

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

(Sacramento)

LIONEL TATE, SR.,

Plaintiff and Appellant,

v.

DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Defendant and Respondent.

C080383

(Super. Ct. No.
34201400157407CUPOGDS)

Plaintiff Lionel Tate, Sr., appeals from a judgment of dismissal after the trial court sustained a demurrer to his amended complaint without leave to amend. Tate had brought an untimely claim under the Tort Claims Act. The trial court denied Tate's petition, under Government Code¹ section 946.6, to excuse his untimely claim. Eight months later, the trial court entered judgment of dismissal after sustaining defendant

¹ Undesignated statutory references are to the Government Code.

California Department of Corrections and Rehabilitation (Department)'s demurrer to Tate's amended complaint.

On appeal, Tate contends the trial court erred in sustaining the demurrer. He argues, inter alia, the trial court erred in denying his petition to excuse his untimely claim. We conclude, however, that Tate did not appeal from the order denying his petition, and therefore we cannot consider a challenge to that order. And without relief from his untimely claim, the demurrer to Tate's amended complaint was properly sustained.

BACKGROUND

On May 10, 2012, Tate's wrists were injured when correctional officers transported him using handcuffs in conjunction with a "blackbox." On March 15, 2013, Tate filed a claim with the government claims board. The claim was filed four months outside the six-month period to file a timely claim. Tate sought the board's permission to present a late claim. On August 23, 2013, the board denied his application to present a late claim.

On November 19, 2013, Tate mailed the superior court a section 946.6 petition for relief from section 945.4 (to excuse his untimely claim). He attached a complaint to the petition. Because the petition initially omitted a hearing date, the petition was returned, and the complaint and petition were subsequently filed separately. The complaint was filed January 13, 2014, and the petition was filed February 14, 2014.

At least three times, when the petition came up for hearing, it was "dropped" from calendar for defective service. On October 8, 2014, the Department demurred to the complaint.

On December 18, 2014, the superior court, in a minute order, denied Tate's petition for relief from section 945.4. The minute order was made effective immediately, and the order directed the clerk to provide notice of the ruling to Tate.

Four days later, on December 22, 2014, the court sustained the Department’s demurrer with leave to amend.² On April 21, 2015, after being served with an amended complaint, the Department demurred to it.³ On June 19, 2015, the superior court sustained the demurrer without leave to amend, noting relief from section 945.4 had never been granted.

Tate moved for reconsideration on July 13, 2015. The motion was apparently denied on August 4, 2015. Notice of entry of judgment was filed on August 18, 2015. On September 24, 2015, Tate filed a notice of appeal, appealing from the August 18, 2015 “[j]udgment of dismissal after an order sustaining a demurrer.”

DISCUSSION

On appeal, Tate contends the trial court erred in sustaining the demurrer without leave to amend.⁴ He raises several arguments regarding his difficulties serving the Department. He also argues his section 946.6 petition for relief from section 945.4 should have been granted because his untimely claim was due to a mistaken belief he had to exhaust his administrative remedies prior to bringing his claim. We, however, cannot consider a challenge to the order denying relief because Tate never appealed from that order. And because he did not obtain relief, his claim is barred.

² In light of the circumstances, we question the propriety of allowing leave to amend after the demurrer was sustained. This served to prolong the litigation even though the denial of the petition made the ultimate outcome a foregone conclusion.

³ At the time of the demurrer, the amended complaint had not yet been filed. The superior court granted the Department’s request to take judicial notice of the amended complaint served on defense counsel. We construe this court action as an order that the copy of the served amended complaint be filed.

⁴ Tate also contends the trial court abused its discretion in denying his request for appointed counsel. We cannot agree. (See *People v. Madeyski* (2001) 94 Cal.App.4th 659, 662 [“As a general rule . . . there is no due process right to counsel in civil cases”].)

“An order denying a section 946.6 petition is an appealable order. . . .” (*DeVore v. Department of California Highway Patrol* (2013) 221 Cal.App.4th 454, 459.) “If an order is appealable, an aggrieved party must file a timely notice of appeal from the order to obtain appellate review.” (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) “ ‘ “The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken.” ’ ” (*Ibid.*)

Tate never appealed from the December 18, 2014, order denying relief, and any purported appeal from it would be untimely because Tate filed his notice of appeal on September 24, 2015, more than 180 days from the order. (See Cal. Rules of Court, rule 8.104 [If there is no notice, the notice of appeal must be filed within 180 days of the order; orders are “entered” on the date of entry in the written minutes, or the date the signed order is filed].) We cannot extend the time to file a notice of appeal or to hear untimely appeals. (*In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1101 [“These time limits are jurisdictional”].)

Without relief from his untimely filing, Tate cannot comply with the procedure of the Tort Claims Act, and his suit is barred. (See *City of Los Angeles v. Superior Court* (1993) 14 Cal.App.4th 621, 627 [“failure to timely comply with the Government Code requirements concerning claims bars a subsequent suit”].) Because compliance with the act is an element of the cause of action, and Tate cannot now allege compliance, his complaint was properly subject to demurrer. (See *State v. Superior Court* (2004) 32 Cal.4th 1234, 1242-1243 [“failure to allege compliance constituted a failure to state a cause of action and subjected a complaint to demurrer”].)

DISPOSITION

The judgment is affirmed.

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Mauro, J.