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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TIMOTHY LEWIS WHITING,

Plaintiff and Appellant,

v.

CITY OF CATHEDRAL CITY,

Defendant and Respondent.

E054059

(Super.Ct.No. INC10006547)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Affirmed.

Timothy Lewis Whiting, in pro. per., for Plaintiff and Appellant.

Joe McMillin for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Timothy Lewis Whiting slipped and fell after stepping off a passenger bus and into a planter area of a sidewalk in Cathedral City, fracturing his right ankle and aggravating an existing back injury. Two years after he was injured, Whiting presented a

written claim for his injuries to defendant City of Cathedral City (City) pursuant to the Government Claims Act (Gov. Code, §§ 810-996.6)¹ (the Act) and filed suit against the City for his injuries. The City rejected the claim as untimely because it was not presented within six months of the date Whiting was injured and his personal injury claim accrued. (§§ 901, 911.2.) The trial court entered judgment in favor of the City after granting its motion for summary judgment on the ground Whiting’s action against the City was barred due to his failure to present a timely claim to the City. (§ 945.4.)

Whiting appeals, claiming he raised triable issues of material fact on two issues raised in his complaint: (1) whether his failure to timely present a claim to the City was the result of purposeful misconduct on the part of his former attorney; and (2) whether the City is equitably estopped from raising his failure to present a timely claim as a defense to his action, because, beginning shortly after he was injured and within the six-month claims presentation period, City police officers intimidated, harassed, and distracted him from timely discovering and presenting his claim.

We affirm. It was undisputed that Whiting did not timely present a claim to the City, and never sought leave from the City to present a late claim. (§§ 911.12, 911.4, 945.4.) Further, Whiting adduced no competent, admissible evidence to support his

¹ All further statutory references are to the Government Code unless otherwise indicated. In *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734, 741-742, the California Supreme Court adopted the “Government Claims Act” as the more appropriate short title for the claims statutes than the “Tort Claims Act,” after concluding that the claims presentation requirements of the Act apply to breach of contract as well as personal injury or tort claims.

claims that he was excused from timely presenting a claim due to purposeful misconduct on the part of his former attorneys, or that the City was equitably estopped from relying on his failure to present a timely claim as a defense to his personal injury action.

II. BACKGROUND

A. *The Applicable Government Claims Statutes*

Under the Act, a suit for personal injury damages against a public entity is barred unless, before filing suit, the plaintiff presented a written claim to the public entity for his or her personal injuries within six months of the date the personal injury claim accrued. (§§ 901, 911.2, 945.4; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208-209; but see § 905 [itemizing exceptions not applicable here].) The timely presentation of a claim is a condition precedent to filing suit and, as such, is a necessary element of the plaintiff's personal injury claim or causes of action against the entity. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1240.)

If a claimant fails to timely present a claim, he or she may apply to the public entity for leave to present a late claim, but the application must be made no later than one year after the claim or cause of action accrued. (§§ 911.4, 911.6; *Doe v. Bakersfield City School Dist.* (2006) 136 Cal.App.4th 556, 566-567.) If the entity denies the application, either expressly or by inaction, the claimant may petition the trial court under section 946.6 for an order relieving the claimant from having to present a claim, but relief under section 946.6 is available only if the claimant has applied to the entity for leave to present

a late claim and the entity denied the application. (*Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 847-848.)

“The purpose of the claims statutes is . . . ‘to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity’s actual knowledge of the circumstances surrounding the claim.’ [Citation.] The claims statutes also ‘enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future.’ [Citations.]” (*City of Stockton v. Superior Court, supra*, 42 Cal.4th at p. 738.)

B. Undisputed Facts and Procedural History

On July 26, 2008, Whiting slipped and fell while stepping out of the rear exit door of a Sunline Transit Agency (STA) passenger bus, and into the planter area of a City sidewalk, twisting and fracturing his right ankle and “reaggravat[ing]” a preexisting back injury. Shortly after the July 26, 2008, incident, Whiting retained the services of an attorney who, on August 26, 2008, presented a written claim to the STA for his injuries. The attorney filed suit against the STA in November 2008, and in May 2010, Whiting discharged the attorney and began representing himself in his action against the STA. In June 2010, Whiting presented his case against the STA to an arbitrator and obtained a nonbinding arbitration award of \$14,600. In October 2010, Whiting settled his claims against the STA for \$14,600.

Meanwhile, on July 26, 2010, exactly two years after the July 26, 2008, incident, Whiting presented an untimely claim to the City for his personal injuries, and filed suit against the City on the same date. By a letter dated August 12, 2010, the City rejected Whiting's claim as untimely because it was not presented within six months of July 26, 2008, the date Whiting was injured and his personal injury claim accrued. (§§ 901, 911.2.)

In November 2010, Whiting filed a verified first amended complaint against the City. In his verified complaint, Whiting averred he did not discover he had a claim against the City until June 2010, after he spoke with a local news reporter and a City engineer who assured him the City was responsible for maintaining the sidewalk where he fell after stepping off the STA passenger bus.

Additionally, Whiting alleged he was excused from timely presenting a claim to the City for two reasons. First, he claimed the attorney who originally represented him in his action against the STA "purposely misled" him to believe he did not have a claim against the City, and possibly "accepted a bribe" from the City in exchange for "sabotag[ing]" his case against the STA and the City. Second, he alleged the City was equitably estopped from relying on his failure to timely present a claim as a defense to his action because, within the six-month claims presentation period, City police officers "purposely" harassed, intimidated, and distracted him from timely discovering he had a claim against the City.

After taking Whiting's deposition, the City moved for summary judgment on Whiting's verified first amended complaint on the ground Whiting's failure to timely present a claim to the City was a complete defense to his personal injury action against the City. Following a hearing, the trial court granted the motion and entered judgment in favor of the City.²

III. DISCUSSION

A. *Standard of Review on Summary Judgment*

Summary judgment is properly granted if all the papers submitted on the motion show there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A moving party defendant is entitled to summary judgment if it shows that one or more elements of each of the plaintiff's causes of action cannot be established or there is a complete defense to each cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-851 (*Aguilar*).

A defendant moving for summary judgment generally bears an initial burden of making a prima facie evidentiary showing that there are no triable issues of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) If the defendant carries this burden, the burden shifts to the plaintiff to make a prima facie evidentiary showing that there are one or more triable issues of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at

² The record does not contain a reporter's transcript of the June 30, 2011, hearing on the City's motion.

p. 850.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar, supra*, at p. 851.)

To make its initial prima facie showing, a defendant moving for summary judgment against a plaintiff who would bear the burden of proof by a preponderance of the evidence at trial “must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, [the defendant] would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact.” (*Aguilar, supra*, 25 Cal.4th at p. 851, fn. omitted.) The defendant is not required to “conclusively negate” an element of the plaintiff’s causes of action, but may show the plaintiff cannot establish the element, for example, “by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.” (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 353, citing *Aguilar, supra*, at p. 854.)

We review an order granting summary judgment *de novo*, construing the evidence in the light most favorable to the opposing party and resolving all doubts concerning the evidence in favor of that party. (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) In performing our independent review of the evidence, we apply the same three-step analysis as the trial court. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.) First we identify the issues framed by the pleadings. Next, we determine whether the moving party has made its initial prima facie showing or established facts justifying judgment in its favor. Third, and finally, if the moving party has met its initial burden,

we determine whether the opposing party has demonstrated the existence of a triable, material issue of fact. (*Ibid.*)

B. The City's Motion for Summary Judgment Was Properly Granted

In support of its motion, the City met its initial burden of making a prima facie evidentiary showing that Whiting could not show he timely presented a claim to the City for his personal injuries, a necessary element of Whiting's personal injury causes of action against the City. (*State of California v. Superior Court, supra*, 32 Cal.4th at pp. 1239-1240; §§ 911.2, 945.4.) Indeed, the City presented undisputed evidence based on Whiting's deposition testimony that Whiting did not present a claim for his personal injuries to the City within six months of July 26, 2008, the date he was injured and his personal injury claim or causes of action against the City accrued. (§§ 901, 905, 911.2.) Instead, Whiting presented a late claim to the City on July 26, 2010, which the City rejected as untimely.

As alleged in Whiting's operative complaint, two additional issues were presented: (1) whether Whiting was excused from timely presenting a claim to the City based on the "purposely" misleading or fraudulent conduct of the attorney or attorneys who represented him in his prior action against the STA; and (2) whether the City was equitably estopped from relying on his failure to timely present a claim to the City because City police officers had harassed, intimidated, and distracted him from timely discovering he had a claim against the City. Based on Whiting's deposition testimony, the City demonstrated that Whiting had no evidence to support either of these claims.

The burden thus shifted to Whiting to raise a triable issue of material fact on either claim. Whiting failed to carry this burden.

Regarding his attorney misconduct claim, Whiting alleged that the attorney or attorneys who represented him in his action against the STA “purposely misled” him by telling him that the sidewalk on which he fell “belong[ed] to a third party” and not the City. On information and belief, Whiting further alleged that his former attorneys “accepted a bribe,” and thereafter attempted to “sabotage” his case against the STA, and suggested that his former attorneys failed to pursue a claim against the City in exchange for this alleged bribe. As a result, Whiting claimed he did not discover that he had a claim against the City until June 2010, after speaking with a local news reporter and a City engineer who assured him the City was responsible for the sidewalk. Thus Whiting presented a late claim to the City on July 26, 2010, and filed his original complaint against the City on the same date.

Whiting’s attorney misconduct claim is loosely based on an exception to Code of Civil Procedure section 473 and Government Code section 946.6. Citing *Buckert v. Briggs* (1971) 15 Cal.App.3d 296 at page 301, Whiting acknowledges that, as a general rule, the inexcusable neglect of an attorney is imputed to the client and may not be offered as a basis for relief under Code of Civil Procedure section 473. Whiting argues, however, that an exception to this general rule applies when the attorney’s actions amount to “positive misconduct” which “obliterates the existence of the attorney-client relationship.” (*Buckert v. Briggs, supra*, at p. 301.) Whiting argues his former attorneys’

misconduct in “possibly accepting a bribe” amounted to “positive misconduct,” and, as such, should not be imputed to him. He also points out that courts applying the exception have emphasized that “[a]n attorney’s authority to bind his client does not permit him to impair or destroy the client’s cause of action or defense.” (*Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353 [Fourth Dist., Div. Two]; *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391.)

This argument fails for at least two reasons. First, Whiting adduced no competent, admissible evidence that his former attorney or attorneys accepted any bribe in exchange for not pursuing a claim and action against the City. That the attorneys accepted such a bribe cannot be reasonably inferred based on their failure to timely present a claim to the City, or any other evidence adduced on the motion. Indeed, it is undisputed that the attorneys timely presented a claim to the STA and timely filed suit against the STA for Whiting’s personal injuries.

Second, Whiting cannot be relieved of his statutory obligation to timely present a claim to the City under Code of Civil Procedure section 473 or Government Code section 946.6. Under Government Code section 946.6, the trial court may relieve a plaintiff from having to present a claim only if the plaintiff applied to the entity for leave to present a late claim and the entity denied the application. (*Williams v. Mariposa County Unified Sch. Dist.*, *supra*, 82 Cal.App.3d at pp. 847-848.) Whiting did not apply to the City for leave to present a late claim. Nor could he have done so more than one year after his personal injury claim accrued on July 26, 2008. (Gov. Code, § 911.4; *Doe v. Bakersfield*

City School Dist., *supra*, 136 Cal.App.4th at p. 566.) Whiting admitted he did not discover he had a claim against the City until after the one-year period expired.

Similarly, an application for relief from “a judgment, dismissal, order, or other proceeding taken against” a party under Code of Civil Procedure section 473, subdivision (b) must be made to the trial court within six months after the judgment, dismissal, order, or other proceeding was taken, and the court is without jurisdiction to grant relief after the six-month period expires. (E.g., *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1512.) Whiting never applied to the trial court for any sort of relief under Code of Civil Procedure section 473. Thus, the City demonstrated that, as a matter of law, Whiting could not establish he was excused from timely presenting a claim for his personal injuries to the City based on any “positive misconduct” on the part of his former attorneys.

The City also demonstrated that Whiting’s equitable estoppel claim was without merit as a matter of law. “It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim *by some affirmative act*. [Citations.] Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. [Citation.] A fortiori, estoppel may certainly be invoked when there are acts of *violence* or *intimidation* that are *intended* to prevent the filing of a claim. [Citations.]” (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 445, first italics added (*John R.*); *Doe v.*

Bakersfield City School Dist., supra, 136 Cal.App.4th at p. 567.) “As far as the claims-presentation statutes are concerned, the clock ‘stops,’ according to *John R.*, during those periods when the [entity’s] affirmative acts deter the filing of a claim. The clock ‘starts’ again once the effects of those affirmative acts have ceased.” (*Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1047.)

In his operative complaint, Whiting alleged that on August 7, 2008, within two weeks after he was injured on July 26, 2008, City police officers “illegally stopped and racially profiled” him; on August 10, 2008, “up to ten” City police officers “falsely detained, assaulted, and arrested” him “on bogus criminal charges which were later all dropped”; and on November 22, 2008, he was “again harassed” by City police officers without probable cause. Whiting alleged these “acts of violence and intimidation” “were carried out to prevent or deter” him “from determining whether the City was one of the parties responsible for his injuries,” and that City officers “continued their onslaught of threats and intimidation” during 2009 and 2010.

In support of its motion, the City presented undisputed evidence that in August and December 2008, Whiting presented two claims to the City for civil rights violations that allegedly occurred in August and November 2008. Indisputably, these claims were presented within the six-month claims period on Whiting’s personal injury claim against the City, which expired in January 2009. In June and August 2009, Whiting presented two additional claims to the City for additional civil rights violations that allegedly

occurred in May and June 2009. On July 26, 2010, Whiting filed his late claim against the City for the personal injuries he sustained in July 2008.

Given Whiting's presentment of two other claims to the City during the six-month claims period on his personal injury claim, the City argues that no affirmative acts by City police officers could have reasonably distracted or deterred Whiting from timely discovering and presenting his personal injury claim to the City. Indeed, in his declaration in opposition to the City's motion, Whiting presented only self-serving assertions that the City police officers' harassment and intimidation of him during the six-month claims period distracted him from timely discovering and presenting his personal injury claim to the City. Whiting presented no competent, admissible evidence that the City police officers who allegedly harassed and intimidated him did so for the intended purpose of preventing him from timely presenting his personal injury claim. (*John R.*, *supra*, 48 Cal.3d at p. 445.) Thus, as a matter of law, the City demonstrated that Whiting could not establish that the City was equitably estopped from relying on his failure to timely present a claim for his personal injuries as a complete defense to his personal injury action against the City.

IV. DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

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KING
J.

We concur:

McKINSTER
Acting P.J.

RICHLI
J.