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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

ANTHONY WAYNE OLIVER,

Plaintiff and Appellant,

v.

K. HOLLAND, et al.,

Defendants and Respondents.

F069363

(Super. Ct. No. S-1500-CV 281073 LHB)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Anthony Wayne Oliver, in propria persona, for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Chief Assistant Attorney General, Kristin G. Hogue, Assistant Attorney General, Joel A. Davis and Brent W. Reden, Deputy Attorneys General, for Defendants and Respondents.

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Plaintiff Anthony Wayne Oliver (Oliver) appeals, in propria persona, from a judgment entered after the trial court sustained the demurrer of defendants Warden Kim

* Before Cornell, Acting P.J., Gomes, J. and Peña, J.

Holland, erroneously sued as K. Holland, and Correctional Officer Robert Harris, erroneously sued as Officer Harris (collectively respondents), to his complaint. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Oliver filed his complaint against respondents, which contains a single cause of action for negligence, on January 9, 2014. Oliver alleges that he suffered personal injuries while an inmate at California Correctional Institution in Tehachapi when he fell down a number of flights of stairs as Harris was escorting him from his cell to the law library. Oliver alleges Holland was negligent due to Harris's improper training on escorting prisoners in restraints, and Harris failed to exercise the standard of care that a reasonably prudent person would exercise while escorting him down the stairs. Oliver claims he suffered injuries to his knees, lower back, left shoulder, left hip and left ankle as a result of the fall.

Oliver alleges he was required to comply with a claims statute and he had done so. Attached to his complaint is an April 26, 2013 letter from the Victim Compensation & Government Claims Board (Board) advising him that the Board rejected his claim at a hearing held on April 18, 2013.¹ The letter advised, in pertinent part: "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."

Respondents demurred to the complaint on the ground its does not state facts sufficient to constitute a cause of action because Oliver failed to comply with the mandatory requirements of the Government Claims Act (Gov. Code, § 900 et seq.).² Specifically, respondents contended that Oliver could not maintain this action because he

¹ All references to dates are to the year 2013, unless otherwise stated.

² Undesignated statutory references are to the Government Code.

failed to file his complaint within the six-month time limit imposed by section 945.6. Respondents pointed out that since Oliver was notified by mail on April 26 that the Board rejected his claim, he had until October 26, 2013 to file his complaint. Since the complaint was not filed until January 9, 2014, it was untimely. Because there was no possibility the defect could be cured, respondents asserted the demurrer must be sustained without leave to amend.

Oliver filed written opposition to the demurrer. Oliver asserted that he did attempt to file the complaint within the six-month period but, due to his own inadvertence, the trial court's deputy clerk returned the complaint unfiled on May 22 because Oliver failed to include a civil cover sheet, a conformed summons to the complaint and an application for waiver of fees. Oliver asserted that he was unable to resubmit the complaint before October 26 because on July 26, Correctional Sergeant G. Ybarra, with no administrative reason or justification, separated him from his legal property until November 22.

In an accompanying declaration, to which he attached the forms referenced in the declaration, Oliver stated that: (1) on May 17, he mailed the complaint to the court for filing; (2) on May 22, the deputy clerk returned the complaint unfiled because Oliver did not send with it a civil cover sheet, summons and an application for waiver of fees; (3) on July 26, before he could comply with the deputy clerk's instructions, Ybarra, for reasons unknown to Oliver, moved him from his cell and confiscated his legal property; (4) he thereafter attempted to have his legal property returned by filing written requests, as required by the California Department of Corrections and Rehabilitation (CDCR), California Code of Regulations, title 15, section 3086, which included (a) a CDCR-Form 22, which was forwarded to the property officer on August 11, advising that when Ybarra moved him to the Administrative Segregation Unit (ASU) on August 7, his legal property was left in his former cell, and asking the property officer to locate his legal property,³

³ Oliver states on the form that he had several "legal litigations" in process and needed his legal property. He asked that his legal property be located and forwarded to

and (b) a second CDCR-Form 22, which was forwarded on September 3 after the property officer failed or refused to respond to his first form, again asking for his legal property;⁴ (5) on September 9, his inmate appeal was filed with the appeals officer after he received no response to his forms; (6) on October 29, during the appeal investigation, it was determined that Oliver's property was inventoried and stored, and that on September 6, his property was located at Facility A and brought to Facility B for issuance;⁵ and (7) thereafter, he resubmitted his appeal to the third level, which was

him. He noted that on July 30, he sent a form to the property officer, in which he asked for verification of the location of his legal property.

⁴ Oliver states on the form that he was trying to locate his legal property left at Facility A, as he was moved to Facility B on August 8 and his property was left behind. He advised he had two conference court calls scheduled for September 10 and October 2, and needed his legal papers.

⁵ The California Correctional Institution First Level Appeal Response issued on October 29 partially granted Oliver's request to be issued his legal property, as both a Legal Officer and Property Officer had attempted to issue him his legal property, but he did not want it issued. The review indicated that on July 26, Oliver was temporarily housed in Clinic Holding at Facility A, requiring his property to be inventoried and stored; Oliver then was rehoused in Facility A ASU, and was not issued his property due to an expected move to Facility B; on August 9, Oliver was transferred to Facility B without his property; on September 6, Oliver's property was located at Facility A and brought to Facility B for issuance, where Oliver's name was added to the property issuance waiting list and the property was made ready for issuance; on October 2, Oliver appeared before Institutional Classification Commission and was cleared for ASU property pending a Minimum Eligible Release Date (MERD) of October 19; and Facility B Property Officers attempted to issue Oliver's property, but he did not want the property issued because he was endorsed for "LAC."

In an interview on October 29, Oliver admitted a Facility B Property Officer told him his property had been located, but he told the officer he did not want the property to be issued due to his MERD expiring, and it did not make sense for the property to be issued to him only to have to box it up for transfer to another prison. Oliver also stated that a Legal Officer had spoken to him pertaining to legal deadlines, but he elected to keep his property/legal material packed instead of having it issued and then repacking it for transfer. Oliver told the interviewer that he did not want his property issued to him, but did want a response to the appeal so he could get an extension on court deadlines.

pending decision, in which he contested the fact he never refused being issued his legal property after it was located on September 6.

Oliver further declared that on October 31, two days after his property appeal interview, he was moved from the Facility B program into the ASU. He submitted another request to the Facility A legal property officer for his legal property. The officer came to Oliver's cell on November 13 and told Oliver he would allow him to go through nine boxes of property in the officer's possession. The officer, however, did not return the following day.⁶ Oliver was transferred out of Tehachapi on November 19 and received at California State Prison-Solano on November 22. At that time, an officer at Solano State Prison issued Oliver his personal legal property.

According to Oliver, he requested a certified copy of his trust statement on December 5, which he received on December 10. On December 25, Oliver forwarded his application for fee waiver to the trust office technician, which was forwarded to Oliver's assigned correctional counselor for issuance to him. On January 6, 2014, Oliver received the certified copy from his counselor for filing and he filed this action three days later.

Oliver contended that when the deputy clerk returned his complaint on May 22, he still had until October 29 to file the action, and had his legal property not been confiscated, his complaint would have been timely filed. He asked the court to consider this evidence and overrule the demurrer.

In reply, respondents argued that because the complaint was rejected for filing due to the lack of the required fees and paperwork, and was not untimely due to delays in the prison mailing system, the prison delivery rule was inapplicable. They further argued

⁶ With his reply, Oliver submitted a declaration from inmate Archie Boatright, III, who declared that on November 12, he was rehoused in the ASU with Oliver, and was allowed to bring his Security Housing Unit (SHU) property with him; on November 13, Legal Property Officer K. Cannon came to their cell door and told Oliver nine boxes of his property had been sent from Facility B and would be pulled so Oliver could go through them to get his legal property; and Officer Cannon did not return to the cell on November 14.

that Oliver’s conduct estops him from the relief he is seeking because he has not explained why he could not have filed the complaint between May 22, when the complaint was returned, and July 26, when his legal papers were confiscated. They also argued he was estopped as he did not file his CDCR 602 appeal form, which references a case from Riverside and not the instant action, until September 9; he was offered to have his legal paperwork returned to him on October 19, but he refused to take possession of it; and the exhibits he submitted establish he did not diligently work to timely file the complaint.

Oliver appeared telephonically at the April 11, 2014, hearing on the demurrer; respondents’ counsel was also present. After the matter was argued and submitted, the trial court sustained the demurrer without leave to amend. Judgment dismissing the complaint was entered on April 24, 2014.

DISCUSSION

Oliver’s Burden as Appellant

Preliminarily, we highlight some of the fundamental principles applicable when a party files an appeal.

Because a judgment or order of a lower court is presumed to be correct on appeal, error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Thus, an appellant must affirmatively show prejudicial error based on adequate legal argument and citation to the record. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656 (*Keyes*); *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522–523 (*McComber*).) “[T]he trial court’s judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited.”

(*Keyes, supra*, at p. 655.) When points are perfunctorily raised, without adequate analysis and authority or without citation to an adequate record, the appellate court may pass them over and treat them as abandoned or forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700; *Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 814 [“We need not address points in appellate briefs that are unsupported by adequate factual or legal analysis.”].)

Moreover, issues not expressly raised in an appellant’s opening brief may be treated as waived. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.) “[T]he appellant must present each point separately in the opening brief under an appropriate heading, showing the nature of the question to be presented and the point to be made; otherwise, the point will be forfeited.” (*Keyes*, 189 Cal.App.4th at p. 656.) As a general rule, presenting an argument for the first time in the reply brief will not suffice. (*Ibid.*) These requirements apply equally to appellants acting without an attorney. (*McComber, supra*, 72 Cal.App.4th at p. 523.)

“On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is *de novo*, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.” (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) It is Oliver’s burden, however, to demonstrate the trial court sustained the demurrer erroneously. (*Smith v. County of Kern* (1993) 20 Cal.App.4th 1826, 1829-1830.)

As will be seen, Oliver has failed to meet his appellate burden in the instant appeal.

The Demurrer

Under the Government Claims Act, an action against a public entity must be commenced within six months from the date of rejection of a claim filed pursuant to that

Act. (§ 945.6, subd. (a)(1).)⁷ An action filed after this time period has elapsed is untimely. (*City of Los Angeles v. Superior Court* (1993) 14 Cal.App.4th 621, 629.) This provision “is a true statute of limitations defining the time in which, after a claim presented to the government has been rejected or deemed rejected, the plaintiff must file a complaint alleging a cause of action based on the facts set out in the denied claim.” (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 209.)

Oliver admits that his January 2014 action was filed more than six months after the Board rejected his claim in April 2013. The Board’s notice of rejection complied with the statutory requirement of a warning about the six-month period for filing an action. (See § 913, subd. (b).) In such a situation, the six-month statute of limitations period is mandatory and cannot be extended. (See *Anson v. County of Merced* (1988) 202 Cal.App.3d 1195, 1200; see also *Chas. L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 90 [action against state].)

In his opening brief, Oliver argues the trial court erred by ruling that he had only from May 22 to July 26 to file his complaint, as this was prejudicial and denied him due process of law.⁸ He further argues the record is silent on whether the trial court determined the late filing of the complaint was due to a nonparty’s mistake, inadvertence, surprise or excusable neglect, and respondents were not prejudiced in their defense of the claim by his failure to present it within six months. Oliver further asserts the question

⁷ Section 945.6, subdivision (a), provides in relevant part: “[A]ny suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with [the Government Claims Act] must be commenced: [¶] (1) If written notice is given in accordance with section 913 [i.e., written notice of claim rejection], not later than six months after the date such notice is personally delivered or deposited in the mail.”

⁸ The reporter’s transcript of the hearing is not part of the appellate record. Oliver asserts the trial court reasoned at the hearing that he had sufficient time to file the complaint despite being deprived of his legal papers, as he could have filed the complaint between May 22, when the court clerk returned his unfiled complaint, and July 26, when he was separated from his legal documents.

before us is whether he could have filed a timely claim had he not been deprived of his legal documents, and contends he was deprived of his documents in retaliation for filing an inmate appeal on another incident, in which Ybarra interviewed him on July 11, 15 days before he separated Oliver from his property.

The only legal authorities Oliver cites in support of his arguments are section 945.6 and California Code of Regulations provisions that state that “[n]o reprisal shall be taken against an inmate or parolee for filing an appeal[,]” and “[i]nmate access to the court shall not be obstructed. . . . Staff shall not in any way retaliate against or discipline any inmate for initiating or maintaining a lawsuit.” (Cal. Code Regs., tit. 15, §§ 3084.1(d) & 3160(a).) But none of these authorities support his assertion he should be excused from complying with the six-month limitations period.

In referencing “mistake, inadvertence, surprise or excusable neglect[,]” Oliver appears to be referring to section 946.6, subdivision (c), which allows the trial court to relieve a petitioner from the *claims presentation requirements* of section 945.4 in certain circumstances, one of which is “[t]he failure to present *the claim* was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4.” (§ 946.6, subd. (c)(1), italics added.) This provision, however, does not apply to the six-month limitations period of section 945.6. “The law is established that although the procedure for granting relief from the claim statutes is remedial in nature and must be liberally construed in favor of the claimant [citation], such liberality does not extend to the ... statute of limitations. [Citations.] The [Government] Claims Act indulges late claimants; not late suitors. ‘A late claim suggests late discovery of the proper means of seeking redress. But once a claimant has filed his [or her] claim, he [or she] demonstrates familiarity with the statutory procedures governing his [or her] grievance, and can reasonably be charged with knowledge of the time limitations that are part of that procedure.’” (*Fritts v. County of Kern* (1982) 135 Cal.App.3d 303, 305–306;

Hunter v. County of Los Angeles (1968) 262 Cal.App.2d 820, 822; see also *Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927 [relief from dismissal under Code of Civil Procedure section 473 for excusable neglect not available where the dismissal was caused by plaintiff's failure to comply with the six-month statute of limitations prescribed in section 945.6, subdivision (a)(1)].)

In his reply brief, Oliver argues for the first time that equitable tolling applies as his untimeliness was due to extraordinary circumstances, namely Ybarra's "retaliatory actions" while he was engaged in protected conduct, and he was diligently pursuing his rights. In support, Oliver cites federal cases holding that the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), is subject to equitable tolling in appropriate cases, such as where the petitioner shows he has pursued his rights diligently and some extraordinary circumstance stood in his way. (*Holland v. Florida* (2010) 560 U.S. 631, 645, 649; *Bills v. Clark* (9th Cir. 2010) 628 F.3d 1092, 1096-1097.) Oliver, however, does not explain how tolling of the AEDPA statute of limitations applies to tolling of the six-month limitations period of section 945.6. Moreover, having raised this argument for the first time in the reply brief, we treat it as forfeited.

In sum, Oliver has not met his burden on appeal of showing reversible error, as he has failed to cite any legal authority in support of his claims and raised arguments for the first time in his reply brief. Consequently, the presumption that the judgment is correct must prevail.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs.