

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

LEANDER CHIBINDA,

Plaintiff and Appellant,

v.

ROBERT GARDNER, as Vice-President,
etc. et al.

Defendants and Respondents.

E053465

(Super.Ct.No. CIVDS1000205)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco,
Judge. Affirmed.

Leander Chibinda, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Jon Wolff, Acting Chief Assistant Attorney
General, Steven M. Gevercer, Assistant Attorney General, and Pamela J. Holmes and
Raymond L. Fitzgerald, Deputy Attorneys General, for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Leander Chibinda appeals from the dismissal of his amended complaint against defendants and respondents Robert Gardner, as vice-president of California State University (State), and the Board of Trustees of California State University, which is the State of California acting in its higher education capacity, following the sustaining of defendants' demurrer without leave to amend. Plaintiff contends the trial court erred by sustaining the demurrer on the ground that (1) he failed to comply with Government Claim Act requirements; (2) the order sustaining the demurrer is unlawful on its face; (3) the trial court abused its discretion by dismissing the case without leave to amend; (4) the trial court erred by dismissing the case as to Gardner based on vicarious liability and in Gardner's capacity as a state official; (5) the trial court obstructed justice by failing to perform an act mandated by law; and (6) the trial court erred by refusing to strike the demurrer under Code of Civil Procedure section 471.5, subdivision (a). We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. Procedural Background

On January 8, 2010, plaintiff filed a complaint for fraud, false arrest, restitution, injunctive relief, other equitable remedies, and civil penalties against defendants. On July 6, 2010, defendants filed a demurrer and motion to dismiss on the grounds that (1) plaintiff failed to state facts sufficient to constitute a state law cause of action because he did not allege compliance with government claim requirements or excuse therefrom, and (2) he failed to state facts sufficient to constitute a federal cause of action because

neither a state nor its officials acting in their official capacity are “persons” for purposes of 42 United States Code section 1983 (hereafter, section 1983). The court sustained the demurrer as to all the state law causes of action on the ground that plaintiff failed to allege compliance with the Government Claims Act (Gov. Code, § 810 et seq.) and granted plaintiff 30 days to amend. The court sustained the demurrer as to all the federal causes of action without leave to amend.

On December 15, 2010, plaintiff filed an amended complaint for fraud, false arrest, restitution, injunctive relief, other equitable relief, and civil penalties, against Gardner, the Board of Trustees of California State University (Board of Trustees), and several individual police officers and university personnel who are not parties to this appeal.¹ In his amended complaint, plaintiff added allegations that he filed a claim under the Government Claims Act, which was rejected at a hearing on June 18, 2009. Although the trial court had sustained defendants’ demurrer without leave to amend as to the federal causes of action, plaintiff realleged his federal causes of action without substantial change.

On January 18, 2011, defendants filed a demurrer and motion to dismiss the amended complaint. The grounds for the motion were: (1) plaintiff failed to file his complaint within six months of the rejection of his government claim; (2) he failed to state facts sufficient to constitute a federal law cause of action because neither a state nor

¹ The additional named defendants were “Jimmy Brown (Police Chief), [Julie] Barbo-Garcia (Police officer), Le Andre (Police officer), Paula Ammerman (Administrative Residency Specialist)” It appears those defendants had not yet been served with summons at the time of the trial court’s ruling on the demurrer.

its officials acting in their official capacity are persons for purposes of section 1983; and (3) he failed to state facts sufficient to state a cause of action against Gardner.

The trial court sustained defendants' demurrer to the amended complaint without leave to amend, and judgment of dismissal was thereafter entered.

B. Allegations of Amended Complaint

We set forth the allegations of the amended complaint consistent with the de novo standard of review we apply to the trial court's order sustaining defendants' demurrer without leave to amend: we determine whether the complaint contains facts sufficient to state a cause of action under any legal theory. (*Estate of Dito* (2011) 198 Cal.App.4th 791, 800.) In doing so, “[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.

[Citation.] We also consider matters which may be judicially noticed.’ [Citation.]”

[Citation.] ‘We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory.

[Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]’ [Citation.]”” (*Id.* at p. 800.)

1. Tuition Allegations

Plaintiff alleged he was accepted by the California State University San Bernardino (CSUSB) as a transfer student in January 2008. Gardner and the State, through their agents, represented that as an out-of-state applicant, plaintiff would pay out-of-state tuition for a year and would then qualify for the in-state tuition rate. Based on that representation, plaintiff obtained loans to attend CSUSB from January 2008 to

January 2009. The representation was false, because plaintiff was required to comply with Education Code sections 68044 through 68080 to qualify for in-state tuition, and that fact was not disclosed on the school's website.

Plaintiff alleged he contacted CSUSB residency specialist Paula Ammerman, named as a defendant in the amended complaint. She misrepresented that reclassification goes by calendar year and plaintiff would qualify by spring quarter 2009. During spring quarter 2009, Ammerman revealed there were additional requirements to qualify for the resident tuition rate and plaintiff would not meet those requirements, because he had been claimed as a dependent on his parents' tax returns for the prior three years. As a result, plaintiff had to take out additional student loans. As a result of his objections to the way the State applied his student loans for fall quarter 2009, defendants "blocked [p]laintiff's registration at all California State University campuses" and made it impossible for him to transfer to any other school.

Plaintiff alleged he appealed the reclassification decision to Frank Rincon, campus vice-president, who refused to hear the complaint and "relegated the case to his assistant." Plaintiff learned of a pamphlet regarding qualification for resident status, but the assistant vice-president could not confirm that the pamphlet was made available to prospective transfer students, nor was it university policy to make sure transfer students were aware of it. Ammerman and Lydia Ortega told plaintiff and his father they were required to enforce classification rules because of the budget shortfall, although usually they had not done so. They told plaintiff that nondisclosure of reclassification requirements was a way of luring prospective nonresident students to enroll, and the

students would then be required to pay higher fees for four years. He was unaware of defendants' secret intent to deceive consumers, and if he had known the truth, he would not have transferred to CSUSB.

C. False Arrest Allegations

Plaintiff alleged that after an armed robbery on campus in October 2008, campus police detective Barbo-Garcia obtained a warrant for plaintiff's arrest based solely upon his race or ethnicity and a misleading photo lineup. As a result of the warrant, plaintiff was twice detained by campus police and was arrested and incarcerated by the county sheriff's office for six days. Campus police continued to harass him. As a result, plaintiff was traumatized, shunned by his friends, and had to pay to retake classes he had failed and from which he was required to withdraw. The "Vice President" and campus police disregarded the actions of their agents regarding the improper application for the arrest warrant and plaintiff's subsequent detention, arrest, and incarceration.

III. DISCUSSION

A. Request for Judicial Notice

Defendants have requested this court to take judicial notice of a "[c]ertified copy of the . . . State of California Victim Compensation and Government Claims Board regarding Leander Chibinda; Claim Number G582403. . . ." We reserved ruling on the request for consideration with the merits of the appeal. The request is granted.

B. Government Claim Requirements

Plaintiff contends the trial court erred by sustaining defendants' demurrer on the ground he failed to comply with government claim requirements because his suit sought

an equitable remedy only. He further argues that because he was engaged in continuing discussions with defendants about settling his claims, he should be excused from claim requirements or defendants should be equitably estopped from raising the defense of noncompliance. Finally, he argues that compliance with claim requirements was not an element of his claims against defendants.

1. Additional Background

On April 24, 2009, plaintiff filed a claim with the California Victim Compensation and Government Claims Board (Claims Board). In the claim, plaintiff sought \$300,000. The Claims Board sent plaintiff a letter dated June 25, 2009, stating that it had rejected his claim. The letter included the following warning: “‘Subject to certain exceptions, you have only six months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim.’ See Government Code Section 945.6. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.” The letter was originally sent to a person whom plaintiff identified as his counsel and was then sent to plaintiff at the San Bernardino address he listed in his application after that named person denied representing plaintiff.

The causes of action in plaintiff’s amended complaint were denominated as (1) breach of Business and Profession[s] Code; (2) deceptive business practice; (3) fraud; (4) unjust enrichment; (5) false arrest, illegal search and false [im]prisonment; (6) racial profiling; (7) intentional infliction of emotional distress, pain and suffering; (8) harassment; (9) breach of federal civil rights; and (10) wire fraud. The prayer for

relief in the amended complaint sought (1) a temporary restraining order that defendants “be enjoined from blocking Plaintiff’s course registration, from blocking his student record, from charging all non[]resident fees retroactively commencing”; (2) judgment for “damages, including but not limited to, damages under [Civil Code] Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured,” including restitution of out-of-state fees in the amount of \$5,704 and “precluded classes” in the amount of \$14,584; and (3) compensatory damages for emotional distress, physical pain and suffering, present and future loss of earnings or earning capacity, and loss of enjoyment of life; and a civil penalty under Business and Professions Code section 17500. (Bolding omitted.)

2. *Analysis*

(a) Nature of relief sought

When the primary purpose of an action is pecuniary, the action is subject to the claim presentation requirements of the Government Claims Act even if it is framed as an action for nonpecuniary relief. (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080.) However, the Government Claims Act does not apply to nonpecuniary actions, “such as those seeking injunctive, specific or declaratory relief.” (*Loehr, supra*, at p. 1081.) In *Loehr*, the court rejected the plaintiff’s argument that his “self-styled causes of action for mandamus and injunctive relief” were exempted from the claim presentation requirements because his demand for extraordinary relief was “merely incidental or ancillary” to his prayer for damages. (*Id.* at pp. 1080-1081.)

Another court has explained that “[i]n determining whether the Claims Act applies, the

critical question is whether the recovery of money or damages was the primary purpose of Plaintiffs' claims. Where the primary purpose of a mandamus action is monetary relief, the mandatory requirements of the Claims Act apply. [Citations.]” (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1493.)

Plaintiff argues that “in his opinion, the complaint against the government seeks equitable remedy only, but if a tort claim is also viable, that is alright by him.” Despite plaintiff’s subjective opinion, the allegations of his complaint are controlling. His complaint unmistakably sought monetary damages as the primary form of relief. Moreover, even if he characterizes his claims as seeking equitable relief, “[a]ctions for restitution or reimbursement are subject to the claim requirements.” (*Sparks v. Kern County Bd. of Supervisors* (2009) 173 Cal.App.4th 794, 799.) Thus, the trial court did not err in sustaining defendants’ demurrer on the basis that plaintiff failed to file his complaint within six months of the Claims Board’s denial of his claim on June 25, 2009.

Plaintiff lists various forms of nonmonetary relief he claims he sought through his complaint. For example, he argues he sought relief from defendants blocking his transfer to another school and holding his transcripts, and he argues defendants “have yet to expunge [his] criminal record.” He also argues defendants’ website “continues to advertise transfer for ‘out of state’ students without disclosing California state code requirements. However, the prayer of the amended complaint does not encompass any of those forms of relief. Moreover, he has conceded his parents have paid the past-due fees that were the basis for CSUSB holding his transcripts and his consequent inability to

transfer to another school, and that contention therefore appears to be moot. Moreover, as a matter of law, expungement of a criminal record is a matter outside the authority of defendants. In short, any injunctive relief was purely incidental to the gravamen of the complaint, which sought monetary damages.

(b) Excuse or estoppel

Plaintiff further argues that compliance with claims requirements should be excused or that defendants should be equitably estopped from raising the defense because he was deceived by the conduct of defendants and their counsel. He contends the behavior of defendants was deceptive “on many occasions. For instance, there is the letter addressed to the V.P. Robert Gardner in which reference of the police trying to run the clock to beat the statute of limitation was mentioned [citation]; then there are email exchanges leading nowhere, except to consume time [citations].”

The referenced documents include communications between plaintiff’s father and Gardner, as well as other individual named defendants; the communications are dated between July and October 2009. On October 26, 2009, a letter from Gardner to plaintiff’s father addressed three concerns: a request for the arrest warrant for plaintiff, a request for a refund of plaintiff’s spring tuition payment, and a request for a review of the residency decision concerning plaintiff. Gardner stated that he had asked the police chief to respond to the request, but that plaintiff’s father should pursue his request with the county district attorney’s office, as that was the responsible agency. Gardner stated that CSUSB was unable to refund plaintiff’s spring tuition. Finally, Gardner stated that any

appeal from the residency decision must be pursued through the chancellor's office in Long Beach.

“A public entity may be estopped from asserting the limitations of the tort claims statutes where its agents or employees *have prevented or deterred the filing of a timely claim by some affirmative act*. The required elements for an equitable estoppel are:

(1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury. [Citation.]” (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785.)

“Estoppel most commonly results from misleading statements about the need for or advisability of a claim” (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 445; see also *Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339, 346-347.)

Here, plaintiff has made no showing that Gardner or the State made any affirmative misrepresentation or concealed any material facts concerning the need for or advisability of a tort claim or the filing of a complaint. Mere silence does not create estoppel unless a party has an obligation or duty to speak. (*Becerra v. Gonzales* (1995) 32 Cal.App.4th 584, 596.) Rather, plaintiff represents merely that he hoped to settle the matter without the need for litigation. His subjective wish to do so provides no basis for estoppel against defendants.

(c) Noncompliance with claims requirements as basis for demurrer

Plaintiff argues that compliance with government claims requirements is a procedural rather than a jurisdictional requirement, and noncompliance is not a ground for demurrer. However, in *State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, our Supreme Court held that failure to plead facts demonstrating or excusing compliance with claim presentation requirements may be raised on general demurrer for failure to state a cause of action. (*Id.* at pp. 1239-1245.) Plaintiff relies on the cases of *Bahten v. County of Merced* (1976) 59 Cal.App.3d 101 and *Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438 to support his argument. However, in *State of California v. Superior Court*, the court expressly overruled those cases. (*Id.* at p. 1244.)

C. Applicability of Claim Statutes to Action Against California State University

Plaintiff contends he presented a written claim in the form of a letter to Gardner, and he therefore complied with statutory requirements applicable to claims against the California State University.

1. Additional Background

On October 12, 2009, plaintiff's father wrote a letter to Gardner concerning plaintiff's problems at the university. Among other things, plaintiff's father requested a tuition refund. On October 26, Gardner responded: "The circumstances . . . do not permit us to refund his tuition payments or provide free tuition."

2. Analysis

Plaintiff relies on Government Code section 912.5² to support his argument that he complied with statutory requirements. While that section establishes a claim procedure specifically applicable to claims against the California State University, it was not enacted until 2010. (Stats. 2010, ch. 636, § 4 (S.B. 1046).) Consequently, the statute is inapplicable to the letter plaintiff's father wrote to Gardner in October 2009.

Plaintiff argues, however, that because Government Code section 912.5 was in effect *at the time he filed his amended complaint*, the procedures established by that statute were applicable rather than the procedures under the general claims statutes. We disagree; rather, the applicable statutes were those in effect at the time plaintiff's claims arose.

D. Sustaining Demurrer Without Leave to Amend

Plaintiff next contends the trial court abused its discretion by sustaining the demurrer and dismissing his amended complaint without leave to amend. We note the demurrer was brought only on behalf of the State and Gardner, as those were the only

² “(a) The Trustees of the California State University shall act on a claim against the California State University in accordance with the procedure that the Trustees of the California State University Provide by rule.

[¶] . . . [¶]

“(c) If a claim for money or damages against the California State University is mistakenly presented to the Victim Compensation and Government Claims Board, the Victim Compensation and Government Claims Board shall immediately notify the claimant of the error and shall include information on proper filing of the claim.” (Gov. Code, § 912.5.)

defendants who had then been served, and dismissal was thereafter entered only as to Gardner and the State.

The plaintiff has the burden to demonstrate how he can amend his complaint to cure the legal defects in the pleading. (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 959.) Plaintiff argues merely that the complaint could have been cured by amendment “by assigning specific . . . cause of action to the government separate from individual defendants.” Plaintiff’s argument falls short of the mark; he has failed to meet his burden of showing he could effectively amend his complaint.

E. Dismissal as to Gardner

Plaintiff contends the trial court erred by dismissing the case as to Gardner based on vicarious liability and in his capacity as a state official.

1. Additional Background

In the original complaint, Gardner was sued “[i]n his capacity as Vice-president of California State University San Bernardino.” The original complaint alleged Gardner “is in charge of all matters related to administration and finance including campus police,” and that unnamed fictitious defendants “were at all times the agents and/or employees under direct order of . . . Gardner in his capacity as Vice President and the public entity herein mentioned and acting at all times within the purpose and scope of such agency and employment.”

In the amended complaint, plaintiff omitted the allegation of suing Gardner in his capacity as vice-president but realleged he was “in charge of all matters related to administration and finance including campus police,” and that other defendants “were at

all times the agents and/or employees under direct order of . . . Gardner at the public entity herein mentioned and acting at all times within the purpose and scope of such agency and employment.” The amended complaint contains no specific allegations against Gardner.

2. Analysis

(a) Federal law claims

Government Claims Act requirements do not apply to section 1983 actions. (*Berman v. City of Daly City* (1993) 21 Cal.App.4th 276, 285-286.) Thus, a timely claim with a public entity is not a prerequisite to filing a civil rights action for damages against that entity. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838.)

In *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 60-61 (*Will*), a state employee filed a complaint against the Department of State Police and its director alleging civil rights violations under section 1983.³ The Supreme Court held that “a State is not a person within the meaning of § 1983.” (*Will, supra*, at p. 64.) The court explained, “Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a

³ “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable” (§ 1983.)

State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity [citation], or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.” (*Id.* at p. 66.) Plaintiff concedes he “never intended nor implied” that his cause of action for false arrest, imprisonment, or discrimination under section 1983 was against the State.

The court in *Will* further held that a state official acting in an official capacity was likewise not a person for purposes of section 1983. The court explained, “Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. [Citation.] As such, it is no different from a suit against the State itself.” (*Will, supra*, 491 U.S. at p. 71.)

In our view, the mere omission of the words “in his capacity as vice president” was insufficient to cure the defect that led to the sustaining of the first demurrer. The amended complaint alleged no personal acts on Gardner’s part; rather, the acts complained of were attributed to others or to unnamed agents.

“To establish supervisory liability under section 1983, [a plaintiff is] required to prove: (1) the supervisor had actual or constructive knowledge of [the subordinate’s] wrongful conduct; (2) the supervisor’s response “‘was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices’””; and (3) the existence of an “‘affirmative causal link’” between the supervisor’s inaction and [the plaintiff’s] injuries.” (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279-1280.) “Under section 1983, a complaint as to an individual defendant is insufficient if it does

not plead specific facts regarding the individual capacities of the defendants and the specific facts of each [citation]. Personal involvement of the defendant is a necessary element of the cause of action [citation]. Supervisory personnel may not be held liable purely on a respondeat superior theory [citation].” (*Kreutzer v. County of San Diego* (1984) 153 Cal.App.3d 62, 70.) We conclude the trial court did not err in sustaining the demurrer as to plaintiff’s federal claims against Gardner.

Plaintiff relies on *Ex Parte Young* (1908) 209 U.S. 123, which held that a federal court could enjoin a state officer from enforcing a law that violated the Constitution. However, that case “does not permit judgments against state officers declaring that they violated federal law in the past” (*Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* (1993) 506 U.S. 139, 146.)

(b) State law claims

Government Code section 820.8 grants an official immunity from liability based on acts of subordinates: “Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.” As noted, plaintiff failed to allege any actions personally committed by Gardner. He is immune from liability based on acts of his subordinates.

In addition, Government Code section 820.2 grants an official immunity for discretionary acts: “Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the

result of the exercise of the discretion vested in him, whether or not such discretion be abused.”

Finally, Government Code section 822.2 provides: “A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice.” Plaintiff did not allege any facts suggesting that either Gardner or those he supervised made misrepresentations motivated by corruption or actual malice. With respect to plaintiff’s claims based on fraud or misrepresentation, Gardner is immune.

We conclude the trial court did not err in sustaining the demurrer as to the state law causes of action against Gardner.

F. Compliance with Duty

Plaintiff contends the trial court obstructed justice by failing to perform an act mandated by law. Specifically, plaintiff asserts that he “submitted numerous pleadings that simply disappeared; some were either rejected without any notification or not acknowledged at all.” He contends that numerous documents he designated as part of the record on appeal were not located in the court file, as evidenced by the affidavit of the trial court clerk listing such documents.

The register of actions included in the record on appeal contains satisfactory explanations why the designated documents were not located. For example, plaintiff designated a March 15, 2010, request to enter default. The register of actions states, “REQ TO ENTER DEFAULT, JUDGMENT is returned by Court for the following

reason(s): PER COURTROOM: NO SUMMONS ISSUED OR SERVED ON DEFENDANTS.” The next entry in the register, dated April 1, 2010, states, “RETURN MAIL: REJECTED DEFAULT AND JUDGMENT MAILED TO PLTF received back from USPO—ATTEMPTED NOT KNOWN.” Other motions were rejected because plaintiff failed to reserve a date or present the motion in proper format.

In the absence of evidence to the contrary, a rebuttable presumption exists that official duty has been regularly performed. (Evid. Code, § 664.) Plaintiff’s bald assertion that the court clerk rejected properly submitted pleadings while failing to provide notification or acknowledgement does not constitute evidence to overcome that presumption.

G. Failure to Strike Demurrer

Plaintiff contends the trial court erred by refusing to strike defendants’ demurrer under Code of Civil Procedure section 471.5, subdivision (a). Plaintiff filed his amended complaint on December 15, 2010, and served it by mail on December 14. He argues defendants had until January 14, 2011, to respond, but the demurrer was not filed until January 18.

1. Analysis

“If the complaint is amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant shall answer the amendments, or the complaint as amended, within 30 days after service thereof, or such other time as the court may direct, and judgment by

default may be entered upon failure to answer, as in other cases” (Code Civ. Proc., § 471.5, subd. (a).) However, under Code of Civil Procedure section 1013, subdivision (a), the time for a response is extended by five calendar days when service is effected by mail. Thus, the demurrer filed on January 18, 2011, was timely.

H. Due Process Contentions

Plaintiff argues he was deprived of due process in the service of defendants’ demurrer to the amended complaint because it was served on him at his Santa Monica, California, address instead of in Ohio where he was then living, and he learned of the demurrer only by looking at the trial court website. On January 18, 2011, defendants served the demurrer on the Santa Monica address shown on the caption page of the amended complaint. The record does not indicate that plaintiff had given formal notice of a change of address, and on January 31, 2011, plaintiff filed a motion for continuance of the case that again bore the Santa Monica address. Plaintiff received a copy of the demurrer by email at his father’s request on February 23, 2011, 16 court days before the date set for the hearing on the demurrer.

Next, plaintiff argues defense counsel knew he had relocated to Ohio because the transcript of the March 17, 2011, hearing so indicated. However, that transcript shows only defense counsel’s knowledge as of the date of that hearing, not on January 18, the date of service of the demurrer.

In any event, given that our review of the trial court’s order sustaining the demurrer is de novo, plaintiff has shown no prejudice. We reject plaintiff’s contention that he was deprived of due process in the service of the demurrer.

IV. DISPOSITION

The judgment is affirmed. Costs of appeal are awarded to Defendants.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.