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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

ROSA PELAYO, Plaintiff and Appellant, v. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Defendants and Respondents.	B230780 (Los Angeles County Super. Ct. No. YC058155)

APPEAL from an order of the Superior Court of Los Angeles County, Ramona G. See and Dudley W. Gray II, Judges. Affirmed.

Reyes & Barsoum, Jorge Reyes; Law Offices of Omid Nosrati and Omid Nosrati for Plaintiff and Appellant.

Kohrs & Fiske, Conrad Kohrs, Kenneth P. Scholtz and Adam Grable for Defendants and Respondents.

Plaintiff filed a complaint asserting four causes of action against her former employer and three employees under the Fair Employment and Housing Act (FEHA) (Gov. Code, §§ 12900–12996) even though she had not exhausted administrative remedies under the act and received a right-to-sue letter. The trial court dismissed the causes of action for failure to exhaust administrative remedies. For the same reason, we affirm. (Undesignated section references are to the Government Code.)

I

BACKGROUND

The following allegations and facts are taken from the pleadings and the exhibits attached thereto. We accept the allegations as true. (See *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 8, fn. 3.)

On September 19, 2008, Rosa Pelayo, a "Mexican female," filed this action, alleging four causes of action under the FEHA against her employer, the Los Angeles County Department of Children and Family Services (DCFS), and three of its employees. Specifically, she alleged causes of action against *all* defendants for (1) racial and national origin harassment (§ 12940, subd. (j)) and (2) failure to prevent harassment (§ 12940, subd. (k)). Against the DCFS only, she alleged causes of action for (1) retaliation (§ 12940, subd. (h)) and (2) race discrimination (§ 12940, subd. (a)). The complaint also alleged common law causes of action for negligent and intentional emotional distress against all defendants. It did not allege that Pelayo had exhausted her administrative remedies under the FEHA and received a right-to-sue letter. (See §§ 12960, 12962, 12963.7, 12965, subd. (b).)

The DCFS demurred to the complaint, contending that the FEHA causes of action were barred by Pelayo's failure to exhaust administrative remedies and that the emotional distress causes of action failed to state facts sufficient to constitute causes of action. Pelayo decided not to oppose the demurrer and chose instead to file a first amended complaint.

The amended complaint, filed on February 17, 2009, included the same causes of action as the original complaint plus two additional claims against the DCFS only: wrongful termination of employment in violation of public policy and constructive discharge. Pelayo alleged she had timely pursued her internal administrative remedies with the DCFS, had filed

a charge with the Equal Employment Opportunity Commission (EEOC) — asserting a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e-4) — and had filed a Government Claims Act form (Gov. Code, §§ 810–998.3). She stated she was "in the process of obtaining her right to sue letters from the Department of Fair Employment and Housing [(DFEH)]."

The DCFS demurred, challenging all of the causes of action with the exception of the claim for intentional infliction of emotional distress. Again, the DCFS attacked the FEHA claims on the ground Pelayo had not exhausted her administrative remedies. The remaining, common law claims were challenged on various grounds not relevant to this appeal.

In her opposition papers, Pelayo included a right-to-sue letter from the DFEH, dated March 3, 2009 — issued approximately two weeks after the amended complaint was filed. She sought leave to file a second amended complaint to allege exhaustion of administrative remedies under the FEHA.

The trial court, Judge Ramona G. See presiding, sustained the demurrer without leave to amend and ordered the DCFS to answer the amended complaint as to the intentional infliction claim. An answer followed.

The DCFS subsequently brought a motion for judgment on the pleadings, contending that the cause of action for intentional infliction of emotional distress was barred by the exclusive remedies available under the Workers' Compensation Act (Lab. Code, §§ 3200–6208). The trial court granted the motion.

The individual defendants demurred separately to the amended complaint, asserting the same grounds as the DCFS. The trial court sustained the demurrers without leave to amend.

By order dated November 15, 2010, Judge Dudley W. Gray II presiding, the trial court ordered that the case be dismissed without prejudice. Pelayo appealed.

II

DISCUSSION

In reviewing the ruling on a demurrer, "we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions

or conclusions of fact or law. . . . We also consider matters which may be judicially noticed.' . . . When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. . . . And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, citations omitted.)

On appeal, Pelayo seeks to reverse the trial court's order as to the FEHA claims only, arguing that the doctrine of equitable tolling permitted her to file suit on those claims before satisfying the act's exhaustion requirement and obtaining a right-to-sue letter. We disagree. Administrative remedies under the FEHA must be exhausted *before a civil action can be filed*. Consequently, this action was filed prematurely and was properly dismissed. In contrast, the doctrine of equitable tolling excuses a delay in completing the exhaustion requirement under the FEHA during the time an employee pursues an alternative administrative scheme such as the DCFS's internal procedure, but the doctrine does not allow a civil action under the FEHA before the act's administrative process is completed.

"The [FEHA] creates a Department of Fair Employment and Housing ([DFEH]) (§ 12901), whose function is to investigate, conciliate, and seek redress of claimed discrimination (§ 12930). Aggrieved persons may file [a charge] with the [DFEH] (§ 12960), which must promptly investigate (§ 12963). If it deems a claim valid it seeks to resolve the matter — in confidence — by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate the [DFEH] may issue an accusation to be heard by the Fair Employment and Housing Commission (Commission). (§§ 12965, subd. (a), 12969; see [also] § 12903.)

"The Commission determines whether an accused employer, union, or employment agency has violated the act. If it finds a violation it must 'issue . . . an order requiring such [violator] to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay,

restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purpose of this part . . . .' (§ 12970, subd. (a).)

"If no accusation is issued within 150 days after the filing of the [charge with the DFEH] and the matter is not otherwise resolved, the [DFEH] must give [the employee] a right-to-sue letter. *Only then may that person sue in the superior court 'under this part'* (§12965, subd. (b))." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 213–214, citations omitted, italics added.)

"The rule is that where a right is given and a remedy provided by statute, the remedy so provided must ordinarily be pursued. . . . The FEHA, moreover, by its terms implies exhaustion is required, and we have so assumed.

"Section 12965, subdivision (b) provides that if the [DFEH] does not issue an accusation within 150 days after the filing of a complaint, or if the [DFEH] earlier determines that no accusation will issue, it shall promptly issue a notice indicating that the [employee] 'may bring a civil action under this part . . . within one year from the date of such notice.' Commenting in prior decisions on the availability of judicial relief under this provision, we have stated that the right-to-sue letter is a prerequisite to judicial action. . . . Relying on such statements, other courts have held that exhaustion of FEHA administrative remedies is a prerequisite to judicial relief on a statutory cause of action. . . .

"We agree that exhaustion of the FEHA administrative remedy is a precondition to bringing a civil suit on a statutory cause of action. In cases appropriate for administrative resolution, the exhaustion requirement serves the important policy interests embodied in the act of resolving disputes and eliminating unlawful employment practices by conciliation . . . as well as the salutary goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute . . . . By contrast, in those cases appropriate for judicial resolution, as where the facts support a claim for compensatory or punitive damages, the exhaustion requirement may nevertheless lead to settlement and serve to eliminate the unlawful practice or mitigate damages and, in any event, is not an impediment to civil suit, in that the [DFEH's] practice evidently is to issue a

right-to-sue letter . . . at the employee's request as a matter of course . . . ." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83–84, citations omitted, italics omitted.)

Finally, "[c]ourts have differed regarding the nature and effect of the exhaustion requirement. [The Sixth District Court of Appeal] has stated the view that in FEHA cases '[t]he failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect.' . . .

"Other courts, both state and federal, have questioned whether the failure to exhaust FEHA or EEOC . . . remedies is truly jurisdictional in the sense of depriving a trial court of fundamental or subject matter jurisdiction, or whether it should be viewed merely in the nature of a condition precedent or an affirmative defense that can be waived if it is not asserted by the defendant. . . .

"Regardless of the 'jurisdictional' nature of the exhaustion requirement, however, we conclude that it was at least a 'precondition to bringing civil suit' on [the] employee's FEHA claims that she first exhaust her FEHA remedies." (*Grant v. Comp USA, Inc*. (2003) 109 Cal.App.4th 637, 644–645, citations omitted.)

In sum, "[u]nder the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a [charge] with the [DFEH] and must obtain from the [DFEH] a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. . . . The timely filing of an administrative [charge] is a prerequisite to the bringing of a civil action for damages under the FEHA." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492, citations omitted.)

In this case, Pelayo filed a civil action containing her FEHA claims on September 19, 2008, but did not exhaust her administrative remedies under the act and receive a right-to-sue letter until March 3, 2009. Accordingly, she failed to comply with the FEHA's exhaustion requirement before filing suit, and any further amendment could not have cured the pleading defect. To conclude otherwise would undermine "the important policy interests embodied in the act of resolving disputes and eliminating unlawful employment practices by conciliation . . . as well as the salutary goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures,

and providing a more economical and less formal means of resolving the dispute." (*Rojo v. Kliger*, *supra*, 52 Cal.3d at p. 83, citation omitted.)

Pelayo's authorities are not to the contrary. In *Brown v. Superior Court* (1984) 37 Cal.3d 477, the employee did not seek to amend his civil action to allege FEHA claims until after he had exhausted administrative remedies under the act and received a right-to-sue letter (*id.* at pp. 480–481). Here, Pelayo included FEHA claims in the original complaint even though she did not satisfy the exhaustion requirement until more than five months later. Similarly, in *Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal.App.4th 449, the employee had exhausted administrative remedies under the FEHA and received a right-to-sue letter before filing a civil suit under the act (*id.* at p. 454). The question there was whether the employee had to also exhaust her employer's internal grievance process under a collective bargaining agreement. And in *Rojo v. Kliger*, *supra*, 52 Cal.3d 65, the Supreme Court held that *common law* claims for wrongful termination in violation of public policy based on the FEHA did not require exhaustion under the act (*id.* at pp. 73–88).

Nor is Pelayo correct that the doctrine of equitable tolling permitted her to avoid the exhaustion requirement. That doctrine does not allow an employee to file a civil suit under the FEHA before exhausting administrative remedies (§ 12965, subd. (b)). Rather, for example, it tolls the one-year statute of limitations for exhausting administrative remedies under the FEHA (§ 12960, subd. (d)) while the employee pursues an alternative administrative process like the DCFS's internal complaint procedure. (See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 105–108; see *id.* at p. 102 & fn. 2 [describing elements of equitable tolling].) Put another way, "'It has long been settled . . . that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' . . . This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*Id.* at p. 101, citations omitted.)

Pelayo had at least three options that would have avoided the procedural morass that now exists. First, she could have filed the original complaint without any FEHA causes of

action and then amended the complaint to add them *after* she received a right-to-sue letter from the DFEH. (See *Brown v. Superior Court*, *supra*, 37 Cal.3d at pp. 480–481.) Second, while pursuing her internal administrative remedies with the DCFS, she could have postponed commencing the administrative process under the FEHA. If she had eventually obtained a right-to-sue letter from the DFEH more than one year after the date of the unlawful practice — late — the time spent involved in the DCFS's internal administrative procedure would have tolled the one-year deadline under the FEHA. (See *McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at pp. 105–108.) And, in addition to appealing the order of dismissal in this case, Pelayo could have promptly filed a second suit, alleging that she had exhausted her remedies under the FEHA, and thereby avoided the problems created by a premature filing and the failure to satisfy the FEHA exhaustion requirement.

For the first time at oral argument, Pelayo asserted that the trial court gave the wrong reason for granting the motion for judgment on the pleadings, specifically, the court stated that the intentional infliction claim was barred for failure to exhaust administrative remedies under the FEHA. Because Pelayo did not raise this issue in her appellate brief, it has been forfeited. (See *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1311, fn. 4.) Further, "a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion." (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568.) The intentional infliction claim was properly dismissed based on the exclusive remedy doctrine of the Workers' Compensation Act, as argued by the DCFS in support of the motion for judgment on the pleadings. (See, e.g., *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 159–161.) On appeal, Pelayo does not address the merits of the exclusive remedy defense.

III

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.