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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

CERTIFIED UNIFIED PROGRAM AGENCY FOR SAN LUIS OBISPO COUNTY, Plaintiff and Respondent, v. EASTGATE PETROLEUM, LLC, Defendant and Appellant.	2d Civ. No. B271741 (Super. Ct. No. 15CV0636) (San Luis Obispo County)

Eastgate Petroleum, LLC (Eastgate) appeals an order denying its motion to vacate a judgment (Code Civ. Proc., § 473[1]) against it. The judgment was entered following an administrative decision in which civil penalties were assessed against Eastgate for violation of environmental regulations relating to hazardous materials. (Health & Saf. Code,

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

§ 25404.1.3.) Eastgate did not timely file a petition to review the administrative decision.

We conclude, among other things, that 1) the judgment is enforceable against Eastgate; 2) the trial court did not err by denying Eastgate's motion to vacate the judgment for counsel error (§ 473, subd. (b)); and 3) the trial court did not abuse its discretion by not staying the proceedings. We affirm.

FACTS

On August 23, 2012, Certified Unified Program Agency for San Luis Obispo County (CUPA), an environmental protection enforcement agency, issued "unilateral enforcement orders" against Eastgate and another petroleum company, Bay Area Diablo Petroleum (Bay Area Diablo). It found they violated Health and Safety Code and state regulations relating to controlling hazardous materials in their underground storage tanks. (Health & Saf. Code, § 25404.1.1.)

The companies appealed. At an administrative law hearing, the administrative law judge (ALJ) found against the companies and assessed $1,412,355 as "administrative penalties." The ALJ ruled the companies could "seek reduction of the total penalty" for "financial hardship" by presenting evidence to CUPA. In a supplemental unilateral enforcement order, CUPA determined Eastgate's penalty was $933,330.

Eastgate and Bay Area Diablo appealed. After an administrative hearing, the ALJ determined the companies had the ability to pay the penalties and he set a payment schedule. The county adopted the ALJ decision, which was served by mail on Eastgate and Bay Area Diablo on April 23, 2015.

On May 26, 2015, Bay Area Diablo filed a petition for writ of mandate to challenge that final administrative decision

(hereafter "the Bay Area Diablo case"). That petition was filed within the 30-day statute of limitations. (Gov. Code, § 11523; Health & Saf. Code, § 25404.1.3.) Eastgate did not file a petition for writ of mandate.

Several months later CUPA filed an "application for judgment" (the current case) to collect the "administrative penalty" of $939,330 against Eastgate (Health & Saf. Code, § 25404.1.3.) based on the final administrative decision.

Eastgate moved to vacate that judgment under section 473, subdivision (b), claiming its counsel erred by not including Eastgate in the Bay Area Diablo case. This motion was filed approximately five months after the expiration of the statute of limitations to challenge the administrative decision.

The trial court denied the motion. It said, "Neither mandatory nor discretionary relief under CCP § 473(b) is available where there is a failure to file within the time allowed by the statute of limitations."

In a motion for reconsideration, Eastgate noted that Judge LaBarbera in the Bay Area Diablo case had recently granted a motion to amend the pleadings to add Eastgate as a plaintiff.

The trial court denied the motion. It said Judge LaBarbera had ruled the "viability" of the amended pleading had to be decided in a future demurrer in the Bay Area Diablo case. It ruled the recent developments in the Bay Area Diablo case did not prevent it from deciding the section 473 motion.

Eastgate claimed the judgment was not enforceable because some of the administrative orders refer to "Eastgate Petroleum, Inc." instead of "Eastgate Petroleum, LLC." The trial court found the judgment was enforceable against Eastgate.

DISCUSSION

Enforceable Judgment and Administrative Orders

Eastgate contends the judgment is not enforceable because in the administrative proceedings some administrative orders refer to "Eastgate Petroleum, *Inc.*," a "non-existent entity," as the respondent. It claims its correct name is "Eastgate Petroleum, *LLC*."

CUPA contends that "Eastgate was fully aware the orders and penalties were assessed against . . . 'Eastgate Petroleum, LLC.'" It notes that the caption of the administrative decision that imposed the penalties lists "Eastgate Petroleum, LLC" as a respondent. The unilateral enforcement orders and the supplemental enforcement order list "Eastgate Petroleum, LLC" as a respondent. The application for judgment by clerk to collect administrative penalty lists "Eastgate Petroleum, LLC" as the respondent. The notice of entry of judgment lists "Eastgate Petroleum, LLC" as the respondent. The trial court found "Eastgate Petroleum, LLC" is the respondent. It correctly ruled the incorrect description of Eastgate's name in some places in the administrative proceedings did not make the administrative orders and judgment unenforceable. (*Thomson v. L.C. Roney & Co.* (1952) 112 Cal.App.2d 420, 425-426.)

Mandatory Relief for Motion to Vacate the Judgment

Eastgate contends the trial court erred by denying its motion to vacate the judgment. It claims it was entitled to mandatory relief for its counsel's error in not timely filing the petition to review the decision. (Health & Saf. Code, § 25404.1.3.) We disagree.

Section 473, subdivision (b) provides for mandatory relief for a variety of mistakes by a party's attorney. But that

mandatory relief provision does not apply where the party fails to file an action within the statute of limitations period. (*Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, 933.) In *Castro*, the court said it does not "create a loophole through which a plaintiff may escape the bar of the statute of limitations." (*Ibid.*; *Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, 1563.)

Eastgate claimed the money judgment CUPA obtained was equivalent to a "default judgment" for which mandatory relief is available under section 473. (*Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 295.) But the trial court correctly ruled this case did not involve a default judgment. (*Ayala v. Southwest Leasing & Rental, Inc.* (1992) 7 Cal.App.4th 40, 44; see also *Prieto*, at p. 295 ["'The Legislature expressly limited the scope of the mandatory provision of section 473(b) to require relief from default judgments only'"].)

This case involved a completed administrative proceeding. Eastgate participated, but did not file a petition to challenge the administrative decision within the 30-day limitations period. (Gov. Code, § 11523; Health & Saf. Code, § 25404.1.3, subd. (a); *Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, 794-795; see also *Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25, 34.) Section 473's mandatory relief provision is not applicable. (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 620 ["courts have held the mandatory relief provision inapplicable" to cases beyond the limitations period]; *Castro v. Sacramento County Fire Protection Dist.*, *supra*, 47

Cal.App.4th at p. 930 [mandatory relief provision not applicable]; *Kupka*, at pp. 794-795.)

Discretionary Relief Under Section 473, Subdivision (b)

Eastgate contends it is "entitled to relief pursuant to Section 473(b)'s discretionary provision." We disagree.

Section 473, subdivision (b) contains both a mandatory and a discretionary relief provision for excusable neglect. But courts have held this statute and its discretionary relief provision do not apply to cases where a party seeks relief for not filing an action within the statute of limitations. (*Hansen v. Board of Registered Nursing* (2012) 208 Cal.App.4th 664, 672 ["'the Legislature did not intend to permit relief on grounds of good cause or under section 473'"]; see also *Maynard v. Brandon*, *supra*, 36 Cal.4th at p. 372; *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1211; *Alliance for Protection of Auburn Community Environment v. County of Placer*, *supra*, 215 Cal.App.4th at pp. 32, 34 [relief for excusable neglect not available]; *Castro v. Sacramento County Fire Protection Dist.*, *supra*, 47 Cal.App.4th at p. 932 [section 473's discretionary relief provision will not provide relief beyond the limitations period]; *Kupka v. Board of Administration*, *supra*, 122 Cal.App.3d at pp. 794-795.)

In *Maynard v. Brandon*, *supra*, 36 Cal.4th at page 372, our Supreme Court said, "[S]ection 473, subdivision (b) cannot extend the time in which a party must move for a new trial . . . . Nor does [it] generally apply to dismissals attributable to a *party's failure to comply with the applicable limitations period in which to institute an action, whether by complaint* [citations] *or by writ petition*." (Italics added.)

In *Kupka v. Board of Administration*, *supra*, 122 Cal.App.3d at page 794, the plaintiff filed a petition to review an administrative decision beyond the 30-day statute of limitations period. (Gov. Code, § 11523.) He sought relief for excusable neglect. (§ 473.) The trial court denied his section 473 motion. The Court of Appeal affirmed and held the Legislature did not intend discretionary relief for mistake, inadvertence or excusable neglect under section 473 to be available to those who do not file within the 30-day limitations period of Government Code section 11523. That is the applicable statutory limitations provision in the current case.

CUPA contends, even assuming arguendo that discretionary relief was not foreclosed, Eastgate did not make a sufficient factual showing to establish relief for excusable neglect. We agree. The party seeking relief must show reasonable diligence. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 624-625.) Here there was a very long delay before counsel acted to correct the omission. The motion to vacate was filed approximately *five months after the expiration* of the statute of limitations. Counsel declared, "On or around October 30, 2015, it came to the attention of counsel . . . that Eastgate had been erroneously omitted from the petitions and amended complaint" in the Bay Area Diablo case.

But the declaration's conclusory language and limited details do not provide sufficient facts to show the reasonableness of counsel's actions, how the delay was excusable, or why it took so long to discover the mistake. (*Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275, 280.) Excusable neglect "is not shown by the mere failure to discover a fact until it

is too late." (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 44; *Greene v. State of California* (1990) 222 Cal.App.3d 117, 122 [attorney's five-month delay was not excusable neglect].) Counsel claimed it was an inadvertent omission. But "'[n]either inadvertence nor neglect will warrant judicial relief unless it [is] . . . the excusable variety upon a sufficient showing.'" (*Marcotte v. Municipal Court* (1976) 64 Cal.App.3d 235, 239.) The failure to take "precautions" to "avoid missing" time limitations "does not constitute excusable neglect." (*Ayala v. Southwest Leasing & Rental, Inc.*, *supra*, 7 Cal.App.4th at p. 45.)

Staying the Proceedings

Eastgate contends the trial court erred by failing to hold the judgment in abeyance because: 1) Judge LaBarbera had recently granted a motion to amend the pleading to add Eastgate as a party plaintiff to the Bay Area Diablo case, and 2) that action challenged "the administrative decisions underlying the Judgment in the present case."

But Eastgate has not shown an abuse of discretion. (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 480.) The trial court said Judge LaBarbera granted the motion to amend that pleading to add Eastgate out of "an abundance of caution without actually considering the merits of the amendment." It noted that "Judge LaBarbera's ruling specifically states that questions concerning the viability of any amended complaint would be better addressed in the context of a demurrer . . . ." The trial court believed Eastgate's amended pleading in the Bay Area Diablo case could not survive a demurrer because of the statute of limitations issue. The issue of whether the current judgment should be vacated was properly before the trial court on

Eastgate's motion for section 473 relief. Eastgate sought to vacate the judgment filed in the current case, not in the Bay Area Diablo case. The two cases had not been consolidated and the court could reasonably find the showing Eastgate made for a stay was insufficient.

Moreover, Eastgate has not shown how a stay by the trial court would change the result because Judge LaBarbera ultimately: 1) sustained the county's demurrer to that amended pleading without leave to amend, 2) ruled "Eastgate's joinder in [the Bay Area Diablo] action" was barred by the running of the statute of limitations, and 3) denied the petition for writ of mandate.

We have reviewed Eastgate's remaining contentions and we conclude it has not shown grounds for reversal.

DISPOSITION

The judgment and orders are affirmed. Costs on appeal are awarded in favor of respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

Cannata, O'Toole, Fickes & Almazan, LLP, Therese Y. Cannata, Mark P. Fickes, Zachary Colbeth for Defendant and Appellant.

Porter Scott, A Professional Corporation, Stephen E. Horan, Jeffrey A. Nordlander for Plaintiff and Respondent.