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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LEVAR EMERSON JONES,

Petitioner,

v.

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES,

Respondent;

PATRICK WILLS et al.,

Real Parties In Interest.

B230361

(Los Angeles County
Super. Ct. No. NC054792)

ORIGINAL PROCEEDING. Petition for extraordinary writ. Petition granted.

Joseph E. DiLoreto, Judge.

LeVar Emerson Jones, in pro. per., for Petitioner.

Robert E. Shannon, City Attorney, Barry M. Meyers, Deputy City Attorney, for
Real Parties In Interest.

No appearance for Respondent.

Without affording the plaintiff notice and an opportunity to be heard, the trial court on its own motion dismissed plaintiff's civil rights action against the City of Long Beach and certain of its employees on the grounds the statute of limitations had run and plaintiff had not complied with the government claims statute. The occasion for the court's ruling was a hearing on an Order to Show Cause (OSC) why the complaint should not be dismissed for failure to file a proof of service of the summons and complaint within 60 days from the filing of the complaint. (Cal. Rules of Court, rule 3.110(b).)¹

Plaintiff, a California prisoner appearing in propria persona, filed a notice of appeal from the court's order dismissing his complaint. Although the appeal was not timely, the circumstances of this case warrant the exercise of our power to treat the appeal as a petition for a writ of mandate in order to avoid a miscarriage of justice.

The Fourteenth Amendment to the United States Constitution and article I, section 7 of our own constitution guarantee that a person may not be deprived of life, liberty or property without due process of law. An "essential principle" of due process is entitlement to "notice and opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central Hanover B. & T. Co.* (1950) 339 U.S. 306, 313.) The trial court's failure to give Jones notice of its intent to dismiss on the grounds of failure to file within the limitations period and to comply with the claims statute and to afford him an opportunity to be heard on these issues requires us to reverse the order of dismissal. (*Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1550.) Jones maintains that the statute of limitations was tolled while his appeal was pending in an earlier version of this suit and that the claim statute was satisfied by the claim he filed under Penal Code section 832.5. We express no view of the merits of these contentions. "The failure to accord a party litigant his constitutional right to due process is reversible per se, and not

¹ By the time of the OSC, the summons and complaint had been served.

subject to the harmless error doctrine.” (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 293.)²

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing the trial court to (1) vacate its September 20, 2010 order dismissing the complaint, and (2) reinstate the case to the civil active list and conduct further proceedings consistent with the views expressed in this opinion. All parties shall bear their own costs.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

² The only case cited by respondents in support of the court’s action, *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267 is not on point. It has nothing to do with the due process right to notice and hearing.