Filed 9/12/17 Frazier v. City of Los Angeles 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| RAYMOND FRAZIER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF LOS ANGELES,<br><br>Defendant and Respondent. | B271500<br><br>(Los Angeles County Super. Ct. No. BS156064) |

APPEAL from an order of the Superior Court of the County of Los Angeles, Joanne O'Donnell, Judge. Affirmed.

Minevich Law and Gary Minevich for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Shaun Darby Jacobs, Deputy City Attorney, for Defendant and Respondent.

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Plaintiff Raymond Frazier appeals the trial court's order denying his petition under Government Code section 946.6[1] for relief from the claim filing requirements of section 945.4, so he may pursue his claims against defendant City of Los Angeles. (Defendant County of Los Angeles has been dismissed from the appeal.) Plaintiff was struck by a car on a City-maintained road, and had no recollection of the exact location of the accident. He did not file his claim with the City until nearly nine months after the accident. His claim, and his request to file a late claim, were denied by the City. Plaintiff contends the trial court erred in finding there was no mistake, inadvertence or excusable neglect on the part of plaintiff or his attorney, and in finding that plaintiff's claim accrued on the date of the accident. We affirm the order.

## BACKGROUND

On the morning of June 16, 2014, plaintiff was hit from behind by a vehicle while riding his bicycle along La Tuna Canyon Road. He suffered a number of injuries, including a broken spine that left him paralyzed, and was in a coma for approximately one month following the accident. Plaintiff's family retained counsel on June 18, 2014.

Plaintiff's attorney obtained the traffic incident report on July 1, 2014, from Officer Garcia of the Valley Traffic Division of the Los Angeles Police Department. The report was written by Officer D. Soltwedel. According to the report, the accident occurred within the City of Los Angeles. The report included a diagram of the roadway, showing that plaintiff was struck while traveling eastbound on La Tuna Canyon Road, 0.4 miles east of

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1 All statutory references are to the Government Code.

Fire Road West. Digital photographs of the scene were taken by Officer Henry, with the Valley Traffic Division. However the photographs were not appended to the report. At the location of the accident, La Tuna Canyon Road consisted of four lanes, two westbound and two eastbound, separated by a double yellow line. Neither the diagram of the roadway nor the report showed bicycle lanes at the location of the accident. The report identified the unlicensed driver of the car as the cause of the accident. The report also included the names and identification numbers of emergency response workers who transported plaintiff to the hospital.

Plaintiff's counsel was unable to find the location of the accident described in the incident report "in any of the topographical resources searched, including online resources such as Google Maps." On July 2, 2014, plaintiff's counsel contacted Officer Garcia and requested copies of the photographs of the accident scene. Garcia "promised" to send them to counsel by email "as soon as they were added to the file." Counsel's "office also made telephonic inquiries to the Los Angeles Police Department for copies of the photographs about every three weeks between July 2014 and January 2015, including at least two phone calls" made by counsel.

Plaintiff awoke from his coma in late July 2014, but had no memory of where the accident occurred.

In August 2014, counsel twice attempted to contact the unlicensed driver who hit plaintiff, but the driver would not discuss the accident with counsel.

The police department finally provided copies of the accident scene photographs to counsel on January 23, 2015. Counsel showed the photographs to plaintiff on January 26, and

plaintiff was able to describe the approximate location of the accident based on the photographs.

In early February 2015, counsel's investigators were able to determine the location of the accident, based on the photographs and plaintiff's description. Counsel visited the location several times in February, and discovered the City's potential liability due to improperly marked bicycle lanes, poorly maintained roads, and inadequate brush and tree clearance. According to counsel, prior to inspecting the accident's location, counsel "had no reasonable basis for believing [plaintiff] had a claim against [the City]."

Plaintiff's claim against the City was mailed on March 9, 2015, and was denied by the City on April 15, 2015. The claim identified "La Tuna Canyon Rd., Fire Road West[,] Sunland" as the location of the accident. The claim stated that the act or omission causing plaintiff's injury was that "the bike lane is improperly marked[;] bicycle lane inadequately maintained[;] and brush and tree clearance is inadequate." Plaintiff's request to file a late claim was sent to the City on April 21, 2015, and was denied on April 29, 2015.

On June 23, 2015, plaintiff filed a petition for an order relieving him from the claim filing requirements of section 945.4. The petition sought relief under subdivision (c)(1) of section 946.6, urging that plaintiff's "failure to timely present claims" to the City resulted from "mistake, inadvertence, surprise, or excusable neglect."

The City argued plaintiff's failure to make a timely claim resulted from inexcusable neglect. The accident report, the City asserted, made clear that the accident occurred within City limits, and that there was no bicycle lane at the location of the

accident. Therefore, the City argued that plaintiff was clearly on notice of his claim against the City.

The trial court denied the petition, concluding that "Petitioner was required to file his claim for personal injury within six months of his accident – or by December 16, 2014." The court noted that the information in the incident report was sufficient to identify the location of the accident.

Relying on maps of the area where the accident occurred, the court observed that "La Tuna Canyon Road runs east-west from Sun Valley, California . . . to the general vicinity of the Crescenta Highlands. . . . During the length of its traverse it only intersects with two fire roads: Hostetter Fire Road and Wildwood Fire Road. Hostetter intersects with the easternmost terminus of South La Tuna Canyon, which branches off from the main La Tuna Canyon thoroughfare near a Foothill Freeway off-ramp. It is unclear whether the author of the traffic collision report believed that South La Tuna Canyon and La Tuna Canyon are the same road. However, it is clear that there is no road named 'La Tuna Canyon' east of the intersection of South La Tuna Canyon with the Hostetter Fire Road[;] South La Tuna Canyon Road ends at its easternmost point and then the Hostetter Fire Road begins. On the other hand, Wildwood Fire Road is the westernmost fire road that intersects La Tuna Canyon and the Wildwood/La Tuna Canyon intersection has an eastern run after it. Along the eastern run, the road noticeabl[y] grades up. Therefore, the 'Fire Road West' must be the Wildwood Fire Road. [] While the foregoing information may not have been sufficient to merit the presentation of claims to Respondent[], it certainly was sufficient to instigate an inspection of the roadway and to

have Petitioner's attorney take pictures of the stretch of road to present to his client. . . ."

The court also concluded that making periodic phone calls to unspecified police personnel to request the photographs was insufficient, and that counsel could have attempted to contact the officers identified in the report. "Ordinary prudence required more than waiting more or less passively for pictures. . . ."

This timely appeal followed.

**DISCUSSION**

No suit for money may be brought against a government entity for personal injuries unless a formal claim has been presented to the entity and the claim has been rejected. (§ 945.4; see *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776 (*Munoz*).) The claim must be presented "not later than six months after the accrual of the cause of action." (§§ 911.2, subd. (a), 915, subd. (a); *Munoz*, *supra*, at p. 1779.) If a claimant fails to present a claim within the statutory period, he or she may apply "within a reasonable time not to exceed one year after the accrual of the cause of action" to the government entity for leave to present a late claim. (§ 911.4, subds. (a), (b).)

If the government entity denies the late claim application, a claimant may petition the court under section 946.6, subdivision (a) for relief from the requirements of sections 911.2 and 945.4. (*Munoz*, *supra*, 33 Cal.App.4th at p. 1777.) "The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that the application to the [public entity to present a late claim was made within one year after the accrual of the cause of action] and that . . . : [¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it

would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4." (§ 946.6, subd. (c).)

"Relief on grounds of mistake, inadvertence, surprise or excusable neglect is available only on a showing that the claimant's failure to timely present a claim was reasonable when tested by the objective 'reasonably prudent person' standard." (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.) The party seeking relief based on a claim of mistake must establish he was diligent in investigating and pursuing the claim. (*Bettencourt v. Los Rios Community College Dist*. (1986) 42 Cal.3d 270, 276.) "A petitioner must show more than that he did not discover a fact until too late; he must establish that in the use of reasonable diligence he failed to discover it." (*Black v. County of Los Angeles* (1970) 12 Cal.App.3d 670, 677.) Relief will not be granted for "defaults which are the result of inexcusable neglect of parties or their attorneys in the performance of the latter's obligation to their clients.' [Citation.]" (*Shank v. County of Los Angeles* (1983) 139 Cal.App.3d 152, 157.)

A trial court has broad discretion to grant or deny a petition for relief under section 946.6 and its determination will not be disturbed on appeal unless that discretion was abused. (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 44; *In re Stephanie M*. (1994) 7 Cal.4th 295, 318.)

Plaintiff contends his counsel was reasonably diligent in investigating his claims, and did not discover the new facts supporting claims against the City until seven months after the accident. Plaintiff asserts that counsel reasonably relied on the incident report's determination that the unlicensed driver was

the sole cause of the accident, and that the City should be estopped from asserting noncompliance with the claim presentation requirements of the Government Code because police failed to adequately describe the location of the accident in their report, and failed to turn over the photographs for nearly seven months. He also contends it was improper for the trial court to determine that his claim accrued at the time of the accident, and that the timeliness of his claim is a question for the jury.[2] We are not persuaded.

An attorney has a duty to diligently investigate the facts and identify possible defendants. (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 439 (*Ebersol*); *Department of Water & Power v. Superior Court*, *supra*, 82 Cal.App.4th at p. 1294, fn. 3.) Although plaintiff had no recollection of the location of the accident, and counsel could not find "Fire Road West" on any map, many facts were readily available in the incident report which should have alerted counsel to the City's potential liability, and would have enabled counsel to determine the location of the accident. First, the report made no mention of a bicycle lane at the scene of the accident, and the diagram of the roadway made clear there was none. Photos of the scene are less conclusive. To the extent plaintiff's claim rests on the absence of a bicycle lane, this should have alerted plaintiff that the City was a possible defendant. (See *Mittenhuber v. City of Redondo Beach* (1983) 142

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[2] Plaintiff appears to be concerned about what effect, if any, the trial court's determination of the accrual date may have on any action against the City. (See, e.g., *County of L.A. v. Superior Court* (1985) 169 Cal.App.3d 1095, 1100-1101 [discussing collateral estoppel in the context of petitions brought under section 946.6].)

Cal.App.3d 1, 4-5; *Stromberg, Inc. v. L. A. County Flood etc. Dist.* (1969) 270 Cal.App.2d 759, 767.)

Counsel also could have questioned the officers who investigated the accident, Officers Henry and Soltwedel. Nowhere in counsel's declaration does he state that these officers were contacted, or that any officer was asked to help counsel identify the location of the accident. Counsel also could have contacted the emergency responders who transported plaintiff to the hospital. Counsel could have driven along La Tuna Canyon Road to look for Fire Road West. Instead of doing any of these things, counsel made phone calls to the unlicensed driver and to unspecified police personnel, seeking copies of the photographs. Counsel did not send any letter or formal demand for the photographs.

It was not excusable for counsel to rely on the incident report which said the driver was solely at fault to conclude the City could not have contributed to the fault of the driver. The police department was responsible to investigate whether a crime had been committed, not whether plaintiff might have a civil claim against the City or any other party.

Plaintiff's reliance on *Ebersol*, *supra*, 35 Cal.3d 427 and *DeVore v. Department of California Highway Patrol* (2013) 221 Cal.App.4th 454 (*DeVore*), to contend that he and his counsel acted with reasonable diligence, is misplaced. *Ebersol* is inapposite, because the plaintiff in that case was unrepresented by counsel during the claims period, but was diligently attempting to secure counsel to represent her (having contacted eight different attorneys who all refused to take her case). The Supreme Court concluded that plaintiff's failure to file a timely

claim against the public entity defendant was due to excusable neglect. (*Ebersol*, at pp. 436-439.)

In *DeVore* the plaintiffs were the wife and daughter of a motorcyclist killed in an accident caused by a drunk driver. Over six months after the accident, at the preliminary hearing in the driver's criminal trial, plaintiffs first learned that a California Highway Patrol (CHP) officer had stopped the driver approximately two hours before the accident, but had not impounded his car even though the driver was unable to produce a valid drivers' license. (*DeVore*, *supra*, 221 Cal.App.4th at pp. 457-458.) The appellate court concluded that the plaintiffs' failure to discover a basis for public entity liability was excusable, where nothing in the police report or accident report indicated that there had been a prior stop by the CHP. (*Id.* at pp. 463-464.) Here, in contrast, the incident report made clear that no bicycle lanes were present at the accident location, and the location of the accident was readily discoverable based on information contained in the report.

We acknowledge that plaintiff's counsel was hindered by his inability to get photographs of the accident scene from the police, by his inability to talk to his client who was in a coma for weeks after the accident, and by the refusal of the person who allegedly crashed into plaintiff to talk to counsel. Nevertheless, as the trial court explained in detail, there were other steps that counsel could have taken that likely would have produced enough information to make a good faith claim against the City. Under these circumstances, the trial court's denial of plaintiff's petition was not an abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

Moreover, we need not consider plaintiff's argument that the trial court wrongly determined that his claim accrued in December 2014, or that the City is estopped from challenging the timeliness of his claim, because these issues were never raised in the trial court. Plaintiff has never, until this appeal, taken the position that his claim was timely, and therefore the issue has been forfeited. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) And, in any event, these claims fail on the merits. The police appear to have accurately reported the accident location, and were not responsible for identifying other potentially liable parties. As for plaintiff's claim to a right to a jury trial, there are no disputed facts as to when any of the key events occurred for the jury to resolve, and the court properly determined as a matter of law that his claim was inexcusably late.

**DISPOSITION**

The order is affirmed. Defendant is awarded its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.