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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

VIRGLE CUNNINGHAM,
Plaintiff and Appellant,

v.

CITY OF ANTIOCH et al.,
Defendants and Respondents.

A134444

(Contra Costa County
Super. Ct. No. MSC1102190)

Appellant Virgle Cunningham appeals from an order denying him relief from the claim presentation requirement of Government Code section 945.4.¹ He argues that his months-long delay in securing legal counsel to pursue claims against respondents City of Antioch and the City of Antioch Police Department in connection with an altercation with two city police officers amounted to excusable neglect. We disagree and affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

This case arises out of a beating that appellant alleges he suffered at the hands of two Antioch police officers on May 15, 2010. According to a police report describing the incident, appellant started chasing a car driven by an off-duty police officer after the officer stopped at an intersection and noticed appellant yelling and acting angry. The off-duty officer contacted police dispatch after appellant tried to enter the officer's personal vehicle. A second off-duty, plainclothes police officer joined the first officer before the

¹ All statutory references are to the Government Code unless otherwise indicated.

arrival of uniformed officers, and the two tried to prevent appellant, who was still acting erratically, from walking toward a park where people were gathered. Appellant then attacked the first officer, and both officers struck appellant in their efforts to subdue him. Appellant was hospitalized for his injuries, which included cuts that caused “a large amount” of bleeding. Police reported that appellant exhibited signs of being under the influence of drugs or “experiencing an extreme psychological breakdown of some sort based on his irrational behavior.” Appellant later declared that he suffered “severe emotional distress and anguish” as a result of the incident. He also experienced “tremendous stress as a result of large medical bills and [his] inability to work.”

Because appellant alleges damages against a public entity, he was required to proceed under the California Government Claims Act. As relevant here, section 911.2, subdivision (a) provides that a claim relating to a cause of action for death or personal injury shall be presented to a public entity within six months after the accrual of a cause of action. When a claim is not timely presented to a public entity pursuant to section 911.2, a written application may be made to the public entity for leave to present the claim. (§ 911.4, subd. (a).) If the public entity denies the application, section 946.6 provides that a party may petition the trial court for relief from the claim presentation requirement of section 945.4. The trial court shall grant relief if it finds by a preponderance of the evidence that (1) the application to the public entity seeking relief was made within a “reasonable time,” not to exceed one year after the accrual of the cause of action; (2) failure to timely present the claim was due to “mistake, inadvertence, surprise, or excusable neglect,” and (3) the public entity does not establish that it would be prejudiced if relief is granted. (§ 946.6, subd. (c)(1); see also *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275; *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 431.) The determination of whether relief is appropriate “shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.” (§ 946.6, subd. (e).)

Although the parties dispute whether the force used against appellant was necessary and appropriate, the following facts regarding appellant’s efforts to institute

legal proceedings are not disputed. Appellant did not graduate from high school and is illiterate. He did not understand that he had only six months to contact an attorney and file a legal claim, and he felt that he could not proceed with a lawsuit because he did not have money to pay a lawyer. At some unspecified time, appellant “attempted to contact some [unidentified] law firms but was not able to speak with anyone who would advise [him] of [his] rights.”²

Appellant contacted an attorney, Marianne Skipper, “[o]n or about” February 21, 2011, about three months after the six-month deadline to file a claim with a governmental agency had passed (§ 911.2, subd. (a)). On March 29, 2011, appellant filed an application to present a late claim against a government agency (§ 911.4). Attached to the application was a proposed claim seeking more than \$137,000 for appellant’s medical bills, plus an unspecified amount for lost wages and other economic damages. The application also included a declaration from attorney Skipper stating that defendant “appears to have some type of mental impairment or learning impediment and does not have much education.” The Antioch City Council denied the application on April 12, 2011, and appellant was notified of the denial by letter dated April 14.

On October 7, 2011, proceeding with a different attorney, appellant petitioned the trial court for relief from the requirements of the claim-filing statute (§ 946.6). He requested relief on the ground that his failure to present a claim within the six-month limitation period was due to “mistake, inadvertence, surprise, or excusable neglect” (§ 946.6, subd. (c)(1)), because he was unaware of his rights or the fact that he had to make a claim within six months.

Respondents opposed the petition, arguing that appellant had failed to demonstrate excusable neglect. Respondents also submitted excerpts from an Antioch police department case report describing the incident giving rise to appellant’s claim, as well as

² In his opening brief, appellant claims, without citation to the record (cf. Cal. Rules of Court, rule 8.204(a)(1)(C)), that the law firms he contacted “were not interested in assisting him due to pending criminal charges.” We are aware of no factual support for this contention in the appellate record.

a toxicology report showing the presence of amphetamine and methamphetamine in appellant's blood on the day in question. According to the incident report, appellant told an investigating officer three days after he was hospitalized that he did not remember much about the events leading to his hospitalization. Appellant was then informed that the two people with whom he fought were police officers.

Appellant filed a reply brief but did not submit additional evidence.

The trial court denied appellant's petition. The court concluded that appellant had "offered no facts to show the reasonableness of any of his misconceptions about the law under the circumstances," citing *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, *People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, and *Harrison v. County of Del Norte* (1985) 168 Cal.App.3d 1 (*Harrison*). This timely appeal followed. (*Ebersol v. Cowan, supra*, 35 Cal.3d at p. 435, fn. 8 [order denying petition under § 946.6 is appealable].)

II. DISCUSSION

Appellant argues that the trial court abused its discretion in denying his petition, because he established that his late claim was the result of excusable neglect. "The 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. [Citation.] Abuse of discretion is shown where uncontradicted evidence or affidavits of the petition establish adequate cause for relief." (*Ebersol v. Cowan, supra*, 35 Cal.3d at p. 435, fn. omitted.) "Section 946.6 is a remedial statute intended 'to provide relief from technical rules that otherwise provide a trap for the unwary claimant.' [Citation.] As such, it is construed in favor of relief whenever possible. [Citation.]" (*Bettencourt v. Los Rios Community College Dist., supra*, 42 Cal.3d at p. 275.) "However, the trial court's discretion to grant relief is not 'unfettered.' [Citation.] It is 'to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'" ' [Citation.]" (*Ibid.*)

The showing required for relief because of mistake, inadvertence, surprise, or excusable neglect (§ 946.6, subd. (c)(1)) is the same as required for relieving a party from a default judgment pursuant to Code of Civil Procedure section 473. (*Ebersol v. Cowan, supra*, 35 Cal.3d at p. 435.) “ ‘Excusable neglect’ is defined as the act or omission that might be expected of a prudent person under similar circumstances. [Citation.] It is not shown by the mere failure to discover a fact until it is too late; the party seeking relief must establish that *in the exercise of reasonable diligence*, he failed to discover it. [Citations.]” (*People ex rel. Dept. of Transportation v. Superior Court, supra*, 105 Cal.App.4th at p. 44, original italics.) “It is not the purpose of remedial statutes to grant relief from defaults which are the result of inexcusable neglect of parties” (*Tammen v. County of San Diego, supra*, 66 Cal.2d at p. 478.) “[I]n order to obtain relief under section 946.6 on the basis of excusable neglect, 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.” (*Ebersol, supra*, at p. 439.) “Generally, the mere ignorance of the time limitation for filing against a public entity is not a sufficient ground for allowing a late claim. [Citation.]” (*Harrison, supra*, 168 Cal.App.3d at p. 7.)

Applying the forgoing principles to the facts of this case, we conclude that the trial court did not abuse its discretion when it denied appellant’s petition. This case is similar to *Harrison, supra*, 168 Cal.App.3d 1, decided by this court more than 27 years ago. Appellant in *Harrison* contended that he was “an unsophisticated layman” who was “unschooled in legal matters.” (*Id.* at p. 5.) He did not contact an attorney until after the claims period (then 100 days, later changed to six months) had passed, because he was unaware that he had causes of action against public entities in connection with injuries he suffered following the explosion of a water pump on a county road project where he was working. (*Ibid.*) This court held that the trial court had not abused its discretion in concluding that appellant’s neglect in failing to file a timely claim was inexcusable, because appellant “took *no steps whatsoever* to obtain counsel until after the” claims period had expired, and information about the claims presentation requirements and

appellant's causes of action could have been ascertained through the exercise of due diligence. (*Id.* at p. 8, italics added.)

Likewise here, appellant declared that he was unaware of the claims process. His ignorance of the time limitation was an insufficient ground for allowing a late claim (*Harrison, supra*, 168 Cal.4th at p. 7), especially because he did not demonstrate diligence in securing counsel. Appellant declared that he “attempted to contact some law firms but was not able to speak with anyone who would advise [him] of [his] rights,” but did not specify when he contacted those (unspecified) firms, or what efforts he took to speak with someone. (Cf. *Ebersol v. Cowan, supra*, 35 Cal.3d at p. 437 [plaintiff's efforts to obtain counsel during claims period, including on the same day she was injured, were “both tenacious and diligent”].) This did not amount to reasonable diligence under the circumstances. (*People ex rel. Dept. of Transportation v. Superior Court, supra*, 105 Cal.App.4th at p. 44.)

Appellant attempts to distinguish *Harrison*, arguing that he alleged more than “mere ignorance of the time limitation for presenting a claim,” but also that he was seriously injured and hospitalized as a result of the beating, “suffered extreme stress,” and had “some type of mental handicap.” Although excusable neglect can result from a party's injuries and disability (*Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1384), appellant's bare allegations about his injuries and stress were insufficient to demonstrate excusable neglect, because “no evidence was offered that these conditions substantially interfered with his ability to function in daily life, take care of his personal and business affairs, or seek out legal counsel.” (*People ex rel. Dept. of Transportation v. Superior Court, supra*, 105 Cal.App.4th at p. 46 [plaintiff's hospital stay and “ ‘depression’ ” following car accident that killed his wife did not demonstrate excusable neglect]; cf. *Barragan, supra*, at pp. 1383-1384 [failure to obtain legal advice within time limits may be excusable neglect under certain circumstances, such as where plaintiff was rendered quadriplegic in rollover accident and recovery “dominated her waking hours during the six-month period”].)

The same is true with respect to appellant's claimed "mental handicap." The only evidence submitted of a *possible* mental condition was the declaration of appellant's first attorney, who stated in support of appellant's application for leave to present a late claim that appellant "appears to have some type of mental impairment or learning impediment." The attorney who represented appellant in connection with his petition in the trial court (and who also represents appellant on appeal) did not expand on this topic in his declaration in support of the petition, and appellant himself did not claim in his own declaration to have any underlying mental impairment, only that he had "suffered tremendous stress" because of his medical bills and inability to work, and that he was uneducated and illiterate. This case is thus distinguishable from *In re the Marriage of Kerry* (1984) 158 Cal.App.3d 456, upon which appellant relies, where the trial court vacated a stipulated settlement pursuant to Code of Civil Procedure section 473 on a finding of excusable neglect, which was supported by a family law psychiatric panel report that one of the parties suffered from mental illness.³ (*Kerry* at pp. 461-462, 465-466.)

Appellant summarizes at length various other cases decided under section 946.6 and Code of Civil Procedure section 473, none of which compels reversal. For example, *County of Santa Clara v. Superior Court* (1971) 4 Cal.3d 545 held that it was not an abuse of discretion for the trial court to grant plaintiffs' petition where their attorney represented that an approximately 30-day delay in filing a claim was due to emotional trauma caused by the death of plaintiffs' son, and the trial court had previously observed

³ Appellant's petition cited, but contained no meaningful analysis of, section 946.6, subdivision (c)(3), which provides relief where the person who suffered injury "was physically or mentally incapacitated during *all of the time*" allotted for the presentation of a claim. (Italics added.) On appeal, appellant again cites subdivision (c)(3), but then focuses exclusively on whether his actions amounted to excusable neglect under subdivision (c)(1) of section 946.6, and apparently does not claim that any mental impairment left him "incapacitated." To the extent that appellant contends that he was mentally incapacitated, we agree with respondents that appellant provided no competent evidence that he suffered an "all-encompassing disability" that prevented him from filing a claim. (*Barragan v. County of Los Angeles, supra*, 184 Cal.App.4th at p. 1384.)

the parties during the course of a trial regarding the son's injuries. (*Id.* at pp. 547, 552-554.) Here, it was not an abuse of discretion to conclude that appellant had not sufficiently demonstrated in his 18-line declaration that his emotional suffering amounted to excusable neglect for purposes of section 946.6.

Appellant also relies on *Syzemore v. County of Sacramento* (1976) 55 Cal.App.3d 517, which held that the filing period set forth in section 911.2 was tolled by the Soldiers' and Sailors' Civil Relief Act of 1940 (now the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq.). (*Syzemore* at pp. 519, 524.) In a single paragraph, the court held that an additional ground for relief was that petitioner had demonstrated mistake and excusable neglect, apparently on the ground that petitioner was "unaware of the existence of a tenable cause of action." (*Id.* at p. 524.) In *Harrison*, this court respectfully declined to follow *Syzemore* because it was inconsistent with governing authority, and we see no reason to now depart from that conclusion. (*Harrison, supra*, 168 Cal.App.3d at p. 7, fn. 5, citing *Ebersol v. Cowan, supra*, 35 Cal.3d 427.)

It is true, as appellant argues, that section 946.6 is construed in favor of relief whenever possible (*Bettencourt v. Los Rios Community College Dist., supra*, 42 Cal.3d at p. 275); however, the cases upon which he relies for this proposition are inapposite. *Bettencourt* involved a wrongful death action arising from a fatal field trip sponsored by a city college. (*Id.* at p. 273.) An attorney who investigated the accident mistakenly filed a claim with the state, believing that the employees of the college were state employees, whereas they were in fact employees of a community college district. (*Id.* at p. 274.) The Supreme Court concluded that the attorney's failure to timely file a claim with the correct public entity was excusable neglect, in part because "public higher education in California represents a sometimes confusing blend of state and local control and funding." (*Id.* at p. 276.) Likewise in *Powell v. City of Long Beach* (1985) 172 Cal.App.3d 105, upon which appellant also relies, the court concluded that plaintiff's mistaken belief that worker's compensation was the sole remedy for injuries suffered at a city-owned harbor was reasonable under the circumstances, where there were no signs

posted indicating that the property in question was owned or operated by a public entity. (*Id.* at pp. 108, 110.)

Here, by contrast, although appellant made general claims that he was “uneducated” and “illiterate,” he did not claim that he was unaware of the identity of the relevant public entities, only that he thought he could not proceed with his claims because he could not afford an attorney. Indeed, he was told three days after his altercation with police that he had fought with police officers, which would put “a reasonably prudent person under the same or similar circumstances” on notice of a claim against the police agency and the city. (*Ebersol v. Cowan, supra*, 35 Cal.3d at p. 435; see also *Tammen v. County of San Diego, supra*, 66 Cal.2d at pp. 477-478 [no excusable neglect where plaintiff and counsel knew of a possible claim against government entity and could have discovered proper party through exercise of reasonable diligence].)

Finally, we need not consider appellant’s argument that reversal is required because respondents have not demonstrated that they would suffer prejudice if relief is granted. “[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.” (*Powell v. City of Long Beach, supra*, 172 Cal.App.3d at p. 109; see also *Tammen v. County of San Diego, supra*, 66 Cal.2d at p. 478.) Because appellant has failed to demonstrate the existence of excusable neglect, we need not reach his arguments regarding prejudice to respondents.

III. DISPOSITION

The order denying appellant’s petition is affirmed. Respondents shall recover their costs on appeal.

Baskin, J.*

We concur:

Reardon, Acting P.J.

Rivera, J.

* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.