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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ALEKSANDR KAMINSKIY,

Plaintiff and Appellant,

v.

WASHINGTON TOWNSHIP HEALTH
CARE DISTRICT, et al.

Defendants and Respondents.

A129804

(Alameda County
Super. Ct. No. RG10525085)

Aleksandr Kaminskiy (Kaminskiy) appeals from an order denying his petition for relief from his failure to timely present a claim to respondents under the Government Claims Act. We find no abuse of discretion on the part of the trial court, and affirm.

BACKGROUND

Kaminskiy’s petition for relief under the Government Claims Act¹ arose out of an incident on April 17, 2009. At the time, Kaminskiy was an employee of California Prostate Laser, a vendor of laser technologist services, and was assigned to work at Washington Hospital in Fremont.² Respondent Tracy Stone, the director of perioperative

¹ The Government Claims Act, Government Code section 810 et seq., previously has been referred to by the informal short title the “Tort Claims Act.” However, “[o]ur Supreme Court adopted the practice of referring to the claims statutes as the ‘Government Claims Act,’ because the statutes also apply to breach of contract claims.” (*California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 34, fn. 3, citing *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734.)

² Respondent Washington Township Health Care District owns and operates Washington Hospital. Respondent Washington Hospital Healthcare Foundation is a

services at Washington Hospital, approached him at work to discuss some allegedly inappropriate comments Kaminskiy made earlier that day to a Washington Hospital employee. Kaminskiy alleged in his complaint that Stone said he had “commented on the employee[’]s ‘beautiful eyebrows.’ ” Kaminskiy further alleged he never “made any inappropriate comments to anyone at Washington Hospital,” and requested a meeting with his accuser, which was refused. Kaminskiy and Stone shook hands, and “it was [Kaminskiy’s] understanding . . . that the incident had been resolved.”

Bryant Welch, the senior director of human resources for Washington Hospital, informed Michael Milner, Kaminskiy’s supervisor at California Prostate Laser, about the incident. At Milner’s request, Welch also sent him a letter on April 29, 2009, in which he detailed the accusations against Kaminskiy, which involved numerous inappropriate comments—none referencing eyebrows—to a Washington Hospital employee. Milner terminated Kaminskiy’s employment with California Prostate Laser on May 1, 2009.

Kaminskiy took a number of actions in response to his termination from California Prostate Laser. He filed a claim for unemployment benefits, which was initially denied. He appealed that decision to the Unemployment Insurance Board, and his benefits were reinstated in December 2009. On May 6, 2009, he filed a complaint with the California Department of Fair Employment and Housing. On September 6, 2009, he filed a claim of employment discrimination with the Equal Employment Opportunity Commission (EEOC).

Kaminskiy retained an attorney on January 11, 2010, three months after expiration of the six-month period in which to file a claim against a government entity.

On February 19, 2010, he filed the complaint in this action. On April 21, 2010, counsel for respondents informed Kaminskiy’s attorney by telephone that Washington

nonprofit corporation “created to serve as a guardian of gifts and bequests” to Washington Hospital Healthcare System, formerly Washington Hospital. Respondent Washington Township Hospital Development Corporation is a nonprofit corporation which transacts business for the benefit of the District. We refer to Washington Hospital Healthcare System as Washington Hospital in this opinion.

Hospital “was a dba for Washington Township Health Care District,” a governmental entity.

On April 28, 2010, Kaminskiy filed a claim and an application for late filing of notice of claim against a public entity with Washington Township Hospital District. The claim and application for late filing of claim were denied on May 26, 2010. Kaminskiy then filed a petition and motion for leave to file a civil action against a public entity under Government Code section 946.6, subdivision (a),³ which was denied on September 2, 2010. This timely appeal followed.

DISCUSSION

Kaminskiy maintains the trial court abused its discretion in denying his petition for relief from the claim presentation requirement of section 945.4. He claims his failure to timely present the claim was due to his mistake and excusable neglect.

“[N]o suit for money or damages may be brought against a public entity . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board or has been deemed to have been rejected by the board” (§ 945.4.) The claim “shall be presented . . . not later than six months after the accrual of the cause of action.” (§ 911.2.) “When a claim that is required by Section 911.2 to be presented not later than six months after accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim.” (§ 911.4.) The application must be granted or denied within 45 days. (§ 911.6.) If the application is denied or deemed denied, “a petition may be made to the court for an order relieving the petitioner from Section 945.4.” (§ 946.6)

Section 946.6 provides the court “shall relieve petitioner from the requirements of section 945.4 if the court finds the application to the board under Section 911.4 was made within a reasonable time not to exceed [one year] . . . and was denied or deemed denied . . . and . . . [¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be

³ All further undesignated statutory references are to the Government Code unless otherwise indicated.

prejudiced in the defense of the claim if the court relieves the petitioner” (§§ 946.6, subd. (c)(1), 911.4, subd. (b).) “Section 946.6 is a remedial statute intended to provide relief from technical rules which otherwise provide a trap for the unwary claimant. [Citation.] The remedial policies underlying the statute are ‘that wherever possible cases be heard on their merits and any doubts which may exist should be resolved in favor of the application.’ [Citation.] Thus, ‘[a]n appellate court will be more rigorous in examining the denial of such relief than its allowance.’ ” (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435.) Nevertheless, “[t]he determination of the trial court in granting or denying a petition for relief under section 946.6 will not be disturbed on appeal except for an abuse of discretion.” (*Ibid.*)

Kaminskiy filed a declaration supporting his petition for relief in which he stated he and his counsel first learned Washington Hospital and Washington Hospital Health Care Foundation⁴ were public entities on April 21, 2010. He applied for leave to file a late claim on April 28, 2010, “within seven days of learning that the government claims act applies to claims against Washington Hospital,” and “within one year of the April 29, 2009 defamation” Kaminskiy explained that prior to April 21, 2010, no one informed him Washington Hospital was a governmental entity. He “never observed any signage, placards, or other information indicating that Washington Hospital was a public entity,” nor did he receive “any correspondence, or any other memorandum, from Washington Hospital which contained any reference to or notice that Washington Hospital is a governmental agency.” “Following the April 29, 2009 incident . . . [Kaminskiy] diligently conducted [his] own investigation of Washington Hospital, and, given that English is a second language, and given that [he] had no legal background, nothing that [he] read or investigated ever advised [him] that [he] would have to file a government claim” He asserted that even if he “had known that Washington Hospital was a government entity, which I did not, I would have not known the legal

⁴ Respondent’s attorney informed Kaminskiy’s attorney that Washington Hospital Healthcare Foundation is a “non-profit corporation created to serve as a guardian of gifts and bequests to the Washington Hospital Healthcare System.”

significance of this regarding my claim, given my status as a Ukrainian immigrant.” His attorney submitted a declaration in which he stated he had not been retained until after the six-month period had expired.

Kaminskiy’s lack of knowledge of the government claim requirement is not adequate to establish excusable neglect or mistake. “[M]istake of law based solely on ignorance of the six-month claim requirement is not enough.” (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1778-1779 (*Munoz*)). “A petitioner or his attorney must show more than that he just failed to discover a fact until too late; they must establish that in the use of reasonable diligence they failed to discover it.” (*City of Fresno v. Superior Court* (1980) 104 Cal.App.3d 25, 32.)

“Moreover, a petitioner may not successfully argue excusable neglect when he or she fails to take any action in pursuit of the claim within the six-month period. The claimant must, at a minimum, make a diligent effort to obtain legal counsel within six months after the accrual of the cause of action. Once retained, it is the responsibility of legal counsel to diligently pursue the pertinent facts of the cause of action to identify possible defendants.” (*Munoz, supra*, 33 Cal.App.4th at pp. 1778-1779.) Although there is “no absolute rule barring excusable neglect when the claimant has failed to obtain counsel during the six-month period,” a claimant must show a “physical and/or mental disability [that] so limited the claimant’s ability to function and seek out counsel such that the failure to seek counsel could itself be considered the act of a reasonably prudent person under the same or similar circumstances” (*Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1385.)

Kaminskiy’s actions after the accrual of his causes of action fail to establish diligence. Simply asserting he did not see or receive anything indicating Washington Hospital was a public entity is not enough to demonstrate diligence. Moreover, the record reflects that, regardless of any language barriers, Kaminskiy was able to pursue unemployment benefits and file an EEOC claim. Kaminskiy also failed to obtain counsel within the six-month period, and he failed to make a showing of any kind of disability limiting his ability to investigate or seek out counsel. On this record, we cannot say the

trial court abused its discretion in determining Kaminskiy had “not acted diligently,” and thus failed to demonstrate excusable neglect or mistake.

Kaminskiy further claims his failure to timely file a claim was excused because “Respondent Hospital committed extrinsic fraud when it concealed and actively sought to mislead [Kaminskiy] regarding [its] public entity status.” Kaminskiy explains the basis for this claim of fraud as follows: “Respondent argued in its opposition to [Kaminskiy’s] Petition and Motion for Leave to File a Civil Action that it sent the April 29, 2009 Bryant Welch correspondence to [Kaminskiy’s] employer containing the defamatory statements . . . on the Respondent Hospital’s letterhead. [Citation.] Appellant, however, did not receive a copy of the April 29, 2009 Bryant Welch correspondence containing the letterhead and statements regarding Respondent’s public entity status[,] . . . [but] received a copy . . . which was not on the Washington Health Care District letterhead and did not contain any reference to the Respondent Hospital’s public entity status.” The fact that the copy of the April 29, 2009, letter ultimately received by Kaminskiy was not on letterhead does not demonstrate any fraud on the part of respondents. It was not respondents’ duty to inform Kaminskiy of their public entity status, but Kaminskiy’s responsibility to use reasonable diligence to discover that fact. And, contrary to Kaminskiy’s assertion, respondents did not “active[ly] conceal[]” their status. The evidence before the court showed a perusal of the Hospital’s Web site would have revealed its public entity status.

Kaminskiy also maintains respondents have not shown they will be prejudiced by his “minimal delay” in filing notice of late claim. He relies on *Ramariz v. County of Merced* (1987) 194 Cal.App.3d 684, in which the court held: “[W]here, as here, the only issue before the trial court is whether the public entity would be ‘prejudiced’ within the meaning of section 946.6, subdivision (c)(1), an abuse of discretion will exist if the finding of the trial court is not supported by substantial evidence.” (*Id.* at p. 689.) Prejudice, however, was not “the only issue before the trial court.” (*Ibid.*) And, unless the court finds excusable neglect or mistake, it need not consider prejudice. (*Powell v. City of Long Beach* (1985) 172 Cal.App.3d 105, 109 “[T]he second factor in granting

relief under section 946.6 (prejudice to the public entity) need not be shown until excusable neglect is found to exist.”].)

The trial court did not abuse its discretion in denying Kaminskiy relief.

DISPOSITION

The order is affirmed.

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.