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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

T. MICHAEL, LLC,

Plaintiff and Appellant,

v.

JENNIFER KENT, as Director, etc.,

Defendant and Respondent.

B275194

(Los Angeles County  
Super. Ct. No. BC578286)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Amy D. Hogue, Judge. Affirmed.

James L. Hudgens, Juan A. Reyes, and Raymond Chandler  
for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Julie Weng-  
Gutierrez, Assistant Attorney General, Leslie P. McElroy and  
Janet E. Burns, Deputy Attorneys General, for Defendant and  
Respondent.

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Plaintiff and appellant T. Michael, LLC (Michael) challenges a judgment of dismissal following a trial court order sustaining without leave to amend the demurrer filed by defendant and respondent Jennifer Kent, as director of the Department of Health Care Services (DHCS) to Michael's first amended complaint (FAC). The trial court found that Michael had failed to exhaust its administrative remedies.

We agree and thus affirm the judgment.

## **FACTUAL<sup>1</sup> AND PROCEDURAL BACKGROUND**

### *Factual Background*

Michael is licensed by DHCS as a residential care facility for the elderly (RCFE). In this litigation, Michael is the putative class representative for an uncertified class action comprised of 120 RCFE's.

On March 24, 2011, Governor Brown signed into law Assembly Bill No. 97, which, in part, required the reduction of Medi-Cal provider payments for specified providers by 10 percent for dates of service on or after June 1, 2011. (Welf. & Inst. Code, § 14105.192.)

On June 27, 2012, Xerox State Healthcare, LLC (Xerox), DHCS's fiscal intermediary, notified Medi-Cal providers of the upcoming 10 percent reductions, retroactive to June 2011. The 10 percent reductions were then applied to payments to Michael

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<sup>1</sup> "Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether the plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

for services rendered. These reductions appeared on the invoices provided by DHCS, through Xerox, to Michael.

In response to this notice, several providers, including Michael, filed administrative appeals with Xerox in September and October 2012. All appeals were denied on November 27, 2012. The denials included a notification that the only recourse lay in a writ of ordinary mandate under Welfare and Institutions Code section 14104.5.

On April 18, 2013, DHCS sent a memorandum to its California Medicaid Management Information System (CA-MMIS) to stop the 10 percent reductions for RCFE's, including Michael, for dates of service on or after June 1, 2011, and initiate an erroneous payment correction to repay the RCFE's, including Michael, for dates of service on or after June 1, 2011.

On May 31, 2013, CA-MMIS sent an operation instruction letter to Xerox to stop the 10 percent reductions for RCFE's for dates of service on or after June 1, 2011, and initiate an erroneous payment correction to adjust reimbursement. Beginning September 10, 2013, through December 16, 2013, CA-MMIS initiated and reviewed the payment corrections for RCFE's. And, on February 26, 2014, CA-MMIS notified Michael that the payment corrections would be processed in April 2014.

On July 3, 2013, DHCS (through Xerox) posted on its Web site a short notice indicating that RCFE's were "retroactively" exempt from the 10 percent reduction, that the withheld funds would be paid back, and that the RCFE's need not take any further action. Michael claims that the Web site is the official means by which all notifications from DHCS are made to RCFE's and that this was the only notice that it received from DHCS concerning this matter after its appeals were denied.

### *Petition for Writ of Mandate*

On April 8, 2014, before the reimbursement corrections had been effected, Michael filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1085, seeking to compel DHCS to pay Michael the withheld funds. Michael also filed a motion to amend its petition for writ of mandate to add an additional cause of action for penalties pursuant to Government Code section 927.

### *Repayment of Monies*

Adjustments for all erroneous payment corrections were set in place by Xerox on or around May 23, 2014, and Xerox made the payment adjustments. No interest or penalties were paid.

### *Dismissal of Petition for Writ of Mandate*

Later, Michael filed a motion to dismiss without prejudice its petition for writ of mandate. On February 17, 2015, the trial court dismissed Michael's petition.

### *Class Action Complaint*

On April 9, 2015, Michael then filed a class action complaint, alleging three causes of action for penalties for the amounts that had been refunded to it and the class members in May 2014, prejudgment interest, and attorney fees for the prior action and the instant action. On September 11, 2015, Michael filed its FAC, dismissing the third cause of action for attorney fees.

### *Demurrer; Judgment; Appeal*

On October 13, 2015, DHCS filed a demurrer to the FAC, arguing, inter alia, that Michael had failed to exhaust its administrative remedies.

Michael opposed the demurrer.

On January 12, 2016, the trial court sustained DHCS's demurrer without leave to amend. It found that Michael had not exhausted its administrative remedies. Specifically, Michael filed an administrative appeal with Xerox in September or October 2012. DHCS denied that administrative appeal on or about November 27, 2012. Pursuant to Welfare and Institutions Code section 14104.5, Michael had until November 27, 2013, to file a petition for writ of mandate contesting DHCS's decision. Because it did not do so until April 8, 2014, its lawsuit was barred.

In so ruling, the trial court rejected Michael's contention that the July 3, 2013, notice rendered Michael's administrative appeal moot, tolling the "statute of limitations until July 3, 2014," noting that Michael offered no legal authority to support this argument.

The trial court also indicated that Michael could have submitted a grievance or complaint to DHCS under California Code of Regulations, title 22, section 51015 within 90 days of DHCS's May 23, 2014, refund of the withheld funds. But, it did not do so.

The FAC was dismissed, and Michael's timely appeal ensued.

## **DISCUSSION**

### *I. Standard of review*

"Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: 'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however,

assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed “if any one of the several grounds of demurrer is well taken. [Citations.]” [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]’ [Citations.]” (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043–1044.)

*II. The demurrer was properly sustained*

In its FAC, Michael seeks interest (Civ. Code, § 3287) and penalties (Gov. Code, § 927) on funds DHCS withheld from June 1, 2011, to April 18, 2013, pursuant to Welfare and Institutions Code section 14105.192.

In order to recoup these monies in a civil action, Michael was required to exhaust its administrative remedies. Exhaustion of administrative remedies is a jurisdictional requirement. (*Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 657; see also *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240.)

California Code of Regulations, title 22, section 51015, subdivision (a), specifies the mandatory grievance procedure that must be followed in order to contest nonpayment or underpayment of a claim for services covered by Medi-Cal: “When a provider of services has a grievance or complaint concerning the processing or payment of his claims for services provided under the Medical Assistance Program the following procedures must be met: [¶] (a) The provider shall initiate an

appeal, by submitting a grievance or complaint in writing, within 90 days of the action precipitating the grievance or complaint, to the appropriate fiscal intermediary identifying the claims involved and specifically describing the disputed action or inaction regarding such claims. [¶] . . . [¶] (d) After these procedures have been followed, a provider who is not satisfied with the appeal decision by the fiscal intermediary, may seek appropriate judicial remedies in compliance with Section 14104.5 of the Welfare and Institutions Code, no later than one year after receiving notice of the decision.” (Cal. Code Regs., tit. 22, § 51015, subds. (a) & (d).)

Welfare and Institutions Code section 14104.5 states that a provider not satisfied with the administrative review of a grievance or complaint concerning processing or payment of its claim for services may “not later than one year after receiving notice of the decision, file a petition for writ of mandate pursuant to Section 1985 of the Code of Civil Procedure in the superior court.” (Wel. & Inst. Code, § 14104.5.) This procedure is the exclusive remedy available to the provider of services for monies payable. (*Ibid.*)

Here, Michael filed its administrative appeal with Xerox in September or October 2012, arguing that it was exempt from the 10 percent reductions; it also requested interest and penalties. DHCS denied Michael’s administrative appeal on or about November 27, 2012. The denial included notification that if Michael was dissatisfied with the decision, its recourse was to seek judicial review pursuant to Welfare and Institutions Code section 14104.5 within one year of receiving DHCS’s decision. Pursuant to California Code of Regulations, title 22, section 51015, Michael had one year, or until November 27, 2013, to file

a Code of Civil Procedure section 1085 petition for writ of mandate challenging DHCS's failure to pay interest and penalties. Because Michael did not file its petition for writ of mandate until April 8, 2014, its action was untimely.

Michael's second opportunity to exhaust administrative remedies occurred in connection with DHCS's reimbursement payments in May 2014. DHCS made its payment to Michael on or about May 23, 2014. At that point, the only possible issue remaining was Michael's dissatisfaction with the amount of reimbursement, namely any claim to interest and penalties (that had not been paid).

California Code of Regulations, title 22, section 51015 required Michael to submit a written grievance to Xerox describing the disputed action within 90 days of the action complained of, followed by subsequent action to be taken by the fiscal intermediary and the provider. In other words, filing of an administrative appeal was required before the trial court could review DHCS's May 2014, processing and payment of Michael's claim. (Welf. & Inst. Code, § 14104.5.) Only after complying with these administrative procedures does Welfare and Institutions Code section 14104.5 allow a provider such as Michael to seek a judicial remedy by filing a petition for writ of mandate.

But, Michael never submitted a grievance or appeal to Xerox in response to the May 23, 2014, payment, let alone a grievance or appeal within 90 days (by August 21, 2014). Thus, Michael did not exhaust its administrative remedies to challenge the amounts paid by DHCS prior to seeking judicial review.

Michael claims that a second administrative appeal was not required. Even if Michael is correct, this argument is unavailing. The time to file a petition for writ of mandate lapsed



well before Michael filed its petition for writ of mandate on April 8, 2014.

Michael claims that the July 3, 2013, posting on the official Web site<sup>2</sup> constitutes a response to its administrative appeal filed in September or October 2012. Thus, it had until July 3, 2014, to file a petition for writ of mandate. Like the trial court, we cannot agree. The notice posted to DHCS's Web site was not a decision in response to Michael's administrative appeal. Rather, the denial of the grievance appeal on November 27, 2012, was a decision in response to the appeal.

Alternatively, Michael contends that the July 3, 2013, notice rendered the denial of his administrative appeal moot. This makes no sense. As noted by the trial court, after Michael's administrative appeal was denied, Michael could have taken appropriate, timely steps to demand the monies it claimed to be owed.

For the first time on appeal, Michael argues that DHCS is barred by the doctrine of equitable estoppel from asserting an exhaustion of administrative remedies defense.<sup>3</sup>

The "doctrine of equitable estoppel may be applied against the government where justice and right require it. [Citations.]" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) The elements of estoppel are: (1) the party to be estopped must be

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<sup>2</sup> In the interest of reaching the merits of Michael's argument, we grant Michael's request for judicial notice of the July 3, 2013, notice posted to DHCS's Web site.

<sup>3</sup> Again, for the sake of resolving issues on the merits, we will consider this argument over DHCS's objection.

apprised of the facts, (2) the party to be estopped must have intended that its conduct be acted upon so that the other party had a right to believe that it was so intended, (3) the other party must be ignorant of the true facts, and (4) the other party must rely on the conduct to its prejudice. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304, 311.)

Here, the FAC does not allege that DHCS intended Michael to rely upon the July 3, 2013, notice in not seeking recoupment of all monies it believed it was entitled to. Certainly we could infer that DHCS intended Michael to rely upon the representation that the withheld monies would be repaid. But, the FAC does not indicate whether the notice mentioned interest or penalties. Thus, Michael had to plead that DHCS intended it to rely upon the notice in not taking earlier steps to recoup interest and penalties. And, Michael does not allege any sort of reliance upon the July 3, 2013, notice.

Because we agree with the trial court that Michael's action cannot proceed for failure to exhaust administrative remedies, we need not reach the merits of the causes of action alleged in the FAC.

### **DISPOSITION**

The judgment is affirmed. DHCS is entitled to costs on appeal.

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\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, J.  
HOFFSTADT

\_\_\_\_\_, J.\*  
GOODMAN

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