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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Calaveras)

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ALAN W. CLAUDINO,  
  
Plaintiff and Appellant,  
  
v.  
  
COUNTY OF CALAVERAS,  
  
Defendant and Respondent.

C067912  
  
(Super. Ct. No.  
CV35667)

Plaintiff Alan Claudino appeals after the trial court granted the motion for summary judgment by defendant County of Calaveras (the County) in Claudino's breach of contract case. Claudino, a retired highway patrol officer who was subsequently elected to the Board of Supervisors of Calaveras County, contends he was entitled to cash payments in lieu of a contribution to the California Public Employees Retirement System (CalPERS) for the period he served as a supervisor. He contends he was entitled to such payments pursuant to Government

Code<sup>1</sup> section 21222. The trial court found that section 21222 did not apply to Claudino's situation, and that there existed no contract providing Claudino with cash in lieu of retirement benefits. We shall affirm the trial court's order.

**FACTUAL AND PROCEDURAL BACKGROUND**

I

*Claudino's Retirement and Election*

Claudino worked as a highway patrol officer for 37 years, from 1965 until 2002. He began receiving retirement benefits from CalPERS in January of 2003. In 2004, Claudino was elected to the County's Board of Supervisors and took office in January 2005. He served four years. Because he was receiving a pension from CalPERS and chose not to be reinstated from retirement and stop receiving his pension, he was not eligible for participation in the CalPERS system for the period he served as a supervisor.

During his service as a supervisor, Claudino noticed his pay stub did not show any retirement contribution. He repeatedly inquired about it, but nothing was resolved by the time his term expired. He believed he was entitled to the same amount as had been contributed for Steven Wilensky, a supervisor who served the same 2005-2009 term. After his term ended, Claudino filed a claim for his retirement allowance. The claim was denied.

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<sup>1</sup> Further undesignated statutory references are to the Government Code.

II

*The Lawsuit*

Claudino filed suit against the County. The second amended complaint<sup>2</sup> originally set forth five causes of action for failure to discharge mandatory duty, breach of contract, misrepresentation, constructive trust, and common count. The County's demurrer to this complaint was overruled only as to the second, fourth, and fifth causes of action. Claudino elected not to amend, but to rely on these causes of action.

The second cause of action was for breach of contract. It alleged that as a result of being elected supervisor, Claudino "was entitled to payments as a Supervisor which included a PERS contribution." He was to receive that contribution for four years. He was repeatedly told his claim for those funds would be taken care of, but when he ceased being a supervisor, the County failed to pay Claudino the sums he was owed, a total of \$35,395.21.

The fourth cause of action was for constructive trust. It alleged Claudino was entitled to receive biweekly retirement contributions as a result of his employment as a supervisor and that the County held \$35,395.12 in the general fund as a constructive trustee on behalf of Claudino.

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<sup>2</sup> The operative complaint is the second amended complaint. A third amended complaint was filed, but it was stricken by stipulation.

The fifth cause of action was a common count.<sup>3</sup> It alleged the County had received \$35,395.12 on Claudino's behalf and denied his request for the money. He was damaged as a result of not receiving the money.

### III

#### *Summary Judgment Proceedings*

The County moved for summary judgment, on the grounds that there was no contract between Claudino and the County. The County contended Claudino was not entitled to contribute to CalPERS, but could and did choose a social security contribution.<sup>4</sup> No contract for a second CalPERS retirement or cash equivalent had been brought before the Board of Supervisors, and if it had been, such a contract would be void as a matter of law.

The County's statement of undisputed material facts set forth that Claudino repeatedly asked Francine Osborn, the Director of Human Resources, to schedule a meeting with the Board of Supervisors so he could secure CalPERS benefits or a cash equivalent. He spoke about the issue with Tom Mitchell,

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<sup>3</sup> A common count is a statement that defendant is indebted to plaintiff for some generalized, formal reason such as "money had and received" without alleging any ultimate facts. Although the practice is directly opposed to the principle of code pleading, it is settled that common counts are permissible in California. (See 4 Witkin, California Procedure (5th Ed. 2008) Pleading, § 553, pp. 680-681.)

<sup>4</sup> The trial court ultimately found that the issue of Claudino's social security contributions and/or distributions was irrelevant to the issues at hand ("a red herring"). We agree.

the County Administrative Officer. No open or closed session took place on his request for retirement benefits or a cash equivalent. The statement also set forth that Claudino had elected to receive social security and that the causes of action for common count and constructive trust were based on the same facts as the breach of contract claim.

In opposition, Claudino denied he had elected to receive social security while on the County payroll as a County Supervisor. He provided a payroll stub and a report from the Social Security Administration to support his denial. He also denied that he chose not to seek reinstatement and the common factual basis of all his claims, but the evidence he cited--his declaration--did not support these denials. In his declaration, Claudino stated he "did not intend to relinquish my right to continue receiving PERS retirement benefits." He based his entitlement to retirement contributions on the fact that a fellow supervisor (not a CalPERS retiree) was receiving a retirement allowance.

#### IV

#### *Ruling*

The trial court granted the motion for summary judgment. The court found the only matters in dispute, including social security payments, were not relevant, let alone dispositive, and that, "The ingredients of a valid contract are missing." The court further found the alleged contract never came before the Board of Supervisors and that "[a]ll of the remaining causes of action are based [ ] on that nonexistent contract."

Claudino moved for reconsideration. The trial court denied the motion, finding no new facts or law. The "bottom line," according to the trial court, was that there was no contract providing that Claudino receive extra compensation as a retired highway patrol officer. In response to Claudino's complaint that this result led to unequal treatment between supervisors, the court noted Claudino's lawsuit was not based on an equal protection violation, but instead on a nonexistent contract.

### **DISCUSSION**

#### I

##### *Standard of Review*

We review the trial court's grant of summary judgment de novo. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017.) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant meets his burden of showing that a cause of action has no merit if he shows that one or more of the elements of the cause of action cannot be established, or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) If defendant makes the threshold showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists. (*Ibid.*)

II

*Contract*

The County moved for summary judgment on the basis that there was no contract between the County and Claudino for the payment of retirement contributions to Claudino.<sup>5</sup> In support, the County offered the declarations of Osborn and Mitchell attesting that the issue of retirement contributions for Claudino never came before the Board of Supervisors.

Claudino fails to show any triable issue as to an alleged contract with the County that gave him the right to retirement contributions. Indeed, in his second amended complaint, his allegations for breach of contract fail to allege precisely *what contract* the County has breached. Instead, he alleges only that as a supervisor, he "was entitled to payments" "which included a PERS contribution for his four years in office."

Elsewhere in the complaint, however, Claudino avers that as a retired PERS employee, "he could no longer receive contributions into the system." To the extent the contract was as alleged--an agreement to make contributions to CalPERS-- Claudino failed to perform the necessary condition precedent; he

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<sup>5</sup> Claudino argues it is difficult to discern this basis from the County's statement of undisputed facts and argues the trial court improperly granted summary judgment on a basis not advanced by the County's statement. The County's position was clear from its memorandum of points and authorities and its argument at the hearing. We note that Claudino's procedural argument is devoid of citations to *any* authority other than section 21222.

failed to be reinstated from retirement. A party's failure to perform a condition precedent will preclude an action for breach of contract or specific performance of the contract. (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 205.)

In the first cause of action for failure to discharge a mandatory duty, as to which the County's demurrer was sustained, Claudino alleged that pursuant to County resolutions, the County had to pay on his behalf the money the County would have otherwise deposited for Claudino in the County PERS fund. We turn next to whether Claudino has raised a triable issue of fact as to whether he is entitled to retirement contributions by law.

### III

#### *Statute or Ordinance*

"[I]t is well-established that the terms and conditions of public employment, unlike those of private employment, generally are established by statute or other comparable enactment (see, e.g., charter provision or ordinance) rather than by contract. [Citation.] Nonetheless, a long line of California cases establishes that with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, *protected by the contract clause*, to require the public employer to comply with the prescribed condition." (*White v. Davis* (2003) 30 Cal.4th 528, 564-565, original italics.)

Except for counties that have adopted a charter,<sup>6</sup> "each governing body shall prescribe by ordinance the compensation of its members." (Cal. Const., art. XI, § 1, subd. (b).) In his complaint, Claudino relies on Ordinance No. 2153, adopted by the County's Board of Supervisors on December 10, 1990. This ordinance sets the salary of supervisors and provides for certain benefits. Section 2, subdivision (b) provides: "Effective December 29, 1990, the County will pay the employee's share of contribution to the Public Employees Retirement System (PERS). This contribution is not to exceed 7%."

As Claudino concedes, as a retiree under CalPERS who was not reinstated from retirement, he is not entitled to participate in the CalPERS system. Generally, one who retires under CalPERS cannot be employed by a contracting agency, such as the County, without reinstating from retirement. (§ 21220, subd. (a).) Claudino declined reinstatement. There is, however, an exception for an elective officer. (§ 21221, subd. (d).) Although, due to this exception, Claudino was entitled to work as supervisor for the County without reinstatement, he acquired "no service credit or retirement rights under this part with respect to the employment." (§ 21220, subd. (a).)

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<sup>6</sup> We take judicial notice of Calaveras County's status as a general law county. (Website of the California State Association of Counties, <http://www.csac.counties.org/default.asp?id=110> [as of 2/7/12].)

Because Claudino was not eligible to participate in CalPERS, the County *could not* make contributions to CalPERS on his behalf pursuant to Ordinance No. 2153. Further, nothing in the ordinance provides for in lieu cash payments in the event a supervisor is not eligible to participate in CalPERS.

During the course of litigation, Claudino identified a different statutory source of entitlement to retirement contributions, section 21222. That section provides: "Notwithstanding Section 21221, if a retired person serves without reinstatement from retirement in an elective office and part or all of his or her retirement allowance is based on service in that elective office, the portion of the allowance based on service in that elective office shall be suspended during incumbency in that elective office. The entire retirement allowance shall be paid for time on and after the person vacates the elective office in the monthly amount payable had the allowance not been suspended. [¶] The governing body of every employer other than the state shall cause immediate notice to be given to this system of the election of any retired person to an office of the employer."

Claudino contends that based on this statute, he was entitled to retirement contributions for his period of service as a supervisor once he left that office. Claudino misreads the statute.

The opening sentence of section 21222 indicates it applies to a retired person, now serving in an elective office, whose *retirement allowance is based on service in an elected office.*

That description does *not* apply to Claudino.<sup>7</sup> Claudino was a retired person serving in an elective office, but his retirement allowance from CalPERS was based on his years of service as a highway patrol officer; none of it was based on service as an elected official. As discussed, *ante*, Claudino was not entitled to a retirement allowance under CalPERS based on his service as a supervisor because he was not reinstated from retirement.

The trial court attempted unsuccessfully to explain the application of section 21222 to Claudino. "This section would apply say, for example, if you are the elected County Clerk and you serve twenty years and you are age 55, you take your retirement and then, [ ], some period of time later you get, [ ], into another elective office, this would cover somebody like that." The trial court was correct. Claudino has failed to raise a triable issue that he is entitled to retirement contributions under either an ordinance or statute.

#### IV

#### *Equal Protection*

The gist of Claudino's argument on appeal is that it is unfair that he did not receive a retirement contribution for his

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<sup>7</sup> Claudino concedes this language "is not directly analogous to these facts." He argues, however, that the County failed to comply with the notice requirement at the end of the statute. He does not explain how the notice provision applies to him when the rest of the statute does not. Nor is it clear how giving notice to CalPERS of Claudino's election to supervisor would aid his quest to receive cash for retirement contributions which were never made to CalPERS in the first place.

four years of service when another supervisor, elected at the same time, did. He claims "it would be a denial of equal protection of the law for a retired police officer to be penalized in having to give up his retirement in order to serve public office at the same rate of compensation as someone who is not a retired PERS employee. That type of discrimination against retired PERS employees simply would not have any valid basis."

We do not reach Claudino's equal protection claim because, as the trial court noted, his complaint did not allege an equal protection violation. "'On summary judgment motions, the pleadings always define the issues.'" (*Wood v. Riverside Gen. Hosp.* (1994) 25 Cal.App.4th 1113, 1120.)

**DISPOSITION**

The judgment is affirmed. The County shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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DUARTE, J.

We concur:

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BUTZ, Acting P. J.

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HOCH, J.