

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ROBERT MALLANO,

Plaintiff and Respondent,

v.

JOHN CHIANG et al.,

Defendants and Appellants.

B285285

(Los Angeles County
Super. Ct. No. BC533770)

APPEAL from an order of the Superior Court of
Los Angeles County. Elihu M. Berle, Judge. Affirmed.

Skadden, Arps, Slate, Meagher & Flom, Raoul D. Kennedy,
Jack P. Dicanio, and William J. Casey for Plaintiff and
Respondent.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez,
Assistant Attorney General, Jennifer M. Kim and Jonathan E.
Rich, Deputy Attorneys General for Defendants and Appellants.

Defendants and appellants John Chiang, Controller of the State of California (the Controller);¹ the Judges' Retirement System (JRS) and the Judges' Retirement System II (JRS II),² appeal from an order enforcing a judgment entered on March 10, 2016, in favor of plaintiff and respondent Robert M. Mallano (plaintiff), individually and on behalf of a class of similarly situated persons (collectively, plaintiffs).³ We affirm the trial court's order.⁴

FACTUAL BACKGROUND

The appealed from order enforces a declaratory judgment that states that salary increases for California state judges were

¹ John Chiang was the elected Controller when this action was commenced. He has since been succeeded in office by Betty Yee. The Controller is required to draw warrants for the payment of money directed by law to be paid out of the state treasury, including the salaries of active California state judges.

² The Controller, JRS, and JRS II are referred to collectively as defendants.

³ Plaintiff is a retired Justice of the California Court of Appeal. Plaintiffs are (1) all California state judges of the Superior Court or justices of the Supreme Court or Court of Appeal who were active since the commencement of fiscal year 2008-2009; (2) all persons who are receiving or since the commencement of fiscal year 2008-2009, have received benefits from JRS; and (3) all persons who are receiving, or have received benefits from JRS II based on a final compensation that includes salary paid at any time since the commencement of 2008-2009.

⁴ Respondent's motion to dismiss this appeal filed October 11, 2017, having been deferred in order to consider the matter on its merits, is hereby denied.

mandated as follows: 0.97 percent for fiscal year 2008-2009, 0.10 percent for fiscal year 2009-2010, 0.11 percent for fiscal year 2010-2011, 0.22 percent for fiscal year 2013-2014, and 2.4 percent for fiscal year 2015-2016.⁵ The judgment also specifies the salary amounts that were to be the bases for payments to class members for each of the specified fiscal years and states that plaintiffs are entitled to payments and benefits based on those salary amounts as well as interest at 10 percent per annum on unpaid sums from the dates on which such sums vested until they are paid. Following entry of the judgment, the trial court awarded plaintiffs their attorney fees.

Defendants appealed from the judgment and the award of attorney fees, and this court in a previous opinion affirmed both the judgment and the fee award. (*Mallano v. Chiang* (Apr. 5, 2017, B272124) [nonpub. opn.]⁶ The remittitur was issued on June 14, 2017.

Following issuance of the remittitur, defendants refused plaintiff's request to pay unpaid salaries and benefits in accordance with the amounts set forth in the judgment, and on June 19, 2017, plaintiff filed a motion for an order enforcing the

⁵ The mandated judicial salary increases are based on the statutory formula set forth in Government Code section 68203 and the average percentage salary increases granted to California state employees during the specified fiscal years.

⁶ Our opinion affirming the judgment and attorneys fee award discusses in more detail the facts and procedural history of plaintiff's declaratory relief action against defendants. (*Mallano v. Chiang* (Apr. 5, 2017, B272124) [nonpub. opn.]

judgment.⁷ The trial court granted the motion and issued an enforcement order on July 28, 2017. This appeal followed.

DEFENDANTS' CONTENTIONS

Defendants raise the following contentions on appeal:

1. The trial court lacked authority to order payment of back wages and benefits in a declaratory relief action in which no claim for damages was asserted.
2. The trial court lacked authority to order monetary payments when enforcing a judgment that included no monetary relief.
3. The trial court improperly denied defendants the opportunity to litigate the statute of limitations and other affirmative defenses.
4. The Government Code provides that class members may only seek monetary relief against defendants by filing and adjudicating individual petitions for writ mandate.
5. The 10 percent per annum interest rate specified in the judgment is unlawful.

DISCUSSION

I. The trial court's authority to order payment of back wages and benefits

We review de novo the issue of whether the trial court had the authority to order defendants to pay plaintiffs back wages and benefits to enforce the declaratory judgment. (See *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal.App.4th 1003, 1008.) We review the trial court's exercise of its equitable power in a declaratory judgment action under the abuse of discretion standard. (*Lortz v. Connell* (1969) 273 Cal.App.2d 286, 300 ["trial court has discretion as to the extent of

⁷ Defendants did pay prospective judicial salary increases and retirement benefits, commencing July 1, 2017, in accordance with the declaratory judgment.

relief to be afforded in a proceeding for declaratory relief]; *Bess v. Park* (1955) 132 Cal.App.2d 49, 53 [“declaratory relief being an equitable proceeding the trial court can in its discretion grant that relief in order to liquidate uncertainties and controversies which might result in future litigation especially where the interpretation of a statute is the subject of the dispute”].)

We reject the defendants’ arguments concerning the trial court’s authority to order payment of back wages and benefits. California law establishes that in a declaratory relief action a court has the power to award damages, even when the complaint has no request for damages. For example, in *Bertero v. National General Corp.* (1967) 254 Cal.App.2d 126 (*Bertero*) the court awarded monetary damages to a plaintiff who sued for declaratory relief with respect to an employment contract and two stock option agreements that his employer claimed had been terminated. The judgment entered declared that all three agreements were valid and in effect and ordered the employer either to extend the stock option agreements to their full seven-year term, or to pay the plaintiff \$302,727.17 in damages. (*Id.* at p. 133.) The employer appealed, arguing that the judgment awarded money damages when none were sought in the plaintiff’s prayer for relief. (*Id.* at p. 144.) The appellate court affirmed the damages award based on the trial court’s broad equitable powers to grant complete relief in an action for declaratory relief:

“Equity having taken jurisdiction over a cause does complete justice, even to the extent of exceeding the specific prayers of the complaint when necessary. [Citation.] “It is fundamental that equity, having taken jurisdiction, will grant complete relief. This is especially true in a declaratory judgment action. ‘If a controversy exists as in this proceeding and a complaining party is entitled to some relief a trial court may not refuse to declare the rights of the

parties concerning the controversy. [Citation.] The purpose of the action is to set at rest or at least quiet, until the occurrence of further events, the rights and relations of the parties. [Citations.]” [sic] “The absence of a prayer is not fatal, the court being charged under section 580, Code of Civil procedure with the duty in a contested case of granting any relief consistent with the case made by the complaint and embraced within the issue.””

(*Bertero, supra*, 254 Cal.App.2d at pp. 145-146.)

Longstanding California case authority reaffirms this principle. (See *California Bank v. Diamond* (1956) 144 Cal.App.2d 387, 389 [when complaint stated cause of action for declaratory relief, court had jurisdiction of the entire matter and jurisdiction to enter money judgment]; *Tolle v. Struve* (1932) 124 Cal.App. 263, 269 [judgment for accrued rent can be rendered in action for declaratory relief as to validity of a lease and sublease]; *Parkford v. Union Drilling & Petroleum Co.* (1931) 118 Cal.App. 538, 540, 544 [monetary relief awarded to contractor in action for declaratory relief in which complaint prayed for declaration of rights of the parties under contract for drilling of an oil well].)

Established California law also contradicts defendants’ position that declaratory relief cannot redress past harm. California courts have long recognized that while declaratory relief operates prospectively, past wrongs may also be redressed in an action seeking such relief. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 366 [“If there is a controversy that calls for a declaration of rights, it is no objection that past wrongs are also to be redressed”]; *California Union Ins. Co. v. Trinity River Land Co.* (1980) 105 Cal.App.3d 104, 110; *Travers v. Loudon* (1967) 254

Cal.App.2d 926, 931 [“that the procedure operates prospectively does not create a conflict with the established principle that redress for past wrongs may be had in a proper action for declaratory relief”].)

II. Trial court has authority to enforce the judgment

We reject defendants’ contention that the trial court lacked authority to order monetary payments when enforcing the declaratory judgment. The declaratory judgment states that “class members were entitled to payments and benefits” based on salary amounts specified in the judgment for the relevant fiscal years. The trial court’s retention of jurisdiction to enforce the terms of that declaratory judgment included the authority to enforce plaintiffs’ entitlement to payments and benefits.

(*Dawson v. East Side Union High School Dist.* (1994) 28

Cal.App.4th 998, 1044-1045 [“retention of jurisdiction by the court for the purpose of interpreting and enforcing its judgment is within the scope of declaratory relief” and as a court of equity, has “broad powers to fashion ‘new remedies to deal with novel factual situations. [Citation.]’ [Citations.]”].) The declaratory relief statute itself states that “[t]he remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.” (Code Civ. Proc., § 1062.)

III. Statute of limitations

Contrary to what they contend, defendants were not denied the opportunity to litigate the statute of limitations or other affirmative defenses⁸ that might bar some class members’ claims

⁸ Defendants in their answer asserted 18 affirmative defenses. Although they contend they were denied the

for unpaid salaries. Defendants did not argue during class certification proceedings that individualized issues concerning the statute of limitations or any other affirmative defense precluded individual class members from adjudicating their entitlement to past salary increases or benefits, nor did they seek to decertify the class on the basis of any such individualized issues. Nothing in the record indicates that the trial court precluded defendants from doing so.

The record shows that defendants were not denied the opportunity to fully litigate their affirmative defenses. Defendants argued at trial that issues unique to individual class members, including whether the statute of limitations barred certain class members from entitlement to salary increases before January 2011, precluded entry of judgment in plaintiffs' favor, but they presented no evidence to support their position. The trial court rejected defendants' arguments, ruling in its statement of decision that "[d]efendants have failed to present sufficient evidence or legal authority to support any of their eighteen affirmative defenses." Defendants reiterated their statute of limitations argument at the hearing on entry of the proposed judgment. Defendants again argued the statute of limitations and waiver in opposing plaintiff's motion for an order enforcing the judgment, but presented no evidence to support any of their affirmative defenses.

Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1 (*Duran*), on which defendants rely as support for their position, is distinguishable. *Duran* was a class action for unpaid overtime brought by bank loan officers who claimed they had been misclassified as exempt employees under a Labor Code provision exempting outside sales persons from overtime pay requirements.

opportunity to litigate their affirmative defenses generally, their appellate brief discusses only the statute of limitations.

After certifying a class of 260 plaintiffs, the trial court in *Duran* adopted a plan to determine the extent of the bank's liability to all class members by extrapolating from a random sample of only 20 employees. (*Id.* at p. 16.) The trial court would not allow the bank to introduce evidence about the work habits of any plaintiff outside this small sample group, and then found, based on testimony from the sample group, that the entire class had been misclassified as exempt employees. The bank then sought unsuccessfully to decertify the class. In the second phase of the trial, the bank again sought to introduce evidence of other class members, including sworn declarations from 75 class members, but the trial court barred such evidence. (*Id.* at pp. 16, 35.) The California Supreme Court concluded that the trial court had, "without following a valid statistical model developed by experts, . . . improperly extrapolated liability findings from a small, skewed sample group to the entire class . . . [and] in pursuing this extrapolation, the court adamantly refused to admit relevant evidence relating to [employees] outside the sample group." These rulings, the Supreme Court concluded, "significantly impaired" the bank's ability to present a defense. (*Id.* at p. 33.)

Unlike *Duran*, the instant case did not involve liability improperly extrapolated from a sample group or refusal to allow submission of evidence. Defendants in this case did not seek to present evidence as to individual class members either at trial or during the enforcement proceedings, and the trial court did not bar them from doing so. *Duran* accordingly is inapposite and does not compel reversal of the trial court's enforcement order.

Defendants claim the trial court narrowly "framed the issue" to be adjudicated at the trial to include only declaratory relief, and that they were constrained from presenting evidence supporting their affirmative defenses, including the statute of limitations. For support, they cite several statements made by

the trial court at various points early in the litigation. However, when those statements are read in the context, they neither constituted a definitive narrowing of the lawsuit or a foreclosure of defendants' right to present evidence.

When the trial court overruled defendants' demurrer and denied their motion to strike the class allegations, the court offered two pertinent rationales -- namely, that (1) the "presence of individual damage issues cannot bar [class] certification" and (2) "the complaint does not seek damages for each putative class member" because "the sole relief sought are the declarations stating what the salary and benefits for the relevant periods should have been."

When the trial court certified the class, however, it ruled that "all of the liability and factual issues presented are common and predominant over any individualized increased, *which appears to be limited to only possible damage calculation down the road.*" (Italics added.)

When the trial court subsequently decided whether individual class members should be permitted to "opt out" of the class, defendants argued that class members should be given the opportunity to opt out because "this litigation will have res judicata [effect] on subsequent litigation." The court rejected this argument, in part because "we're talking about declaratory relief" and that there is a "distinction between a damage class and a declaratory relief class."

Although it is possible, as defendants urge, to extrapolate from some of the trial court's statements -- in particular, that "the sole relief sought are the declarations" and that "we're talking about declaratory relief"-- that the retroactive award of salary and benefits that flows from such declaratory relief were off of the proverbial table, this extrapolation would require us to ignore that trial court's statement that there would be a "damage

calculation down the road.” It would also require us to ignore defendants’ own understanding of what was at stake in the litigation. Before the trial court’s statements at the first hearing regarding the demurrer and motion to strike, defense counsel understood that there was “a financial aspect to this case” that would “affect the individual salaries retroactive and going forward of each of the individual judges and justices.” Tellingly, nothing the trial court subsequently said altered defendants’ understanding because, as late as the hearing on class notice, defendants still recognized that the “financial aspect” of the case was still live. Thus, defendants’ decision not to present evidence in support of their affirmative defenses was not the product of any narrowing by the court; it was defendants’ decision, and theirs alone.

IV. The Government Code does not mandate individual petitions for writ of mandate

Defendants next contend that under Government Code section 965.7, class members can seek monetary relief against the state only by filing individual petitions for writ of mandate and separately adjudicating their entitlement to past salary increases. The plain language of the statute undermines defendants’ position. Government Code section 965.7 subdivision (a) states that “[a] writ of mandate is an appropriate remedy to compel the state, or an officer or employee of the state, to perform any act required by this chapter.” The statute plainly states that a writ of mandate is “an appropriate remedy,” not the only way to compel the state to pay a claim for monetary relief. Defendants’ position is also contradicted by Government Code section 942, which states that “[n]othing in this division shall be construed to deprive a claimant of the right to resort to a writ of mandate *or other proceeding* against the public entity . . . to compel payment of a claim.” (Gov. Code, § 942, italics added.) Defendants come

within the definition of a “public entity.” (Gov. Code, § 811.2 [“‘Public entity’ includes the state . . . public authority, public agency, and any other political subdivision or public corporation in the State”].) Government Code section 965.7 does not require each of the plaintiffs to obtain unpaid salaries and benefits by bringing individual petitions for writ of mandate.

V. Interest

In this appeal, defendants again seek to contest the 10 percent per annum interest rate imposed by the declaratory judgment on unpaid salaries and retirement benefits, an issue they sought unsuccessfully to raise in the prior appeal. Our opinion in the prior appeal affirmed the judgment in its entirety, including the 10 percent per annum interest rate. (*Mallano v. Chiang* (Apr. 5, 2017, B272124) [nonpub. opn.].) That decision is binding on defendants and precludes them from relitigating the issue in this appeal or in any subsequent case involving interpretation or enforcement of the judgment. (*Pacific Tel. & Tel. Co. v. San Francisco* (1961) 197 Cal.App.2d 133, 143.)

Moreover, defendants forfeited the issue by failing to raise in the trial court any argument concerning the impact of subdivision (f) of Government Code section 68203 at the time the declaratory judgment was entered, or in opposing plaintiff’s motion for an order enforcing the judgment. We therefore do not address the issue. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603 [issues not raised in the trial court cannot be raised for the first time on appeal].)

DISPOSITION

The order enforcing the judgment, including the provision for “pre and post judgment interest thereon at the rate of 10% per annum from the date on which the additional payment should have been paid to the actual date of payment,” is affirmed. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
MATZ

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.