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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JAMES GONZALES, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF HEALTH SERVICES, Defendant and Respondent.	A128238 (Contra Costa County Super. Ct. No. MSC0602413)

I.

INTRODUCTION

Appellant James Gonzales, proceeding in propria persona, appeals from the dismissal of his civil action following the sustaining of respondent California Department of Health Services' (DHS) demurrer to his third amended complaint. Appellant contends on appeal that the trial court erred in sustaining the demurrer without granting him leave to amend, because it was reasonably possible for the defects in his complaint to be cured by an amendment. We affirm the dismissal.

II.

FACTUAL AND PROCEDURAL HISTORY

The original three-page complaint was filed by appellant in propria persona in the Contra Costa County Superior Court on November 29, 2006. It consisted of two causes of action alleging respondent's failure to accommodate his disability and failure to prevent disability discrimination. The complaint alleged that on or about November 21,

2005, respondent issued a right-to-sue notice to appellant, and that the misconduct which occurred took place in or about January 2003, and January 2004.

That complaint was superseded by a first amended complaint for damages (FAC) filed on or about November 28, 2007. The FAC alleged five causes of action, all arising out of appellant's employment as a painter at respondent's Richmond, California site, which commenced on December 30, 2002. While working for respondent, appellant sustained neck, back, shoulder and arm injuries in an unrelated automobile accident in early 2003. He alleged further that his medical doctor put him on work restrictions resulting from these injuries, and that he requested respondent to provide him with reasonable accommodations, including, but not limited to, a lighter ladder to use. He was refused all accommodations by respondent, which also refused to engage in an "interactive process," all of which exacerbated his injuries. Thereafter, appellant took a leave of absence in December 2003, until he was terminated by respondent in January 2004, because he was not able to perform his job duties.

Respondent filed a motion for judgment on the pleadings seeking dismissal of the FAC on the grounds that appellant had failed to file his lawsuit within one year of issuance of the right-to-sue notice issued to him on November 21, 2005, by the Department of Fair Employment and Housing, as required by Government Code section 12965, subdivision (b). The motion also sought dismissal of appellant's tort claims both on the ground that a public entity cannot be sued in tort under common law, and that appellant also had failed to comply with the claim requirements of the California Tort Claims Act.

An opposition to the motion was filed on appellant's behalf by The Martinez Business and Immigration Law Group, P.C. As to the statute of limitations issue, appellant requested leave to file an amended complaint to allege that from the time his cause of action accrued until November 29, 2006, the time he filed his complaint, he was insane, within the meaning of Code of Civil Procedure section 352 (Section 352), thereby equitably tolling the one-year statute of limitations during that time.

Respondent opposed appellant's attempt to amend the FAC to allege equitable tolling, attaching documents to its reply brief showing that appellant was working for the Department of Consumer Affairs during the purported period of insanity. The reply brief argued further that the equitable tolling under Section 352 did not apply to the Federal Employment and Housing Act (FEHA) one-year statute of limitations, because it was not mentioned as an exception to the limitations period under Government Code section 12965, subdivisions (d) and (e).

The trial court granted the motion for judgment on the pleadings but also granted appellant leave to amend. The court concluded it did not appear at that time that appellant's proposed amendment was a "sham" pleading as a matter of law. The court also found that because the briefing on the issue of whether the Section 352 tolling applied to FEHA claims was "sparse," it would be more appropriate to consider the issue after the amended pleading had been filed.

The second amended complaint (SAC) was then filed by counsel on or about March 6, 2009. In the SAC, unlike the proposed SAC, appellant alleged he was insane, within the meaning of Section 352, for a period "at least 30 days, after which medical treatment rendered him capable of caring for his property and transacting business." The SAC was met with a demurrer filed by respondent, again raising the statute of limitations as a bar. The arguments raised by respondent mirrored those contained in its earlier reply brief, but also contended that Section 352 by its own terms did not apply to the FEHA.

The court sustained the demurrer, but once more granted appellant leave to amend because it concluded appellant's "insanity" claim had not been pleaded with specificity. In so holding, the trial court also determined that Section 352 could equitably toll the statute of limitations period set forth in Government Code section 12965, subdivision (b).

A third amended complaint (TAC) was filed on appellant's behalf by counsel on or about June 1, 2009. As relevant here, paragraph 8 of the pleading alleged that "[o]n or about November 21, 2005, [appellant] suffered from a condition of mental derangement, which rendered him incapable of caring for his property, transacting business, or understanding the nature or effects of his acts."

Paragraph 9 of the TAC averred, "[o]n or after December 21, 2005, [appellant] recovered sufficient soundness of mind that he became capable of caring for his property, transacting business, and understanding the nature and effects of his acts. This action has been brought less than one year after the date [appellant]'s mental derangement ceased."

Once again respondent demurred, raising the same arguments as those in its demurrer to the SAC. The demurrer also pointed out that the TAC failed to allege any facts explaining why and how he was incapable of pursuing his claim during the alleged period of disability. Noting that appellant had now pleaded inconsistent periods of insanity (first as one year, and now one month), respondent asserted it was "apparent that he cannot allege such facts and is simply improperly attempting to circumvent the statute of limitations."

Counsel for appellant filed an opposition to the demurrer, arguing he had met the general pleading requirement, and that no more "particularity and specificity" was required. To the extent the allegations were generalized, appellant took the position that he was entitled to plead "ultimate facts."

A hearing was held on August 11, 2009, in connection with this demurrer. The court expressed concern that if appellant could satisfy the pleading requirement by simply citing the language of Section 352, without specifying any facts, it would unfairly allow anyone who "blew a statute of limitations" to plead they were insane for some period, and get around the statute of limitations in every case. The court allowed appellant's counsel to make an offer of proof as to appellant's "insanity." In making the offer of proof, which will be considered in detail in a later section of this opinion, counsel assured the court that appellant possessed the factual allegations necessary to cure the defects in the complaint.

The trial court found the offer of proof to be insufficient to plead a factual case of "insanity." The court then confirmed its tentative ruling to sustain the demurrer, this time without leave to amend, noting that appellant had persistently failed to allege specific facts relating to his insanity defense which he was required to do in "pleading around" the statute of limitations.

This timely appeal followed.

III.

DISCUSSION

A. Standard of Review

We apply a de novo standard of review to an order sustaining a demurrer without leave to amend, " 'i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' [Citation.]" (*Santa Teresa Citizen Action Group v. State Energy Resources Conservation & Development Com*. (2003) 105 Cal.App.4th 1441, 1445.) " ' "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." [Citation.]' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "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.]" (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

B. Legal Analysis

1. The Trial Court Did Not Err by Concluding Appellant Had Failed to Plead Equitable Tolling Under Section 352 With Sufficient Specificity

Appellant concedes that his civil action was commenced eight days after the expiration of the applicable statute of limitations. (Gov. Code, § 12960.) However, he contends the limitations period was tolled under Section 352 for a period of time sufficient to make the filing of his original complaint timely.

Section 352, provides: "Persons under disabilities [¶] (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action. [¶] (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with

Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971."

The legal test for "insanity" under Section 352 has been defined as a "condition of mental derangement which renders the sufferer incapable of caring for his property or transacting business, or understanding the nature or effects of his acts. [Citations.]" (*Hsu v. Mt. Zion Hospital* (1968) 259 Cal.App.2d 562, 571 (*Hsu*).)

The "insanity" defense to the statute of limitations was raised by appellant's counsel for the first time in connection with respondent's demurrer to the FAC. The court sustained the demurrer with leave to amend allowing appellant to assert the defense to the statute of limitations.

The demurrer to the SAC was sustained because the trial court concluded appellant's "insanity" claim had not been pleaded with specificity. In the SAC, counsel simply restated the legal test or standard for Section 352 insanity, and provided no facts or specifics pertaining to that alleged insanity, alleging that the period of insanity was for "at least 30 days, after which medical treatment rendered him capable of caring for his property and transacting business."

In granting leave to amend a second time, appellant was directed by the trial court to plead specific facts. However, in his TAC appellant did no more than recite the legal test for "insanity" in Section 352, alleging that "[o]n or about November 21, 2005, [appellant] suffered from a condition of mental derangement, which rendered him incapable of caring for his property, transacting business, or understanding the nature or effects of his acts."

Although appellant argued below that the demurrer was not well taken because he had complied with the applicable general pleading requirements, it appears appellant now acknowledges that it was incumbent on him to plead specific facts in order to plead "insanity" as a defense to a "blown" statute of limitations.

Appellant is well advised to concede this point. Where a plaintiff wishes to "plead around" an affirmative defense, such as the statute of limitations, specific facts must be pled that would avoid the defense. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824-825.) This rule requiring the pleading of specific facts applies where the defense to the statute of limitations is the doctrine of equitable tolling. (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.)

There is little argument to be made that appellant's SAC and TAC both lacked the factual specificity required. Simply reciting the conclusory language of Section 352 does not provide either the defendant, nor the court, with a sufficient indication of the factual underpinning for the claim of equitable tolling. As the trial court correctly noted, "if every plaintiff who blew a statute of limitations, all they had to do is come in and say, I was deranged or insane for some period of time without alleging any specific facts, then everybody could get around the Statute of Limitations on any kind of case." We agree, and the trial court correctly sustained the demurrer to the TAC. The real question is whether it was error not to grant leave to amend the complaint a third time.

2. The Trial Court Did Not Abuse Its Discretion In Refusing to Grant Appellant Leave to Amend the Complaint a Third Time

We review the court's refusal to allow leave to amend under the abuse of discretion standard. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.) Generally, it is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the plaintiff can state a valid cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1126.) However, "[t]he plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Prior to the hearing on respondent's demurrer to the TAC, the court issued a tentative ruling, which informed counsel and the parties as follows: "[Respondent]'s demurrer is sustained without leave to amend. [Appellant] has been given multiple opportunities to allege the factual basis for equitable tolling of the statute of limitations

set out in Gov[ernment] Code [s]ection 12965. Specific facts must be pled when the complaint's allegations reveal the existence of an affirmative defense, as is the case here. [Citation.] The [TAC] persists in pleading only a legal conclusion."

Despite the tentative ruling, no proposed amended complaint providing factual support for a claim of equitable tolling was filed before the hearing on the demurrer, or proffered to the court at the hearing. Nevertheless, at oral argument, once the court indicated its intent to sustain the demurrer, appellant's counsel requested another opportunity to amend the complaint. The court then asked counsel to make an offer of proof as to the facts that would be alleged in connection with the "insanity" equitable tolling claim. In response, appellant's counsel stated:

"At deposition we submitted pictures of his house. How his house was. How his backyard was. How he was cited for not taking care of his property. His house, his property had gone to pot. It was really bad. He was suffering from a severe, severe depression when he lost his job [in January 2004], his health problems, all of these things that were happening.

"He was put under medication that literally he was like a living vegetable at the time. He didn't know what was going on. He let everything—there was—we gave the defense pictures of how his house looked, his backyard looked, to show how—for until he was able to get enough treatment that he was able to get back—still, he still suffers from a depression, but it was at a real severe depression that he suffered at the time when all this was happening."

Given appellant's burden of proof, there was no abuse of discretion in the trial court's denial of leave to amend. First, even assuming the factual sufficiency of counsel's offer of proof, counsel's comments referenced no specific time period, and thus, were too vague to compel the trial court to grant leave to amend. As noted, appellant was terminated by respondent in January 2004. Appellant's right-to-sue notice, which commenced the running of the one-year statute of limitation, was not issued until almost two years later on November 21, 2005. Both the SAC and the TAC stated that the

period of insanity arose at some time *after* this date.[1] It was not possible to determine when, and for how long appellant was claiming these factors mentioned by counsel (medical treatment and depression) rendered appellant insane, or if they occurred during the period of November 21 to December 21, 2005, the period of insanity alleged in the TAC.[2]

Moreover, the facts themselves are insufficient to plead equitable tolling under Section 352. In *Hsu*, *supra*, 259 Cal.App.2d 562, the Court of Appeal affirmed a jury's finding that the plaintiff was not "insane" within the meaning of Section 352, even though plaintiff had been hospitalized, or committed, because of a mental condition: "As we understand these cases, the basic question to be resolved by the jury is whether the allegedly insane plaintiff is sufficiently aware of the nature or effects of his acts to be able to comprehend such business transactions as the hiring of an attorney and the instigation of a legal action. If he is so aware, then the statute will begin to run against him." (*Hsu*, *supra*, 259 Cal.App.2d at p. 575.)[3]

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[1] The SAC stated appellant was "insane" for a 30-day period sometime within the one-year period, while the TAC stated he was disabled by insanity from "on or about November 21, 2005," until "[o]n or about December 21, 2005." As respondent points out, in his proposed SAC appellant alleged the period of insanity to be from the time his cause of action accrued until November 29, 2006.

[2] Inexplicably, appellant's appendix on appeal ends with almost 30 pages of what appear to be medical records, legal documents, and photos of some real property. We glean from these unauthenticated documents, which do not appear to be part of the official record below, that they are added by appellant to document or augment his counsel's offer of proof. We note, too, that none of them bear dates falling within the 30-day period of "insanity" referenced in the TAC, and thus are insufficient for this court to reverse the trial court's denial of leave to amend.

[3] As to the plaintiff's evidence that he had been hospitalized for his mental condition, the court observed: "This definition [insanity under Section 352] may include within its meaning a person who has been adjudicated mentally ill pursuant to the provisions of the Welfare and Institutions Code, but such adjudication is not a conclusive judicial determination that he is an insane person. [Citations.]" (*Hsu*, *supra*, 259 Cal.App.2d at pp. 571-572.)

Not only did counsel's offer fail to specify the time during which appellant was "insane," but the generalized comments about medical treatment received by appellant for depression are much too vague to meet his burden of proving that appellant could cure the pleading defect if given a third chance to do so. As the court noted at the hearing below, "there are people with mental problems walking around on the street, going to work, doing their business. Just because you have a mental illness doesn't, ipso facto, mean that you're disabled or you can't take care of your affairs or that kind of thing." We agree. Counsel did no more than offer comments that appellant was suffering from depression during some undefined period of time, and that for some undefined period he was taking medications that rendered him a "living vegetable." Even if those facts could support a defense of equitable tolling under Section 352, there is no evidence that this condition occurred specifically during the month (or year) for which appellant claimed the statute of limitations was tolled.

Indeed, this offer is far different from those reported decisions which have upheld the pleading of equitable tolling under Section 352. For example, in *Feeley v. Southern Pacific Transportation Co*. (1991) 234 Cal.App.3d 949, the court reversed a summary judgment where the plaintiff had shown that he was comatose after falling on defendant's property, thus tolling the running of the statute of limitations. (*Id.* at pp. 950-951; see also *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212, 230-232, [statute of limitations tolled in suit against physician alleging malpractice resulted in brain damage].)[4]

In *Gottesman v. Simon* (1959) 169 Cal.App.2d 494, 496, another case cited by the *Feeley* court, the plaintiff was rendered unconscious for a number of weeks after an automobile accident, and in a coma for some considerable period of time thereafter. Ultimately, plaintiff's wife was appointed guardian for the plaintiff and his estate due to

[4] *Feeley* also referred to two out-of-state cases to support its conclusion that lack of consciousness meets Section 352's definition of insanity. (*Sobin v. M. Frisch & Sons* (1969) 108 N.J.Super. 99, 260 A.2d 228, 231 [plaintiff in coma for three months, and thereafter was irrational]; *Hill v. Clark Equipment Company* (1972) 42 Mich.App. 405, 202 N.W.2d 530, 533 [evidence of blackouts and unconsciousness presented an issue of fact for jury as to whether plaintiff was "insane"].)

his brain and physical injuries which rendered him incompetent to properly manage and take care of himself or his property. (*Id.* at p. 496.) " 'The party who invokes the protection of such saving clause, or those claiming under him, must show the condition of mind contemplated by the statute, which will not be extended to embrace other conditions. The term "insane," as used in this connection, has been given a generic, rather than a technical, meaning, and has been held to mean such a condition of mental derangement as actually *to bar the sufferer from comprehending rights which he is otherwise bound to know*, and the exception has been held to embrace temporary unsoundness of mind as well as chronic or fixed insanity.' " (*Gottesman v. Simon*, *supra*, at pp. 498-499, quoting 54 Corpus Juris Secundum, p. 269, sec. 242, italics added.)[5]

In summary, there was no proffered evidence that, if given another chance to amend his complaint, appellant could allege specific facts, occurring during his claimed period of insanity, showing a mental disability that prevented him from "comprehending [his] rights" in order to pursue his claim against respondent. (*Gottesman v. Simon*, *supra*, 169 Cal.App.2d at pp. 498-499.) Given this record, and the legal principles which govern pleading in civil actions, we cannot conclude that the trial court abused its discretion in denying appellant leave to amend. For these reasons, we affirm the judgment of dismissal.

Because we have concluded that appellant has failed to plead with specificity equitable tolling under Section 352, and that he has not shown that it is reasonably possible for the defects in his claim to be cured by an amendment, we need not and do

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[5] In support of his argument, appellant cites a nonpublished United States Magistrate Finding and Recommendation in a 42 U.S.C. section 1983 action. Unpublished federal opinions are "citable as persuasive, although not precedential, authority. [Citation.]" (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1301, fn. 11.) We do not find that case to be persuasive, both in light of sufficient applicable published state appellate authorities, and because the case appellant cites, *Willis v. Weeks*, is significantly different factually from the showing made by appellant in this case. (*Willis v. Weeks* (E.D.Cal., June 18, 2010, No. CIV S-09-0342 MCE DAD P.) 2010 U.S. Dist. WL 2553888.)

not address respondent's additional argument that Section 352 does not apply to FEHA's one-year statute of limitation or to public entities in general.

IV.

DISPOSITION

The judgment of dismissal is affirmed. Each side is to bear his or its own costs on appeal.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.