 1375), and a penalty assessment relating to the overpayment (Unemp. Ins. Code, § 1375.1). At some point, the EDD also determined that appellant was eligible only for reduced benefits. Following those determinations, the EDD withheld some unemployment insurance benefits and a portion of appellant's state income tax refund. Appellant undertook administrative appeals from these determinations.

The FAC alleges that on or about July 8, 2013, the parties entered a written agreement. According to the FAC, the terms of the agreement were set forth in a July 1, 2013 document entitled "Final Demand Notice" that appellant sent to Harris. (Capitalization omitted.) The document stated: "You have failed to comply with my repeated requests to release funds due to me that your agency stole under false pretenses. You must release all funds within seven days of receipt of this letter or immediate legal action will begin! . . . [¶] . . .Your agency is in violation of multiple local, state, and federal laws both criminal and civil . . . . [¶] . . . [¶] . . .You must release the funds in 'good faith' immediately upon receipt of this letter. If funds are not posted to my . . . account by 9:00 a.m. on Monday, July 8[,] you and your agency agree to pay $25,000.00 for each day you have violated my Constitutional/civil rights in addition to interest and penalties. [¶] . . . I will begin legal action to

secure my rights . . . ."[4] The FAC further alleged that the EDD and Harris accepted the contract "by continuing to withhold . . . funds due to [appellant] . . . in violation of [her] Constitutional and/or civil rights . . . for an additional 154 days, after which the funds were released."

After the July 8 deadline passed, appellant took action in her administrative appeals to recover the withheld funds. Later, in early September 2013, the administrative law judge in those appeals issued decisions, concluding that "[a]lthough the overpayment was not caused by [appellant's] fraud or other wrongful act, repayment [of the $563 in overpaid benefits] is required." The administrative law judge further concluded that no penalty was properly assessed because appellant did not willfully mislead the EDD by act or omission, and that appellant had "received reduced benefits in an incorrect amount . . . ." As a result of the administrative law judge rulings, at least some withheld benefits were released.

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[4] Regarding the impending litigation, the notice stated: "Legal action may include the filing of both criminal and civil suits as well as liens against the real and personal properties of yourself ([Harris]), your agency (. . . EDD) and all other individuals involved in this racket. Wage attachments may be served and prison sentences incurred. Any cost associated with pursuing legal action will be added to the amount owed/stolen." According to the opposition, an administrative law judge overruled that determination in or about September 2013.

On September 23, 2014, appellant sent the EDD a document entitled "Invoice," demanding the payment of $5,984,068. Later, on August 18, 2014, appellant submitted a claim to the California Victim Compensation and Government Claims Board (Board), seeking $5,895,634 (former Gov. Code, § 915, subd. (b)(1)). The claim attributed the damages to a "[f]ailure to pay monies owed to [appellant]," asserted a breach of the July 2013 contract, and identified the date of the relevant incident as October 24, 2013. In September 2014, the Board notified appellant that it had no jurisdiction to consider the claim because it was filed more than one year after the incident constituting "the basis of the claim . . . ."

On October 13, 2014, appellant submitted an "update" to her previous claim, requesting $6,284,068. On the same date, appellant wrote to the Board and certain public officials, stating: "The date of the incident that forms the basis of my claim is October 24th, 2013. . . . [¶] In this case, refusal to pay per the terms and conditions of the contract occurred 30 days after invoicing. You cannot *fail* to pay *before* I request payment. Your first invoice was issued on September 23rd, 2013. You had 30 days in which to pay, which you failed to do. Therefore, you breached the contract on the 24th of October, 2013."

C. *Analysis*

In sustaining the demurrer, the trial court concluded that the FAC failed to allege the existence of a contract, and that its cause of action for breach of contract was time-

barred. As explained below, we agree with those determinations.

1. *No Contract*

The FAC fails to state a claim for breach of contract because its allegations show that no contract was ever established between the parties. "To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation.] If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference. [Citation]." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) In reviewing the sustaining of a demurrer, an appellate court may reject the allegation that a written document constitutes a contract when the document and its surrounding circumstances establish that it is not, in fact, a contract. (*Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1562.)

The FAC identifies the July 2013 demand notice -- a copy of which is attached and incorporated by reference -- as the agreement in question, but alleges no conduct by the EDD or Harris sufficient to constitute acceptance of the agreement. The "essential elements" of a contract are "(1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration." (*Marshall & Co. v. Weisel* (1966) 242 Cal.App.2d 191, 196;

Civ.Code, § 1550.) Generally, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722 (*Southern Cal. Acoustics*).) Thus, acceptance may be inferred from silence in special circumstances, including inaction "in the face of a duty to act" or "from retention of the benefit offered." (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1386.) No such acceptance is alleged in the FAC.

The FAC asserts that the EDD and Harris manifested acceptance "by continuing to withhold unemployment insurance funds due to [appellant] without due process and in violation of [her] Constitutional and/or civil rights . . . ." As our Supreme Court has explained, retention of benefits may in some circumstances constitute acceptance because "a party [is] not [to] be permitted to receive and enjoy benefits that he knows are being offered to him at a price without paying for them, if he had an opportunity to reject them when . . . offered without any expense or material inconvenience." (*Durgin v. Kaplan* (1968) 68 Cal.2d 81, 91 (*Durgin*); see Rest.2d Contracts, § 69, subd. (1)(a).)

Under that standard, the withholding of the unemployment insurance benefits alleged in the FAC cannot be regarded as acceptance of the purported contract, as nothing suggests that those benefits were "offered to [the EDD and Harris] at a price" (*Durgin*, *supra*, 68 Cal.2d at p. 91). The July 2013 demand notice itself shows that the

funds had not been tendered to the EDD with the expectation of compensation, as the notice asserted that the EDD had "stole[n]" the funds "under false pretenses." Furthermore, the FAC and its supporting documents establish that the EDD withheld the funds while acting under color of its statutory duties. According to the administrative appeal decision attached to the FAC, the EDD paid appellant reduced benefits because she "did not report the correct amount of wages" for the pertinent period. Additionally, before the trial court, appellant acknowledged that the EDD withheld some unemployment insurance benefits due to a determination that she was ineligible for those benefits, and withheld funds from her state income tax refund due to a determination that she had received an overpayment of benefits. Because the withholding predated the purported contract and reflected the EDD's statutory duties, that conduct did not manifest acceptance. (See *Southern Cal. Acoustics*, *supra*, 71 Cal.2d at p. 723 [conduct by general contractor merely demonstrating a "response to statutory command" did not constitute acceptance of subcontractor's contractual offer].) Accordingly, the trial court did not err in concluding that the breach of contract claim failed for want of a contract.

2. *Untimely Claim*

The trial court also correctly concluded that appellant's cause of action failed for an independent reason, namely, that it was untimely. Under the Government Claims Act, subject to certain exceptions, "all claims for money or

damages against local public entities" must be presented to the responsible public entity before a lawsuit is filed. (Gov. Code, § 905.) Generally, claims for personal injury and property damage must be presented within six months after accrual; all other claims must be presented within a year after their accrual. (Gov. Code, § 911.2.) During the pertinent period, no suit asserting a claim subject to these requirements was permitted to be brought against a public entity until the claim had been presented to the entity and denied by Board, either expressly or through the Board's inaction. (Gov. Code, § 945.4.) "Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bar[red] a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239 (*Bodde*).)

As appellant's lawsuit against the EDD and Harris is for breach of contract, her cause of action was barred unless she presented her claim to EDD within a year of its accrual. "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Sav. Bank* (1954) 123 Cal.App.2d 145, 149; accord, *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 966 (*Lauron*).) Accordingly, in order to determine the time -- if ever -- at which the claim accrued, we must determine what the purported contract required of the EDD and Harris, as well as when they allegedly failed to perform that act.

Identifying the performance required of the EDD and Harris presents a question of law to be resolved solely by reference to the language of the alleged contract -- that is, the July 2013 demand notice -- as the FAC's allegations preclude the existence of negotiations or other extrinsic evidence bearing on the requisite performance. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.) The demand notice, by its plain language, sought the performance of a specific act by the EDD and Harris, namely, the immediate restoration of the withheld benefits. The notice set a date by which that act was to be performed in order for the EDD and Harris to avoid legal action by appellant; additionally, the demand notice stated that they "agreed to pay $25,000 for each day" they retained the withheld benefits.

Viewed as a whole, the notice is not plausibly interpreted as proposing a contract; rather, it demanded immediate release of the withheld funds, and identified unfavorable consequences for the failure to comply. To the extent the notice may be construed as offering a contract, however, it proposed a settlement agreement with a liquidated damages provision. The alleged contract attempted to resolve appellant's dispute with the EDD and Harris through an exchange of performances, that is, appellant would refrain from further litigation if the EDD and Harris were to restore the withheld benefits promptly, that is, no later than July 8, 2013. The additional term relating to the $25,000 per diem payment operated as a liquidated damages provision, as it set forth a formula for

calculating the amount of damages owed by the EDD and Harris for a failure to restore the withheld benefits by July 8, 2013.[5] So understood, the purported contract required the EDD and Harris to release the funds on or before the specified date.

The trial court thus correctly concluded that appellant's breach of contract action was time-barred. In view of the principles applicable to claims for breach of contract, appellant's action accrued when the EDD and Harris failed to release the funds by July 8, 2013. (*Lauron*, *supra*, 8 Cal.App.5th at p. 966.) However, appellant first presented a claim to the Board on August 13, 2014, more than a year later. Accordingly, under the Government

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[5] "'The term "liquidated damages" is used to indicate an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement, and which may not ordinarily be modified or altered when damages actually result from nonperformance of the contract.' [Citations.] 'Liquidated damages constitute a sum which a contracting party agrees to pay or a deposit which he agrees to forfeit for breach of some contractual obligation.' [Citation.] A liquidated damages provision in a contract 'normally stipulates a pre-estimate of damages in order that the parties may know with reasonable certainty the extent of liability for a breach of their contract.' [Citation.]" (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 521 (*McGuire*).) Such provisions include contractual terms establishing temporally-based formulas for determining the amount of damages. (*Bayol v. Zipcar, Inc.* (N.D. Cal. 2015) 78 F.Supp.3d 1252, 1256-1257.)

Claims Act, appellant's failure to present a claim within a year of the accrual of her action bars her lawsuit. (*Bodde*, *supra*, 32 Cal.4th at p. 1239.)

Before the trial court and on appeal, appellant has contended the breach of the contract pertinent to the accrual of her cause of action occurred after appellant propounded the September 2013 invoice. Because appellant predicates that contention on the argument that the EDD and Harris "could not fail to pay before they were billed" (underlining and bolding deleted), the contention relies on the interpretation of the contract that appellant has offered below and on appeal, namely, that the "$25,000 per day" clause set forth the key performance owed by the EDD and Harris. As explained below, that interpretation is defective.

According to appellant's proposed interpretation, the "$25,000 per day" clause did not provide the measure for determining her liquidated damages, but effectively created an alternative option for performance by the EDD and Harris. (*McGuire, supra*, 220 Cal.App.4th at p. 513 ["[A] provision in a contract that appears at first glance to be . . . a liquidated damages clause . . . may instead merely be a provision that permissibly calls for alternative performance by the obligor"].) The FAC alleges -- and appellant's brief asserts -- that she "allowed [the EDD and Harris] use of [the] . . . funds *as agreed* waiving all Constitutional and civil rights to said . . . funds pending the outcome of the [Board's] decision on the matter, provided that [they] would pay $25,000 per day for the injustice and inconvenience." (Italics added.) Appellant thus maintains that under the

contract, if the EDD and Harris did not restore the withheld benefits, they were required to pay $25,000 per day in exchange for appellant's waiver of her litigation rights.

The proposed interpretation fails in light of the plain language of the July 2013 demand notice, which stated, "You must release all funds within seven days of receipt of this letter or immediate legal action will begin!", described the proposed litigation, and offered no waiver of that litigation. Because the notice did not identify the $25,000 per day assessment as a performance owed by the EDD and Harris in exchange for appellant's waiver, we reject appellant's contention regarding the accrual date of her cause of action.

Appellant also contends her cause of action is exempt from the claim presentation requirement of the Government Claims Act because it concerned unemployment insurance benefits. We disagree. Government Code section 905 excludes from those requirements enumerated claims, including claims "arising under" the provisions of the Unemployment Insurance Code" (Gov. Code, § 905, subd. (j)).[6] Generally, "the statutory exceptions specified in [Government Code] section 905 are given a strict

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[6] The exception in subdivision (j) of Government Code section 905 encompasses "[c]laims arising under any provision of the Unemployment Insurance Code, including, but not limited to, claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed."

construction." (*Dalton v. East Bay Mun. Utility Dist.* (1993) 18 Cal.App.4th 1566, 1573.)

In *Baillaregeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 675-678, a public employee sued her employer, asserting causes of action based on the denial of a benefit promised in a booklet describing her pension plan, but not contained in the plan's actual provisions. The trial court granted judgment on the pleadings, concluding that the employee had not satisfied the claim presentation requirements, notwithstanding the statutory exception for claims for benefits "'under any public retirement or pension system'" (Gov. Code, § 905, subd. (f)). (*Baillaregeon, supra,* at pp. 675, 681-682.) In determining that the causes of action were subject to the claim presentation requirements, the appellate court stated: "The written promise upon which [the plaintiff] relied was *not* in the [p]lan but was contained in a separate document, the *booklet*. This is the essence of her claim." (*Id.* at p. 681.)

That rationale applies here. Appellant's breach of contract action did not aim at ending the dispute regarding her unemployment insurance benefits -- which she acknowledges was resolved through her administrative appeals -- but instead sought the additional benefits ostensibly provided by her alleged contract with the EDD and Harris. Because her action did not "aris[e] under" the provision of the Unemployment Insurance Code, it was thus subject to the claim presentation requirements of the

Government Claims Act. In sum, the trial court did not err in sustaining the demurrer to the FAC.[7]

D. *Denial of Leave to Amend*

We turn to whether the trial court properly sustained the demurrer without leave to amend. Although appellant requested leave to amend before the trial court, and asserts on appeal that she can amend her complaint to include new causes of action, she has identified no allegations capable of curing the FAC's defects or supporting tenable claims. We therefore discern no abuse of discretion. As explained in *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43, 44, "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]"

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[7] Appellant suggests that there was a waiver of the defense predicated on the claim presentation requirements, arguing that in September 2014, the Board engaged in a "blatant lie" when it denied jurisdiction to hear appellant's claim. However, because that denial was predicated on the Board's conclusion that appellant's claim was untimely under the claim presentation requirements, the Board correctly denied jurisdiction.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.