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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DANIEL BOREEN,

Plaintiff and Appellant,

v.

CITY & COUNTY OF SAN  
FRANCISCO et al.,

Defendant and Respondent.

A138528

(City & County of San Francisco  
Super. Ct. No. CGC09484172)

Plaintiff Daniel Boreen was a firefighter for defendant City and County of San Francisco (CCSF). CCSF's Fire Commission disciplined him in 2003 and again in 2006. Boreen brought this action, a petition for administrative mandamus and a complaint to quiet title and for declaratory relief, in January 2009. The trial court granted CCSF's motion for judgment on the pleadings, without leave to amend, on the ground the action was barred by the statute of limitations applicable to challenges to local agency decisions. (Code Civ. Proc.,<sup>1</sup> § 1094.6.) We conclude judgment on the pleadings was proper as to Boreen's cause of action for quiet title and declaratory relief, but not as to the petition for administrative mandamus.

**I. BACKGROUND**

In considering a motion for judgment on the pleadings, the court accepts as true the plaintiff's factual allegations and gives them a liberal construction. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515–516 (*Gerawan Farming*)). We also

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

consider exhibits attached to the complaint and matters subject to judicial notice. (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 322, fn. 12 (*Fiorini*); *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; § 438, subd. (d).)

Boreen began working as a firefighter in the San Francisco Fire Department (the Department) in 1997. In 1999, he was asked to bring some of his personal property to a training facility at Treasure Island and use it to build and install an “adjunct training assessment system devised of piping, valves, manifolds, couplings, fittings, nuts, bolts, washers and other mounting and restraining components which Petitioner had purchased at his own expense.” He did so on the understanding that it would be “removable at will.” In November 2002, Boreen removed the training equipment from the Treasure Island premises. The Department took the position that he had donated the equipment to the Department and that his removal of the equipment constituted a theft. The Department reported the matter to the San Francisco Police Department; after a police investigation, the district attorney’s office declined to prosecute Boreen.

The Department brought disciplinary proceedings against Boreen before CCSF’s Fire Commission (the Commission). At a December 11, 2003 meeting, the Commission found him guilty of four violations: unfamiliarity with rules, acts detrimental to the welfare of the Department, insubordination, and unauthorized use or disposition of property. Boreen received a 10-day suspension and was fined one month’s salary. The Commission sent him a letter on December 15, 2003, informing him of its action.

Boreen sent the president of the Commission a letter on March 12, 2004, saying that on March 7, 2004, he had learned of the provisions of the Code of Civil Procedure governing judicial review of local agency decisions, and expressing his concern that section 1094.6 establishes a 90-day statute of limitations. He informed the commissioner that he had not received “notification of a final administrative adjudication,” and stated, “Unless immediately informed otherwise, I must act expeditiously . . . in filing an Administrative Mandamus, and a Stay of Administrative Decision.” He asked the Commission to agree to toll the statute of limitations, and asked for information on

further administrative remedies. He also requested a copy of the complete administrative record pursuant to section 1094.6, subdivision (d).

In February 2005, the Department notified Boreen that he had failed to pay the fine of one month's salary and told him he would be charged with insubordination. At a meeting on January 12, 2006, the Commission found Boreen guilty of insubordination and imposed a 90-day suspension, but provided the suspension could be reduced to 30 days if he paid the fine by the end of March. The suspension was to begin on April 1, 2006. The Commission sent Boreen a letter on January 17, 2006, informing him of its action and notifying him, "[t]he time within which any judicial review of this Decision must be sought is governed by California Code of Civil Procedure, Section 1094.6." On January 23, 2006, Boreen delivered to the Commission a request for the administrative record.

Boreen filed his petition for administrative mandamus and complaint on January 16, 2009. He served it on CCSF three years later, on January 17, 2012.

In his first cause of action, entitled "Declaratory Relief to Quiet Title," Boreen alleged a present and actual controversy existed between him and CCSF<sup>2</sup> regarding the adverse claims against the disputed training equipment. In his second cause of action, for a writ of mandate, Boreen sought judicial review of the 2003 and 2006 disciplinary actions.

CCSF moved for judgment on the pleadings on the ground the operative pleading, the second amended petition and complaint, was barred by the statute of limitations and the doctrine of laches and that it failed to state a cause of action. The trial court found that the second amended petition and complaint was barred in its entirety by the statute of limitations of section 1094.6, subdivision (b), and granted the motion for judgment on the pleading without leave to amend. The court accordingly granted judgment in CCSF's favor.

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<sup>2</sup> The named defendants were CCSF, the Commission, several commissioners, the Department, and Fire Chief Joanne Hayes-White. We refer to defendants collectively as CCSF.

## II. DISCUSSION

Boreen contends the trial court erred in concluding his petition was barred by section 1094.6, which governs the limitations period for petitions for writ of mandate.

### A. Section 1094.6

Section 1094.6, subdivision (b), provides in pertinent part that a petition challenging a local agency decision “shall be filed not later than the 90th day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, or for a written decision or written findings supporting the decision, in any applicable provision of any statute, charter, or rule, for the purposes of this section, the decision is final on the date it is announced. . . . If there is a provision for a written decision or written findings, the decision is final for purposes of this section upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ.”

The petitioner may request a complete record of the proceedings from the public agency, which the agency “shall” deliver *within 190 days*. (§ 1094.6, subd. (c).) *If the petitioner makes such a written request “within 10 days after the date the decision becomes final as provided in subdivision (b), the time within which a petition pursuant to Section 1094.5 may be filed shall be extended to not later than the 30th day following the date on which the record is either personally delivered or mailed to the petitioner or his attorney of record, if he has one.”* (§ 1094.6, subd. (d), italics added.)

A final provision of the statute that is pertinent here is subdivision (f), which provides: “In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section.”<sup>3</sup>

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<sup>3</sup> Section 1094.6, subdivision (e) defines a decision, in pertinent part, to mean “a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, . . . [or] imposing a civil or administrative penalty, fine, charge, or cost . . . .”

## **B. The 2003 Decision**

We first consider whether Boreen sought judicial review of the Commission's 2003 decision in a timely manner. In doing so, we, like the trial court, "accept[] as true the factual allegations that plaintiff makes" (*Gerawan Farming, supra*, 24 Cal.4th at p. 515) and assume the truth of all facts reasonably inferred from the exhibits to the complaint (*Fiorini, supra*, 231 Cal.App.4th at p. 322, fn. 12). We review the trial court's decision "de novo and as a matter of law." (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448 (*Ott*); see *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

The Department found Boreen guilty of four violations and imposed a 10-day suspension and a fine of one month's salary on December 11, 2003, and notified him by letter of the decision on December 15, 2003. However, there is no indication that it provided the notice required by subdivision (f) of section 1094.6 that subdivision (b) governed the time within which judicial review must be sought. Boreen argues that because the Commission failed to comply with this requirement, its 2003 decision never became final and the 90-day statute of limitations therefore never began to run; as a result, he contends his petition for writ of mandate, filed in 2009, was timely.

For this contention, Boreen relies on *Cummings v. City of Vernon* (1989) 214 Cal.App.3d 919, 922 (*Cummings*), which held that under section 1094.6, "the decision of the local agency does not become final for the purpose of subdivision (b) until the notice required by subdivision (f) is given." The petitioner there filed a petition more than 90 days after an adverse local agency decision, but fewer than 90 days after the city attorney gave him the notice required by subdivision (f). (*Cummings*, 214 Cal.App.3d at p. 921.) The appellate court concluded the action was not barred by the statute of limitations; in doing so, it noted that section 1094.6 provides a short statute of limitations, and it should avoid an interpretation that shortened the period even further. (*Cummings*, at p. 923.) The court reasoned: "Since section 1094.6 benefits local agencies by reducing the statute of limitations, requires local agencies to give the notice, and impliedly prohibits local agencies from adopting a shorter limitation period, it should not

be interpreted in a way which permits local agencies to shorten the period even further by delaying the notice. This is avoided if the local agency's decision does not become final for the purpose of subdivision (b) until the notice required by subdivision (f) is given. This interpretation encourages prompt notice, assures that all plaintiffs will have substantially all of the 90-day period in which to prepare, and avoids uncertain and unnecessary case-by-case litigation over whether the delay was so prejudicial as to give rise to estoppel." (*Ibid.*)

The court in *El Dorado Palm Springs, Ltd. v. Rent Review Com.* (1991) 230 Cal.App.3d 335 (*El Dorado*), agreed with *Cummings* that the 90-day statute of limitations did not begin to run until the subdivision (f) notice was given, but disagreed with its conclusion that the agency decision is not final until the agency gives notice. The court explained: "First, it seems to us that one must give section 1094.6 a strained reading to conclude that that section uses the phrase 'final decision' to mean anything other than, or more than, the substantive decision reached, and then issued in final form, by a local agency following the completion of that agency's administrative decision-making processes. Second, taken to its (il)logical conclusion, *Cummings*'s position on 'finality' would permit a local agency to preclude a decision's *ever* becoming final by the simple expedient of never issuing a notice pursuant to subdivision (f). In light of the fact that only 'final' administrative decisions are subject to judicial review [citation], *Cummings*'s position on 'finality' results in a state of affairs wherein the mere failure of a local agency to give notice pursuant to subdivision (f) effectively insulates an agency decision from judicial review. This, clearly, is not a result intended by our Legislature." (*El Dorado*, 230 Cal.App.3d at pp. 345–346.) The court concluded that "the better course in interpreting section 1094.6 is to avoid any attempt to give 'finality' a strained reading and, instead, to simply read the section as containing a 90-day statute of limitations that is *tolled* until such time as the subdivision (f) notice is given." (*Id.* at

p. 346.)<sup>4</sup> We find the reasoning of *El Dorado* persuasive, and agree that an agency’s failure to provide the notice required by section 1094.6, subdivision (f) does not prevent the decision from becoming final, but instead tolls the statute of limitations.

There is no evidence in the record that CCSF ever informed Boreen of the statute of limitations in connection with the 2003 decision, as required by section 1094.6, subdivision (f). The record leaves no doubt, however, that Boreen in fact became aware of the limitations period: On March 12, 2004, in a letter to the president of the Commission, he stated, “On Sunday, March 7, 2004, I learned of California Code of Civil Procedure (CCP) 1094.5 (a)–(k) and 1094.6 (a)–(g), governing judicial review of administrative adjudication.” He expressed his concern about the 90-day statute of limitations, and indicated he “must act expeditiously” in filing a petition for administrative mandamus. To conclude that the statute of limitations remained tolled even after Boreen not only *was* aware of the statutory requirements, but after he had explicitly informed the Commission of that awareness would exalt form over substance to an unreasonable degree. As our high court explained in considering the effect of an employer’s failure to notify an employee of his workers’ compensation rights, “such an inflexible rule would be inconsistent with the policies underlying statutes of limitations. Such statutes are intended to afford ‘finality and predictability in legal affairs, and [to ensure] that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh.’ [Citation.]” (*Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 65.) We recognize that the statute of limitations found in section 1096.4 should be “strictly construed to avoid the forfeiture of a person’s rights.” (*Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1103; and see *id.* at p. 1105 [“courts have cautioned that an interpretation of section 1094.6 which shortens the 90-day period even further should be avoided.”]; *Blaich v. West Hollywood Rent*

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<sup>4</sup> The court went on to note that this would not give an aggrieved party an “‘opened’ period of time within which to seek judicial review” of the action, because even if the statute of limitations was tolled, the equitable doctrine of laches would still apply to the party’s timeliness in seeking judicial review. (*El Dorado, supra*, 230 Cal.App.3d at p. 346.)

*Stabilization Dept.* (2011) 195 Cal.App.4th 1171, 1176 [based on concerns about short limitations period, “courts have declined to stray from the express language of section 1094.6.”].) However, in light of the explicit evidence that by March 12, 2004 Boreen knew that section 1094.6 governed this action and that it provided a limitations period of 90 days, we conclude the tolling of the limitations period ended as of that date.

Because Boreen did not file his petition and complaint until 2009, it necessarily follows that he did not seek review the 2003 Commission decision in a timely manner.

### **C. The 2006 Decision**

We reach a different conclusion as to the 2006 decision. The Commission reached its decision finding Boreen guilty of insubordination on January 12, 2006. On or about January 17, 2006, the Commission mailed him a letter informing him of its decision.<sup>5</sup> The letter stated, “The time within which any judicial review of this Decision must be sought is governed by California Code of Civil Procedure, Section 1094.6.” On January 23, 2006, eleven days after the Commission reached its decision, and six days after it mailed its letter, Boreen hand-delivered a letter to the president of the Commission requesting the administrative record.

As we have explained, if a petitioner makes a written request for the record within 10 days of the time a decision becomes final, the time for filing a petition is extended to 30 days after the record is delivered to the petitioner. (§ 1094.6, subd. (d).) Boreen contends the decision was not final until January 17, 2006, when the Commission mailed him the letter informing him of its decision, and his record request made six days later served to toll the statute of limitations. CCSF takes the position that the Commission’s decision was final on the day it was announced, January 12, 2006. In its brief on appeal, CCSF argued that that the request filed on January 23, 2006 did not serve to extend the limitations period because it was filed one day outside the 10-day limit of section 1094.6, subdivision (d). However, after we requested supplemental briefing, CCSF now

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<sup>5</sup> The copy of the letter in the record is directed to the Chief of the Department, but in his petition, Boreen alleges the letter was mailed to him.

concedes that the January 23, 2006 request was made in time to toll the limitations period, for the reasons that follow.

January 22, 2006—ten days after the Commission reached its decision—fell on a Sunday. Under section 12a, “If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day that is not a holiday.” (§ 12a, subd. (a); and see § 10 [Sundays included in definition of holidays].) As a result, the time to file the record request was extended to Monday, January 23, 2006. Because the petition and the matters judicially noticeable do not show that the Commission provided Boreen with the administrative record before he filed his petition, CCSF has not shown for purposes of the motion for judgment on the pleadings that Boreen’s contentions with regard to the 2006 decision are barred by the 90-day statute of limitations of section 1094.6.

Accordingly, we conclude the trial court erred in granting the motion for judgment on the pleadings as to the second claim for relief, the petition for writ of mandate. (See *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452 [if any part of cause of action properly pleaded, demurrer will be overruled].)<sup>6</sup>

CCSF’s motion for judgment on the pleadings was also based on the doctrine of laches. According to CCSF, Boreen delayed unreasonably both in waiting until 2009 to file his action and in waiting until 2012 to serve it. (See *El Dorado, supra*, 230 Cal.App.3d at p. 346 [even if section 1094.6 does not bar action, “the doctrine of laches would still apply to the timeliness of a party’s effort to secure judicial review”].) The trial court’s ruling, however, was based solely on the statute of limitations, and CCSF does not argue on appeal that we should affirm the trial court’s judgment based on laches. We therefore express no view as to any relief that may be available to CCSF under the doctrine of laches.

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<sup>6</sup> As we have discussed, however, we agree with the trial court that any challenge to the 2003 Commission decision is not properly before the court.

#### **D. Declaratory Relief and Quiet Title**

The trial court concluded that Boreen's first cause of action, for declaratory relief and quiet title, was also barred by section 1094.6's statute of limitations. In his opening brief, Boreen made no argument regarding his first cause of action, and has accordingly forfeited any challenges. (See *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 548; *Moran v. Endres* (2006) 135 Cal.App.4th 952, 956.)

In any case, we conclude judgment on the pleadings as to this cause of action was properly granted. Two principles lead to this conclusion. First, "[i]t is well settled that declaratory relief is not an appropriate method for review of an administrative order [citation]; rather, administrative mandamus is the proper remedy. [Citations.]" (*Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 244.) Second, declaratory relief and quiet title are appropriate where there is an "actual, present controversy" between the parties. (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 831; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606.) In his first cause of action, Boreen alleges an actual controversy exists between the parties concerning their adverse claims, that CCSF alleged he had committed "theft" of the disputed equipment, that he is the sole owner of the equipment, that he installed the equipment with the understanding he could remove it at any time, and that a Department employee used her superior position to assert an adverse claim and try to enforce that claim under threat of criminal or administrative proceedings. It is evident that these allegations were largely, or entirely, made to support his contention that the Commission acted wrongfully in disciplining Boreen for removing the equipment. But, as we have explained, declaratory relief is not properly used to challenge an administrative order. (*Guilbert*, 93 Cal.App.3d at p. 244.) Moreover, the petition itself makes clear that CCSF is not asserting a continuing adverse claim to the equipment: In 2003, after the police department completed its investigation, the district attorney declined to pursue the matter and the case was cleared. Boreen pleads no facts showing that CCSF made any further effort, through any means, to recover the equipment in the nine and a half years that intervened between the time he removed it and the time he filed his second amended

petition and complaint.<sup>7</sup> Indeed, in its answer, CCSF denied the allegation that it claimed any right in the equipment. Thus, aside from the challenge to the propriety of the Commission’s administrative orders, there is no “actual, present controversy” between the parties. (*Friends of the Trails*, 78 Cal.App.4th at p. 831.) In the circumstances, Boreen’s remedy, if any, lies in mandamus. The trial court properly granted judgment on the pleadings as to the first cause of action.

#### **E. Denial of Leave of Amend**

Boreen contends the trial court erred in denying leave to amend the second amended petition and complaint. We review the denial of leave to amend for abuse of discretion. (*Ott, supra*, 31 Cal.App.4th at p. 1448.) The plaintiff has the burden of proving the deficiencies may be cured by amendment. (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 78.)

Boreen has not met this burden. He states in a conclusory manner that he has “demonstrated in the preceding pages of this brief that he can plead facts sufficient to establish that his petition was timely filed,” but makes no effort to argue that he can amend his complaint to cure the defects we have discussed in connection with the cause of action for quiet title and declaratory relief.<sup>8</sup> The trial court did not abuse its discretion in denying leave to amend.

### **III. DISPOSITION**

The judgment is reversed as to the second cause of action, for writ of mandate, and affirmed as to the first cause of action, for “declaratory relief to quiet title.” The parties shall bear their own costs on appeal.

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<sup>7</sup> The limitations period for an action for taking “goods or chattels, including actions for the specific recovery of personal property,” is three years. (§ 338, subd. (c)(1).)

<sup>8</sup> Nor, for that matter, does he suggest any facts that might cure the defect with respect to the Commission’s 2003 decision.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Streeter, J.