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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JENNY LOPEZ,

Plaintiff and Appellant,

v.

COUNTY OF VENTURA,

Defendant and Respondent.

2d Civil No. B236340
(Super. Ct. No. 56-2011-00398032-CU-PT-
VTA)
(Ventura County)

Jenny Lopez appeals from an order denying her petition for relief from the claims presentation requirement of Government Code section 945.4.¹ The trial court denied the petition on the ground that appellant's failure to present a timely claim to County of Ventura (County) and subsequent failure to submit a timely late claim application was not the result of mistake, inadvertence, surprise or excusable neglect. (§ 946.6, subd, (c)(1).) We affirm.

Procedural History

On January 4, 2010, appellant tripped on a sidewalk at the Ventura County Government Center, fracturing her wrist. Appellant retained Attorneys Shurmer & Drane four days later but counsel did not present a "Claim For Damage or Injury" until July 20, 2010.

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

County returned the claim on July 23, 2010, because it was not presented within six months of the injury. (§ 911.2.) In a letter sent by certified mail, County warned: "Your only recourse at this time is to apply without delay to the Clerk of the Board of Supervisors for leave to present a late claim."

Appellant submitted an application to present a late claim about five months later on December 28, 2010. (§ 911.4.) County denied the application on January 13, 2011.

On June 6, 2011, appellant petitioned the superior court for relief from the claims presentation requirement. (§ 946.6.) Appellant's attorney declared that the claim was filed late because the "[claims] statute was inadvertently calendared for the wrong date in this office by mistake"

The trial court, in denying the petition, found that it had to determine whether appellant submitted the application for leave to present a late claim within a reasonable time, not to exceed one year after accrual of the cause of action. (See § 911.4, subd. (b); *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 431.) "Here, [appellant's] application for leave to present a late claim was made days before the expiration of the one-year period. [Appellant] and her counsel believed [appellant] had a cause of action against the County in January 2010, and by late July 2010, they knew they needed to petition for relief from the claims presentation requirements. No explanation was given for the approximately five-month delay, from July 23 to December 28, 2010, in applying for that relief following the return of the late claim."

Claims Presentation Requirement

The denial of a section 946.6 petition is reviewed for an abuse of discretion. (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275-276 (*Bettencourt*).) A plaintiff suing a public entity for personal injuries must file a written claim with the public entity not later than six months after accrual of the cause of action. (§ 911.2; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776-1777.) If the six month deadline is missed, plaintiff may apply to the public entity for leave to file a late claim, provided the application is made within one year of accrual of the cause of

action. (§ 911.4, subd. (a).) If the public entity rejects the application, plaintiff may petition the superior court under section 946.6 for relief from the claims presentation requirements. (*Id.*, at p. 1777.)

"Before a court may relieve a claimant from the statutory tort claim filing requirements, the claimant must demonstrate by *a preponderance of the evidence* both that the application to the public entity for leave to file a late claim was presented within a reasonable time [not exceeding one year after accrual of the cause of action] and that the failure to file a timely claim was due to mistake, inadvertence, surprise or excusable neglect. [Citation.] [¶] The mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief. Relief on grounds of mistake, inadvertence, surprise or excusable neglect is available only on a showing that the claimant's failure to timely present a claim was reasonable when tested by the objective 'reasonably prudent person' standard. The definition of excusable neglect is defined as 'neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances.' [Citation.]" (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.)

Excusable Negligence/Reasonable Diligence

Appellant argues that section 946.6 is a remedial statute that should be liberally construed to grant relief for calendaring errors. " 'It is not the purpose of remedial statutes to grant relief from defaults which are the result of inexcusable neglect of parties or their attorneys in the performance of the latter's obligation to their clients.' [Citation.]" ' ' (*Department of Water & Power v. Superior Court, supra*, 82 Cal.App.4th at p. 1296.)

The cases cited by appellant involve instances in which the attorney, after discovering the calendaring error, took immediate steps to submit an application to present a late claim with the public entity. (*Nilson v. City of Los Angeles* (1967) 249 Cal.App.2d 976, 978 [claim against city filed 47 days late; immediately upon discovery of late date, counsel submitted application; *Flores v. Board of Supervisors* (1970) 13

Cal.App.3d 480, 483 [14 day delay; after critical oversight, appellants' attorneys "religiously followed the statutory requirements in pressing appellant's claim"].)

Appellant waited more than six months after accrual of the action to file a claim with County. After County returned the claim with a warning, another five months elapsed before appellant submitted an application to present a late claim which was denied. When appellant petitioned the superior court for relief, counsel provided no explanation for the delay other than to say that it was a clerical error.

Under *Bettencourt*, the court considers not only the nature of the mistake but the overall diligence of the attorney.² (*Bettencourt, supra*, 42 Cal.3d at p. 276.) "A person seeking relief must show more than just failure to discover a fact until too late; or a simple failure to act. He must show by a preponderance of the evidence that in the use of reasonable diligence, he could not discover the fact or could not act upon it. [Citation.]" (*Department of Water & Power v. Superior Court, supra*, 82 Cal.App.4th at p. 1296.)

Diligence was lacking here. Counsel determined that appellant had a good case, had appellant sign a fee agreement on January 8, 2010, but did not file a claim until six months later. County returned the untimely claim with a warning that raised a red flag for everyone concerned. Appellant, however, did not submit an application to present a late claim until five months later. At the hearing on the petition, the trial court asked counsel the reason for the delay:

"MR. THIELE [counsel for appellant]: Well, the claim notice was filed late and denied in May or June, and I assume, it took a couple months for the firm to process the paperwork to file the appeal to the County . . .

THE COURT: Doesn't it take a couple of months to do that though?. What was the delay?

² The automatic relief provisions of Code of Civil Procedure section 473, subdivision (b), for relief from default based on an attorney affidavit of fault do not apply to Government Code section 946.6 petitions. (*Tackett v. City of Huntington Beach* (1994) 22 Cal.App.4th 60, 64-65.)

MR. THIELE: I don't know what the delay– I don't know what the delay was, other than perhaps workload at the firm. I'm not sure, your honor." "

Appellant argues that County was not prejudiced by the delay but that is not at issue here. (See VanAlsytne, Cal. Government Tort Liability Practice (7 2012) § 7.34, pp. 346-347; *Department of Water & Power v. Superior Court*, *supra*, 82 Cal.App.4th at p. 1296-1297.) "The public entity has no burden of establishing prejudice arising from the failure to file a timely claim until after the party seeking relief has made a prima facie showing of entitlement to relief. [Citations.] No such showing has been made here." (*Id.*, at p. 1297.)

Six Month Delay After County's Denial of Application to File Late Claim

Appellant argues that the trial court erred in considering the six month period between County's denial of the late claim application (January 13, 2011) and the date the petition was filed in superior court (June 6, 2011). (See *Cabamongan v. City of Long Beach* (1989) 208 Cal.App.3d 946, 952.) Although the issue was discussed at the hearing, the court's contemporaneous remarks may not be used to impeach the judgment. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268; see e.g., *Patarak v. Williams* (2001) 91 Cal.App.4th 826, 830.)

The order denying the petition explains why the five-month delay from July 23, 2010 (date the claim was returned as untimely) to December 28, 2010 (date appellant submitted late claim application) was unreasonable. The cases cited by the trial court all denied relief where the plaintiff delayed filing an application to present a late claim (§ 911.4), not a section 946.6 petition. (*Drummond v. County of Fresno* (1987) 193 Cal.App.3d 1406, 1411; *Lutz v. Tri-City Hospital* (1986) 179 Cal.App.3d 807, 811; *DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 864.)

Appellant must not only show that the failure to file the claim within six months of accrual of the action was due to mistake, inadvertence, surprise or excusable neglect, but the section 911.4 application for leave to present a late claim "was made within a reasonable time. . ." (§ 946.6, subd. (c); *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 474 [application filed 10.5 months after alleged wrongful death; counsel

retained within 2 weeks following the death]; *Hasty v. County of Los Angeles* (1976) 61 Cal.App.3d 623, 626 [two month delay in filing application unreasonable]; *County of Sacramento v. Superior Court* (1980) 105 Cal.App.3d 898, 903 [three month delay unreasonable].)

The judgment (order denying section 946.6 petition for relief from claims presentation requirement) is affirmed. County is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Mark Borrell, Judge
Superior Court County of Ventura

Earl S. Schurmer; Schurmer & Drane and Gerald Philip Peters, for
Appellant.

LeRoy Smith, County Counsel, County of Ventura, Jaclyn Smith, Assistant
County Counsel, for Respondent.