

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

JUDY CURTIS,

Plaintiff and Appellant,

v.

BENJAMIN A. GROSSMAN,

Defendant and Respondent.

C069458

(Super. Ct. No. SCCVPO
10-01577)

Judy Curtis sued Benjamin A. Grossman, a detective in the Siskiyou County Sheriff's Office, alleging he violated her civil rights (42 U.S.C. § 1983; hereafter section 1983) in 2008 when he seized marijuana from her property for which she had a valid physician recommendation. Grossman's demurrer to the complaint on the ground Curtis's claims are barred by the statute of limitations was sustained without leave to amend.

Curtis brings this judgment roll appeal from the subsequent judgment. She argues her action is timely because it did not accrue until 2010, when she learned (in the criminal proceedings against her husband arising from the same seizure complained of in this action) that Grossman committed fraud in obtaining the search warrant by which her

marijuana was seized and, alternatively, because the statute of limitations was tolled during the pendency of the criminal proceedings. We find no error and shall affirm the judgment.

BACKGROUND

Because this is an appeal following a successful demurrer, we accept as true all facts properly pleaded in plaintiff's complaint, and also incorporate any facts of which we may take judicial notice. (*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200.)

On May 29, 2008, Grossman -- a trained and experienced member of Siskiyou County's marijuana eradication team -- "seized and eradicated" marijuana for which Grossman was aware Curtis had a valid physician's recommendation following a warrantless search of Curtis's property.

On June 10, 2008, Grossman returned to Curtis's property with a search warrant, and again seized Curtis's medical marijuana and other property.

Following the June 10 seizure of marijuana on Curtis's property, a criminal complaint was filed in Siskiyou County against Curtis's husband (*People v. Curtis, Dale Alan* (Super. Ct. Siskiyou County, 2010, No. MCYKCRBF08-1109); hereafter criminal case). Curtis herself was not a party to any criminal proceedings; nor was she a party to the Penal Code section 1538.5 motion to quash that was filed in the criminal case. The trial court in the criminal case determined that the June 10, 2008, seizure was illegal because Grossman committed fraud in obtaining the search warrant used in that event. Proceedings in the criminal case were dismissed August 4, 2010.

Curtis initiated this action on November 23, 2010. She alleged Grossman violated her federal civil rights (§ 1983) by the warrantless seizure on May 29, 2008, of what he knew to be marijuana that Curtis was authorized to possess by virtue of the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5 et seq.; hereafter Compassionate Use Act). She also alleged the affidavit submitted by Grossman in

support of the search warrant used in the June 10, 2008, seizure of Curtis's medical marijuana and other property constituted "an intentional misrepresentation, deceit, and concealment of material facts known to [Grossman]" which, when discovered by the trial court in the criminal case, resulted in a ruling in that case traversing the warrant.

Grossman demurred to the original complaint on the grounds Curtis's complaint failed to allege facts sufficient to state a cause of action and, alternatively, that it is barred by the two-year statute of limitations applicable to section 1983 actions because it was brought more than two years after June 10, 2008, when the last seizure occurred. The trial court agreed that the complaint failed to state a cause of action, and sustained the demurrer with leave to amend.

Curtis filed an amended complaint, in which she made the same allegations of wrongdoing against Grossman, but also alleged that the statute of limitations was tolled until August 4, 2010, by virtue of the pending criminal case, and the ultimate determination by the judge in the criminal case that the search warrant was obtained by fraud.

Grossman demurred to the amended complaint. He argued accrual of Curtis's claim can only have occurred on the dates of the allegedly wrongful seizures; she may not invoke statutory tolling principles because she was not a party to the criminal case; she cannot invoke equitable tolling principles because she was neither a party to the criminal case nor did she attempt to obtain any relief in those proceedings; and she failed to allege any facts giving rise to a section 1983 cause of action.

After a hearing, the transcript of which is not in the record on appeal, the trial court sustained the demurrer without leave to amend, on the ground the action is time barred. The court also took judicial notice of its own records in the criminal case, and found Curtis was neither a party nor a movant in that case.

DISCUSSION

I. Standards of Review

A demurrer may be sustained without leave to amend where the facts are not in dispute and the nature of the plaintiff's claim is clear but, under substantive law, no liability exists. (*Seidler v. Municipal Court* (1993) 12 Cal.App.4th 1229, 1233.) On appeal from a judgment of dismissal after an order sustaining a demurrer without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We accept as true all material facts properly pled in the complaint. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pled, but we do not assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

When, as here, a court sustains a demurrer without leave to amend, our task on review is to “decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) It is the plaintiff's burden on appeal to show either that the demurrer was sustained erroneously or that the trial court's denial of leave to amend was an abuse of discretion. (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1576; *Bush v. California Conservation Corps* (1982) 136 Cal.App.3d 194, 200.)

II. Curtis's Contentions Lack Merit

Section 1983 provides, in part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be

subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress” Curtis’s only cause of action alleges that Grossman’s actions violated section 1983.

Absent an exception, such as delayed accrual or tolling, Curtis’s section 1983 claim would be barred by a two-year statute of limitations. (See *Rivas v. Cal. Franchise Tax Bd.* (E.D. Cal. 2008) 619 F.Supp.2d 994, 998-999 [applicable statute of limitations for a section 1983 claim is drawn from the forum state’s limitations period for personal injury actions; in California, the statute of limitations for personal injury is now two years]; *Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1028.)

To avoid the operation of that limitations period, Curtis argues on appeal her action did not accrue until the criminal court determined that Grossman committed fraud in support of the search warrant executed on June 10, 2008, or, alternatively, the limitations period was tolled during the pendency of the criminal case, either by operation of statute or by equitable tolling principles. We find no merit in these arguments.

A. The Delayed Discovery Rule Does Not Apply

The elements of a section 1983 claim are 1) the plaintiff held a constitutionally protected right; 2) she was deprived of that right in violation of the Constitution; 3) the defendants intentionally caused the deprivation; and 4) the defendants acted under color of state law. (*Schertz v. Waupaca County* (7th Cir. 1989) 875 F.2d 578, 581.)

Statutes of limitations begin to run when a cause of action accrues (Code Civ. Proc., § 312 [“Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued”]) and a cause of action ordinarily accrues when the wrongful act occurs, the liability arises, and the plaintiff is entitled to prosecute an action. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

The accrual date of a section 1983 cause of action is a question of federal law. (*Wallace v. Kato* (2007) 549 U.S. 384, 388 [166 L.Ed.2d 973, 980] (*Wallace*)). “The standard rule is that accrual occurs ‘when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.’ [Citation].” (*Rivas v. Cal. Franchise Tax Board, supra*, 619 F.Supp.2d at p. 999 [quoting *Wallace, supra*, 549 U.S. at p. 388 [166 L.Ed.2d at p. 980]].) A civil rights plaintiff is entitled to bring a suit for damages as soon as “he was injured and suffered damages” (*Wallace, supra*, 549 U.S. at p. 390, fn. 3 [166 L.Ed.2d at p. 982].)

Curtis contends her complaint falls within the delayed discovery rule, because she “did not know the search and seizure were illegal . . . until the [criminal] court said so in [granting] the motions and dismissing the action against her husband” on August 4, 2010. “The common law delayed discovery rule is an exception to the general rule and provides that a cause of action does not accrue until a plaintiff discovers, or reasonably should discover, the cause of action. ‘A plaintiff has reason to discover a cause of action when he or she “has reason at least to suspect a factual basis for its elements.” [Citations.]’ [Citation.] The elements that the plaintiff must suspect are the generic elements of wrongdoing, causation, and harm. [Citation.] A plaintiff who suspects that he or she has suffered an injury caused by the wrongdoing of another is charged with the knowledge that a reasonable investigation would reveal, and the limitations period begins to run at that time.” (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 66, fn. omitted.)

Here, even were we to find that the delayed discovery rule applies to a section 1983 case, Curtis’s allegations are insufficient to bring the claim within the discovery rule, because she alleges that when Grossman seized “her” medical marijuana without a warrant on May 29, 2008, and when he did so pursuant to warrant a few weeks later on June 10, she knew he was fully aware she was a qualified medical marijuana patient under the Compassionate Use Act, and that she was in compliance with the act.

The 2008 seizures thus entitled Curtis to bring suit against Grossman to determine whether her constitutional rights were violated by him, and whether he acted without probable cause (see *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 738-739 [individuals having a legal right to medical marijuana can seek money damages against law enforcement officers for breach of their constitutional rights]) because she was, at that point, “injured and suffered damages” (*Wallace, supra*, 549 U.S. at p. 390, fn. 3 [166 L.Ed.2d at p. 982].) The allegations of Curtis’s complaint assert that she knew the seizures were wrongful when they occurred, and Grossman knew it also. That the trial court in the criminal case against Curtis’s husband later confirmed Curtis’s belief by its express determination that Grossman obtained the warrant used on June 10 without probable cause was helpful, but not necessary to Curtis’s initiating her lawsuit. (*Wallace, supra*, 549 U.S. at pp. 391-392 [166 L.Ed.2d at p. 982] [plaintiff’s section 1983 suit accrued when he was detained pursuant to legal process, not when the arrest was determined to have been made without probable cause and plaintiff’s conviction set aside])

B. The Action Was Not Tolloed by Operation of Government Code Section 945.3

Although federal law determines the date a section 1983 cause of action accrues, state law generally governs the application of tolling doctrines. (*Harned v. Landahl* (E.D. Cal. 2000) 88 F.Supp.2d 1118, 1120-1121.)

Government Code section 945.3 provides that the statute of limitations governing a civil action for damages against a peace officer is tolled while criminal proceedings are pending when the complaint is based upon conduct relating to that criminal prosecution: “No person charged [with] a criminal offense may bring a civil action . . . against a peace officer . . . based upon conduct of the peace officer relating to the offense for which the accused is charged . . . while the charges against the accused are pending before a superior court. [¶] Any applicable statute of limitations for filing and prosecuting these

actions shall be tolled during the period that the charges are pending before a superior court.”

That Government Code section 945.3 applies to section 1983 claims (*Harned v. Landahl, supra*, 88 F.Supp.2d at p. 1121) avails Curtis nothing, because she was never a “person charged [with] a criminal offense [seeking to] bring a civil action . . . against a peace officer . . . based upon conduct of the peace officer relating to the offense for which the accused is charged” within the meaning of Government Code section 945.3: she was not a defendant in the criminal case. (Gov. Code 945.3.) Curtis’s civil claim against Grossman was not tolled by the criminal proceedings pending against Curtis’s husband. (*Rivas v. Cal. Franchise Tax Board, supra*, 619 F.Supp.2d at p. 1001 [Gov. Code § 945.3 does not apply to toll the claims of an individual who was not the subject of criminal charge].)¹

C. Equitable Tolling Principles Do Not Apply

Finally, Curtis argues the applicable limitations period was equitably tolled “throughout the criminal proceedings that concerned her seized property.” For reasons we explain, she is mistaken.

The equitable tolling doctrine broadly applies “ ‘ “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.” ’ [Citations.]” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100 (*McDonald*); *Addison v. State of California* (1978) 21 Cal.3d 313, 318.) Tolling the statute of limitations during the pendency of an earlier action, even where the two actions are not identical, eases the pressure on parties to seek redress in two separate forums with

¹ Curtis asserts that Code of Civil Procedure section 356 applies “[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action,” but that argument relies upon her mistaken assertion that the statute of limitations was tolled by operation of Government Code section 945.3.

the attendant danger of conflicting decisions on the same issue, affords grievants the opportunity to pursue informal remedies, and benefits the court system by reducing the costs associated with a duplicative filing requirement by (among other things) rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary. (See *McDonald, supra*, 45 Cal.4th at p. 100, and cases cited therein.) Equitable tolling can also extend to the voluntary pursuit of alternate remedies, including voluntary administrative remedies. (See, e.g., *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 107-109 [holding equitable tolling applies to the two-year limitations period for Lab. Code § 1197.5 wage discrimination claim while *plaintiff* pursues related claim under the federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.)]; *Elkins v. Derby* (1974) 12 Cal.3d 410 [statute of limitations on a personal injury action tolled during the pendency of the *plaintiff's* workers' compensation claim]; *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 407-409 [equitable tolling applies during *plaintiff's* pursuit of internal labor grievance procedure]; *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1101-1102 [equitable tolling applies during *plaintiff's* pursuit of title VII complaint (42 U.S.C. § 2000e et seq.) with the Equal Employment Opportunity Commission]; *Nichols v. Canoga Industries* (1978) 83 Cal.App.3d 956, 963 [equitable tolling applies during *plaintiff's* pursuit of breach of warranty action in federal court].)

In sum, equitable tolling principles toll the running of the limitations period “[when] an injured person has several legal remedies and, reasonably and in good faith, pursues one.” (*Elkins v. Derby, supra*, 12 Cal.3d at p. 414.) These principles cannot be applied to suspend the statute of limitations applicable to this action because Curtis did not have “several legal remedies.” Curtis was not a party to the criminal proceeding in which her husband was a defendant; she was not a movant in that proceeding. She could not, and did not attempt to, obtain any relief for herself in the criminal case brought against her husband. She was not voluntarily pursuing alternate legal remedies in that

proceeding, so as to warrant the equitable tolling of the civil action while the criminal case was pending. (Cf. *McDonald*, *supra*, 45 Cal.4th at pp. 100-101, 103, 105.)

DISPOSITION

The judgment is affirmed. Grossman is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.