Filed 10/12/16 Kamal v. Farber CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KARIM KAMAL, Plaintiff and Appellant, v. GAIL FARBER, Defendant and Respondent.	B269077 (Los Angeles County Super. Ct. Nos. EC058265 & EC058416)

APPEAL from a judgment of the Superior Court of Los Angeles County. Samantha P. Jessner, Judge. Affirmed.

Karim Kamal, in pro. per.; Dalila Kamal-Griffin for Plaintiff and Appellant.

Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall for Defendant and Respondent.

Plaintiff and appellant Karim Kamal sued defendant and respondent Gail Farber, "in her individual and official capacities," as the alleged director of the Los Angeles County Department of Public Works. He alleged three causes of action as to Farber: allowing a dangerous roadway, pursuant to Government Code section 835;[1] negligence in the management and supervision the roadway; and intentional infliction of emotional distress, also premised on the management and supervision of the roadway. The trial court sustained Farber's demurrer to all three causes of action based on the immunity from individual liability afforded public employees under section 820.2, and entered a judgment in favor of Farber accordingly. Kamal appeals, arguing that the primary element necessary for immunity, namely, a public employee's discretionary acts, is not present in his claims against Farber. We affirm.

FACTS

Background

As always required in reviewing a ruling on a demurrer we treat the facts alleged in the operative pleading to be true. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We may also consider matters that are judicially noticed. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Examined in light of these rules, the facts in this case are as follows:

On April 17, 2011, Kamal was driving a motorcycle on Big Tujunga Canyon Road in the Vogel Flats area of the Angeles National Forest. At the exact same time, Samuel Morales (a named defendant in Kamal's operative pleading, but not a party to Kamal's present appeal) was riding a motorcycle on Big Tujunga Canyon Road in the same area as Kamal, traveling in the opposite direction. At the location where Morales and Kamal were approaching each other, Big Tujunga Canyon Road is an undivided roadway in a mountain area, with two traffic lanes, one in each direction of travel, and is "one of the most dangerous segments of roads in the County of Los Angeles" due to inadequate speed limit signs and or other signs warning of dangerous curves in the roadway.

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

As Kamal was approaching a sharp curve, he "suddenly saw a motorcycle coming from the opposite lane, miss the turn and go straight at [him]." The other motorcycle, driven by Morales, "came out of its lane, went straight into [Kamal]'s lane and collided head on with [Kamal]'s motorcycle while [Kamal] was in his lane." Kamal suffered serious and permanent injuries as a result of the collision between the two motorcycles.

The Operative Pleading and Demurrer

In June 2012, Kamal filed a first amended complaint against Morales, Los Angeles County, the Los Angeles County Department of Public Works and the State of California. Kamal also named Farber, in her individual and official capacities, "as the alleged director of the Los Angeles County Department of Public Works." As to Farber, the complaint alleged three causes of action, listed respectively: allowing a dangerous condition of public property under section 835; negligence for maintaining and supervising a roadway without adequate signs and for failing to provide "adequate law enforcement" to prevent drivers such as Morales from speeding on the roadway; and intentional infliction of emotional distress based on the same claims.

As to the causes of action under section 835 and for negligence, the complaint alleged that Big Tujunga Canyon had "no speed limit sign anywhere . . . coming . . . down the mountain in the direction that . . . Morales was driving . . . ," that it lacked a sign warning of the "sharp curve" that Morales overdrove, and that it lacked speed bumps ahead of dangerous curves.[2] As to Farber, the complaint alleged that she "knew that the lack of sign [*sic*] could cause an accident such as the one that occurred in this case," that the accident "was a foreseeable consequence of the absence of signs," and that Farber "did not remedy or correct the dangerous condition of the road" created by the absence of signs by placing signs "at . . . appropriate locations" on Big Tujunga Canyon Road within the meaning of Vehicle Code section 22349, subdivision (c). Kamal alleged that posting such signs was "economically feasible."

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[2] Morales filed a cross-complaint against the County for indemnity based on section 835. Morales's claims against the County are not relevant to Kamal's current appeal.

In September 2012, Farber filed a demurrer to Kamal's FAC. Farber argued, among other issues, that she was immune from individual liability on Kamal's causes of action under section 820.2, which provides:

> "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission *where the act or omission was the result of the exercise of the discretion vested in him [or her]*, whether or not such discretion be abused." (Italics added.)

Farber argued that if she made any decisions about where to place signs on Big Tujunga Canyon Road, and how many, and of what nature, the decisions necessarily involved the exercise of discretion. As Farber argued in her demurrer: "The crux of the claims against all of the defendants except defendant Samuel Morales is the alleged failure to place signs 'where appropriate.' . . . Plaintiff echoes the language in Vehicle Code section 22349, wherein it states that the Legislature intends that there be signs at 'appropriate locations.' . . . By its plain language, the government entities and employees tasked with determining those 'appropriate locations' do so by exercising their discretion. Thus, plaintiff's claims as to Ms. Farber are barred by [section] 820.2."

On November 14, 2012, the trial entered a minute order memorializing its reasons for its decision to sustain Farber's demurrer without leave to amend based on her defense under section 820.2.

On October 21, 2015, the trial court signed and entered a final judgment in favor of Farber.

On December 17, 2015, Kamal filed a notice of appeal from the judgment in favor of Farber entered on October 21, 2015.

DISCUSSION

I. Kamal's Appeal is Timely

Preliminarily, we dispose of Farber's argument that our court lacks jurisdiction to entertain Kamal's appeal because he filed an untimely notice of appeal. Farber is wrong.

California Rules of Court, rule 8.104(a) (hereafter rule 8.104(a)) provides that a notice of appeal must be filed on or before the earlier of two dates, specifically, the 60th

day after the appellant was served with a document explicitly entitled "notice of entry" of the appealable order or judgment, or the 180th day after the actual entry of the appealable order or judgment. "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc*. (1997) 15 Cal.4th 51, 56; and see also, e.g., *Stuart Whitman, Inc. v. Cataldo* (1986) 180 Cal.App.3d 1109, 1113 [an appellate court has "no discretion" to entertain an untimely appeal, and "must" dismiss the appeal]; and see also, e.g., *Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1107.) In short, "'an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.'" (*Norman I. Krug Real Estate Investments, Inc. v. Praszkver* (1990) 220 Cal.App.3d 35, 46.)

Here, the trial court signed and entered the judgment in favor of Farber on October 21, 2015. We see no indication that Farber served notice of entry of the judgment in her favor, thus Kamal had 180 days to file his notice of appeal, meaning he had until perhaps mid-April 2016 to do so. Kamal filed his notice of appeal on December 17, 2015, well within the time period prescribed by rule 8.104(a). Even assuming the 60 day time limit were applied, Kamal still had until late December 2015 to file his notice of appeal, and did so.

Farber's arguments for dismissal fail because they focus on the trial court's minute order of November 14, 2012, memorializing the court's decision to sustain her demurrer without leave to amend. Farber argues on appeal that the decision to sustain her demurrer without leave to amend constituted an appealable judgment. Although Farber is correct that the decision to sustain her demurrer without leave to amend had the practical effect of ending Kamal's case as to Farber, we reject Farber's argument for dismissal of this appeal for the simple reason that an order sustaining a demurrer is not an appealable judgment; an appeal may only be taken from the ensuing judgment. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 781.) Until Farber obtained a signed and entered final judgment against Kamal in October 2015, Kamal could not file a notice of appeal as there was not yet an appealable judgment from which an appeal could properly be taken.

When Farber finalized the judgment process in October 2015, Kamal thereafter filed a timely notice of appeal.

II. Standard of Review

We review an order sustaining a demurrer de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.) The judgment will be affirmed if the allegations fail to plead an essential element or clearly disclose some defense or bar to recovery. (*Brown v. Crandall* (2011) 198 Cal.App.4th 1, 8.)

III. Immunity

Kamal contends the judgment in favor of Farber must be reversed because the trial court erred in ruling that Farber was immune from personal liability under section 820.2. Kamal's arguments are not persuasive.

Nearly 50 years ago, in *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, (*McCorkle*), the Supreme Court explained the general coverage of the immunity afforded to individual public employees under section 820.2: "Whether or not a public employee is immune from liability under section 820.2 depends in many cases upon whether the act in question was 'discretionary' or 'ministerial,' respectively. [Citations.] For this reason, [the immunity issue has] frequently required judicial determination of the category into which the particular act falls: i.e., whether it was ministerial because it amounted 'only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own,' or discretionary because it required 'personal deliberation, decision and judgment.' [Citations.]" (*McCorkle*, *supra*, 70 Cal.2d at pp. 260-261.) The Supreme Court's more recent pronouncements on the subject are similar. As the court stated in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, the Legislature enacted section 820.2 to grant immunity from liability to public employees for their discretionary acts within the scope of their employment. (*Id*. at p. 980.)

Here, Kamal argues that "[t]here was no discretion to exercise" by Farber in the placing of speed and or other traffic warning signs on Big Tujunga Canyon Road, "only a mandate to obey." The problem with Kamal's argument is that she does not point to any

law or other directive that gave Farber a mandate to place any particular type of sign at or near the location on Big Tujunga Canyon Road where the Morales drove his motorcycle out of his lane and head-on into Kamal's motorcycle. Kamal points to Vehicle Code section 22349, which is in essence the law imposing the maximum speed limit on state roadways, but he reads a mandate in the statutory language which is not truly there. As relevant to Kamal's arguments, Vehicle Code section 22349, subdivision (c), provides: "It is *the intent* of the Legislature that there be *reasonable signing* on affected two-lane, undivided highways . . . , including placing signs at county boundaries to the extent possible, and *at other appropriate locations*." (Italics added.) We do not read this language to have imposed a mandated duty on Farber to have erected any sign of any kind at the curve on Big Tujunga Canyon Road where Morales drove into Kamal. Assuming that Vehicle Code section 22349, subdivision (c), applies to all nature of traffic warning signs, as opposed to merely the maximum speed limit, the determination of what is sufficient to constitute "reasonable signing" and where would be an "appropriate location" for traffic signs, plainly involves a public employee's exercise of his or her discretion, applying the employee's expertise, study, planning and judgment. Accordingly, section 820.2 applies.

In our view, Kamal's claims, and the issue of public employee immunity under section 820.2, are properly analyzed by reference to the reasoning in cases such as *Posey v. State of California* (1986) 180 Cal.App.3d 836 (*Posey*) and *California Highway Patrol v. Superior Court* (2008) 162 Cal.App.4th 1144 (*California Highway Patrol*). In *Posey*, a plaintiff sued the state after he drove into a disabled vehicle on the shoulder of a public roadway. California Highway Patrol (CHP) officers had driven by the disabled vehicle on normal patrol, but did not stop, inspect, or undertake any efforts to remove it from the shoulder. In sustaining the state's demurrer, the Court of Appeal ruled: "Under the facts of this case we decide that the failure of [CHP] officers to stop and inspect or to stop and remove a vehicle parked alongside the traveled roadway does not create a basis for liability on the part of the CHP, and thereby the State of California . . . , in that there is neither a mandatory duty nor a special relationship which obligates these officers to do

the aforesaid acts." (*Posey, supra,* 180 Cal.App.3d at pp. 840-841.) In its analysis, the Court of Appeal ruled that neither internal CHP procedures, nor the provisions of Vehicle Code section 22651, both of which authorize the CHP to do the types of acts that the plaintiff averred should have been done, created a mandatory duty to act. (*Posey,* at pp. 847-852.) Thus: "[t]he inspection and removal of disabled vehicles are discretionary acts and are therefore covered by the statutory immunities as set forth in . . . section 820.2." (*Id*. at p. 848, fn. omitted.)

In *California Highway Patrol,* plaintiffs filed a wrongful death action against the CHP and two of its officers. There, the CHP officers released a vehicle to a driver with a suspended license, and the driver almost immediately caused an accident that killed the decedent. Plaintiffs claimed that had the CHP officers impounded the vehicle, then the accident would not have occurred. The issue was whether Vehicle Code section 14602.6, which authorizes the impoundment of vehicles driven by certain categories of unlicensed drivers, created a mandatory or discretionary duty. The Court of Appeal ruled the authority was discretionary. (*California Highway Patrol, supra,* 162 Cal.App.4th at p. 1148.) In so ruling, the Court of Appeal noted both that there could be no liability because the officers had not breached a mandatory duty to act (see section 815.6) and that, "[i]f the enactment merely confers discretionary authority, public entities and employees are generally immune from liability." (*Id.* at p. 1155, citing section 820.2.)

In our view, the authority vested in public works employees such as Farber under Vehicle Code section 22349, subdivision (c), specifically, to erect "reasonable signing" at "appropriate locations" on a public roadway, is similar to the authority vested in public employees in the Vehicle Code sections involved in *Posey* and in *California Highway Patrol*. Vehicle Code section 22349, subdivision (c), is an empowering statute, and the manner in which that power is exercised is a matter for discretionary decisions. Because section 22349, subdivision (c), did not mandatorily command Farber to erect signs at any particular locations on Big Tujunga Canyon Road, she necessarily exercised discretion in doing so, and, thus, the immunity afforded under section 820.2 is applicable.

Kamal relies on three United States Supreme Court cases,[3] none involving section 820.2, for a different result. We find these arguments unpersuasive. All three cases upon which Kamal relies involved claims under the Federal Tort Claims Act (FTCA), and the application of the so-called "discretionary function" exception to liability pursuant to 28 U.S.C. section 2680(a). Even assuming that the federal cases applying the discretionary function exception of the FTCA coincided with state law applying section 820.2, a legal proposition which is not shown by the arguments in Kamal's opening brief, we would still reject Kamal's arguments. Kamal's discussion of the federal cases does not discuss any of the facts of those cases. As a result, it is not possible for us to evaluate whether the federal exception to liability under the FTCA may be applied by analogy or by parity of reasoning to Kamal's claims here, in juxtaposition to section 820.2. In short, Kamal's arguments relying on the federal cases are not sufficiently developed to show the trial court erred in his case in applying section 820.2.

Finally, Kamal argues: "It is a constant principle that the failure to warn of a danger is not a discretionary function." Here, he relies on *Johnson v. State of California* (1968) 69 Cal.2d 782 (*Johnson*). Again, we find Kamal's arguments unpersuasive. In *Johnson*, the Supreme Court ruled that a parole officer's decision whether to warn an adult couple that their prospective foster child had a background of violence "present[ed] no . . . reasons for immunity" inasmuch as the officer's decision was "at the lowest, ministerial rung of official action," and constituted "a classic case for the imposition of tort liability." (*Id*. at pp. 796-797.) In coming to these conclusions, the Supreme Court noted that virtually every public act encompasses some element of discretion, and ruled that section 820.2 is intended to afford immunity for "basic policy decisions," but not for the ministerial implementation of that basic policy. (See *Johnson*, at p. 796.) Further, the Supreme Court postulated that if courts did not properly apply the immunity from liability afforded under section 820.2, then they would find themselves "in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate

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[3] *United States v. Varig Airlines* (1984) 467 U.S. 797; *Berkovitz v. United States* (1988) 486 U.S. 531; *United States v. Gaubert* (1991) 499 U.S. 315.

branch of government." (*Johnson*, at p. 793.) Thus, the rule to be taken from Johnson and similar cases is that courts must apply immunity in a scope "no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions." (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 445 (*Tarasoff*) [discussing *Johnson* and ruling in context of demurrer that state employee therapist was not necessarily immune from liability for failing to warn victim that a patient expressed a desire to kill the victim].)

Kamal's case does not involve an alleged failure to give warning to a specifically identifiable person, based on a specifically presented risk, in a specifically set context, as in *Johnson* and *Tarasoff*. Here, we are presented with basic policy decisions regarding the build-out of a roadway's warning signs infrastructure, not to deter a single identified motorist (Morales) of a dangerous curve, but for the utility and safety of the motoring public generally. Under such circumstances, we are satisfied that the immunity afforded under section 820.2 is appropriately recognized.

DISPOSITION

The judgment in favor of defendant and respondent Farber is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.