



Analysis

As of: Apr 10, 2013

**GERALD KUPKA, Plaintiff and Appellant, v. BOARD OF ADMINISTRATION OF
THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Defendant and
Respondent**

Civ. No. 23711

Court of Appeal of California, Fourth Appellate District, Division Two

122 Cal. App. 3d 791; 176 Cal. Rptr. 214; 1981 Cal. App. LEXIS 2125

August 5, 1981

SUBSEQUENT HISTORY: [***1] A petition for a rehearing was denied September 1, 1981, and appellant's petition for a hearing by the Supreme Court was denied October 2, 1981.

PRIOR HISTORY: Superior Court of San Bernardino County, No. 194709, Charles Bierschbach, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former officer sought review from the Superior Court of San Bernardino County (California), in which his petition for writ of mandate, to review a decision of respondent retirement system denying his application for disability pension, was denied. Appellant sought relief under *Cal. Civ. Proc. Code § 473* alleging mistake and excusable neglect.

OVERVIEW: Appellant former officer of the California Highway Patrol filed an application for disability pension with respondent public employees' retirement system

(PERS) which PERS denied. Appellant then sought new counsel and, due to a misunderstanding, the writ was filed after the deadline expired. Appellant sought a petition for writ of mandate to review the decision of PERS. Realizing the petition was filed beyond the applicable statute of limitations, appellant did not wait for PERS to invoke the bar of limitations but instead moved for relief under *Cal. Civ. Proc. Code § 473*. The trial court denied the motion and judgment was entered accordingly. The court affirmed the denial of the motion, holding that appellant's failure to discover the cause of action did not excuse the untimely filing where the respondent did not fraudulently conceal the cause of action. The showing of mistake or excusable neglect by itself was not sufficient to overcome the bar of limitations.

OUTCOME: The court affirmed the denial of the motion and judgment entered in favor of respondents because appellant had been afforded due process of law, and application of the statute of limitations to bar the petition was not unconstitutional.

LexisNexis(R) Headnotes***Administrative Law > Judicial Review > General Overview******Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus******Environmental Law > Litigation & Administrative Proceedings > Judicial Review***

[HN1] Where judicial review of an administrative decision made under the Administrative Procedure Act, *Cal. Gov't Code* § 11370, is sought by writ of mandate, the petition must be filed within 30 days after the last day on which reconsideration can be ordered. *Cal. Gov't Code* § 11523.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus***Governments > Legislation > Statutes of Limitations > Time Limitations***

[HN2] Like any other cause of action, a proceeding for writ of mandate is barred if not commenced within the applicable limitation period.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview***Governments > Legislation > Statutes of Limitations > Extension & Revival***

[HN3] Statutes of limitation are, of necessity, adamant rather than flexible in nature, and are upheld and enforced regardless of personal hardship. When the Legislature has decided to introduce an element of flexibility in a particular instance, it has expressly provided for extension of the limitation period on a showing of good cause, and courts have interpreted the "good cause" standard as equivalent to a showing under *Cal. Civ. Proc. Code* § 473. In the absence of such a specific provision for extension, it must be inferred the Legislature did not intend to permit relief on grounds of good cause or under § 473.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview***Civil Procedure > Pretrial Judgments > Default > Relief From Default******Civil Procedure > Judgments > Relief From Judgment******> Motions for New Trials***

[HN4] *Cal. Civ. Proc. Code* § 473 provides for relief from defaults and default judgments, and from a judgment, order, or other proceeding taken through mistake, inadvertence, surprise, or excusable neglect.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview***Governments > Legislation > Statutes of Limitations > Time Limitations***

[HN5] *Cal. Civ. Proc. Code* § 473 also applies to amendment of pleadings. Under it a court may, for good cause shown, permit a plaintiff to amend a complaint after the statute of limitations has run, but only if recovery is sought in both pleadings on the same general set of facts. Also, a complaint may be amended after the statute has run to correct a misdescription of a party but not to add an entirely new party.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview

[HN6] Similarly, failure to discover a cause of action, where discovery is not necessary to accrual of the cause of action, does not excuse an untimely filing unless the defendant has fraudulently concealed the cause of action from the plaintiff. A defendant will not be permitted to invoke the bar of limitations if the defendant's conduct causes the plaintiff to delay filing the action, but the plaintiff's innocent mistake, not caused by the defendant, has never been permitted to excuse late filing.

SUMMARY:**CALIFORNIA OFFICIAL REPORTS SUMMARY**

A former officer of the highway patrol filed a petition for a writ of mandate (*Code Civ. Proc.*, § 1094.5) to review a decision of the Public Employees Retirement System denying his application for a disability pension. The petition was not filed within 30 days after the last day on which reconsideration could be ordered as required by *Gov. Code*, § 11523. Plaintiff therefore moved for relief under *Code Civ. Proc.*, § 473, contending the bar of limitations could be avoided by an order under that statute granting relief on the ground of mistake, inadvertence, or excusable neglect, based on the alleged failure of his attorney to file the petition on time. The trial court denied the motion. (Superior Court of San Bernardino County, No. 194709, Charles Bierschback,

Judge.)

The Court of Appeal affirmed, holding the 30-day limit in *Gov. Code*, § 11523, is a statute of limitations, and, like any other cause of action, a proceeding for a writ of mandate is barred if not commenced within the applicable limitation period. The court held statutes of limitation are, of necessity, adamant rather than flexible in nature, are upheld and enforced regardless of personal hardship, and therefore rejected plaintiff's contention that relief was available under *Code Civ. Proc.*, § 473. The court further held plaintiff was afforded due process of law and application of the statute of limitations to bar his petition was not unconstitutional. (Opinion by The Court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Mandamus and Prohibition § 53--Mandamus--Defenses--Statute of Limitations.

--Under *Gov. Code*, § 11523, providing that when judicial relief from an administrative decision made under the Administrative Procedure Act is sought by writ of mandate, the petition must be filed within 30 days after the last day on which reconsideration could be ordered, the 30-day limit is a statute of limitations. Like any other cause of action, a proceeding for writ of mandate is barred if not commenced within the applicable limitation period.

(2a) (2b) Administrative Law § 102--Judicial Review and Relief--Methods--Administrative Mandamus--Time Requirements.

--In an administrative mandamus proceeding initiated by a former officer of the highway patrol to review a decision of the Public Employees Retirement System denying his application for a disability pension, in which the petition was not filed within the 30-day limit required by *Gov. Code*, § 11523, the trial court properly denied plaintiff's motion for relief from the bar of limitations under *Code Civ. Proc.*, § 473, which grants relief on the ground of mistake, inadvertence, or excusable neglect. Statutes of limitation are, of necessity, adamant rather than flexible in nature and are upheld and enforced regardless of personal hardship. When the Legislature has decided to introduce an element of flexibility in a particular instance, it is expressly provided for by extension of the

limitation period on a showing of good cause, which has been interpreted as an equivalent to a showing under *Code Civ. Proc.*, § 473. Thus, in the absence of such a specific provision for extension, it must be inferred the Legislature did not intend to permit relief on grounds of good cause or under *Code Civ. Proc.*, § 473. Moreover, plaintiff was afforded due process of law and application of the statute of limitations to bar the petition was not unconstitutional.

(3) Limitation of Actions § 8--Validity, Construction and Application of Statutes--Validity.

--Statutes of limitation are consistent with due process where they allow the plaintiff or petitioner a reasonable time to bring the action.

COUNSEL: Samuel J. Wells for Plaintiff and Appellant.

George Deukmejian, Attorney General, and Melvin R. Segal, Deputy Attorney General, for Defendant and Respondent.

OPINION BY: THE COURT

OPINION

[*793] [**215] Gerald A. Kupka, formerly an officer of the California Highway Patrol, filed a petition for writ of mandate (*Code Civ. Proc.*, § 1094.5) to review a decision of the Public Employees' Retirement System (PERS) denying his application for a disability pension. Realizing that the petition was filed beyond the applicable statute of limitations, plaintiff did not wait for PERS to invoke the bar of limitations but instead took the initiative by moving for relief under *Code of Civil Procedure section 473*. The trial court denied the motion and judgment was entered accordingly, from which plaintiff has appealed.¹

¹ The judgment states that "petitioner's motion for leave to file a petition for writ of mandate is denied." As the petition was already on file, however, the effect of the judgment was to dismiss the petition, the same as if a demurrer had been sustained without leave to amend.

[***2] In support of the motion, plaintiff offered declarations by himself and by his attorney. Briefly summarized, these declarations reveal that plaintiff sought new counsel after PERS denied his pension application. He obtained an appointment with Attorney

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Wells at which the possibility of pursuing the matter by writ of mandate was discussed. Plaintiff was informed that Wells would require a retainer of \$ 1,000 and the cost of preparing a record would be an additional \$ 700. Attorney Wells told plaintiff the chances of success in the writ proceeding depended on the standard of review, and he would have to do some research to ascertain what standard of review would apply. Both plaintiff and Attorney Wells knew exactly when the time for filing the writ of mandate would expire. Plaintiff left the meeting thinking he had retained Wells, but Wells left the meeting thinking that plaintiff had made no definite commitment. Wells phoned plaintiff a few days later and informed him the "weight of the evidence" standard would apply and therefore chances of success in the writ proceeding were good. When the deadline for filing the writ approached and Wells had not received any money from plaintiff, [***3] [*794] Wells assumed plaintiff had decided not to [**216] pursue the matter. Plaintiff assumed that Wells would file the writ petition on his behalf. The misunderstanding was discovered after the filing deadline expired when plaintiff sent the \$ 1,000 retainer to Wells.

On this appeal, plaintiff contends (1) relief from late filing of a writ petition is available under *Code of Civil Procedure section 473*, and (2) the decision of the court below denying relief was an abuse of discretion.

[HN1] Where judicial review of an administrative decision made under the Administrative Procedure Act (*Gov. Code, § 11370 et seq.*) is sought by writ of mandate, the petition must be filed "within 30 days after the last day on which reconsideration can be ordered." (*Gov. Code, § 11523.*) In the present case, it is undisputed that this 30-day limit applies, that it expired November 19, 1979, and that the petition was thereafter filed on February 19, 1980.

(1) Plaintiff concedes, as he must, that the 30-day limit is a statute of limitations. (*Ginns v. Savage (1964) 61 Cal.2d 520, 524 [39 Cal.Rptr. 377, 393 P.2d 689].*) [HN2] Like any other cause of action, a proceeding for writ of mandate is [***4] barred if not commenced within the applicable limitation period. (*Barlow v. City Council of Inglewood (1948) 32 Cal.2d 688, 697 [197 P.2d 721]; Valvo v. University of Southern California (1977) 67 Cal.App.3d 887, 894 [136 Cal.Rptr. 865]; Gomes v. Superior Court (1969) 272 Cal.App.2d 702, 704 [77 Cal.Rptr. 539].*)

(2a) Plaintiff contends the bar of limitations may be

avoided by an order under *Code of Civil Procedure section 473* granting relief on the ground of mistake, inadvertence, or excusable neglect. Apparently no one has advanced this argument before, for we find no cases directly in point.

Accepting plaintiff's argument and permitting relief on grounds of mistake or excusable neglect would work a profound change in our system of procedure and would run counter to the reasoning of our courts in many related areas. We have therefore concluded that plaintiff's contention is without merit.

[HN3] Statutes of limitation "are, of necessity, adamant rather than flexible in nature," and are "upheld and enforced regardless of personal hardship." (*Chas. L. Harney, Inc. v. State of California (1963) 217 Cal.App.2d 77, 91 [*795] [15 Cal.Rptr. 870].* [***5] See also, *Lobrovich v. Georgison (1956) 144 Cal.App.2d 567, 575 [301 P.2d 460].*) When the Legislature has decided to introduce an element of flexibility in a particular instance, it has expressly provided for extension of the limitation period on a showing of good cause, and courts have interpreted the "good cause" standard as equivalent to a showing under *section 473*. (See *Amaro v. Unemployment Ins. Appeals Bd. (1977) 65 Cal.App.3d 715, 718-722 [135 Cal.Rptr. 493].*) In the absence of such a specific provision for extension, it must be inferred the Legislature did not intend to permit relief on grounds of good cause or under *section 473*. (See *Gomes v. Superior Court, supra*, 272 Cal.App.2d 702, 704.)

[HN4] *Section 473*, which provides for relief from defaults and default judgments, and from "a judgment, order, or other proceeding . . . taken . . . through mistake, inadvertence, surprise, or excusable neglect," is not universal in its application. For example, it cannot excuse a late motion for a new trial. (*Kisling v. Otani (1962) 201 Cal.App.2d 62, 71 [19 Cal.Rptr. 913].*)

[HN5] *Section 473* also applies to amendment of pleadings. Under it a court may, [***6] for good cause shown, permit a plaintiff to amend a complaint after the statute of limitations has run, but only if "recovery is sought in both pleadings on the same general set of facts." (*Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal.3d 932, 934 [136 Cal.Rptr. 269, 559 P.2d 624, 85 A.L.R.3d 121].*) Also, a complaint may be amended after the statute has run to correct a misdescription of a party but not to add an entirely new party. (See *Mayberry v. Coca Cola Bottling Co. (1966) 244 Cal.App.2d 350, 352*

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[53 Cal.Rptr. 317].) These limitations on the power of the court to permit amendment of a complaint after the statute of limitations has run, even on a showing of good cause, indicate that a showing of mistake or excusable neglect is [**217] not by itself sufficient to overcome the bar of limitations.

[HN6] Similarly, failure to discover a cause of action, where discovery is not necessary to accrual of the cause of action, does not excuse an untimely filing unless the defendant has fraudulently concealed the cause of action from the plaintiff. (*Neff v. New York Life Ins. Co.* (1947) 30 Cal.2d 165, 171 [180 P.2d 900, 171 A.L.R. 563]; *Pena v. City of [***7] Los Angeles* (1970) 8 Cal.App.3d 257, 266-267 [87 Cal.Rptr. 326].) A defendant will not be permitted to invoke the bar of limitations if the defendant's conduct caused the plaintiff to delay filing the action, but the plaintiff's innocent mistake, not caused by the defendant, has never [*796] been permitted to excuse late filing. (See *Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 678-679 [63 Cal.Rptr. 377, 433 P.2d 169]; *Cal. Cigarette Concessions v. City of L.A.* (1960) 53 Cal.2d 865, 869-870 [3 Cal.Rptr. 675, 350 P.2d 715]; *Pena v. City of Los Angeles*, *supra*, 8 Cal.App.3d 257, 263-266; *Gomes v. Superior Court*, *supra*, 272 Cal.App.2d 702, 704; *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 755-758 [44 Cal.Rptr. 707]; *Clark v. Henderson* (1959) 169 Cal.App.2d 731, 734-735 [337 P.2d 834].)

Plaintiff relies primarily on two cases decided under *Code of Civil Procedure section 418.10, subdivision (c)*, providing that upon denial of a motion to quash service of summons or to stay or dismiss the action on the ground of inconvenient forum, "the defendant, within 10 days after service upon him of a written notice [***8] of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action."

In *Cornell University Medical College v. Superior Court* (1974) 38 Cal.App.3d 311 [113 Cal.Rptr. 291], the defendant prepared a petition for writ of mandate and on the 10th day after the order denying motion to quash service of summons gave it to a messenger with instructions to present it to the Court of Appeal for filing. Through inadvertence of the messenger the petition was

not presented to the proper court until some days later and the court summarily denied it as untimely. The defendant then returned to the trial court and obtained an extension on a showing of good cause to a date within the extended 30-day period provided by *section 418.10*. The plaintiff maintained the trial court lacked jurisdiction to grant the extension because the application for extension was not made within the initial 10-day period. The Court [***9] of Appeal rejected this contention, holding that the extension could be requested and ordered after the 10-day period expired, so long as the petition was filed within the total period of 30 days.

In *Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296 [118 Cal.Rptr. 548], the petition was filed with the Court of Appeal on the 11th day after denial of the defendant's motion to quash, but the Court of Appeal issued the alternative writ without noticing the defect. The Court of Appeal ruled that it could, after the fact, extend the time for filing the petition on a showing of good cause.

[*797] We do not find these authorities helpful to plaintiff's argument. *Code of Civil Procedure section 418.10* provides for an extension of the filing date on a showing of good cause. In both of the cited cases, the petitions were filed after the initial 10-day period but within the total 30-day period, and in both cases good cause for the delayed filing was shown. Thus in both cases the court did no more than interpret the express language of a provision allowing an extension for good cause. *Government Code section 11523* contains no provision extending the filing period on a showing [***10] of good cause, and the very absence of such a provision must be taken to mean that no such extension may be granted.

Plaintiff argues in the alternative that *Government Code section 11523* is unconstitutional if its rigid 30-day limit cannot be extended on a showing of mistake or excusable [**218] neglect. Plaintiff asserts that the right to judicial review of an administrative decision affecting a vested property right, such as a pension, is constitutionally protected and must be permitted absent proof of waiver. The appropriate definition of waiver for use here, according to plaintiff, is "the voluntary relinquishment of a known right." (See *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 68 [145 Cal.Rptr. 368, 577 P.2d 188].) Plaintiff maintains that any relinquishment under the facts of the present case was inadvertent rather

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than voluntary and therefore there was no valid waiver.

The constitutional issue raised by plaintiff is procedural due process.

(3) Statutes of limitation are consistent with due process where they allow the plaintiff or petitioner a reasonable time to bring the action. (*Ocean Shore R. R. Co. v. City of Santa Cruz* (1961) 198 Cal.App.2d [***11] 267, 273 [3 Cal.Rptr. 706]; *Rombotis v. Fink* (1948) 89 Cal.App.2d 378, 386, 391 [201 P.2d 588]; *Day v. Metropolitan Life Ins. Co.* (1936) 11 Cal.App.2d 681, 684 [54 P.2d 502].) Plaintiff has not argued that 30 days was an unreasonably short period within which to file the petition, and in fact his evidence indicates the petition would have been filed within that time had there not been the unfortunate misunderstanding between plaintiff and his attorney. This misunderstanding was not caused by PERS, the court, or any government agency, and plaintiff was at all times aware of the necessity of filing the

petition within the 30-day period. Even in the context of a trial of a criminal charge, the defendant may lose constitutionally protected procedural rights by inadvertent failure to assert them in a timely manner. (See *People v. Windham* (1977) 19 Cal.3d 121, 127-128 [137 Cal.Rptr. 8, 560 P.2d 1187]; *In re La Croix* (1974) 12 Cal.3d 146, 153 [115 Cal.Rptr. 344, [*798] 524 P.2d 816]; *People v. Blake* (1980) 105 Cal.App.3d 619, 623 [164 Cal.Rptr. 480]; *People v. Morgan* (1980) 101 Cal.App.3d 523, 527-529 [161 Cal.Rptr. 664].)

[***12] (2b) Plaintiff has been afforded due process of law and application of the statute of limitations to bar the petition is not unconstitutional.

We conclude the court below did not err in denying plaintiff's motion under *Code of Civil Procedure section 473*.

The judgment is affirmed.