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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRUCE V. MALKENHORST, SR.,

Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM, et al.,

Defendants and Respondents;

CITY OF VERNON,

Real Party in Interest and Respondent.

G047959

(Super. Ct. No. 30-2012-00588466)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed.

Law Offices of John Michael Jensen and John Michael Jensen, for Plaintiff and Appellant.

Gina M. Ratto and Wesley E. Kennedy for Defendants and Respondents.

Nicholas George Rodriguez, City Attorney (Vernon), Scott Edward Porter, Zaynah N. Moussa, Deputy City Attorneys; Liebert Cassidy Whitmore, Steven M. Berliner and Joung H. Yim, for Real Party in Interest and Respondent.

Jackie Lacey, District Attorney (Los Angeles), Anne Ingall, Deputy District Attorney, Amicus Curiae on behalf of Defendants and Respondents.

\* \* \*

Bruce V. Malkenhorst, Sr., filed this lawsuit against the California Public Employees' Retirement System and its governing Board of Administrators (collectively CalPERS), challenging its authority to calculate his pension based on the provisions of the Public Employee's Pension Law. (Gov. Code, § 20000, et seq.; PERL.) Malkenhorst asserted that because his employer, the City of Vernon (named as real party in interest herein), is a charter city which retains maximum constitutional authority to control its municipal affairs, CalPERS was required to defer to Vernon's internal assessment of Malkenhorst's qualifying compensation for purposes of pension calculation, and could not rely on provisions of PERL to limit or reduce the amount of pension payable to him.

CalPERS demurred to the complaint, arguing the court lacked jurisdiction to adjudicate the dispute because Malkenhorst failed to exhaust his available administrative remedy for challenging CalPERS' adverse pension determination. The trial court agreed with CalPERS, and sustained its demurrer without leave to amend on that basis. The court subsequently entered judgment against Malkenhorst.

On appeal, Malkenhorst devotes most of his 65-page brief to arguing the substantive merit of his claims against CalPERS, while limiting his discussion of whether he failed to exhaust his administrative remedy to the last five pages of his brief. With respect to that issue, Malkenhorst argues he was excused from the requirement he exhaust

his administrative remedy because (1) his complaint seeks class-wide relief on behalf of all employees of charter cities and counties; and (2) his complaint raises “constitutional” and “charter” issues which cannot be addressed within the CalPERS administrative process. We find neither assertion persuasive and affirm the judgment.

## FACTS

“In reciting the facts, we are guided by well-settled principles governing appellate review after the sustaining of a demurrer without leave to amend. ““We 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.””” (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1132.)

Malkenhorst filed his complaint and petition for writ of mandate against CalPERS in August 2012, identifying the City of Vernon as the real party in interest. According to the complaint, Vernon has contracted with CalPERS to administer its employee pensions since approximately 1948.

In 1978, Vernon created the position of City Administrator, and appointed Malkenhorst to fill that position. He held the position until his retirement in 2005. Ten years after Malkenhorst was appointed, Vernon became a charter city, adopting a charter that grants it the “full power and authority to adopt, make, exercise and enforce all legislation, laws and regulations, and to take all action in respect to municipal affairs, without limitation, which may lawfully be adopted, made, exercised, taken or enforced under the Constitution of the State of California . . . .” (Italics omitted.)

The governance structure set out in Vernon’s charter required the City Administrator to perform many different tasks or duties, including acting as City Clerk,

but he was paid no additional compensation for those additional duties. His sole compensation was for fulfilling the duties of City Administrator. Vernon promised Malkenhorst a pension based on his “final compensation,” and reported his compensation to CalPERS, which allegedly accepted Vernon’s pension contributions as a percentage of compensation, pursuant to the terms of the contract between Vernon and CalPERS.

From the time Malkenhorst retired in 2005 until August 2012, CalPERS allegedly paid Malkenhorst’s pension based on the full amount of his compensation from Vernon. However, CalPERS then announced its intention to reduce Malkenhorst’s pension, by substituting “its own interpretation of definitions, laws, and regulations in [PERL] in place of . . . Vernon’s designated compensation and municipal structure.” Specifically, CalPERS determined that Malkenhorst was employed in several separate capacities by Vernon, with separate salaries, and that Vernon failed to provide publicly available pay schedules for the separate positions. As a consequence of that determination, CalPERS “is threatening to disallow most of Malkenhorst’s compensation that Vernon reported to CalPERS.”

Malkenhorst sought declaratory relief to determine the rights of all “Charter City or Charter County” employees to have CalPERS administer their pensions in accordance with their respective charter entities’ “constitutional ‘home rule’ autonomy.” He also sought declaratory relief to determine (1) his personal right to receive a CalPERS pension which is based on the “last and highest compensation [he] earned as City Administrator/City Clerk at Vernon, pursuant to Vernon’s constitutional ‘home rule’ autonomy,” and (2) CalPERS’ right to “[apply] ‘statewide’ PERL or CalPERS’ regulations to limit or reduce the compensation or amount of pension payable to [him] by CalPERS.”

In addition to declaratory relief, Malkenhorst sought (1) injunctive relief to bar CalPERS from relying on PERL or its own regulations to limit or reduce the pension

payable to him on account of his employment with Vernon; and (2) issuance of a writ of mandate to prohibit CalPERS from “invading Vernon’s constitutional ‘home rule’ autonomy to designate ‘compensation’ for purposes of calculating a CalPERS pension” and to compel CalPERS to continue paying him a pension based on his “last and highest compensation amount paid by Vernon.”

Vernon filed an answer to the complaint in September 2012, denying the material allegations. CalPERS demurred, however, based solely on the contention the court lacked jurisdiction because Malkenhorst had failed to exhaust his administrative remedy for challenging CalPERS’ pension decision. The court agreed with CalPERS and sustained the demurrer without leave to amend.

In its minute order, the court noted that Government Code section 20134 gives specific authorization to the Board of Administration of CalPERS to “hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person under this part,” and explained that “[w]here an administrative remedy is provided by statute, relief must be sought from the administrative body and the remedy exhausted before courts will act; a court violating the rule acts in excess of its jurisdiction.” The court also explained that, under the test outlined in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1082 (*Coachella Valley*), Malkenhorst had not persuasively demonstrated the court should consider his assertion that CalPERS itself lacked jurisdiction to decide this dispute prior to his exhaustion of the administrative remedy.

The court denied Malkenhorst’s subsequent motion for reconsideration, and entered judgment in CalPERS’ favor.

## DISCUSSION

### *1. The Governing Pension Law*

CalPERS is a retirement system created by statute, for the purpose of administering retirement, disability and death benefits for California state employees in accordance with the provisions of PERL. (Govt. Code, § 20001.) However, the CalPERS system is not limited to state employees. Other governmental entities, including charter cities, may choose to participate in the CalPERS pension system. (Govt. Code, § 20460.) “[T]he CalPERS system covers not only state employees but also employees of ‘contracting agencies,’ that is, public entities . . . *that have chosen to participate in CalPERS by contract with the CalPERS governing board.*” (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 499, italics added.) However, CalPERS “may refuse to contract with, or to agree to an amendment proposed by, any public agency for any benefit provisions that are not specifically authorized by this part and [which] would adversely affect the administration of this system.” (Govt. Code, § 20461.)

Management and control of the CalPERS system vested in its Board of Administration (Govt. Code, § 20120), which is empowered by statute to “determine and . . . modify benefits for service and disability” in accordance with PERL and the rules it promulgates thereunder. (Govt. Code, § 20123.) Further, “[t]he board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.” (Govt. Code, § 20125.) All persons receiving benefits under CalPERS are defined as “members,” and they are bound by both the provisions of PERL and the rules promulgated by the board. (Govt. Code, § 20122; see also Govt. Code, § 20506 “[a]ny contract heretofore or hereafter

entered into shall subject the contracting agency and its employees to all provisions of this part and all amendments thereto applicable to members”].)

Moreover, PERL establishes an administrative process for resolving essentially any disputes arising under its provisions. Government Code section 20134 provides that “[t]he board may, in its discretion, hold a hearing for the purpose of determining *any question* presented to it *involving any right, benefit, or obligation of a person under this part.*” (Italics added.) These hearings are conducted in accordance with the administrative hearing provisions of the Government Code (Cal. Code Regs. tit. 2, § 555.4; Govt. Code, § 11500 et seq.), and those administrative decisions may be reviewed by way of a petition for writ of mandate. (Govt. Code, §§ 20134, 11523.)

## *2. Malkenhorst’s Exhaustion of Administrative Remedies*

Although Malkenhorst addresses a myriad of issues in his opening brief, the only issue properly before us is whether the court below erred by concluding it lacked jurisdiction to adjudicate his claims against CalPERS because he failed to exhaust his administrative remedy. We review this question de novo. (*Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 203; *McKee v. Orange Unified School Dist.* (2003) 110 Cal.App.4th 1310, 1316.)

If the court’s ruling is correct, we will affirm the judgment without reaching the merits of Malkenhorst’s pension claims. If the court’s ruling was incorrect, we must reverse the judgment and remand the case without regard to how we view the merits of Malkenhorst’s claims, because his alleged failure to exhaust administrative remedies was the sole basis for CalPERS’ demurrer. (*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504 [order sustaining a demurrer without leave to amend “will be affirmed on appeal if any of the grounds stated in the demurrer is well taken”].) We consequently do not consider those merits.

Initially, we note Malkenhorst does not contest the existence of an administrative remedy for adjudication of CalPERS pension disputes. Thus, the basic rule requires that he utilize that remedy, to its conclusion, before seeking redress from the courts with respect to whether CalPERS may properly reduce his pension. “Under the doctrine of exhaustion of administrative remedies, when an administrative tribunal has been created to adjudicate an issue, the matter must be presented there before any resort is made to the courts.” (*Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 91.) “[R]elief must be sought from the administrative body and this remedy exhausted before the courts will act.” (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.)

Instead, what Malkenhorst claims is that he was excused from utilizing that administrative remedy because (1) his complaint seeks recovery on behalf of other persons, in a representative capacity; and (2) CalPERS’ jurisdiction is limited and does not allow it to adjudicate constitutional issues or to regulate the municipal affairs of charter cities. Neither assertion is persuasive.

Malkenhorst’s claim that he is pursuing relief on behalf of a class of persons employed by charter cities and counties does not entitle him to sidestep the requirement that he exhaust administrative remedies. First, the mere assertion of a class action does not *automatically* exempt a party from the obligation to exhaust his administrative remedy. (*Lopez v. Civil Service Com.* (1991) 232 Cal.App.3d 307, 312 [“The mere bringing of a class action is not ipso facto an exception to the exhaustion requirement”].) And yet Malkenhorst has made no attempt to explain why the specific circumstances of this case would warrant such an exception.

Second, notwithstanding Malkenhorst’s characterization, his complaint does not actually allege any facts suggesting either that he has been authorized to act in a representative capacity or that this case might be suitable for class action treatment.

Instead, Malkenhorst merely alleges he is seeking declaratory relief to ascertain the pension rights of a group of unnamed other persons who also work for charter cities or charter counties that have entered into contracts with CalPERS.

That assertion is fatally flawed, however, because Malkenhorst has no personal stake in whatever disputes might exist between CalPERS and *other* CalPERS members who are employed by charter entities, and thus no standing to seek a court declaration as to the rights of those other members. A declaratory judgment action requires an “actual controversy relating to the legal rights and duties *of the respective parties.*” (Code Civ. Proc., § 1060, italics added.) None of those other unnamed CalPERS members is a party to Malkenhorst’s complaint. And as explained in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117, an ““actual controversy”” under the declaratory relief statute is “one which admits of definitive and conclusive relief by judgment within the field of judicial administration, *as distinguished from an advisory opinion upon a particular or hypothetical state of facts.*” (Italics added.) Absent the inclusion of those other members as parties to this action, the court could not possibly render a judgment declaring their rights which was anything other than “advisory.”

Because Malkenhorst has no standing to assert a claim for declaratory relief on behalf of other CalPERS members, his attempt to do so has no legal effect on his obligation to exhaust his administrative remedy before pursuing an action based on his own personal claims.

Malkenhorst’s second argument is that he was excused from exhausting his administrative remedy because CalPERS itself lacks jurisdiction to adjudicate the issues he has raised. However, as explained by our Supreme Court in *Coachella Valley*, courts must weigh three factors in determining whether *to even consider* a party’s assertion that

an administrative agency lacks jurisdiction over a claim before the party has completed the administrative process: “In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue.” (*Coachella Valley, supra*, at p. 1082.)

While Malkenhorst claims the trial court below did not consider this three factor test, his assertion is belied by the record. The court’s minute order sustaining CalPERS’ demurrer specifically references the *Coachella Valley* test, and expressly concludes, after considering the specified factors, that it need not address Malkenhorst’s challenge to CalPERS jurisdiction prior his exhaustion of that administrative remedy.

In reaching its conclusion, the court reasoned that requiring Malkenhorst to exhaust his administrative remedy before seeking relief from the courts imposed only a slight burden on him: “If the administrative hearing continues, petitioner is only delayed a few months. If he is dissatisfied with the administrative result, he can seek relief.” The court also concluded that Malkenhorst’s jurisdictional argument was weak, because “CalPERS has authority to undertake the calculation concerning pension benefits,” and that “CalPERS has expertise in these pension calculations.”

After incorrectly asserting the trial court ignored the *Coachella Valley* test, Malkenhorst argues that proper application of the test requires the court to address his jurisdictional claim on the merits. We cannot agree. Malkenhorst first suggests that because he has “sought declaratory relief on behalf of 81,659 employees of charter cities and 29,367 employees of charter counties that contract with CalPERS,” this case involves “significant public interest” which would be thwarted by requiring him to participate in the administrative process. However, as we have already explained, Malkenhorst has no

standing to seek such declaratory relief, and thus it plays no part in our analysis. Next, Malkenhorst argues that CalPERS' "threat" to "confiscate" his pension "supports irreparable injury." But a mere *threat* does not even demonstrate harm and as a general rule, the withholding of money would not qualify as "irreparable harm." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352 ["irreparable injuries [are] ones that cannot be adequately compensated in damages" (italics omitted)].)

Malkenhorst then asserts, in conclusory terms, that his assertion CalPERS lacks jurisdiction is strong because "[t]he [C]onstitution deprives the agency of jurisdiction on preemption determinations." But the disputed issue in this case is not "preemption"; instead, it is the proper method by which CalPERS should calculate Malkenhorst's pension. There is simply no question but that the determination of a retiree's pension amount is properly handled within CalPERS' administrative process. Government Code section 20123 gives the CalPERS board authority to "determine and . . . modify benefits for service and disability" in accordance with PERL and the rules it promulgates thereunder. And Government Code section 20134 gives the board authority to "hold a hearing for the purpose of determining *any question* presented to it *involving any right, benefit, or obligation of a person under this part.*" (Italics added.) In light of this broad authorization allowing the board to address *any question* involving *any right, benefit or obligation*, Malkenhorst can raise whatever arguments he believes establish support for his pension claim – whether based on constitutional precepts, charter law, or preemption analysis – within the administrative process.

Finally, we agree with the trial court that CalPERS, which administers the pension rights of over 100,000 charter entity employees on a day-to-day basis (assuming Malkenhorst's numbers are correct), would likely have a substantial amount of expertise which it could bring to bear on this dispute. Malkenhorst does not persuasively contend otherwise.

After considering the factors set forth in *Coachella Valley*, we find no error in the trial court's refusal to entertain Malkenhorst's assertion that CalPERS lacked jurisdiction over this dispute prior to his exhaustion of that administrative remedy.

#### DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.