Filed 12/10/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JONATHAN MORGAN, Plaintiff and Appellant, v. SAN JOAQUIN COMMUNITY HOSPITAL, Defendant and Respondent.	F045075 (Super. Ct. No. CV-248385) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Jonathan Morgan, in pro. per., for Plaintiff and Appellant.

J. Craig Jenkins for Defendant and Respondent.

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It is well settled that a notice of appeal divests the trial court of jurisdiction to alter a judgment. A motion for reconsideration that is intended to affect the judgment, but which also purports to be a notice of appeal from the judgment, would therefore seem to be self-defeating *as* a motion for reconsideration. But can such a document nevertheless

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

be valid as a notice of appeal? In the published part of this opinion, we hold that it can and that here it was. Therefore, plaintiff Jonathan Morgan filed a timely notice of appeal.

That said, however, in the unpublished part of the opinion, we conclude that the trial court did not err in sustaining defendant San Joaquin Community Hospital's demurrer without leave to amend as the action was barred by the statute of limitations. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiff, a former prison inmate, is HIV-positive. He was treated with antiviral medications on the recommendation of a physician at defendant hospital. Acting in pro. per., he filed a complaint in Kern County Superior Court on October 11, 2002, alleging medical malpractice on the basis of side effects from the drugs. The complaint alleged that the harm was caused by negligence that took place on November 22, 1998, almost four years before the action was filed.

The limitations period for medical malpractice is one year from reasonable discovery of the injury or three years from the injury, whichever comes first, and in no event more than three years from the injury, unless tolled. (Code Civ. Proc., § 340.5.)[1] Plaintiff amended the complaint in an attempt to allege facts sufficient to toll the limitations period. The trial court found his allegations inadequate. It sustained defendant's demurrer to plaintiff's second amended complaint on statute-of-limitations grounds, without leave to amend, and entered judgment for defendant on May 28, 2003.

The same day, plaintiff filed a document titled "Notice and Motion for Reconsideration (C.C.P. § 1008) and/or Notice of Appeal (C.C.P. § 904.1; CRC 2(c)." After a hearing, the court denied the motion for reconsideration on June 11, 2003. Defendant did not serve a notice of judgment on plaintiff until January 23, 2004. Plaintiff filed a second notice of appeal on March 3, 2004.

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[1]Statutory references are to the Code of Civil Procedure unless stated otherwise.

DISCUSSION

I. Timeliness of notice of appeal

The parties' arguments on the issue of timeliness of the appeal focus on the second notice of appeal. Defendant points out that this notice was filed over nine months after entry of judgment, exceeding the outer limit of 180 days that applies even though plaintiff filed a motion for reconsideration. (Cal. Rules of Court, rules 2(a), 3(d).) Plaintiff does not dispute this, but contends that the late filing should be excused because defendant caused it by delaying in providing notice of entry of judgment.

If these were the only issues, the appeal clearly would be untimely. California Rules of Court, rule 2(a), governing the normal time for filing a notice of appeal, and rule 3(d), governing the time for filing a notice of appeal when a motion for reconsideration has been filed pursuant to section 1008, both provide an outer limit of 180 days from entry of judgment. There is no authority supporting plaintiff's contention that delay in service of a notice of entry of judgment can alter this outer limit.

But the earlier document, purporting to be both a motion for reconsideration *and* a notice of appeal, supports a different conclusion. The document's title states that it is both a motion for reconsideration and a notice of appeal. It contains a notice of motion stating that on the designated date plaintiff "will move the Court to reconsider its Order Granting Defendant SJCH's Request to Take Judicial Notice in Support of SJCH's Demurrer to Second Amended Complaint and Order Sustaining Demurrer of Defendant SJCH to Plaintiff's Second Amended Complaint Without Leave to Amend and Judgment of Dismissal on May 6, 2003 (hereinafter 'Orders')." It also contains a Memorandum of Points and Authorities, which concludes: "Wherefore, Plaintiff prays Court reconsider its Orders and or Plaintiff hereby [gives] Notice of Appeal to the erroneous rulings."

To be sure, this document reflects a self-represented litigant's multiple mistakes. The motion purported to be for reconsideration of orders granting judicial notice and sustaining the demurrer and of the entry of judgment. Initially, we question whether this

was even a proper use of a motion under Code of Civil Procedure section 1008 to seek reconsideration of a judgment (as opposed to an order) (see, e.g., *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236 [court cannot entertain motion for reconsideration of a judgment under Code of Civil Procedure section 1008]). In any event, the document was not a proper means of asking the trial court to reverse its decision. The filing of a valid notice of appeal "'divest[s] the trial court of jurisdiction over anything affecting the judgment.'" (*People v. Flores* (2003) 30 Cal.4th 1059, 1064.) If the notice of appeal was valid, it defeated plaintiff's effort to obtain reconsideration in the trial court.

As a notice of appeal, however, the document was valid. First, its language sufficiently informed the court and parties of plaintiff's intention to appeal from the judgment against him. A "notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 1(a)(2).) The clear intent of the document is to give notice of an intent to appeal from the judgment based on the sustaining of the demurrer, so the notice is adequate in this respect. The combining of the notice of appeal with a motion for reconsideration did not invalidate the document *as* a notice of appeal. (See *Dept. Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board* (1959) 169 Cal.App.2d 785, 789-790 [document submitted to administrative agency that purported to be both a petition for reconsideration and a notice of appeal was a valid notice of appeal].)

Second, the notice was timely. The document is dated May 15, 2003, and was filed on May 28, 2003, the day on which judgment was entered. Presumably, it was prompted by the court's announcement during a hearing on May 6, 2003, that it was sustaining defendant's demurrer without leave to amend. We do not know whether it was filed earlier or later in the day than the actual entry of the judgment. If it was filed later, it was filed timely. If earlier, it was still filed timely rather than prematurely. (California Rules of Court, rule (2)(d)(1) ["A notice of appeal filed after judgment is

rendered but before it is entered is valid and is treated as filed immediately after entry of judgment"] or rule (2)(d)(2) ["The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment"].)

II. Demurrer

We recently restated the pertinent standard of review:

> "In an appeal from a judgment dismissing an action after a general demurrer is sustained without leave to amend, our Supreme Court has imposed the following standard of review. 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

The original complaint, filed October 11, 2002, alleged that plaintiff was injured when he was treated by defendant on November 22, 1998. The original complaint contains no allegations to support tolling and no other pertinent dates. Based on this, the complaint would have had to be filed by November 22, 2001, at the latest, and was almost 11 months too late. (§ 340.5.)

A first amended complaint was filed on January 13, 2003, but it is not included in the record submitted by the parties. Plaintiff's second amended complaint (SAC), filed on March 14, 2003, contains several new allegations intended to support a tolling claim. None of these allegations is adequate.

First, the SAC alleged that the symptoms from the alleged improper treatment appeared during June of 1999. If this was the true date of injury, the limitations period

would have expired on June 30, 2002, at the latest, and the complaint would still have been filed too late.

Second, the SAC alleged that defendant withheld medical records showing the results of an HIV test until July 28, 1999, and that this constituted intentional concealment of the injury within the meaning of section 340.5, tolling the beginning of the limitations period until that date. But these allegations could at most extend the end of the limitations period to July 28, 2002, more than two months before the complaint was filed. In addition, we do not see how these allegations support the contention that defendant concealed the injury from plaintiff. Plaintiff's claim was that defendant harmed him by giving him anti-HIV drugs whose side effects made him ill, not that it caused him to become HIV-positive.

Third, the SAC alleged that on July 9, 2002, plaintiff served on defendant a notice of intention to sue pursuant to section 364. Section 364 requires a medical malpractice plaintiff to file a notice of intention to sue 90 days before filing suit and provides that if the notice is filed within the last 90 days of the limitations period, the limitations period is extended 90 days from service of the notice. (§ 364, subds. (a), (d).) Therefore, even assuming the notice of intention to sue was served before the end of the limitations period, it only extended the limitations period to October 7, 2002, and the complaint was filed four days late.

Fourth, plaintiff alleged in the SAC that equitable tolling was appropriate because the prison interfered with the filing of his notice of intent to sue, which he had deposited in the prison mail drop on May 31, 2002. But earlier service of the notice of intention would *shorten* the extension granted by section 364, not lengthen it. For instance, if the limitations period had begun running on July 28, 1999, and plaintiff filed a notice of intention on May 31, 2002, the limitations period would have expired on August 29, 2002, over a month before plaintiff filed the complaint.

Finally, the SAC alleged that plaintiff was a prisoner at all relevant times and that the limitations period was tolled by his incarceration under section 352.1. Section 352.1 tolls for a maximum of two years the limitations period for a prisoner while he or she is incarcerated. Our Supreme Court has held, however, that section 352.1 does not extend the limitations period for a medical malpractice action beyond the outer limit of three years from the injury. (*Belton v. Bowers Ambulance Service* (1999) 20 Cal.4th 928, 931 ["No tolling provision outside of [the Medical Injury Compensation Reform Act, of which section 340.5 is a part] can extend the three year maximum time period that section 340.5 establishes"].)

For these reasons, the action was barred by the statute of limitations, and the demurrer was properly sustained without leave to amend.

DISPOSITION

The judgment is affirmed. Costs are awarded to defendant.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Harris, J.