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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FERGUS LEWIS,

B280604

Plaintiff and Appellant,

(Los Angeles County
Super. Ct. No. BC582105)

v.

LOS ANGELES COUNTY
METROPOLITAN
TRANSPORTATION
AUTHORITY,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephanie M. Bowick, Judge. Affirmed.

SW Smyth and Andrew Smyth for Plaintiff and Appellant.

Kessel & Associates, Elizabeth M. Kessel and Victoria N. Jalili for Defendant and Respondent.

* * * * *

Plaintiff Fergus Lewis was a bus driver for defendant Los Angeles County Metropolitan Transportation Authority (MTA). He was fired after he refused to drive a bus without his equipment bag, and reported to various MTA personnel that it would be “unlawful” for him to drive without his bag. He sued the MTA and the County of Los Angeles, alleging whistleblower retaliation (Lab. Code, § 1102.5, subds. (b), (c)). The trial court sustained the MTA’s demurrer to the operative complaint without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began working as a bus driver for the MTA in August 1990. On March 12, 2014, he reported to his assigned bus to begin his workday. He stepped away from the bus for a brief time, and upon his return was told by an MTA mechanic that he had to drive a different bus. Plaintiff was unable to retrieve his equipment bag from his assigned bus, containing his verification of transit training card, medical card, wheelchair key, maps, stop sheets, punch card, and accident envelope. Plaintiff informed the mechanic that he could not legally drive another bus without his equipment bag. Plaintiff tried to formally report the incident to maintenance staff, but was redirected to the transportation building, where he was met by MTA employee Larry Costner. Plaintiff told Mr. Costner it was illegal to drive a bus without his bag. Mr. Costner ordered him to drive the bus. An argument ensued, and security and police were called. Mr. Costner placed plaintiff on administrative leave.

There were two administrative hearings concerning the incident. It appears these were disciplinary hearings, pursuant

to the collective bargaining agreement.¹ At the conclusion of the second hearing on May 23, 2014, plaintiff was informed that his employment was terminated. Plaintiff filed a Government Torts claim under the Government Claims Act (Gov. Code, § 810 et seq.) on March 12, 2015, almost ten months after the termination of his employment. His claim was rejected on March 16, 2015, as untimely.

Plaintiff filed this lawsuit on May 15, 2015. The MTA demurred, on the basis that plaintiff did not timely file a Government Torts claim within six months of his May 23, 2014 termination. The MTA alternatively argued that the lawsuit was barred because plaintiff failed to exhaust all internal administrative remedies provided by his collective bargaining agreement prior to suing, including a comprehensive grievance and appeal procedure and arbitration. The MTA also argued that the complaint failed to state facts supporting a whistleblower retaliation claim.

Plaintiff opposed the demurrer, arguing first that he was not required to exhaust the internal grievance procedures in his collective bargaining agreement and, in the alternative, that he had exhausted administrative remedies by attending the two administrative hearings (presumably the disciplinary hearings) that were completed before the termination of his employment.

¹ The various amended complaints do not make clear the exact nature of the “administrative hearings” that plaintiff alleges were held before and after his employment termination. At times it appears that plaintiff is referring to pre-termination disciplinary proceedings, and at other times it appears that plaintiff is referring to post-termination union grievance proceedings preliminary to arbitration.

He also argued that arbitration was optional and was not required by the collective bargaining agreement.

On October 5, 2015, the trial court sustained the demurrer with 20 days leave to amend as to first and second causes of action. It appears from the Los Angeles Superior Court case summary that on October 16, 2015, plaintiff moved to stay the proceedings to pursue arbitration, and that his motion was granted. On May 6, 2016, he moved to restore the case to the court's active calendar. In response to plaintiff's motion to restore the case to the court's active calendar, the MTA submitted a declaration advising the court that plaintiff's union was no longer seeking arbitration of plaintiff's grievance.

Plaintiff filed a first amended complaint on June 16, 2016, which included new tolling and exhaustion of administrative remedies allegations.

The parties stipulated to the filing of a second amended complaint. The second amended complaint included new tolling allegations. Plaintiff alleged that he filed a workers' compensation claim concerning the incident in June 2014, and that his claim was still pending. He also filed a grievance under the collective bargaining agreement in May 2014, and as part of the grievance process, plaintiff's union requested arbitration. Plaintiff alleged that "[i]t was [the MTA's] position that Plaintiff . . . had to complete arbitration in order to 'exhaust administrative remedies' as a prerequisite to filing this lawsuit." Plaintiff "contested his termination in administrative hearings" after his termination date, and these hearings continued until at least June 16, 2016, "when the question of whether arbitration was needed to exhaust administrative remedies was resolved." He also admitted he "did not go to arbitration offered by [the

MTA].” Plaintiff alleged that “[t]his failure does not constitute a failure to exhaust administrative remedies” because arbitration was discretionary, and because the MTA insisted that arbitration should be binding. He alleged the “ongoing hearings with [the MTA]” tolled the time in which to file a Government Torts claim.

The MTA demurred to the second amended complaint, arguing that the time to file a Government Torts claim had not been tolled either by the workers’ compensation claim or the arbitration. The MTA requested that the court take judicial notice of plaintiff’s June 24, 2014 application for adjudication of his workers’ compensation claim. The application stated plaintiff suffered injuries to his body and nervous system on March 12, 2014, when the MTA forced him to drive a bus without supplies. The claim form made no mention of the termination of plaintiff’s employment, “whistleblowing,” or retaliation. The MTA argued that plaintiff’s workers’ compensation claim did not put it on notice of the retaliation claim asserted in this lawsuit. The MTA also argued that the parties’ arbitration efforts *during the prosecution of this lawsuit* could not have retroactively tolled the claim filing period, and that plaintiff had consistently denied that arbitration was required. The MTA again argued that the retaliation claim did not state sufficient facts to state a cause of action, because plaintiff did not allege he engaged in protected activity.

In opposition, plaintiff asked the court to take judicial notice of his workers’ compensation claim form and “Petition for Serious and Wil[ly]ful Misconduct Under Labor Code section 455[3].” The claim form indicated that plaintiff suffered anxiety and “gastro” problems arising from the MTA’s act of “forc[ing]” him to drive a bus without supplies in violation of the

MTA operator's handbook, thereby putting the public at risk. The claims made no mention of plaintiff's employment termination, even though they were created on June 24, 2014, after plaintiff was fired. Plaintiff's opposition did not address the MTA's argument that arbitration did not toll the limitations period.

The trial court sustained the demurrer without leave to amend, finding that plaintiff's claim was late, and that equitable tolling did not apply because the workers' compensation proceeding concerned physical injuries arising out of the March 12, 2014 incident, unrelated to plaintiff's wrongful termination. The trial court did not address the issue of whether arbitration tolled the time to file a claim. The trial court entered a judgment of dismissal, and this timely appeal followed.

DISCUSSION

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer 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." (*Ibid.*) "The plaintiff bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

No suit for money may be brought against a government entity unless a formal claim has been presented to the entity and the claim has been rejected. (Gov. Code, § 945.4; see *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776.) A claim must state the “date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted” and provide a “description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim[.]” (§ 910, subds. (c), (d); see also *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.) “If a plaintiff relies on more than one theory of recovery against [a government entity], each cause of action must have been reflected in a timely claim. In addition, the factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint; . . . the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.” (*Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79.) Moreover, 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*, at p. 1779.)

Plaintiff does not dispute that he failed to file his Government Torts claim within six months of accrual of his cause of action. Plaintiff argues, instead, that the time for filing his claim was tolled by his workers’ compensation case, and because he pursued other remedies. We are not persuaded.

1. Workers’ Compensation

Plaintiff contends that his workers’ compensation claim equitably tolled the time for filing a Government Torts claim. The equitable tolling doctrine operates to protect the claim of an injured person who has several legal remedies and, reasonably

and in good faith, pursues one. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 414 (*Elkins*).) Application of the doctrine requires “timely notice, . . . lack of prejudice[] to the defendant, and reasonable and good faith conduct on the part of the plaintiff.” (*Addison v. State of California* (1978) 21 Cal.3d 313, 319.)

A defendant is not prejudiced if “the facts of the two claims [are] identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the second. Yet the two ‘causes of action’ need not be absolutely identical. The critical question is whether notice of the first claim affords the defendant an opportunity to identify the sources of evidence which might be needed to defend against the second claim.” (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 925.)

The doctrine of equitable tolling has been applied where a plaintiff filed a workers’ compensation claim for injuries sustained at work, and later filed a lawsuit for the same injuries, outside of the limitations period, following denial of the workers’ compensation claim. In *Elkins, supra*, the plaintiff’s workers’ compensation claim was denied because the Workers’ Compensation Appeals Board determined plaintiff was not an employee. The court applied equitable tolling because the lawsuit arose from the same facts as the workers’ compensation claim. (*Elkins, supra*, 12 Cal.3d at p. 418 [“After the filing of a compensation claim, the employer can identify and locate persons with knowledge of the events or circumstances causing the injury. By doing so, he takes the critical steps necessary to preserve evidence respecting fault.”].)

Unlike *Elkins*, plaintiff’s workers’ compensation claim arose from entirely different facts than those alleged in his

lawsuit, and is based on an entirely different theory of recovery than his retaliation claim. Plaintiff's whistleblower retaliation claim arose from plaintiff's termination on May 23, 2014, in retaliation for his reporting the "illegality" of operating a bus without his necessary supplies to various MTA personnel. The viability of a retaliation claim turns on evidence of the employer's motive to terminate the plaintiff. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.) Defendant's investigation of plaintiff's *personal injuries* sustained March 12, 2014, in the context of a workers' compensation case, would not put it on notice of plaintiff's whistleblower retaliation claim arising from his termination on May 23, 2014.

We are not persuaded by plaintiff's argument that his "Petition for Serious and Wil[l]ful Misconduct Under Labor Code section 455[3]" in the workers' compensation proceeding put the MTA on notice of his retaliation claim. Section 4553 provides for increased compensation in workers' compensation cases where the injury results from the employer's "serious and willful misconduct." (*Ibid.*) Serious and willful misconduct is conduct which is likely to jeopardize the safety of the employee. (See *Schmidt v. Pursell* (1920) 47 Cal.App. 440, 441-442.) Safety issues relating to driving a bus without the equipment bag are wholly unrelated to whether the MTA terminated plaintiff's employment in retaliation for whistleblowing.

2. Arbitration

Plaintiff next contends that arbitration pursuant to his collective bargaining agreement tolled the time to file his Government Torts claim. Plaintiff also argues that the MTA should be estopped from challenging the timeliness of his claim because the MTA consistently maintained that plaintiff was

required to participate in arbitration of his union grievance as a prerequisite to filing this lawsuit.²

These contentions lack merit because plaintiff, by his own allegations, has made it clear he did not refrain from filing a Government Torts claim in order to pursue in good faith a remedy in arbitration. To the contrary, plaintiff consistently maintained that arbitration was unnecessary and was not required because he had exhausted all available internal remedies by May 23, 2014. Plaintiff only consented to arbitration after he filed this lawsuit, in response to the MTA's arguments made in its initial demurrer.

A plaintiff may not avoid demurrer by pleading contradictory or antagonistic facts in subsequent pleadings. (See, e.g., *Steiner v. Rowley* (1950) 35 Cal.2d 713, 718-719; see also *Thompson v. County of Fresno* (1963) 59 Cal.2d 686, 690; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425-426.) Moreover, "[t]he admission of fact in a pleading is a 'judicial admission.' . . . 'An admission in the pleadings is not treated procedurally as evidence . . . but may be . . . relied on as part of the case. And it is fundamentally different from evidence: It is a *waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues. Under the doctrine of "conclusiveness of pleadings," a pleader is bound by well

² The MTA argues that these issues were forfeited because plaintiff did not present these arguments to the trial court. The MTA ignores that a plaintiff may present new facts or theories for the first time on appeal supporting leave to amend. (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.)

pleaded material allegations or by failure to deny well pleaded material allegations. [Citations.]’ [Citation.] [¶] . . . Because an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial.” (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.)

Here, plaintiff’s claim that he is entitled to equitable tolling or estoppel is belied by the fact that he has consistently alleged in the various versions of his complaint that he was not required to pursue any internal grievance remedies, that he was not required to participate in arbitration, and that he exhausted all available internal remedies by attending two administrative hearings (presumably the disciplinary hearings which occurred before his termination date). The allegations in the second amended complaint admit that plaintiff *refused* to participate in arbitration because it was discretionary, and because the MTA insisted that arbitration should be binding. These allegations forbid us from concluding that plaintiff chose reasonably and in good faith to forego filing a Government Torts claim in favor of pursuing his rights in arbitration.

Given our finding that plaintiff failed to comply with the Government Claims Act, we need not decide whether plaintiff alleged sufficient facts to state a claim for whistleblower retaliation.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.